House of Representatives

The House was not in session today. Its next meeting will be held on Tuesday, January 31, 2006, at noon.

Senate

WEDNESDAY, JANUARY 25, 2006

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

PRAYER

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

Let us pray.

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

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

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

PLEDGE OF ALLEGIANCE

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

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

RESERVATION OF LEADER TIME

The President pro tempore. Under the previous order, the leadership time is reserved.

MORNING BUSINESS

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

RECOGNITION OF THE MAJORITY LEADER

The President pro tempore. The majority leader is recognized.

SCHEDULE

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

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

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

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

EXECUTIVE SESSION

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

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

Without objection, it is so ordered. The Senate will proceed to executive session, and the clerk will report.

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

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

This “bullet” symbol identifies statements or insertions which are not spoken by a Member of the Senate on the floor.

Printed on recycled paper.
Mr. FRIST. Mr. President, I will be happy to yield.

The PRESIDENT pro tempore. The Senator from Arizona.

LOBBYING REFORM

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

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

I thank the majority leader.

Mr. FRIST. Mr. President, just a very short comment. I have been in discussion with the Democratic leader on this. Our distinguished colleague from Arizona has just said, we on the Republican side have put together a working group in terms of how we on the Republican side have put together a working group in terms of how we are in developing an appropriate response over the coming days.

Mr. President, I now ask unanimous consent that the time from 10 a.m. until 8 p.m. tonight be divided, with the time from 10 to 11 under the control of the Majority leader or his designee, with the time from 11 to noon under the control of the Minority leader or his designee, with the first hour from 10 to 11 under the control of the Democratic leader or his designee.

The PRESIDENT pro tempore. Is there an objection? Without objection, it is so ordered.

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

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

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

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

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

He is a graduate of Princeton and Yale Law School. He has dedicated his 30-year legal career to public service as a Federal prosecutor, as a judge on the Third Circuit in New Jersey. He is the consummate professional. He is the consummate professional. He is a man of integrity, and his credibility.

A judge can't have an agenda. A judge can't have any preferred outcome in any particular case. A judge can't have any agenda. A judge can't have any preferred outcome in any particular case. A judge can't have any preferred outcome in any particular case. A judge can't have any preferred outcome in any particular case. The judge's only obligation is to apply the law, as it's presented to the judge, according to the rule of law, and what that means is that in every single case, the judge has to do what the law requires.

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

Until I read [Judge Alito's] 1985 Reagan job application, I could not tell you what his politics were . . . When we worked on cases, we reached the same result about 95 percent of the time . . . It was my experience that Judge Alito was (and is) capable of setting aside any personal biases he may have when he judges. He is the consummate professional.

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

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

He would not have been our pick for the high court. Yet Judge Alito should be confirmed based on his positive qualities as an appellate judge and because of the dangerous precedent his rejection would set... Supreme Court confirmations have never been free of political interference. Judge Alito's work lies within it. While we harbor some anxiety about the direction he may push the court, we would be more alarmed at the long-term implications of dismissing him as a qualified appellate judge. No President should be denied the prerogative of putting a person as qualified as Judge Alito on the Supreme Court.

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

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

(See exhibit 1.)

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

EXHIBIT 1

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

CONFIRM SAMUEL ALITO

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

There are serious concerns about his record on civil rights statutes and precedents too narrow and too narrow-minded to follow. His jurisprudence, as he is not a member of the American Bar Association’s “mainstream” of contemporary jurisprudence, defines “mainstream” of contemporary jurisprudence. His colleagues of all stripes speak highly of him. His integrity, notwithstanding efforts to smear him, remains unimpeached.

His colleagues of all stripes speak highly of him. His integrity, notwithstanding efforts to smear him, remains unimpeached. Humility is called for when predicting how a Supreme Court justice will vote on key issues, or even what those issues will be, given how people and issues evolve. But it’s fair to guess that Judge Alito will favor a judiciary that exercises restraint and 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 range of understanding, but less disagreement about the scope of proper judicial power. The institutional self-discipline and modesty that both Judge Alito and Chief Justice Roberts profess could do the court good if taken seriously and applied apolitically. Supreme Court confirmations have never been free of politics, but neither has their history generally been one of party-line votes or of ideology as the determinative factor. To go down that road is to believe that American law is the law. The president’s choice is due deference—the same deference that Democratic senators would expect a Republican Senate to accord the well-qualified nominee of a Democratic president.

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

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

Mr. SPECTER. Certainly.

Mr. LEAHY. Mr. President, the distinguished senior Senator from Pennsylvania has worked as hard on this issue as anybody here. As the distinguished Presiding Officer knows, the original PATRIOT Act was written by myself, the distinguished Senator from Pennsylvania, and others. It was the distinguished Republican leader from Texas, Dick Armey, and I who put in the sunset provisions which we face at the present time. There were three additional requests which we took to the House and got all of them, the most important of which is the sunset provisions, which the law changed from 7 years to 4 years. Then additional changes were requested, and they could not be accommodated.

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

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

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

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

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

My preference is the bill which passed the Senate, but we have a bicameral system, and the House has its own point of view, and I think they have been reasonable. We have a good bill, certainly a bill in the conference report which is vastly improved with respect to civil rights over the current bill. But I am not in favor of having short-term extensions. If we have another short-term extension, it will beget another short-term extension. I want to fish or cut bait before February 3 on that issue.

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

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

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

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

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

The bill which we have reported to the floor is the product of enormous effort and enormous analysis by the Judiciary Committee. It was voted out of committee 13 to 5. Senator LEAHY and I have convened meetings, along with the assistance of Judge Becker, a senior Federal judge—he had been Chief Judge of the Court of Appeals for the Third Circuit—where we have brought in the so-called stakeholders: the insurers, the trial lawyers, the AFL/CIO, and the manufacturers. They worked through that bill which has festered in the Congress for more than 10 years from the time of the first Senator Gary Hart, then-Senator from Colorado, brought in Johns Manville, which was a key constituent of his, which was having a problem. I believe it is clear that if we are not able to act now, it will be decades before this kind of an effort can be mustered again.

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

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

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

I am glad to yield to Senator LEAHY.

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

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

At these meetings we had, again, every single stakeholder was involved. It was open. It was bipartisan. That was made clear by the Senator from Pennsylvania from the beginning, that they would have to be open and bipartisan. He, as would be expected, has kept his commitment all the way through.

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

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

I urge people to come to this with an open mind, vote it up or down, vote the amendments up or down. I have heard some opponents quoted as being prepared to demagogu this bipartisan bill. This bill did not just suddenly spring
out of nowhere; it was worked on in such a way that it is a bipartisan bill. And I might say there is pain in it for everybody. Everybody has had to give something in this. The Senator from Pennsylvania did not get everything he wanted. The stakeholders who came to the table, virtually all of them openly and honestly, they gave up a lot on it. But the people who are suffering from asbestos poisoning in whatever form are the ones waiting for us to act.

The time is right to act. We can pass a bipartisan bill. I believe the other body would be glad to see such a bill. The President has stated publicly and he certainly stated privately to both Senator SPECTER and myself that he is behind taking action. Everybody cries out for some bipartisan action around here. This is one of those cases where Republicans and Democrats could come together, where the Congress and the White House could work together, and actually those who benefit will be the people suffering. We ought to get on with it.

EXHIBIT 1

DEAR COLLEAGUE: The Patriot Act is due to expire on February 3, 2006 after being extended from its prior expiration date of December 31, 2005.

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

To my knowledge, no one wants to let the Act expire.

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

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

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

Sincerely,

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

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

The amount of work that the Senator from Vermont has specified has been gigantic. It has been 5 years in process. Senator Hartry took the lead with the trust fund concept where the manufacturers and the insurers have agreed to put up some $140 billion into the trust fund with no government payments and is coming out of the pockets of the taxpayers.

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

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

I may conclude, my staff and I have undertaken an extensive review of Judge Alito’s record and of his some 361 opinions in total. We have categorized 238 of those as major decisions while serving on the Third Circuit Court of Appeals. We have reviewed 49 of the cases that Judge Alito handled during his tenure as U.S. attorney. We have made an analysis of 43 speeches and articles Judge Alito authorized and evaluations of 38 formal opinions, petitions, and Supreme Court briefs which Judge Alito wrote while serving in the Department of Justice.

Additionally, the Judiciary Committee heard testimony of some 30 hours and 20 minutes in which we had 17 hours and 45 minutes of questioning of Judge Alito and testimony from 33 outside witnesses.

It is on the basis of that voluminous record that it is my personal view that Judge Alito ought to be confirmed.

He has a background from a father who was an immigrant from Italy, not...
born with a silver spoon in his mouth, came up the hard way, had the extraordinary academic record at Princeton and the Yale Law School, worked as an Assistant U.S. Attorney, then was U.S. Attorney and worked in the Department of Justice, and for 15 years has been on the Court of Appeals for the Third Circuit.

I think he answered questions put to him more extensively than any other nominee in recent times. I would emphasize that the full text of the prepared statement be printed in the RECORD at the conclusion of my remarks, which specifies the details of the questions asked and provides analysis of many of his cases.

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

(See exhibit 1).

Mr. SPECTER. Mr. President, Judge Alito came under very extensive questioning on the issue of a woman’s right to choose his work on a brief on the Thornburgh case. I think this case was the subject of a number of articles. And Judge Alito expressed his view that the Constitution did not protect the right to an abortion. Judge Alito testified at length that he has an open mind on this subject.

I think it is fair to say that when a question is raised by a lawyer in an advocacy capacity, it represents the view of a client on a position taken and not a personal view. With respect to the statement that he made about his view of the Constitution in 1985, has since gone to great lengths to analyze the Supreme Court’s decisions on the issue of a woman’s right to choose and has made assurances that he has an open mind on the subject.

He was questioned extensively on this subject, because of his work on a brief. He was not a personal view. And Judge Alito expressed his regard for stare decisis, the Latin expression of maintaining an open mind on this subject.

He commented that he agrees with the position of Chief Justice Rehnquist on the Miranda case involving suspects’ rights on statements and confessions. Chief Justice Rehnquist, earlier in his career, had been against Miranda and later changed his view to support Miranda because of his work on a brief. It became embedded in the culture of police practices. And Judge Alito stated that he thought there was weight to be accorded to cultural changes.

I think it is fair to have that statement of principle apply on a woman’s right to choose.

Judge Alito later testified that he agreed with Justice Harlan’s dissent in the case of Poe v. Ulman, that the constitution is a living document; and that he agreed with Justice Carozza in Palko v. Connecticut that it reflects the changing values and mores of our society.

He is not an originalist. He does not look only original intent. He does not look only to the static black letter, but he understands the importance of evolving values and of evolving reliance.

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

When it came to the issue as to whether he reviewed it and regarded it as settled law, his testimony was virtually identical to the testimony of Chief Justice Roberts, who testified that it was settled. As Chief Justice Roberts put it in his confirmation hearings, it is settled beyond that.

Chief Justice Roberts left open the unquestionable right and duty of the Court to review all cases on the merits when they are presented and to afford appropriate weight to stare decisis and to precision of the position that precedents can never be overturned.

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

In taking up questions of Executive power, Judge Alito would not answer questions posed about the President’s authority to go to war with Iran. How could a nominee answer a question of that magnitude in a nomination proceeding without knowing a lot more about the circumstances? And judges make decisions after they have a case and controversy, when they have briefs admitted, when they have arguments prepared, when they have discussions with their colleagues, and they reflect on a matter and come to conclusion.

When Justice Scalia was put at a witness table in a Judiciary Committee hearing, Judge Alito answered the questions as to the considerations which would be involved. Again, he went about as far as he could go.

On the question of congressional power, I questioned him at length on concerns I have about what the Supreme Court has had to say about declaring acts of Congress unconstitutional because the Supreme Court disagrees with our view. We argued, the Supreme Court had done and from that, thought about asking to intervene as amicus curiae, as a friend of the court, and took it the final step: Why not go to the Court and argue our cases ourselves, through counsel, which is an appropriate way. Congress has the authority to grant standing. We can grant standing to ourselves to see to it that our views are appropriately presented to the Court.

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

The issue of Executive authority and the current surveillance practices came up for discussion in Judge Alito’s confirmation hearings. Again, he could not say how he would rule on the case, but he has to give us the briefs, hear the arguments, consider it. But he responded by giving us factors and items which he would consider.

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

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

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

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

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

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

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

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

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

I have not voted in favor of Judge Alito as a matter of party loyalty. If I thought there would be no rule, so on the committee and in the Senate we are left to our best judgment as to qualifications without guarantees. The separation of powers entrusts to the President the role of making the nominations. It is a balanced approach. I think it is important the Senate does not oppose confirmations and then to confirm or not confirm. After that, it is up to the Justices to make the decisions on the Court. The separation of powers has served us well.

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

EXHIBIT 1

ALITO FLOOR STATEMENT

Mr. President, today the Senate begins the debate on the confirmation of Judge Samuel A. Alito to be an Associate Justice of the United States Supreme Court. It has been 86 days. The three months, since President Bush announced his choice of Judge Samuel Alito to fill the seat being vacated by Justice Souter, has taken an extensive review of Judge Alito's record, including an examination of his 238 major decisions while serving on the Third Circuit Court of Appeals, a review of 49 of the cases Judge Alito handled during his tenure as a United States Attorney, analyses of 43 speeches and articles Judge Alito authored, and evaluations of the 38 formal opinions, petitions, and Supreme Court briefs which Judge Alito wrote while serving in the Department of Justice. Additionally, the Judiciary Committee held 30 hours and 29 minutes of hearings, which included 17 hours and 45 minutes of questioning of Judge Alito and testimony from 31 outside witnesses.

Based on my thorough review of his record, I intend to vote to confirm Judge Alito as the 110th Justice of the United States Supreme Court. I did not reach this decision lightly. As I have said before, except for a declaration of war or its virtual equivalent, a constitutional question for the use of force, no Senate vote is as important as the confirmation of a Supreme Court justice. And this vote is one that requires Senators to free themselves from the straight-jacket of party loyalty and exercise independent judgment. Under separation of powers, Senators are separate from
On the topic of a woman's right to choose, Judge Alito testified that "Roe v. Wade is an important precedent of the Supreme Court..." He agreed with the result in the foundational case of Griswold v. Connecticut, which guaranteed that same right to contraception, and with the presumption that "the Constitution itself doesn't change, but the principles have to be applied to those situations that come up..." Judge Alito also stated that "Roe is settled as a precedent of the Court, entitled to stare decisis." Moreover, both Chief Justice Roberts and Judge Samuel Alito agreed that the constitutional considerations and his judicial commitments as to how he would vote, because a similar case might come before the Supreme Court or any other Court should be respected. Judge Alito stated, "I think it's settled as a precedent of the Court, entitled to stare decisis."

Consent.

The fact is that, notwithstanding Senators' concerted efforts, it is not possible to predict how Judge Alito will rule on the issue of abortion. If there is a rule on expectations, it is probably one of surprise. Two or three decades ago, no one would have predicted that Justices O'Connor, Kennedy, or Souter would have voted to uphold a woman's right to choose. In confirmation hearing, Justice O'Connor testified that she personally viewed abortion with "abhorrence" and stated, "my own view in the area is that it's a very serious matter of birth control or otherwise." Yet, roughly 10 years later, she voted to uphold Roe v. Wade and has done so ever since. Justice Kennedy explained that he was brought up to think of abortion as a great evil. He once denounced the Roe decision as the Dred Scott of our time, a reference to the infamous 1857 ruling that sanctioned slavery and helped spark the Civil War." Yet, in 1992, Justice Kennedy cast the deciding vote in Casey v. Planned Parenthood to uphold Roe v. Wade. When he was New Hampshire Attorney General, Justice Souter filed a brief arguing that taxpayer dollars should not be used to fund "the killing of unborn children" and defended abortion laws that had already been undermined by Roe v. Wade. During his confirmation hearing, the National Organization for Women has released another attack flyer—this one declaring "Save Women's Lives. Vote No on Alito." The rule is that there is no rule.

Judge Alito was also questioned extensively on Executive power and whether the resolution for the authorization of use of force gave the President authority to engage in war. Senator Feinstei asked Judge Alito whether he agreed with Justice O'Connor's statement in Hamdi that "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens," Judge Alito responded, "Absolutely. That's a very important principle. The Constitution provides a framework of Government and a protection of fundamental rights that we have lived under very successfully for 200 years, and the Constitution itself doesn't change, but the fact that situations come up..." As times change, new factual situations come up, and the principles have to be applied to those situations that come up... The Constitution itself doesn't change, but the factual situations change, and as new situations come up, the principles and the rights have to be applied to those situations... Judge Alito's record confirms that he is as it should be: no nominee for the Supreme Court needs to be a special justification for overturning a prior precedent.

Similarly, Judge Alito testified that "Roe v. Wade is an important precedent of the Supreme Court. It is entitled to stare decisis." He explained his methods of reasoning. For example, when questioned by me and other
Senators about how he would decide questions dealing with the limits of executive power, he responded that he would apply Justice Jackson’s framework from the Youngstown Sheet and Tube Company case. He said, “As I said, the President has to follow the Constitution and the laws and, in fact, one of the most solemn responsibilities of the President is the protection of the Constitution—and that is the President’s task to take care that the laws are faithfully executed, and that means the Constitution, it means the laws of the United States.”

“But what I am saying is that some issues arise, I mean, there may be no law to analyze under the framework that Justice Jackson set out. And it would be placed on removal, the precedents—the leading precedent is Humphrey’s Executor and that is reinforced, and I would say very dramatically, for example, the decision in Morrison, which did not involve any such agency. It involved an officer who was carrying out what I think would agree is a core function of the branch. It is the enforcement of the law, taking care that the laws are faithfully executed.

“That is an expression of the Constitution’s view on an issue where the claim for—where the claim that there should be no removal restrictions imposed is far stronger than it is with respect to an independent agency like the one involved in Humphrey’s Executor.”

I have another major concern, for some time now, about the case of United States v. Morrison, where the Supreme Court declared part of the Violence Against Women Act unconstitutional. The majority opinion in that case dismissed lengthy Congressional findings because five justices disagreed with our “method of reasoning.” The inference was that they believed the Court has a superior method of reasoning to the Congress. I believe that the Constitutional separation of powers rejects that kind of view and I know that many of my colleagues share this concern.

I asked Chief Justice Roberts about this during his confirmation hearings and I raised it again with Judge Alito. Judge Alito said that: “I would never suggest that judges have superior reasoning power than does Congress.” I think that Congress’s superior reasoning power to reason is fully equal to that of the judiciary.”

The Judiciary Committee had the rare, but not unprecedented, opportunity to hear seven of Judge Alito’s current and former colleagues on the Third Circuit. These men and women, Democrat and Republican appointed, had had years to hear cases with him and sat in conference with him, they have worked to craft opinions with him. The process that appellate judges go through in rendering decisions is not familiar to many people and it was very instructive to have the insight of these judges.

Judge Alito’s “position was closely reasoned and supportable either by the record or by his interpretation of the law, or both.” Judge Alito’s “judical scholarship approaches judging with no agenda and was not an ideologue. He said, “The Sam Alito that I have sat with for 15 years is not an ideologue. He is not a movement person. He is a real judge deciding each case on the facts and the law, not on his personal views, whatever they may be. He scrupulously adhered to the law and, where appropriate, he exhibited bias against any class of litigation or litigants.”

The current Chief Judge of the Third Circuit, Judge3 Edward S. Becker, confirmed this view of Judge Alito, as did Judge Maryanne Trump Barry, and all the other current and retired judges who testified.

I thought the wisdom of Judge Alitz Timothy Lewis was particularly influential, given his background. He is an African American who described himself at the hearing as “unapologetically pro-choice” and as “a committed human rights and civil rights activist.” He joked that it was not coinci-dent at all that he was appointed to a circuit that handles constitutional matters at the “far left” end of the panel of judges.

Still, based on his personal knowledge of the kind of judge Judge Alito is, Judge Lewis spoke enthusiastically in his favor. He said: “Having worked with him, I came to respect what I think are the most important qualities for anyone who puts on a robe, no matter what court they will serve on, but in particular the United States Supreme Court, and first and foremost among these is intellectual honesty.”

He testified that “I cannot recall one instance during conference or during any other experience that I had with Judge Alito, but in particular during conference, when he exhibited the sort of posing an ideological bent. That does not mean that I agree with him, but he did not come to conference or come to any decision that he made during the time that I worked with him based on what I perceived to be an ideological bent or a result-oriented demeanor or approach. He was intellectually honest, and I wanted to be intellectually honest, so I respected and listened to the views that he shared.”

In the area of civil rights, Judge Alito has a strong record. The U.S. Attorney for New Jersey, he took steps to diversify the office—hiring and promoting women and minorities. Since taking the bench, he has continued to demonstrate a commitment to civil rights. Of course, when a judge has decided over 4,800 cases, as Judge Alito has, it is possible to select a few of his cases to place him at any and every position on the judicial spectrum. But, on balance, Judge Alito’s record in this area is more than satisfactory.

Again, Judge Lewis’s testimony is instructive. He told the Committee that “If I believed that Sam Alito might be hostile to civil rights as a member of the United States Supreme Court, I would not currently expect that I would not be sitting here today.”

Coming from one with an unquestioned commitment to civil rights who has worked closely with Judge Alito, that testimony is entitled to considerable weight.

Judge Lewis’s testimony supported my view of Judge Alito from former cases. Indeed, I have found many cases where he has defended civil rights and the interests of African Americans. For example, in U.S. v. Kithcart, Judge Alito held that the Fourth Amendment does not allow police to target drivers because of the color of their cars. Judge Alito quoted a police report that two black men in a black sports car had committed three robberies, she pulled over the first black man in a black sports car she saw. Judge Alito ruled that this violated the Constitution.

In Brinson v. Vaughn, Judge Alito ruled that the Constitution does not allow prosecutors to exclude African Americans from juries. In that case, the prosecutor had used 13 of his 14 “strikes” to exclude African-Americans from the jury. Judge Alito explained that the prosecutor could not tell right from wrong and he concluded that “in the case of African-Americans on the jury.”

In Zabi v. Atlantic Corp., Judge Alito authored a lone dissent, opposing the establishment of a stringent limitations period in which civil-rights plaintiffs would have to file a claim. The Supreme Court unanimously vindicated Judge Alito’s position four years later.

In Reynolds v. USX Corporation, Judge Alito, in favor of Deborah Reynolds, an African-American woman who was subjected to racial and sexual harassment at work. Her employer claimed that the company would be liable because the harassment came from her coworkers, rather than supervisors. Alito concluded that her supervisors were aware of the harassment and the company had a duty to act.

During Judge Alito’s time on the bench he has also demonstrated great sensitivity to the unique challenges faced by people with disabilities. He understands that people with disabilities are still subject to discrimination in our society and that they are entitled to civil rights. As he testified at his hearing: “When I have a case involving someone who’s been subjected to discrimination because of disability, I have to think of persons who I’ve known. I’ve known very, very greatly who had disabilities and I’ve watched them struggle to overcome the barriers that society puts up, often just because it doesn’t think what it’s doing, the barriers that it puts up to them.”

He has issued several important decisions vindicating the rights of people with disabilities. Thomas v. Commissioner of Social Security, which Judge Alito discussed at his hearing, is a good example of this. It is also one of the few cases where Judge Alito was reversed by the Supreme Court—in this instance unanimously—because the Court thought that Judge Alito went too far to protect the “little guy.”

In that case, Judge Alito ruled in favor of a woman with disabilities who sought social security benefits. The Administration concluded that the plaintiff was not entitled to benefits because she could still perform her former job as an elevator operator—even though such jobs no longer exist. Judge Alito ruled that this was not a problem, because he allowed 3 African-Americans onto the jury. Judge Alito explained that the prosecutor could not tell right from wrong. As he testified, “I am an African American who described himself at the hearing, is a good example of this. It is also one of the few cases where Judge Alito was reversed by the Supreme Court—in this instance unanimously—because the Court thought that Judge Alito went too far to protect the “little guy.”

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Thomas is only one example of Judge Alito’s strong record on disability rights. He has ruled in favor of numerous workers, students, customers, and disability advocacy groups in disability-related claims. Over the years, he has reversed the rulings of lower courts to do so. Other examples include:

Shapiro v. Township of Lakewood, where Judge Alito held that a majority of the township’s parking officers, who were required to provide medical benefits to EMT technicians, violated Title VII of the Civil Rights Act.

Fatin v. INS, where Judge Alito ruled that an Iranian woman could establish a basis for asylum if she showed that her country’s gender specific laws would be deeply abhorrent to her or that the state had refused to account for her background and skills.

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

Judge Alito has authored a number of other important, progovernment opinions, including opinions that indicate his so-called “little guy” approach. For example, in Fatin v. INS, Judge Alito held that an Iranian woman could establish a basis for asylum if she showed that her country’s gender specific laws would be deeply abhorrent to her or that the state had refused to account for her background and skills.

In Cort v. Director, Judge Alito wrote an opinion that redefined the Black Lung Benefits Act, an Administrative Law Judge had denied the worker’s claim, finding that the worker was able to obtain work as a wire cutter, he wasn’t disabled. Judge Alito found that the statute and associated regulations established a presumption of total disability due to Black Lung disease for a miner who worked for more than 10 years as a miner and met one of four medical requirements—which the plaintiff satisfied. He reasoned that the statute focused on the source of disability, not its degree.

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

Shore Regional High School Board of Education v. P.S., where Judge Alito again reversed a lower court to find in favor of a plaintiff with disabilities. The plaintiff in that case was a child with disabilities who had suffered severe harassment from bullies at his school. Because an Administrative Law Judge had found that the student could not go to school due to the education he was receiving and that the school district did not have a reasonable plan to prevent the harassment, Judge Alito ruled that the student’s parents should be reimbursed for tuition at a neighboring public school.

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

Judge Alito is anything but a “stealth” candidate. Those who opposed Chief Justice Roberts’ nomination asked for a nominee with a deeper record to analyze. In Judge Alito’s case, the Committee had the opportunity to review literally thousands of decisions and some 461 written opinions. It also had the opportunity to hear directly from Judge Alito in a lengthy testimony. In three days of intense questioning in which he spent over 18 hours in the witness chair, Judge Alito was asked roughly 500 questions, Justice Ginsburg was asked 384 questions and Justice Breyer was asked only 355 questions. Clearly, Judge Alito’s record has been vetted as thoroughly as any nominee’s possibly could be.

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

I thank the Chair and I now yield the floor.

The PRESIDING OFFICER. The Senator from Alabama.

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

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

We have the greatest legal system in the world. It is the foundation of our liberty and the foundation of our economic prosperity. But the focus and the key ingredient of our legal system is an independent judge who makes decisions every day based on the law and the facts, not on their personal, political, religious, moral or social views.

If we descend to that level, if we allow those social, political views to affect or infect the decision-making process, justice has been eroded. That is contrary to every ideal of the American rule of law.

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

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

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

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

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

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

This is an extraneous interpretation of the separation of church and state. It is not consistent with our classical understanding of law in America. We had the Supreme Court, in this past year,
leader, Senator HARRY REID, has urged the New York Times last week, the nominee. It does appear, according to Judge Alito. He is such a fabulous branch or State legislatures or passed on the law passed by the legislative agenda be promoted. We are asking we are not asking that a conservative promoting a more liberal agenda. But see that the Court has actually been promised to do, and that is what he has every speech he made. That is what he promised he would appoint it. President Bush was concerned about American people are concerned about fine that? Do they have hearings on cense for a judge to do whatever they ing of words and the understanding of tion. Yet they contend that they may declared that morality—this is hard to benefited. They struck down every par- tial-birth abortion law. They have declared that morality—this is hard to believe but true in recent years—can- not be a basis for congressional legisla- tion. They contend that the Court must decide opinions and redefine the meaning of words and the understanding of words over hundreds of years based on what they declare to be evolving standards of decency. Is that a standard or is that just a li- cense for a judge to do whatever they feel like doing at a given time? Evolv- ing standards of decency, who can de- fine that? Do they have hearings on what these standards are? They are important issues. The American people are concerned about it. President Bush was concerned about it. He promised he would appoint judges who show restraint, judges of great ability and integrity but who would show restraint and be more moder- est in the way they handle these cases. That is a fair standard. It is a legiti- mate issue for the American people to decide. He talked about it in almost every speech he made. That is what he promised to do, and that is what he has done.

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

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

Judge Alito has a remarkable record. He is the son of immigrants in New Jersey. His father was an immigrant to this country. He went to Princeton, gets his degree with honors, but he ac- cept an invitation to join an eating club that excludes women and others. I guess that was beneath the members of that club. He decided while he was there that he would just dine with ev- erybody else, the scruff and the sorum that you find at Princeton. Then he went to Yale Law School where he fin- ished at the top of his class, served as editor of the Yale Law Journal, partici- pated in the ROTC at a time when that was not a very popular thing to do; served in the Army Reserve for 8 years, and was offended that Princeton would kick the ROTC from their campus. I am sure he was not pleased when the rioters bombed the ROTC building at Prince- ton.

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

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

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

How did the American Bar Associa- tion rate Judge Alito? They gave him their highest possible rating. They said that he was an exceptionally unani- mously, by the 15-member committee that meets to decide that issue. They interviewed 300 people, people who have litigated against Judge Alito as a pri- vate lawyer, people who have been his supervisors, people who have worked for him, people who had their cases de- cided by him.

They go out and talk to these people. They will share with the American Bar Association privately what they might not say publicly. So they interviewed 300 people, and contacted over 1,200. They concluded that Judge Alito has established a record of both proper ju- dicial conduct and evenhanded applica- tion in seeking to do what is funda- mentally fair. They declare that Judge Alito was held "in incredibly high regard." That was said by attorney John Payton, an African American who argued the Uni- versity of Michigan quota case before the U.S. Supreme Court, not a right- winger. He said they found the people they interviewed hold Judge Alito in incredibly high regard. I asked him if he chose that word carefully. He said: I did; yes, sir.

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

This is what he said at the hearing: The PRESIDING OFFICER (Mr. GRA- HAM). The majority's time has expired. Mr. SESSIONS. Mr. President, I ask unanimous consent for 3 seconds to wrap up. The PRESIDING OFFICER. Without objection, it is so ordered.

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

Mr. SESSIONS. This is what he said:

I had the good fortune to begin my legal career as a law clerk for a judge who really epitomized openmindedness and fairness. He read the record in detail in every single case. He insisted on following precedent, both the precedents of the Supreme Court and the dec- isions of his own court. He taught all of his law clerks that every case had to be decided on an individual basis. He really didn't have much use for grand theories.

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

I yield the floor.

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

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

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

While the Senator from Alabama is still on the floor, I note that there seem to be talking points going around that the Democratic leader, Senator Reid, has been lobbying to make this a party-line vote. I don't know where those talking points came from. I have heard them in different places. The Democratic leader was asked aloud that yesterday by the press in open session. He said it is absolutely not so. I am the ranking member of the Senate Judiciary Committee. Just as nobody from leadership has lobbied me on now-Chief Justice Roberts when I voted for his nomination, and a number of Republican Senators know it, and some have been courageous to say so publicly. The fact is, we all know it. The liberties and rights that define us as Americans, the checks and balances that serve to preserve them should not be sacrificed to threats of terrorism or to the expanding power of the Government. Security and liberty are not mutually exclusive values. We should have both, and we can have both. So long as we have adequate checks and balances and with the extra effort it takes to chart the right course to preserve our liberties as we preserve our security, we can preserve both.

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

Now that the illegal spying on Americans has become public, the Bush administration's lawyers are contending that Congress authorized it. The September 2001 authorization to use military force against Osama bin Laden did not authorize warrantless spying on Americans, as the administration has now claimed. I thought—we all thought—that when we as Democrats joined in the bipartisan authorization of military action against Osama bin Laden more than 4 years ago, our action would have been more effective and that done by now succeeded in ridding the world of that terrorist leader. We gave the President all the authority he needed to go after Osama bin Laden, and we thought with the great power of this country he would do it and he did catch him. He didn't. They averted our special forces out of Afghanistan and into Iraq before we even announced we were going to go to war against Iraq. We lost the opportunity to catch Osama bin Laden, the man who did our attacks on that day.

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

This past week, I introduced a resolution to clarify what we all know, that the congressional authorization for the use of military force against Osama bin Laden did not authorize warrantless spying on Americans, as the administration has now claimed. I thought—we all thought—that when we as Democrats joined in the bipartisan authorization of military action against Osama bin Laden more than 4 years ago, our action would have been more effective and that done by now succeeded in ridding the world of that terrorist leader. We gave the President all the authority he needed to go after Osama bin Laden, and we thought with the great power of this country he would do it and he did catch him. He didn't. They averted our special forces out of Afghanistan and into Iraq before we even announced we were going to go to war against Iraq. We lost the opportunity to catch Osama bin Laden, the man who did our attacks on that day.

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Senator FEYERSTER and I held a fair and open hearing on him. Democrats had substantive and probing questions to try to learn more about Judge Alito, and some Republicans did the same. These complaints about the treatment of Judge Alito into five hours, and after Senator Alito and then President Bush was forced by an extreme faction of his own Republican Party to withdraw his first choice for the vacancy, Harriet Miers. It was a humiliation of the President by an extreme faction in his party. Within hours of the time he nominated her, many groups on the far right criticized the nomination, and a number of Republican Senators raised serious concerns about her qualifications and critical reviews probing in light of their concerns about her record.

The same groups on the right immediately embraced Samuel Alito after they had forced Harriet Miers to be withdrawn. Ten Republican Senators who said they needed to learn more about Harriet Miers’ judicial philosophy before they could vote to confirm her are now doing an about face and criticizing Democrats for saying they want to do the same type of inquiry for Judge Alito. President Bush buckled to pressure and withdrew the nomination for Harriet Miers because she didn’t pass the litmus test and because there were those who said they were not sure of their votes. That is not the case.

The third nomination—Judge Alito’s—people applauded, implying that here we have somebody who we know how he will vote, so he is fine.

Democratic Senators are taking their constitutional responsibilities very seriously. We have a single fundamental question: Will the Senate serve its constitutional role and preserve the Supreme Court as a constitutional check on the expansion of presidential power? A nomination will have Executive power and the checks and balances built by the Founders into our constitutional framework should always weigh heavily in hearings for those nominated to the Supreme Court. Executive power issues were the first issues I raised with Chief Justice Roberts at his confirmation hearing, and they were the first issues I raised with Judge Alito.

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

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

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

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freedoms—something I said in the days following 9/11, and I believe it just as strongly today.

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

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

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

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

That is a dangerous diversion of our investigative resources.

When they talk about thousands of al-Qaeda conversations they have to monitor going to Americans—thousands? Interesting. So how many people have been arrested because of those thousands? Two thousand people? Fifteen hundred people? One thousand? Five hundred? Four hundred? Three hundred? Thirteen? Seven? Five, three, four, two, one? Hard to check, hard to know, is a crucial check in maintaining the right balance so that all Americans can have both security and liberty.

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

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

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

In both cases, the Third Circuit held that the Government agents had acted inappropriately and had violated the Fourth Amendment when they conducted these invasive searches of innocent persons who were not named in the search warrants. When I asked him why he, in contrast, looked beyond the “four corners” of the warrant that was actually signed by the magistrate in Doe, Judge Alito replied that the issue was a “technical” one. Repeatedly when pressed about this case, Judge Alito insisted that the issue was merely “technical.” The illegal strip search was not “technical” for the 10-year-old girl. Then-Judge Chertoff understood that this issue is far from technical, but, rather, embedded in the core protections of our individual privacy and dignity from governmental intrusion. In the court’s opinion, rejecting the rationale of Judge Alito’s dissent, Judge Chertoff wrote: “This is not an arcane or legalistic distinction, but a fundamental right of the constitutional requirement that judges, not police, authorize warrants.”
Judge Alito tried to find “technical” ways to excuse the illegality. Judge Alito’s dissent relied on the affidavit accompanying the warrant. To the extent the affidavit had requested a search of “all occupants” of the home, it did not authorize the Government in any language in the affidavit in order to misconstrue the affidavit more broadly and to then substitute it for the magistrate’s warrant.

Judge Alito’s rationale was that because the officers’ initial request was broad, it could be assumed that the magistrate intended to grant broader search authority than that set forth in the warrant. The Supreme Court had specifically rejected this type of reasoning in the case of Ramirez v. Groh, which was decided a month before Judge Alito issued his dissent. In Ramirez, the Supreme Court held that the law draws between what is authorized in a warrant, and what was requested. Judge Alito went to great lengths to criticise the hyper-technical attempt to distinguish the Supreme Court’s decision in Groh.

Similarly, in Baker v. Monroe Township, Judge Alito saw the facts in the light most favorable to the Government in order to hold American citizens in custody indefinitely without any court review. In his dissent, Judge Alito found that although the warrant in question did not describe any persons to be searched, it nevertheless was appropriate for officers to search and handcuff a mother and her three teen-aged children as they approached a relative’s home. Judge Alito’s dissent relied on the affidavit accompanying the warrant. The Supreme Court held a search warrant invalid, citing the sharp distinction the law draws between what is authorized in a warrant, and what was requested. Judge Alito went to great lengths to render hyper-technical and improper readings of the affidavit to authorize a search of “all occupants” of the home even though the mother and her three children were not named in the warrant and there was no reason to suspect any wrongdoing. “To [his] mind” the warrant had been intended to authorize a search of “any persons found on the premises.” Judge Alito went so far as to excuse the officers’ failure to request or obtain a warrant permitting the search of persons on the premises as sloppiness.

The Senate should not be a rubber stamp to the President’s effort to pack the court with those who would give him unbridled leeway. In my view, the Supreme Court needs to act as a check and to prevent overreaching by any branch. The Senate should not be a rubber stamp to the President’s effort to pack the court with those who would give him unbridled leeway.

Unfortunately, Doe and Baker are outliers in Judge Alito’s record. As troubling as his dissents are in those two cases, they are only part of a broader pattern of deference to the Government that shows far too little concern for individual liberties and rights, which find their ultimate protection in the Supreme Court.

Judge Alito’s record on the use of excessive force is also troubling. It goes back at least as far as his time in the Meese Justice Department. I find particularly troubling a 1984 memorandum he wrote to General Regan regarding a case called Tennessee & Memphis Police Department v. Garner. In a long memo in which he repeatedly wrote in the first person proclaiming his own beliefs, Samuel Alito argued that there were no constitutional problems with a police officer shooting and killing an unarmed teenager who was fleeing after apparently stealing $10 from a home. A year later, the Supreme Court ruled 6–3 against Judge Alito’s position in that the doctrine of “deadly force” if a suspect presents no danger. In contrast to Justice O’Connor’s dissent on federalism grounds, Samuel Alito’s description of the human tragedy of the events nor did he think the Constitution even applied since he argued that the unjustified shooting was not technically a “seizure.” Most troubling is Judge Alito’s statement in his legal memo endorsing the “general principle that the state is justified in using whatever force is necessary to enforce its laws.” I fear that this deference to the Government, which he has continued on the bench, makes him an ineffective check on the Government or protector of individual liberties and rights.

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

Unfortunately, Doe and Baker are outliers in Judge Alito’s record. As troubling as his dissents are in those two cases, they are only part of a broader pattern of deference to the Government that shows far too little concern for individual liberties and rights, which find their ultimate protection in the Supreme Court.

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

I voted for President Reagan’s nomination of Justice Sandra Day O’Connor, for President Reagan’s nomination of Justice Anthony Kennedy, for President Bush’s nomination of Justice Souter, and for this President’s recent nomination of Chief Justice Roberts. I cannot vote for this nomination.

At a time when the President is seizing unprecedented power, the Supreme Court needs to act as a check and to provide balance. Based on the hearing and on his record, I have no confidence that Judge Alito would provide that crucial check and balance.

I see the distinguished senior Senator from Massachusetts in the Chamber, Mr. Kennedy, that our courts will all ultimately be an independent, appropriate, and a prodigious hearing and for the leadership he provides for our committee on so many different matters of importance to the American people.

The stakes in this nomination could not be higher. This is the vote of a generation. If confirmed, Judge Alito will have enormous implications for basic civil rights and liberties for decades to come. After all, the Supreme Court is the guardian of our most cherished rights and freedoms, and they are symbolized in the four eloquent words inscribed above the entrance of the Supreme Court of the United States: “Equal justice under law.”

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

Contrary to what a number of my Republican colleagues have argued, the Senate has an obligation to ensure that the nominee is ethical in the strictest sense. The Senate has a responsibility to ensure the nominee to the Court will be that kind of Justice when he told President Jefferson he had exceeded his war-making powers under the Constitution. Justice Robert Jackson was that kind of Justice when he told President Truman he could not misuse the Korean war as an excuse to take over the Nation’s steel mills. Chief Justice Burger was that kind of Justice when he told President Nixon to turn over the White House tapes on Watergate. Justice Sandra Day O’Connor was that kind of Justice when she told President Bush that “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”

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

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

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

His consistent advocacy of what he calls the gospel of the unitary executive is troubling. As Steven Calabresi, one of the originators of the unitary executive theory, has said, “The practical consequence of this theory is dramatic: It renders unconstitutional independent agencies and counsels to the extent that they exercise discretionary executive power.” But this bizarre theory goes much further. Its supporters concede that without the unitary executive as a foundation, the Bush administration cannot even hope to justify its constitutional abuses in the name of fighting terrorism.

Judge Alito refused to discuss his current view of the constitutional limits on the President when it came to the Federalist Society, he stated that he believed “the theory of the unitary executive best captures the meaning of the Constitution’s text and structure.”

Under this radical view, all current independent agencies would be subject to the President’s control. This would destroy the independence of agencies such as the Federal Election Commission, the Securities and Exchange Commission, the Consumer Product Safety Commission, and the Federal Reserve Board. He strongly criticized the Supreme Court’s ruling rejecting the theory of unitary executive and outlined a strategy for bypassing it.

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

Similarly, Judge Alito had written earlier that the President’s understanding of a bill should be just as important as that of Congress,” and that Presidents should be allowed to issue statements announcing their own legal interpretations in the hope of influencing the way the courts would construe the law.

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

This is his view. But as Justice Hugo Black said in a 1952 decision in the case of the President’s power to see that the laws are faithfully executed, the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to recommending laws he thinks wise and the vetoing of laws he thinks bad.

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

I think many of us remember that meeting Senator McCain had with the President down in the White House, and the Senator from Arizona thanked the President for working out the language that would be included in the Defense appropriations bill and the President thanked him for his help and assistance in working that out. They both shook hands. This picture was on all three networks that night. Four or five days later, the President signed the bill, and he issued an executive signing statement that said he continued to retain all of his constitutional power, and that he was effectively taking any question of his Executive power out of the hands of any courts in this country. That is a complete reversal to what was agreed to, a complete reversal to what was said, a complete reversal to the understanding that the President had with Senator from Arizona. The Senator from Arizona has spoken about it. That is Executive power.

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

In cases involving claims of privacy and freedom from unjustified searches
and seizures under the Bill of Rights. Judge Alito has consistently deferred to the Government at the expense of core individual rights. In the Doe v. Groody case, Judge Alito issued a dissent defending the strip search of a 10-year-old girl without authorization from a warrant. In his majority opinion, Michael Chertoff, former head of the criminal division in the Department of Justice, who is now President Bush’s Secretary for Homeland Security, sharply criticized Judge Alito’s view of the requirement of a search warrant into a little more than a rubber stamp. This is not Democrats saying this; this is President Bush’s Secretary of Homeland Security saying this. He was a judge on that circuit, criticizing this kind of action, extension of a search warrant, because of the inclusion of some kind of other document into the search warrant. We understand what Michael Chertoff was saying, and Judge Alito’s record is clear. In Mellott v. Heemer, Judge Alito reported it was reasonable for marshals to pump a sawed-off shotgun at a family sitting in their living room. The family committed no crime. Seven marshals had detained and terrorized a family and friends, ransacked their home while carrying out an unriveted civil eviction. Yet Judge Alito’s decision meant the family never got a trial before a jury of their peers.

Judge Alito’s record in cases involving civil and individual rights shows a judge who repeatedly rules against individuals seeking justice for wrongs by the powerful. In Bray v. Marriott Hotels, a hotel worker claimed she was denied a promotion because she was an African American. The Third Circuit held she was entitled to a trial because the employer falsely stated she was unqualified and had evaluated her qualifications differently compared to White applicants. Judge Alito would have denied her the chance to prove her case. His colleagues on the court—not the Democrats on the committee—his colleagues on the court wrote that his dissent would have evinced key provisions of the landmark Civil Rights Act of 1964.

His record in other areas of civil rights is also troubling. In the case in which a disabled person sought physical access to a medical school under the Rehabilitation Act of 1973, the judge’s majority wrote that few, if any, Rehabilitation Act cases would survive if Judge Alito’s view prevailed. That is the majority, not Members of the Democratic Party. That is the majority of the court members, looking at his view. There it is—issues on race, issues on disability, individual rights and liberties, those individuals, farmers, and others in a home involving a civil action, who committed no crime, where marshals used restraints like tactics. They were denied an opportunity for a court to give a hearing. Judge Alito said no. That is why many Members wonder what kind of an opportunity the average American is going to have. Does Judge Alito tip more to the powerful and the entrenched interests and the Executive authority? Does he give those individuals—women, minorities, near-death, serious health care seekers—their opportunity for justice?

Judge Alito said, let’s look at the record. We have looked at the record. We looked at primarily the dissents, as pointed out in the previous discussions. Ruth Bader Ginsburg, who is considered to be a very progressive figure on the Court, Judge Bork, a conservative figure who was proposed for the court, agreed 91 percent of the time. It is in the dissent that we understand whether an individual and individual rights are protected. Those are the indicators. As we have seen from studies—not just from the members of the Judiciary Committee but by independent sources—Knight Ridder, Yale Law School Study Group, even the Washington Post, distinguished authority and thoughtful individuals about constitutional law—all have reached a very similar conclusion that I have outlined here. We will hear on the other side: Well, they are only finding a few cases. We have suggested that we have seen from the Judiciary Committee this happens to be the prevailing position of the nominee.

In another case, a jury ruled a woman had provided enough evidence to show that she had wrongly lost her job because of her race. Ten members of the Third Circuit who heard the case on appeal agreed. Only Judge Alito argued that she had not provided adequate proof of discrimination. Who is out of step? Who is out of step? Is it Alito, or out of step is the dissent that we understand whether their confirmation is in the best interests of our Nation? That is the test. It is a test with which Judge Alito himself seems to agree. He said he would look at his record and decide whether he should be confirmed. I have done so. I have compared the challenges that our Court will face in the future with Judge Alito’s record and I cannot support his nomination.

In this new century, the Court will undoubtedly consider sweeping new claims to expand Executive power at the expense of core individual rights, including detention of Americans on American soil without access to counsel or the court, and eavesdropping on Americans in violation of Federal law. The Court will decide new issues in America’s struggle against prejudice and discrimination. It must remain a fair and impartial decisionmaker for ordinary Americans seeking justice.

Justice Alito’s record shows he should not be entrusted with these vital decisions. We have the responsibility to make a judgment that this Court, and I urge my colleagues to join me in opposing Judge Alito’s nomination.

The PRESIDING OFFICER. The Senator from Illinois.

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

Those who are following this debate—my colleagues and those in the audience—will see this is a historic moment in the Senate. It is rare that Members of the Senate are given an opportunity to review a Justice to the Supreme Court. It has been 11 years. Recently, we have had two. Chief Justice John Roberts came before this Senate, and today is the historic moment for the nomination of Judge Sam Alito to fill the vacancy of Sandra Day O’Connor on the Supreme Court.

I take this very seriously. As Senator KENNEDY said yesterday in another reading: Next to a vote on war, there is nothing more serious than this decision. The man or woman whom we choose to serve on the Supreme Court
is there for the rest of their natural life. For 10, 20, or 30 years, that person will be making critical decisions on the highest Court in the land, the Court which is the refuge for our freedoms and our liberties.

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

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

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

As important as her gender is, the fact is, she brought unique leadership to the Court. You see, over the last 10 years, there have been 193 decisions in that Court that were decided 5 to 4. One Justice's vote made the difference. If one Justice had voted the other way, the decision would have been the opposite—193 times in 10 years. And in 148 of 193 cases, Justice Sandra Day O'Connor was the deciding vote.

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

What kind of cases did Sandra Day O'Connor provide the decisive vote on? Cases which safeguarded Americans' right to privacy in the area of reproductive freedom, the rights of women; cases that required courtrooms to be accessible to people with disabilities; decided 5 to 4; preserving the rights of universities to use affirmative action programs, decided 5 to 4; affirming the right of State legislatures to protect the right of privacy in America, decided 5 to 4; upholding State laws giving individuals the right to a second doctor's opinion if their HMO denied them treatment, decided 5 to 4; reaffirming the Federal Government's authority to protect the environment that we live in, a 5-to-4 case; and reaffirming America's time-honored principle of the separation of church and State, 5 to 4.

In every one of these cases, the fifth vote was Sandra Day O'Connor. And now she leaves, after many years of service to America, with an extraordinary record of public service. Many of us are listening, and reading, and wondering, to what extent certain persons replacing her can rise to the challenge, and not only the challenge of serving in the Court but the challenge of fighting for the same values she fought for. Sandra Day O'Connor came to the Supreme Court with the support of Barry Goldwater, the premiun conservative in American politics in the 1960s and beyond. Many expected her to be of the same stripe, that she would follow his basic philosophy. In many ways, she did because Goldwater's contribution to American politics, you will find him starting in a very conservative position and, over the years, moving to a more libertarian position, a position that valued personal freedom more.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I am—to some degree.

That is a qualified answer, but I took it and went on. The reason I raised it was this: Many people have asked Bruce Springsteen, Where do you come up with the stories in your songs? How do you talk about all these people who are struggling in America? He answered:

I have a familiarity with the crushing hand of fate.

The reason I asked that question was to go to some specific cases Judge Alito had decided and ask him about the crushing hand of fate. Senator KENNEDY just mentioned one of them.

An African American, charged with murder, facing the possibility of the death penalty, argues on appeal that his verdict was unfair because the prosecutor had done the same thing—had the Blacks off the jury systematically. The Third Circuit Court on which Judge Alito served said that defendant was right; that is not something we accept in America; we are going to send this case back to be retried by a jury of this defendant’s peers. They saw the importance of a justice system that is blind to race.

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

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

When it came to health and safety questions involving coal mines, a topic we see in the news every day, Judge Alito was the sole dissent in a case as to whether a coal mining operation would be subject to Federal mine and safety inspection. The court who happened to have an attorney who was looking for a day in court who happened to have an attorney without the appropriate skills? When it came to health and safety questions involving coal mines, a topic we see in the news every day, Judge Alito was the sole dissent in a case as to whether a coal mining operation would be subject to Federal mine and safety inspection. The court who happened to have an attorney who was looking for a day in court who happened to have an attorney without the appropriate skills?

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

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

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

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

I yield the floor.

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

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

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

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

It is clear to me, though, during the course of the confirmation discussions, that the reason I support Judge Alito is his philosophy of judicial restraint is exactly the reason his detractors oppose his nomination. The sad fact is that there are some in this country who believe that judges are not only allowed but expected to participate in the participatory democracy and self-determination, and people don’t favor it. They know the American people believe that the people have retained some rights and the American people themselves don’t agree with these far left, out-of-the-mainstream views.

For these advocates of these out-of-the-mainstream views, the only way they will ever see their views enacted into law is to circumvent the American people and pack the courts with judges who will impose their agenda on the American people. They believe in judicial activism because judicial activism is all they have.

Of course, Judge Alito’s detractors will never say they believe in judicial activism. They know the American people don’t favor it. They know the American people believe fervently in democracy and self-determination, and they don’t want unelected judges making the laws of this country. So Judge Alito’s detractors are forced to oppose his nomination on the basis of certain pretexts. They are forced to grasp for any pretext in order to try to defeat his nomination. As one of Judge Alito’s detractors put it, “you name it, we will do it” to defeat Judge Alito.

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

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

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

The committee members should not think for a moment that I support Judge Alito’s nomination because I am a dedicated defender of the Bush administration. On the contrary, I and my firm have been litigating against the little guy. It requires them to rewrite history. It requires them to believe this or support this supposed theory, they have to radically rewrite history. It requires them to paint Justice O’Connor as some sort of liberal. The truth is far different. For example, according to the Harvard Law Review, over the last decade, the Justice on the Court with whom Justice O’Connor agreed most frequently—over 80 percent of the time—was former Chief Justice William Rehnquist. We think we will all agree that Chief Justice Rehnquist was no liberal. Yet Sandra Day O’Connor and Chief Justice William Rehnquist agreed with each other more than 80 percent of the time.

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

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

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

Another favorite pretext of the opponents of this nominee is that he is somehow biased against the mythical little guy. That he always rules against the little guy in favor of the big guy. The basis for this pretext is a litany of cases his opponents cite where Judge Alito has sided against a sympathetic plaintiff. This pretext suffers from a number of flaws.

The first flaw is a selective reading of Judge Alito’s record. Judge Alito has been a judge for 15 years. He has decided plenty of cases in favor of consumers, medical malpractice victims, employment discrimination victims, and other plaintiffs. In other words, he has decided plenty of cases for the little guy. But his opponents ignore all of these cases and focus only on the cases where he has decided against a sympathetic plaintiff. Anyone who has looked at his entire record will recognize the claim of bias to be completely without merit, indeed, including the Washington Post. The Washington Post did an analysis of
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Judge Alito’s entire record and found he is no more likely than the average appeals court judge to rule for businesses, for example, over individuals. And, yes, I said the Washington Post and not the Wall Street Journal.

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

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

Sam Alito is my favorite judge to sit with on this court. He is a wonderful judge and a terrific human being. Sam Alito is my kind of conservative. He is intellectually honest. He doesn’t have an agenda. He is not an ideologue. Judge Higginbotham, a hero to the civil rights movement in this country, would never have made such glowing remarks if he believed for an instant that Sam Alito was guilty of some of the false charges being made against him.

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

One would not know by listening to some of Judge Alito’s opponents that he is a fairminded judge. In the America of his opponents, no plaintiff ever loses a case. If the entrepreneur ever wins, no matter how frivolous the claim of employment discrimination; police departments never win a case no matter how desperate the claim of a criminal defendant; Government agencies, including the Environmental Protection Agency and the Social Security Administ-

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

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

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

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

We have seen through the years that certain individuals get appointed for a lifetime, their nominees continue, as a threat or as an actual practical impediment to someone receiving a vote, it will make it much more difficult for any President to be able to recruit from the private sector the qualified men and women who have the experience, the personality, the insight, the leadership, and the ability to serve our Government. That might be in a variety of different fields. That is why I think it is important that we as a country—whether it is the Senate or in the practice of holding up nominees and not according them the fairness of an up-or-down vote.

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I do believe, though, that all nominees who are reported out of a committee, whether the Judiciary Committee—for that matter, any committee—Foreign Relations, or other committees, ought to be accorded the fairness of an up-or-down vote at the end of this gauntlet. If you are going to make someone go through all of this, have all these slings and arrows, some relevant, some tangential, and some irrelevant. If they are going to go through all of this, they ought to be accorded the fairness of an up-or-down vote.
consistent, thoughtful, deliberative process to decide cases. This is what judges are supposed to do. They are not supposed to be issuing cases based on predetermined ideology, or an eye toward future confirmation hearings. They should faithfully apply the law to the evidence before the court to the law in that particular case before the court.

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

In recent years the Third Circuit Court of Appeals, he has demonstrated his understanding of the proper role of a judge in our constitutional system of Government, and will apply the law fairly and equally. Judge Alito, in my view, genuinely respects the rule of law in our representative democracy. In recognition of Judge Alito’s outstanding service on the Federal bench, the American Bar Association has given him his highest rating of well qualified. The American Bar Association’s criteria for their evaluation are integrity, professionalism, competence, and judicial temperament.

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

He said:

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

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

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

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

They can’t touch him on credentials or his mastery of jurisprudence, so they’re trying to get him on guilt by ancient association. Senators Ted Kennedy and Chuck Schumer did their best yesterday to imply that Judge Alito was racist and sexist by linking the nominee with the Concerned Alumni of Princeton, which back in the 1970s and 1980s took issue with university policies on coeducation and affirmative action.

Of course, Judge Alito said he didn’t agree with any of that. He was concerned about fair access for our military recruiters on campus. The closing lines in the Wall Street Journal editorial stated:

As for Judge Alito’s prospects, if this irrelevant arcana is the most his opponents have, he can start measuring his new judicial robes.

Another comment made by some members of the Judiciary Committee is they don’t have the assurance that the judge firmly believes in precedent. They criticize him for apparently having an open mind.

What some Senators choose to do is not recognize that there are times where precedent should be overturned such as the Court overruling Plessy v. Ferguson and Korematsu v. United States.

Also, as time changes and our country develops, the case law that comes before the Supreme Court also changes, to recognize the advances in technology and science.

In Roe v. Wade, Justice Blackmun recognized that advancements in medical science will impact the trimester standard for when the State’s interest in life begins.

As constitutional jurisprudence moves forward, Judge Alito, with his understanding that stare decisis is not an "inexorable command," makes a great deal of sense. We have seen that throughout the history of our country. There were some comments made during his confirmation process by the groups objecting to the nomination of Judge Alito. The last paragraph with the conclusion he reached after an independent review of the facts of a particular case. While these groups, and all Americans, have an important role in a free society and deserve to state their view, they also in some cases are distorting the proper role of a judge. On the bench, Judge Alito has not been a partisan activist. To the contrary, there have been no substantive claims that any litigant before Judge Alito did not have a fair and impartial judge. Factors that weigh whether a President should be overturned, or modified—are there many factors, such as the nature of the original decision, whether that precedent has been changed, or there is a desire on the part of the people who are the owners of the Government to change it. Another factor could be whether the precedent has been undermined by subsequent decisions or new facts or new laws.

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

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

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

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

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

We also see judges altering the will of the people in a variety of other ways. They struck down some laws in Virginia within the last 2 years because of international standards. Friends, colleagues, we make the laws. Why represent the people of this country. It is our Constitution. It is not the U.N. constitution or various conglomeration or what confederations of other countries may think our laws should be. The laws are made by the people of this country.

A continuing debate has to do with parental notification. People in Virginia, when I was Governor, and other
States thought, if an unwed minor daughter is going through the surgery, the trauma of an abortion, and is 17 years old or younger, a parent ought to be involved. After all, if a child is going to get a tattoo or their ears pierced, they require parental consent. The laws are passed by various States, there is one in contention dealing with New Hampshire. Federal judges, ignoring the will of the people in various States, strike down and allow those laws to be overturned.

Last year, in the summer, the Supreme Court got involved in a case that created a great deal of concern because the city of New London, CT, the city council, acting akin to commissars, decided they were going to take people’s homes, the American dream, and condemn those homes, take them not for a school, not for a road or any such public purpose, but rather they wanted to derive more tax revenue off of that property. This is part of the Bill of Rights, the Constitution. It was the Supreme Court, in a very narrow decision, allowed New London, CT, in the Kelo case, to take away people’s homes. This is an example of Supreme Court justices, Federal judges, selected and serving without the advice and consent of the people to communicate with the legislature and advise them they may wish to revisit a certain issue. It was not the role of the Supreme Court. The proper role of the Supreme Court, to quote examples from his very distinguished career, his knowledge, and what I feel about this troubling trend of judges who think, I know the law, but it may be appropriate to certify their own preferences to the people. A parent ought to have a say in this.

I met with Judge Alito in my office and discussed with him my concerns about this troubling trend of judges who ignore the will of the people and start inventing laws themselves. I was actually very encouraged by his scholarship, his knowledge, and what I felt was a very genuine, sincere understanding of the Constitution that we need a respectful, restrained judiciary. And also his ability to cite examples from his very distinguished career of cases where he was presented with decisions where he put aside his personal view and followed the law.

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

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

In our system of government, it is essential the people in the States be free to experiment in public policy and that Washington, the Federal Government, should not intervene. Oppositions have referenced half a dozen cases out of the more than 1,500 that he has been involved in while serving on the Third Circuit Court of Appeals. The fact is, no matter how Judge Alito answered the questions posed to him, his detractors would continue to oppose his nomination. On the particularly important charge that he favors an expansive view of the Commerce Clause. Judge Alito reiterated his view that no branch of government has more power and that no person in this country, no matter how powerful or powerful, is above the law; no person in this country is benefited by the law. Judge Alito has been a very genuine, sincere upholding of the Constitution—of the Constitution, the Bill of Rights, the Constitution, the Bill of Rights is the most important part of our Constitution, serving for life, amending our Bill of Rights.

Aside from this very unambiguous answer, one can point to a litany of cases where Judge Alito came down against the authority of the Government, or for the little guy as some people like to call it.

Another criticism of this nomination has been that Judge Alito, if confirmed, will replace a moderate on the Court, retiring Justice Sandra Day O’Connor. Sandra Day O’Connor by the way, in Kelo v. New London, CT, “commissar taking of homes” case, ruled on the side of the Constitution, so there will be no change there. We will need to get another Justice if the States are not able to rein in such taking of homes. Justice O’Connor is a person for whom I have a great deal of respect. She served with great distinction on the Court for many years and has a compelling, interesting life story. The fact that President Reagan appointed her as the first woman on the Supreme Court of the United States as a pioneer in so many ways has been an inspiration to many young people, regardless of gender. Particularly many young women who commented to me that he has been a role model to them in the law. We have seen a great increase in the number of young women interested in studying in our law schools.

They will say that we have to have someone who has the exact same philosophy as whoever was being replaced. They want to remember the Founders, in drafting article III of the Constitution that creates the Supreme Court, provides no requirement there must be an ideological balance on the Court. For example, the Senate has respected the prerogative of the President and performed their advice-and-consent function and ultimately voted for qualified judges, despite their political orientation.

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

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

The PRESIDING OFFICER. The Senator from Florida.

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

The Constitution demands that the President’s nominees to the Supreme Court receive the advice and consent of a majority of Senators. The standard to be used is not spelled out in the Constitution, but 200 years of tradition offers a guide. That guide, that standard, that was applied to nominees throughout our history, is the very same standard we should apply today to Judge Samuel Alito. By that standard, Judge Alito is well qualified.

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

As Alexander Hamilton noted in Federalist No. 78, if the courts are to be truly independent, judges cannot substitute their own preferences to the “constitutional intentions of the [legislative branch].” Judge Alito clearly expressed during his confirmation hearings, and his judicial answers in the Senate, that he would not impose his personal views over the court’s and precedent. I find that refreshing, I find that encouraging, and I find that a strong reason for supporting the nomination of Judge Alito.

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

Judge Alito not only received their
unanimous approval, but he received
their most qualified rating. That means
one of the key members of that commit-
tee gave Judge Alito their highest, most qualified rat-
ing. This should weigh heavily in favor
of the confirmation of Judge Alito.

What we have—after the confirma-
tion hearings, after extensive inter-
view with Members of the Senate,
and after 3 days of testimony before the Ju-
diciary Committee, and responses to a
wide range of written questions by Sen-
ators after the hearings—is that Judge
Alito is a humble and dispassionate
judge, with a deep understanding and
modest view of his judicial role in the
governance of our Nation and respect
for the limitations of precedent.

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

I am persuaded that Judge Alito will
look to establish precedents be re-
spect of the principle of stare decisis,
and will use the Constitution and the
law as his guideposts as opposed to any
personal whim or political agenda.

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

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

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

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

Judge Alito has made it abundantly
clear that his personal views have ab-
solutely no place in determining his ju-
dicial role in our constitutional struc-
ture. Rather, the Constitution, stat-
utes, and controlling prior decisions, as
applied to the facts of the case at hand,
are the sole basis for his judicial deter-
minations. I find that, as it should be,
the correct standard to apply to a judi-
cial nominee for determining his fit-
ness for this high office.

At the end of the day, we know that
elections have consequences. The fact
that President Bush in the office of President now for
a second term has also been an indica-
tion that President Bush deserves and
should be allowed to have his pick for the
Court.

It is our tradition that Presidents
nominate, select, and fill vacancies to
the Court, while the Senate’s role is
one of advice and consent. We simply
do not have the prerogative of deciding
who it is we would prefer to see on the
Court or who it is we might find more
philosophically suitable to us or more
to our liking. Our role as Senators is to
provide the President with the advice
and consent on the qualifications of
those he seeks to put in this high of-
fice.

I see an evolving new standard before
us. I heard from the members of the
Judiciary Committee who did not sup-
port this nominee the setting of a
standard and leave it unchallenged as
our philosophy. That, I would suggest, is
the proper role of the courts in the in-
terpretation of the law.

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terpretation of the law.

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

THE PRESIDENT. Without objection,
it is so ordered.

COAL MINING TRAGEDIES IN WEST VIRGINIA

January 25, 2006

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

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

Above the ground, we all prayed for a
miracle such as we had enjoyed with the
nine miners who had been trapped at
the mine at Quecreek, PA, in 2002 and
were found alive. But this time, there
was only one miracle. My wife Erma
and I, like many others in my great State of West Virginia, continue to pray
for the correct standard to apply to a judi-
cial nominee for determining his fit-
ess for this high office.

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

And once again, the national media
rushed in to report the disaster to the
world. Once again, editorials filled
newspapers across the country decry-
ing the dangers of mining coal, de-
nouncing the callousness of coal com-
panies, and questioning the commit-
ment of State and Federal officials to
mine safety.

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

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

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

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

Coal miners are a special breed. I have known miners go into a mine after an explosion, risking their own lives, realizing that another explosion might occur and another tragedy would follow in the wake of the first tragedy. Yes, MSHA is filled with good, well-intentioned, and dedicated professionals, but something is terribly wrong with the leadership at MSHA.

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

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

A short 2 weeks later, similar horrors emerged from a second tragedy at the Aracoma Alma mine and, again, MSHA lost time. Welch took 24 hours for 24 hours. Something is incredibly wrong. It is obvious something is very, very wrong at MSHA. The rescue procedures for miners are woefully inadequate.

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

Congress had issued a long time ago that mine safety and health depends on financial penalties that “make it more economical for an operator to comply” with the law “than it is to pay the penalties assessed and continue to operate.” Wrong, wrong, wrong. Something is terribly wrong. Something is terribly wrong. Something is terribly wrong.

It takes a love for one’s fellow man. To go into a mine after a disaster is not only a heroic act but a willful act. It is an act of faith, it is an act of love, it is an act of humanity. What does that say about the people leading this agency when they don’t even know about the existence of lifesaving technology that ought to be in the mines? What does that say? Shame, shame on them. I am talking about the people leading the agency when they testified that they don’t even know about the existence of lifesaving technology that ought to be in the mines. Why is the Acting Administrator of MSHA, charged with protecting the health and safety of coal miners, so abysmally ignorant of these technologies? The families of these miners and the Members of this Congress are owed an explanation.

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

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

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

Our Nation’s coal miners are vital to our national economy. During World War I, coal miners put in long, brutal
hours to make sure that the Nation had coal to heat our homes, power our factories, and fuel our battleships. In World War II, American coal miners again provided the energy to replace the oil that was lost with the outbreak of that global conflict. During the oil boycott early in the 1970s, our Nation once again called upon—yes, our Nation once again turned, yes, to the coal miners to bail us out. We have turned, yes, to the coal miners to bail us out of that global conflict. During the oil boycott early in the 1970s, our Nation once again called upon—yes, our Nation once again turned, yes, to the coal miners to bail us out. We have turned, yes, to the coal miners to bail us out of that global conflict. During the oil boycott early in the 1970s, our Nation once again called upon—yes, our Nation once again turned, yes, to the coal miners to bail us out. We have turned, yes, to the coal miners to bail us out of that global conflict. 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But how and why these men lived, that is perhaps the more important thing to be studied. We know this much for certain: They were men who loved their families. They were men who worked hard. They were men of integrity, and honor. And they were also men who laughed and knew how to tell a good story. Of course they could. They were West Virginians!

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

No one might be said or done concerning these events, let us forever be reminded of who these men really were and what they believed, and who their families are, and who West Virginians are, and what we believe, too.

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

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

We are proud of who we are.

We stand up for what we believe.

We keep our families together.

We trust in God.

We do what needs to be done.

We are not afraid.

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

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

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

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

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

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

Mr. KERRY. I thank the Chair.

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

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

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

Confirmation of a Supreme Court Justice is one of the most important jobs we have as Senators.

This will be the second Supreme Court nominee I will have considered since coming to the Senate.

I take this responsibility very seriously.

I have spent time with Judge Alito and I have studied his background and record.

I closely followed his confirmation hearings in the Judiciary Committee. I can say without question that he should be confirmed.

I don’t doubt that Judge Alito and others like him are, and who West Virginians are, and what we believe, too.

We are all familiar with the basics of Judge Alito’s background.

He has been on the Third Circuit Court of Appeals for 15 years.

He has participated in several thousand cases and written several hundred opinions.

He attended top schools for both college and law school—Princeton and Yale.

I gather all of my colleagues would agree that those things are important and impressive—but they do not alone qualify him for the job.

There is a lot more to being qualified for the Supreme Court than pedigree and judicial experience.

Judicial philosophy and one’s approach to judging and the law are most important.

All these factors and more must be looked at and weighed before deciding if a nominee is qualified.

I have done so and it is clear to me that Judge Alito should be confirmed.

A good place to begin is with Judge Alito’s record on the Third Circuit Court of Appeals.

He has participated in over 3,000 cases and written over 300 opinions.

His record in those cases shows that he is fair and impartial. And that he understands the law and the judicial process.

His opinions are written clearly and provide clear guidance to the lower courts.

Clarity is something we certainly need on the Supreme Court.

The clarity and fairness of Judge Alito’s opinions speak well to his qualifications.

But what speaks volumes is that his critics have been unable to find a single case he participated in to show that he is unqualified as a judge.

That is not to say that his critics have not tried. But to use any case against him—critics have had to distort the record or confuse the issue.

Judge Alito’s opponents are trying to stop his nomination.

They are concerned he will be a vote for the rule of law and the Constitution. And not a judicial activist to their liking on the Supreme Court.

The framers of the Constitution created a system of government where the peoples’ voices are to be expressed through their elected representatives.

All Senators and Representatives stand for election and are responsible to the people of their States or districts.

The President is accountable to the entire Nation and must face the people in every State.

The Justices of the Supreme Court never have to face voters.

That is why the framers gave the legislative powers to the Congress.

And that is why they gave the administrative powers to the President.

Elected represent policy decisions—are accountable to the voters.

The Justices of the Supreme Court are not.

At its simplest—that is what is meant by the rule of law. We are a Nation of laws—starting with the most basic law, the Constitution.

The Constitution spells out the roles of the branches of Government.

It sets out the role to the courts—which is to settle legal disputes between parties, and not to set national policy.

The Supreme Court is also to be a last check on the legislative and executive branches when they clearly violate the Constitution—but not to override policy decisions when the Constitution is silent.

Judge Alito has a demonstrated record of respecting the rule of law and the will of the people through their elected representatives.

That disturbs some who belong to this body.

It bothers them to know that if Judge Alito and others like him are on the Supreme Court—then the steady advance of courts acting as a policy-making branch of government will be halted.

Judge Alito has shown respect for the rule of law throughout his career on the bench—and even before that when serving in the Reagan Administration.

He understands that each branch of government has a unique role to play.

And he understands that only two are accountable to the people.

I take great comfort in Judge Alito’s understanding that there is a place in our system of government for policy making—and that the place is not the courts.

Many of Judge Alito’s opponents view the courts as just another policy making branch of government.

In other countries that may be true. But in the United States it is not.

Our judges are insulated from public pressure.

It is this way so that they can make impartial and fair judgments on cases—no matter how popular or unpopular the result.
They are also insulated from the political process to prevent undue influence from Congress or the President.

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

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

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

They want liberal judges who will rule by dictating policies that fall at the ballot box.

They want activist judges. And Judge Alito is not an activist judge. Judge Alito will stand up to the activists on the Supreme Court and help make sure the Court follows its proper and vital role.

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

Like Chief Justice Roberts, I am confident Judge Alito will only act within the Supreme Court's proper role.

And I am confident he will help re-store the American people's faith in our court system.

I press upon my colleagues to support this nomination. I will vote for Judge Alito and whatever measures and procedures necessary to ensure he gets a final vote up or down.

I am proud to support him. Mr. President, I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

The PRESIDING OFFICER. Without objection.

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

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

"We who are his colleagues are convinced that he will also be a great Justice." (January 25, 2006)

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

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

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

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

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

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

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

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

I would overlook many technical violations of the Federal Rules of Appellate Procedure, and I think it is too much to insist that Pirolli's brief at least state the ground on which reversal is sought.

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

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

I am so hopeful that the people who would vote against him would at least let us have the vote. He has been thoroughly vetted. He has been thoroughly questioned. The Senate has fulfilled its constitutional responsibility and I think by the end of this week we should allow Judge Alito to be able to start preparing for the very important cases that are going to come before the Court right away. Let him have the chance to be fully prepared and do his job. This is the least we should expect of the Senate. It is the responsible approach for the U.S. Senate. The Supreme Court and the people of America deserve no less.

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

The PRESIDING OFFICER. The Senator from Arizona is recognized.

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

We know that elections have consequences. When President Bush ran for reelection, he stated plainly and often that if given the opportunity, he would nominate judges to the U.S. Supreme Court who strictly interpret the Constitution of the United States. True to his promise, the President nominated John Roberts to become the 18th Chief Justice of the Court. Just as true to his promise, he nominated Samuel Alito to serve as Associate Justice of the Supreme Court.

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

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

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

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

Our party affiliations and views on policy matters span the political spectrum. We have worked for Members of Congress on both sides of the aisle and have actively supported and worked on behalf of all Democratic, Republican, and Independent candidates.

And they go on to say in their letter:

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

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

Finally, they go on to say:

It never once appeared to us that Judge Alito had prejudged a case or ruled based on political ideology. To the contrary, Judge Alito meticulously and diligently applied controlling legal authority to the facts of each case after a full and careful consideration of all relevant legal arguments. It is our uniform experience that Judge Alito was guided by his profound respect for the Constitution and the limited role of the judicial branch.

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

I will make one other comment. We are dragging out this process for no good reason. We all know what the outcome of the vote is going to be. We have other pressing business, including lobbying reform, which needs to be taken care of by this body. We have pending the issue of the PATRIOT Act. There are many issues we should be addressing and at least beginning to work on, rather than dragging out this process.

I wish my colleagues on the other side of the aisle who have sat with for 15 years is not an ideologue. He's a wonderful partner in dialogue. He's open to differing views and will often change his mind in light of the views of a colleague. He's not doctrinaire, but rather work. He's a wonderful partner in dialogue. His intellect is of a very high order. He's brilliant, he's highly analytical and meticulous and careful in his comments and his written work. He's a wonderful partner in dialogue. He's not doctrinaire, but rather open to differing views and will often change his mind in light of the views of a colleague.

When there is a large number of votes against this highly qualified individual, it is a symptom of the rather bitter partisanship that exists in this body today, and I regret that very much. There are issues, such as Iran and their rapid acquisition of nuclear weapons, which spring to mind. We have to sit down in an atmosphere of mutual trust and respect and work on these things. I will be very sad when I see this large vote against this good and decent American, but, more importantly, I will be upset because we continue to engage in the kind of partisanship which has even been ratcheted up lately on lobbying reform, when we should be working together toward a common approach and a common cure for a significant illness that afflicts this body and the Capitol today.

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

I thank my colleagues, and I yield the floor.

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

Mr. GRAHAM. Mr. President, I suggest this nomination be resubmitted.

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

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

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

It is clear to me that President Bush picked two very well qualified people to serve on the Supreme Court when it came his time to choose a Supreme Court nominee. You don’t have to take my word for it. Seven judges testified before the committee who served on the Third Circuit with Judge Alito. They were nominated by Lyndon Johnson, Richard Nixon, Ronald Reagan, George H.W. Bush, and Clinton. Collectively they have served with Judge Alito for more than 75 years, watching him work and evaluating his intellect, character, independence, and demeanor.

Judge Becker on working with Judge Alito up close: “There is an aspect of appellate judging that no one gets to see—no one but the judges themselves: how they behave in conference after oral argument, at which point the case is decided, and which, I submit, is the most critically important phase of the appellate judicial process. Hundreds of conferences, I had never once heard Sam raise his voice, express anger or sarcasm, or any other emotion. What he did was ask questions, sometimes as long as a half hour.

I ask unanimous consent to print in the RECORD excerpts of these judges’ comments.

Even try to proselytize. Rather, he expresses his views in measured and temperate tones.”

Judge Becker on Judge Alito’s intellect and open-mindedness: “Judge Alito’s intellect is of a very high order. He’s brilliant, he’s highly analytical and meticulous and careful in his comments and his written work. He’s a wonderful partner in dialogue. He’s open to differing views and will often change his mind in light of the views of a colleague.”

Judge Becker on whether Judge Alito is an ideologue: “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, whatever they may be. He scrupulously adheres to precedent. I have never seen him exhibit a bias against any class of litigation or litigants.”

His credo has always been fairness.”

Chief Judge Scirica on Judge Alito’s personal character: “Despite his extraordinary talents and accomplishments, Judge Alito is modest and unassuming. His thoughtful and inquiring mind, so evident in his opinions, is equally evident in his personal relationships. He is concerned and interested in the lives of those around him. He has an impeccable work ethic, but he takes the time to be a thoughtful friend to his colleagues. He treats everyone on our court, and everyone on our court staff, with respect, with dignity, and with compassion. He cares deeply about his country and to his profession. But he is equally committed to his family, his friends, and his community. He is an admirable judge and an admirable person.”

Chief Judge Scirica on Judge Alito’s open-mindedness: “Like a good judge, he considers...
Mr. GRAHAM. Mr. President, I have limited time, so I am not going to read them all. But I ask each Member of the body to look, if they can, at these short quotes, or if they want to listen to the whole testimony, they can certainly refer to the whole testimony. They can certainly say? That he has a temperament—some amazing amount of independence to serve as a Justice on the United States Supreme Court.

Mr. GRAHAM. Mr. President, I have unlimited time, so I am not going to read them all. But I ask each Member of the body to look, if they can, at these short quotes, or if they want to listen to the whole testimony, they can certainly refer to the whole testimony. They can certainly say? That he has a temperament—some amazing amount of independence to serve as a Justice on the United States Supreme Court.

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country is more divided. All I can say is, don’t start down a road that you will regret because Justice Ginsburg replaced Justice White, and if we are going to base our vote on Roe v. Wade, what somebody might do, then a pro-life Senator would have a very difficult time justifying a vote for Justice Ginsburg because she openly embraced a constitutional right to abortion and supported public funding of abortion. That is a view held by many Americans. It is a legitimate view to have. But the point of view is also clear that she was going to probably be different than Justice White because Justice White dissented in Roe v. Wade.

If that is the only reason you were voting for Justice Ginsburg, you knew with a high degree of certainty the balance of power on the Court would change when it came to that one issue. Somehow back then people of a pro-life persuasion set that aside and looked at her qualifications. She was never attacked, that I can find in the Record, for being the general counsel for the American Civil Liberties Union, a left of center organization, from a conservative’s point of view, that embraced with which I personally disagree. But people understood there was a difference between lawyering and judging. I would argue forcefully that the unpopular cause needs the best lawyer. Instead of holding it against her for representing politically unpopular causes, causes with which I completely disagree, I would give her credit as a lawyer because the unpopular cause needs the best lawyers in the country. The more popular it is, the worse lawyer you can have because you are likely to win.

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

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

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

I honestly challenge anyone in this body to say that in terms of legal ability, legal philosophy and personal character, there is a dime’s worth of difference between Roberts, Alito, Ginsburg, and Breyer. There is not. The record in Judge Alito’s case and in Judge Roberts’ case shows beyond any doubt they are well-qualified lawyers who have practiced before the Supreme Court, who have the admiration of their colleagues, their associates, and those they have opposed in court, and that they are without any doubt historically respected.

You can take a record and make it what you want to make it for political reasons. You can take anyone’s life and snip and cut and cut and paste and make that life anything you want it to be in a 30-second commercial. It can happen to me, it can happen to you. Mr. President, it can happen to any American because if you have been involved in the law as long as Judge Alito, you can cut and paste his life as a lawyer, as a judge, and as a person. I just ask that we reject the politics of cut and paste and we look at the entire record and the complete person.

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

I end with this: Elections do matter. President Clinton earned the right from the American people to make two selections. He picked people of known liberal philosophy and inclination to be on the Court. These are legitimate philosophies to embrace and to have. He picked extremely well-qualified people to be on the Court. They are on the Court now with an impact on women in America reached the legal profession. Justice O’Connor’s impact on women in America reached the legal profession. Justice O’Connor’s case shows beyond any doubt they are well-qualified lawyers who have practiced before the Supreme Court, who have the admiration of their colleagues, their associates, and those they have opposed in court, and that they are without any doubt historically respected.

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Judges are on the Court now with an impact on women in America reached the legal profession. Justice O’Connor’s impact on women in America reached the legal profession. Justice O’Connor’s case shows beyond any doubt they are well-qualified lawyers who have practiced before the Supreme Court, who have the admiration of their colleagues, their associates, and those they have opposed in court, and that they are without any doubt historically respected.
to the Senate. I hope that same standard of looking to the American Bar is applied to other nominees in the future.

Second, does he have the highest personal and professional integrity? Particularly on judicial issues. By all accounts, he is an honest man. He pays his bills. His wife is devoted to him. He seems to have wonderful children.

Professional integrity: I have some flashing yellow lights here. One is the concern about how he says he is this fainthearted person. He always open, doesn't believe in discrimination.

I am troubled by his past membership in that very conservative Concerned Alumni for Princeton which Senator Frist and other prominent Princeton alumni repudiated. But Alito didn't. He boasted about his membership when he applied with the Reagan administration. That was the same group that didn't want women in Princeton; women weren't their kind. There are a lot of other decisions he ruled on as a judge against people who "just weren't our kind." He claims he doesn't remember that he was a member of this group, but he used it to get a job. Now he doesn't want to use it to get this job.

The third criterion I have is will the nominee protect core constitutional values and guarantees that are central to our system of government?

Based on his own statements and testimony at the confirmation hearing, I have serious doubts about safeguarding civil rights, the right to privacy, and equal protection of the law for all Americans. That is the bedrock of our democracy. We are left to wonder if he will protect fundamental rights—the right to be free from unnecessary Government intrusion. In the hearings, he had many opportunities to let us know whether he would secure those rights.

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

First, let's take the issue of civil rights. One of the most important civil rights is the right to vote. Yet Alito left me with serious doubts on what his true views are. When applying for a job at the Reagan administration, Alito was 35 years old. He applied to work in the Reagan administration. He was 35 years old, so he had to be out of the mainstream.

Let me tell you my criteria for deciding on a Justice—actually on any judge.

First, is the nominee competent? Judge Alito is competent. He has the highest rating of the American Bar Association. I listen to them very carefully because we consider them an important advisory group that weighs in with their opinions.

Another fundamental principle is the ability for an individual to go to court when his or her rights are violated. An open courthouse door is fundamental to our democracy. Yet Judge Alito's record is troubling. In one case involving race discrimination, a woman sued her employer for racial discrimination. Yet Judge Alito argued that the woman shouldn't be allowed to present her case to the jury. The majority disagreed with Alito and allowed the woman to have her trial. In fact, the majority stated if they had applied Alito's analysis Title VII of the Civil Rights Act would have been eviscerated.

There are many other cases in the area of civil rights and race relations I find troubling, that show Judge Alito is not a moderate or a mainstream judge as he seems to suggest he was at the hearings.

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

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

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

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

Then there is the right to privacy. In the area of the constitutionally protected right of privacy, it is unclear what Judge Alito believes the Constitution protects. Again, I go back to the statements he made when he applied to work in the Reagan administration. He was 35 years old, he wasn't some kid who wasn't sure about himself. He was exploring big theories and ideas in law school. He was applying for a job at the Justice Department. You have to be a pretty experienced professional to even think you are qualified to apply for a job at the Justice Department. He was seasoned, and he was experienced, but he chose to say in that instance that he was proud he would have argued that the Constitution does not protect the right to an abortion.
Let me say these are his words, not Senator Mikulski's. Not only did he take the position to eliminate the rights in Roe v. Wade, he thought it was important that he emphasized it in his job application. No wonder the things he presents a different view. The key question for Judge Alito on the constitutionally protected right to privacy was whether he considered Roe to be settled law.

Judge Roberts at his confirmation hearing hailed Roe as settled law. Repeatedly, Alito was also asked at the hearings if he considered Roe to be settled law and if he agreed with Judge Roberts. Alito refused to say. He repeatedly refused to answer how he would protect the fundamental and explicit right of privacy—implicit right of privacy—in our Constitution. He himself refused to clarify his previous dismissal of Roe v. Wade.

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

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

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

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

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

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

I have given careful consideration to this nomination. I have carefully watched the Judiciary Committee hearings. I may not be a member of the Judiciary Committee, but I have paid close attention to the hearings and watched them on C-SPAN. I went over his past writings, his decisions as a judge and the testimony of others. The Supreme Court, what he will mean to our Government itself does not become a predator on the ordinary citizen’s privacy. Issue after issue leaves me with great concern.

In the end, I have too many doubts about Judge Alito’s views on the Supreme Court, what he will mean for civil rights, our civil liberties, checks and balances on executive power, caused by what he said—and even more by what he refused to say. I am concerned he is out of the mainstream, that he is willing to say what he needs to say to get a job, that he is an ideologue and that his personal views will influence his decisions. It is not acceptable that Judge Alito has expressed views that are so far removed from the constitutional law. They want to ask about the culture of corruption that seems to have taken over Washington under the Republican leadership. They have questions about their health care which is at risk, even if you are employed, or the pensions which seem to disappear with regularity these days. They are concerned about the day-to-day, bread-and-butter, table-top issues that we all live with.

I say this vote we are going to take in the Senate will end up having a great deal to do with how they live their everyday lives within our country, with the quality of life and liberty and pursuit of happiness available to Americans.

The Constitution commands the Senate provide the President with meaningful advice and consent on judicial nominations. I take this constitutional charge very seriously. I have carefully reviewed the committee’s hearings and Judge Alito’s extensive record. I have met with the judge. I have spoken with people who have written to me both sides of this nomination. I have concluded I cannot give my consent to his nomination to the Supreme Court.

The way I read American history is that the key to American progress has been the ever-expanding circle of freedom and opportunities that we have been the common thread through all periods of our history—greater rights and greater responsibilities of citizenship and equality.

Each time we have made strides forward there have been vocal voices of opposition. There have been those who wanted to go back. At those moments of profound importance to our
country, the Federal courts have been the guardians of our liberties, have stood on the side of greater freedom and opportunity.

We all know the famous cases cited as representing this forward march of progress: Brown v. Board of Education, which struck down the notion of separate but equal; Baker v. Carr, which invalidated discriminatory State voting apportionment schemes and paved the way for the concept of one man, one vote; Griswold v. Connecticut, which recognized a right to privacy in the Constitution; Roe v. Wade, which established that women have a right to choose.

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

Time and again, when given the choice, he has voted to narrow the circle, to restrict the rights Americans hold dear. Now is not the time to go backward.

Without the progress we have made in the past 230 years, without that expansion of the circle of equality and freedom and opportunity, I certainly would not be standing here, nor would a number of my colleagues. There would be no opportunities for women in public life.

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

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

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

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

When I ran for the Senate, I told New Yorkers that I would only vote for judges who would affirm constitutional precedents, such as Roe and Brown and other landmark achievements and expanding rights and the reach of equality for all Americans. This is about more than a woman’s right to choose.

The American people are counting on us not to be a rubberstamp but counting on us to make sure the President’s nominee will not take us backward.

I also view this nomination through the prism of the Justice that Judge Alito will replace. I have not always agreed with Justice Sandra Day O’Connor. But she has shown, throughout her career of distinguished service to the Court that one Justice makes a big difference. One Justice can protect our constitutional rights. Justice O’Connor is a true conservative, a mainstream jurist. She appreciated the advancements we have made as a society because she lived them. Anyone who has ever really lived that way has to understand the little cowgirl growing up on a ranch in Arizona, going off to school, eventually going to Stanford Law School, graduating near the top of her class and being unable to find a job simply because she was a woman.

I do not believe millions of Americans face. On the contrary, Judge Alito's nomination, in contrast, has been enthusiastic, effusive, even ecstatic. Why? Because they know exactly what they are getting.

Judge Alito’s constrained views have not been limited to issues of privacy. While on the Third Circuit, he has rarely sided with individuals seeking relief from discrimination on the basis of race, gender, or disability. In fact, in the vast majority of civil rights cases, Judge Alito has sided with those who would infringe on the civil rights of Americans. For example, in several dissenting opinions, he has called for curtailing the progress we have made as a society.

Any fair reading, in my view, of Judge Alito’s record does not demonstrate that same independence of judgment, nor does it illustrate a reverence for questions of constitutional rights. No one who reads the Federalist Papers or the history of our country comprehends the historical context in which our Declaration of Independence and our Revolution occurred could underestimate the importance they placed on having three truly independent and equal branches of Government.

The Founders understood human nature. They got it. They knew that unchecked power would lead to abuses. And we have seen, week after week, right here in Washington over the last 5 years. They realized that we had to check and balance against power centers in order to bring out the better angels of our nature, but also to keep a watch on each other. That is why Congress, independent of the President, is the key to our system, the check that guards against executive or judicial overreach.

The extreme rightwing of the Republican Party was up in arms when President Bush nominated Harriet Miers to the Court to replace Justice O’Connor. The extreme left was quite a spectacle, a good woman, who had risen to the top of her profession in Texas—not, I would imagine, an easy place to be the president of a State bar and be the managing partner of a large law firm, but the extreme left had her on the bench by dint of hard work and intelligence—he turned on by members of her own party because they could not be sure she would agree with them on no matter what the facts or circumstances. Their reaction to Judge Alito’s nomination, in contrast, has been enthusiastic, effusive, even ecstatic. Why? Because they know exactly what they are getting.

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Reagan administration, he made the argument that Cabinet officials who are charged with authorizing illegal wiretaps of Americans in this country should be entitled to absolute immunity. At a time when this President and his political party stand accused of politicizing the judicial power, we must demand from our judiciary a respect for the proper role of each of our three branches of Government. But Judge Alito’s excessive deference to Presidential authority, coupled with his aggressive view of executive power, we must demand from our judiciary a respect for the proper role of each of our three branches of Government.

What is worse is that in supporting the expansion of the reach of Presidential power, Judge Alito also holds a harshly limited view of what the Government can or should do to help ordinary Americans. Judge Alito said it all in 1986, when he was a young lawyer with the Reagan administration. He wrote that when it comes to protection of the “health, safety and welfare” of the American people, “We, I guess that explains the inept, slow, and dangerous response to Hurricane Katrina. If you are not responsible for the protection of the health, safety and welfare, why should you be held accountable when people suffer, when their Government leaves them neglected without any help?

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

Since his appointment to the Third Circuit, Judge Alito has aggressively sought to promote this theory of limited congressional power. In one case, he voted to invalidate parts of our Federal gun laws, arguing there was no evidence in the record to determine that Congress had the power under the Constitution’s commerce clause to enact legislation that regulated the sale of machine guns. In another case, Judge Alito wrote an opinion striking down Congress’s right to make a State agency comply with the Family and Medical Leave Act. And just 3 years later, the Supreme Court, with a similar set of facts, reached precisely the opposite conclusion.

The PRESIDING OFFICER. The Senator’s time has expired.

Mrs. CLINTON. Mr. President, I ask unanimous consent for 5 more minutes.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

Mrs. CLINTON. In several criminal cases, Judge Alito has shown blatant disregard for the constitutional right to be tried by an impartial jury—what any one of us would want if we or a loved one were ever in this position—chosen free of racial or gender prejudice. He has also narrowly construed other constitutional criminal procedure protections, arguing often in favor of granting law enforcement officials the greatest of latitude to conduct unauthorized searches and seizures.

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

Judge Alito, if confirmed, may hold a seat on the Supreme Court for a generation—long after this President has left office. Perhaps through 8 to 10 Presidential elections, decades of progress would fall prey to his radical vision of what constitutes a serious threat to civil liberty, gender prejudice. He has also narrowly construed other constitutional criminal and personal conduct protections, arguing often in favor of granting law enforcement officials the greatest latitude to conduct unauthorized searches and seizures.

A bedrock principle for NOW is full Constitutional rights for women and at the heart of our fundamental commitment to protect the health, safety and welfare of women when they deal with their reproductive health care and childbirth decisions. When applying for a position in the Reagan administration in 1983, Alito stated he was “particularly proud” of his work on cases arguing “that the Constitution does not protect a right to an abortion.” A memo released later shows that Alito told his boss that two pending cases provided an “opportunity to advance the goals of overruling Roe v. Wade and, in the meantime, of mitigating its effects.” These are not the actions of someone simply trying to please his boss, but bold pronouncements that we have no reason to believe have altered in the past two decades.

Also troubling is his proud touting of his membership in a Princeton alumni group that complained about the admission of women and the number of minority students on the elite college campus. How will Judge Alito deal with educational opportunity and Title IX? How will Judge Alito deal with challenges to federal legislation guaranteeing disability rights, lesbian and gay rights, and reproductive rights?

We believe he will rule on the side of narrowing our freedoms and barring our redress in court.

Please consider all of these issues as you review Samuel Alito’s fitness to serve on our highest court in the land. Based on his record, he will not come down on the side of fairness and equality for all. We ask that you vote against his nomination.
Alito often favors a restrictive reading of the law, which results in the narrower interpretation of civil rights. Thus, individuals may be unable to enjoy the full reach of these protections. The rights. The need for judicial restraint and discouraging judges from legislating from the bench, he has used these themes as a means to limit access of individuals to their day in court. And, he frequently argues to constrain the power of the courts and the power of Congress, with regard to binding states, is that individuals, courts, and Congress have less ability to hold states accountable to ensure compliance with the law and remedy legal violations. Alito's stance on executive branch powers would make it harder for workers to challenge state employment discrimination cases. The Supreme Court does not protect a right to privacy. He furthered his support for increased power for the executive branch. A lawyer in the Solicitor General's Office in 1984, Alito wrote a memo supporting immunity for cabinet officials who authorized illegal wiretaps of Americans due to national security concerns. Later, he co-authored a brief to the Supreme Court in which the government argued for absolute immunity—an argument rejected by the Supreme Court. In contrast, Justice O'Connor, writing for an 8-1 majority in the case of American-born detaine Yaser Esam Hamdi (Hamdi v. Rumsfeld), in which the court ruled that an American citizen seized overseas as an "enemy combatant" cannot challenge the factual basis of his arrest or detention, said the Court has "made clear that a state of war is not a blank check for the president when it comes to the rights of the nation's citizens." After becoming a judge, Alito wrote in several opinions that would have extended the reach of the executive branch. In a dissenting opinion in Doe v. Groddy, he argued that police officers did not violate the Constitution when they strip-searched a mother and her ten year-old daughter, despite the fact that neither was named in the search warrant. The majority opinion, written by now-Homeland Security Secretary Michael Chertoff, asserted that Judge Alito's position would effectively eviscerate the antidiscrimination purposes of the law, by accepting the employer's reasoning without adequate review to determine whether racial bias influenced the hiring decision. They stressed that what mattered was not whether the company was seeking the "best" candidate, but whether a reasonable factfinder could conclude that Bray was not deemed the best because she is Black. In his fifteen years on the bench, Judge Alito has shown a pattern of limiting the rights of women and girls. In Planned Parenthood of Southeastern Pennsylvania v. Casey, Judge Alito wrote a dissent in which he called for increased power for the executive branch. He wrote that the Constitution does not protect a right to privacy. In the meantime of mitigating its effects. Alito's stance on executive branch powers is further revealed in a Feb. 5, 1986 draft memo where he argued that the White House should issue "interpretive signing statements" when signing a bill into a law, and that courts might be persuaded to consider this "executive intent" equally with legislative intent. The balance of power between the two branches, and the White House interpretation is accorded equal weight with congressional support. In conclusion, Judge Alito has consistently articulated positions that are outside the mainstream, that undermine legal protections against employment discrimination, that distort the law in favor of extending power to the right to abortion, and that reverts to judicial activism, blantly ignoring the clear intention of the legislature to push his arch-conservative political agenda. Therefore, we urge our colleagues to oppose his nomination to the U.S. Supreme Court. If you have any further questions, please contact Lisalyn Jacobs at Legal Momentum, (202) 335-0640. Sincerely, LISA LYNN JACOBS, Vice President for Government Relations.
affirmative action even in cases of intentional, on-going and "egregious racial discrimination." Alito signed a brief arguing the extraordinary theory that relief in Title VII cannot be committed to "troubling victims of discrimination," contradicting an earlier view of the Equal Employment Opportunity Council (EEOC) itself. The Supreme Court rejected Alito's argument, stating that affirmative action relief may be ordered by a court as a remedy for past discrimination even though the beneficiaries may be non-victims." Furthermore, in the 1970s and 1980s Alito was a member of the Concerned Alumni of Princeton (CAP), an organization that actively sought to limit the number of women and minorities accepted to the university. Justice O'Connor cast the decisive vote in Grutter v. Bollinger, upholding affirmative action in higher education. If Judge Alito's views on affirmative action were to replace Justice O'Connor's on the Supreme Court, institutes throughout the country would be harmed. Eliminating this important tool for promoting diversity would deny universities, workplaces and other organizations the enlightenment provided by a greater variety of backgrounds.

In addition to a restrictive approach to affirmative action, Alito's Supreme Court record strongly questions the legitimacy of employment discrimination claims, and in a number of instances, Judge Alito issued opinions that made it far more difficult for victims of discrimination to get to court to prove their cases. Again, this is an area where Justice O'Connor has often been the swing vote in protecting and advancing civil rights. Alito has ruled against three of every four people who claimed to have been victims of discrimination.

In one such gender discrimination case, Sheriff's Deputy Maria de Németh-Clement was the sole dissenter in a 10-1 decision; arguing that he would require victims of discrimination to present much more evidence before they would be entitled to take their case to trial. Were this position adopted more broadly, it would make it much more difficult for victims of discrimination to have their day in court and remedy these actions of prejudice. In another employment discrimination case, this one dealing with race, Alito went even further than upping the level of evidence needed for a trial stating that discrimination occurring in the past may not be against the law. In Bray v. Marriott Hotels, Ms. Bray, an African-American woman, applied for a promotion but a white woman was hired for the job instead. Her employer, Marriott, did not follow its own guidelines for hiring and several of the key employees involved in the process gave conflicting statements about how the decision to hire the white woman was ultimately made. Judge Alito argued in his dissent that it might not be illegal for an employer to overlook a qualified person of color even if the employee's belief that he had selected the 'best' candidate was the result of conscious racial bias." The majority opinion responds to this analysis by noting that Title VII would not be interpreted if the analysis were to halt where the dissent suggests. In addition to the troubling interpretation of Title VII, Alito's dissent demonstrates skepticism about the legitimacy of discrimination claims. He closed his dissent with the disturbing pronouncement that a percentage of discrimination cases are manufactured by disgruntled employees, rather than victims of discrimination. This shows a lack of respect for the going national problem of discrimination in the workplace. In contrast to Judge Alito, 78% of Americans believe racism is a problem in the workplace today. This again illustrates that Samuel Alito is out of step with mainstream American views on the importance of protecting the civil rights of all Americans.

Finally, it is important to look at the make-up of the court. Given the role that Justice O'Connor plays on the court, it is necessary to review Judge Alito not only on his merits but also in the context of whom he will be replacing on the bench. Justice O'Connor has added an important, independent voice to the Supreme Court. As the first woman to sit on the nation's highest court, she has broken barriers for women not only by blazing a trail but also by providing a voice and a vote on the many issues that affect women and girls. In contrast to Alito's rulings on issues that affect civil rights, and women's rights, including reproductive freedoms, Justice O'Connor is the deciding fifth vote. If Judge Alito is confirmed to the Supreme Court, women and girls will have unprecedented access to a critical voice speaking for the rights of women and girls.

AAUW believes it is more important than ever to ensure the moderate balance of the U.S. Supreme Court by confirming a justice who reflects mainstream America. Decades of progress for women and girls hang in the balance. Further, given that Judge Alito has been nominated to replace the often-deciding vote of Justice Sandra Day O'Connor, this nomination has much at stake. AAUW is concerned that the confirmation of a potentially extremist justice would turn back the clock on decades of progress for women and girls. Two key areas in particular have led to AAUW's opposition to Judge Alito's confirmation:

Equal opportunity and legal protections against discrimination. Judge Alito's Supreme Court record has a troubling record on a range of civil rights issues, revealing a philosophy that would weaken workplace protections that are central to the well-being of today's women. A number of Judge Alito's opinions would make it harder for employees to win their suits or even get their case to trial. Judge Alito has also demonstrated opposition to actions that seek to curtail constitutional protections against sexual harassment in schools, and aggressively sought to curb congressional authority to address issues such as family and medical leave. In several of these cases, U.S. Supreme Court decisions have later espoused views opposite to those put forward by Judge Alito, showing him to be far outside the mainstream.

Reproductive rights and approach to precedent: Judge Alito has actively rejected a woman's constitutional right to choose, supported limits on abortion, and consistently upheld limits to this fundamental right. While Judge Alito has been careful to stress the importance of stare decisis, his recognition of the importance of the rule is not a predictor that he would follow the principle if confirmed. As a member of the nation's highest court, the obligation to follow settled precedent is a duty. Judge Alito helped develop the strategy for undermining women's reproductive rights, it stands to reason that Roe v. Wade and related cases maintaining the right to privacy could fall within the exceptions Judge Alito has set for himself regarding adherence to stare decisis.

As you know, the Senate has few constitutional duties more significant than that of advising and consenting to U.S. Supreme Court nominations. AAUW believes you should confirm only a nominee that exhibits the impartiality and independence that are so critical to this third, co-equal branch of our government.

No nominee is presumptively entitled to confirmation. After a thoughtful review of Judge Alito's record, AAUW believes Judge Samuel A. Alito, Jr. is the appropriate choice for a lifetime position on the U.S. Supreme Court. AAUW urges senators to reject Alito's nomination and let their votes be a true measure of their commitment to equity for women and girls.

Sincerely,

Lisa M. Maatz,
Director, Public Policy and Government Relations.
Chairman Specter and Senator Leahy:

The National Council of Women’s Organizations, the oldest and largest coalition of the nation’s women’s groups, urges the Senate to reject the nomination of Samuel Alito to the United States Supreme Court. Judge Alito’s extreme positions of denying reproductive rights, workplace discrimination and violence against women, make him the wrong choice to replace retiring Justice Sandra Day O’Connor.

In nominating Samuel Alito after Harriet Myers withdrew from consideration, President Bush chose to put political expediency ahead of the rights and well-being of this nation’s women and girls. Mr. Bush’s right-wing base clamored for rejection of Ms. Myers because, as conservative as she is, she fell into the war on terrorism category, and they apparently feel he has 10 percent of their issues. Samuel Alito, however, is apparently their man.

Judge Alito has a long record demonstrating hostility to women’s reproductive rights. In the 1980’s, he repeatedly advocated the overturning of Roe v. Wade. In the 1990’s, as an assistant solicitor general in the Reagan Administration, and the Justice Department attorney, Alito urged the government to overrule with provisions of the Family and Medical Leave Act, Women have fought hard over the last four decades, against resistance, setbacks and lackluster funding of fundamental mental rights. If confirmed, Judge Alito will be in a position to undermine our gains for generations to come. We urge you to stand firm for women’s rights and reject this nomination.

Sincerely,

Susan Scanlan, Chair
Terry O’Neill, Executive Director

National Women’s Law Center

Hon. Arlen Specter, Chairman
Ranking Member, Committee on the Judiciary, U.S. Senate

National Women’s Law Center
Senator Office Building, Washington, DC.

Dear Chairman Specter and Senator Leahy:

On behalf of the National Women’s Law Center, an organization that has worked since 1972 to advance and protect women’s legal rights, we write to reiterate the Concerns of the National Women’s Law Center about Judge Alito’s appointment to the Supreme Court.

A majority of the Supreme Court, often has cast the decisive vote when the United States women’s groups, urges the Senate to reject the nomination of Samuel Alito to the United States Supreme Court. Judge Alito’s extreme positions of denying reproductive rights, workplace discrimination and violence against women, make him the wrong choice to replace retiring Justice Sandra Day O’Connor.

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in those cases. With the retirement of Justice O’Connor, the Court will lose not only its first female Justice, but also the Justice whose vote often has been pivotal on issues critical to women. Judge Alito’s record demonstrates that if he is confirmed to the Supreme Court, he is likely to eviscerate core rights that American women rely upon, and undermine the rights that American women have worked so hard to win.

In the past, in the 22 years I have been here, like many of my colleagues, I have voted for Federal court nominees despite the fact I disagreed with them ideologically. I have voted, I am confident, hundreds of times. In fact, I voted for Justice Scalia because despite our ideological differences, in the confirmation process he promised to be openmindedness that we have not seen in the Court.

So we have learned the hard way. The words of the confirmation hearings simply do not erase ideology, they do not erase a track record. And that ideology cannot be overlooked because a Justice’s decisions can and will have profound and enduring effects that we otherwise take for granted.

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

He or she needs to appreciate the significant struggles that our Nation has endured in the context of racial, sexual, and disability discrimination and to be aware of the road still to be traveled. And that awareness of the road still to be traveled has to be evidenced in the decisions and writings of that nominee. In short, ideology does matter. The Supreme Court’s ideologically driven decisions have been the most regrettable in our Nation’s history, decisions such as Korematsu, Dred Scott, and Plessy v. Ferguson.

In fact, ideology matters more in this nomination than it would in many others. We are replacing Sandra Day O’Connor, President Reagan’s nominee to the Supreme Court, the person who has occupied the center of balance on the Court. She has been the deciding vote in critical cases involving and defining our constitutional rights and liberties. As we contemplate ripping that center out from under the Court, we have to understand what the impact of that action will be.

Given how high the stakes are, our decision simply cannot be based on whether Judge Alito is a smart man or whether he is a nice man or whether he is an accomplished man or even whether he is well respected in legal circles. He is all of those things. But what we need to consider is the impact that a Justice Alito will have on the Court and whether that impact is good for our country, good for our Constitution, and good for the American people.

I believe, based on his track record, the decisions already made, the writings already expressed, the questions that went unanswered in the hearings, the cases he has decided, where studies have shown a pattern of willingness to ignore our Constitutional rights and deny people access to our court system, for all of these and for other compelling reasons, I oppose this nomination.

Sincerely,

Nancy Duff Campbell,
Marcia D. Greenberger,
Sandra Fluke,
Mrs. Clinton, Mr. President, I yield the floor.

The Presiding Officer (Mr. Martinez). The Senator from Massachusetts.

Mr. Kerry. Mr. President, obviously, today we face one of the most important choices we make as Senators. This is a choice, as colleagues have said, that is going to affect the country for the next several decades. To place on the bench Sandra Day O’Connor, the President has nominated a man who has consistently deferred to Government action regardless of how egregious that action may be. He has nominated a man whose pattern of decisions erects rather than breaks down barriers in the area of civil rights; a man who, to this day, has never retreated from his declaration that the Constitution does not protect a woman’s right to privacy; a man who has demonstrated a persistent insensitivity to the history of racial discrimination in this country and was even, at the Government’s request, willing to ignore overwhelming evidence that African Americans were intentionally stricken from an all-White jury in a Black defendant’s capital case.

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

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

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

For the reasons of this track record: the of his writings in the Justice Depart-
and Thomas.’” Apparently, Mr. Buchanan believes that the Alito nomination demonstrates the President’s change of heart. He heralded the nomination as one that would unite and rally the base, a nomination for the base, of the country.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In fact, even Stephen Calabresi, one of the fathers of the theory, has stated that “[t]he practical consequences of the theory are dramatic. It renders unconstitutional independent agencies that commit a violation of law under the Constitution would lose the power to protect public safety by creating agencies like the Consumer Products Commission, which ensures the safety of products on the marketplace, or the Securities and Exchange Commission which protects Americans from corporations such as Enron. And who would gain the power? The Executive, the President.

Carried to its logical end, the theory goes much further than simply invalidating independent agencies. The Bush administration has already used this theory to justify its illegal domestic spying program and its ability to torture detainees. The administration seems to view this theory as a blank check for Executive overreaching.

Judge Alito’s endorsement of the unitary executive theory is not the only cause for concern. In 1986, while working at the Justice Department, he endorsed the idea that signing statements could be used to influence judicial interpretation of legislation. His premise was that the President’s understanding of legislation is just as important in determining legislative intent as Congress’s, which is absolutely startling when you look at the history of legislative intent and of the legislative branch itself. President Bush has taken the practice of issuing signing statements to an extraordinary new level. Most recently, he used a signing statement to reserve the right to ignore the ban on torture that Congress overwhelmingly passed. He also used signing statements to attempt to apply the law restricting habeas corpus review of enemy combatants in a manner inconsistent with Congress’s intent. The implication of President Bush’s signing statements are absolutely astounding. His administration is refusing the right to ignore those laws it doesn’t like. Only one thing can hold this President accountable, and it is called the Supreme Court. Given Judge Alito’s endorsement of the unitary executive and his consistent deference to government power, I don’t think Judge Alito is prepared to be the kind of check we need. Relining in excessive government power matters more today to the average American than perhaps at any recent time in our memory, as we work to try to provide a balance between protection of our rights and balance of power. As Justice O’Connor said: The war on terror is not a blank slate for government action. We can and must fight that in a manner consistent with our Constitution.

Last but certainly not least, I have grave concerns about Judge Alito’s ability and willingness to protect a woman’s right to choose. In his 1985 job application, Judge Alito wrote that he was “particularly proud” of his work around Title VII. In his 1985 job application, Judge Alito wrote that he “thought the Government should not be held accountable for shooting an unarmed boy who was trying to escape while merely pulling purse or even for forcibly evicting farmers from their land in a civil bankruptcy proceeding where there was no show of resistance from those farmers. He believed a show of force from the enforcers was reasonable.”
hearings, Judge Alito stated these statements were accurate reflections of his views in 1985. But what is more disturbing is what he refused to say. He refused to say his views have changed, that he accepted Roe v. Wade as settled law. As Chief Justice Roberts did during his confirmation hearings.

In other words, Judge Alito refused to give any assurances that his concept of the Constitution’s protected liberty is consistent with mainstream America’s.

I really believe Judge Alito has put his lie to keep an open mind on this issue. But we all know that once safely on the Supreme Court, Justice Thomas voted to overturn Roe v. Wade months later, writing a dissent in Casey that likened abortion to polygamy, sodomy, incest, and suicide. Given Justice Thomas’ views, I can hardly imagine Karl Rove whispering to Judge Alito: Just say you have an open mind; say whatever it takes.

We cannot rely on these empty platitudes, and we cannot rely on any promises of open-mindedness when we appear before the Judiciary Committee, particularly when they are absent an acknowledgment of what is or what is not a settled law, particularly when the nominee’s entire professional history suggests otherwise. We cannot rely on them particularly when the past promises of that very nominee have already been rendered meaningless by his actions once safely on the bench. In Judge Alito’s 1990 Judiciary Committee hearings, he promised that he would recuse himself in any cases involving the Vanguard Company given his ownership of Vanguard mutual funds. In his Supreme Court hearings, he admitted he could not remember having put Vanguard on his permanent recusal list. We know it did not appear on his 1993, 1994, 1995, or 1996 list. So how do we know he kept his word to the Judiciary Committee? We don’t. How can we trust him now? We can’t.

I am deeply concerned about where we are heading with this ideological choice for the Court. I am deeply concerned about maintaining the integrity of our constitutional rights and liberties. I fear that the most disadvantaged by the salami slicing of our system of justice, a system that is already becoming increasingly harder for them to access. I fear that the President’s powers will grow beyond the Framers intended even further and we will be unable to do the work of the American people.

Therefore, I cannot and will not vote to confirm a nominee who will shift the Court in this ideological way. I believe that Judge Alito had the burden of proving his proved his words were not just empty words, but to the American people, that he would not be a Justice who would move the Court far to the right, that he would understand what was settled law and what was not. I believe he failed to carry that burden. I believe if he moves the Court in the direction I think he will—I hope I am proven wrong, but if he moves it far to the right, then I think that those rights and values which I cherish so deeply will be set back and the country will move backwards with them.

Mr. President, I ask unanimous consent that letters to Senator LEAHY and Senator SPECTER in opposition to this nomination from the National CaUCUS, Black Caucus, and Hispanic Caucus all be printed in the RECORD at this time. There being no objection, the material was ordered to be printed in the RECORD, as follows:


HON. ARLEN SPECTER,
Chairman, Senate Committee on the Judiciary, Dirksen Senate Office Building, Washington, DC.

HON. PATRICK J. LEAHY,
Ranking Member, Senate Committee on the Judiciary, Dirksen Senate Office Building, Washington, DC.

DEAR CHAIRMAN SPECTER AND RANKING MEMBER LEAHY: As women Members of Congress who work hard to enact legislation and promote policies that protect women and ensure equality within our society, we fear our work, and the contributions of our colleagues who served before us, will be dismantled with the confirmation of Judge Samuel Alito to the U.S. Supreme Court.

We believe that Judge Alito poses a direct threat to the rights of women in America. As the attached memorandum details, Judge Alito has a long record of extreme views on women’s reproductive health, sexual and workplace discrimination, the Family Medical Leave Act and civil rights. He has worked to thwart established precedent and has affiliated himself with radical organizations that have actively sought to keep women and minorities from advancing educationally and economically.

Under the scrutiny of the nomination process, it is not surprising that Judge Alito now disavows his positions on issues important to women and families in order to secure confirmation votes. But his record speaks to his true views and it speaks loudly. Rather than offering a balanced successor to the most moderate views of Justice Sandra Day O’Connor and the majority of this nation, Judge Alito’s nomination radically tips the scales of justice against women.

As guardians of the Constitution, Supreme Court Justices play a key role in protecting and ensuring our liberties. They are given life tenures and are expected to stay above the political fray so their decisions will be fair and unbiased. They must judge cases with impartiality and open-mindedness, and they must respect settled law.

You have a responsibility to ensure that the highest court is not stacked against the hard fought rights that protect women across the country. When you consider the nomination of Judge Alito to the U.S. Supreme Court, we hope you will reflect on the milestones in women’s rights and the constitutional and legal traditions you have to review the attached memorandum which details many of the disturbing examples of Judge Alito’s extreme views of women’s rights. We urge you to consider that this lifetime appointment will have detrimental consequences for American women, and oppose the confirmation of Judge Alito as the next U.S. Supreme Court Justice.

Sincerely,


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

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

DEAR CHAIRMAN SPECTER AND RANKING MEMBER LEAHY: As you examine the nomination of Judge Samuel Alito to the United States Supreme Court, we ask you to consider the particular implications that Judge Alito’s confirmation would have on the Latino community.

We are deeply disappointed that President Bush did not take this third opportunity to nominate a qualified Latino to the Supreme Court. Given the size of the Hispanic community in the United States, we believe the representation of Hispanics in the judiciary and the abundance of Hispanics qualified for appointment, it is difficult to comprehend the President’s decision. Rather than in the best interest of political factors trumping all other considerations.

We do not need to stress to you the importance of this nomination and the impact that the Court has on the lives of our citizens. We are equally confident that you understand the critical role that the Supreme Court has played in safeguarding the rights of minorities. Oftentimes it is the Court in which minorities must turn for protection from discriminatory laws and practices. It is therefore important that nominees are sensitive to the experiences and struggles that minorities must turn for protection and ensure equality within our society.

We believe that Judge Alito poses a direct threat to the rights of women in America. As the attached memorandum details, Judge Alito has a long record of extreme views on women’s reproductive health, sexual and workplace discrimination, the Family Medical Leave Act and civil rights. He has worked to thwart established precedent and has affiliated himself with radical organizations that have actively sought to keep women and minorities from advancing educationally and economically.

Under the scrutiny of the nomination process, it is not surprising that Judge Alito now disavows his positions on issues important to women and families in order to secure confirmation votes. But his record speaks to his true views and it speaks loudly. Rather than offering a balanced successor to the most moderate views of Justice Sandra Day O’Connor and the majority of this nation, Judge Alito’s nomination radically tips the scales of justice against women.

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You have a responsibility to ensure that the highest court is not stacked against the hard fought rights that protect women across the country. When you consider the nomination of Judge Alito to the U.S. Supreme Court, we hope you will reflect on the milestones in women’s rights and the constitutional and legal traditions you have to review the attached memorandum which details many of the disturbing examples of Judge Alito’s extreme views of women’s rights. We urge you to consider that this lifetime appointment will have detrimental consequences for American women, and oppose the confirmation of Judge Alito as the next U.S. Supreme Court Justice.

Sincerely,

Grace F. Napolitano,
Chair, Congressional Hispanic Caucus.

Charles A. Gonzalez,
Chair, CHC Civil Rights Task Force.
CONGRESSIONAL HISpanic CAUstions TO SUpreMe ciRcuit JUdiciary NOminee Judge SAMuEL A. ALeo, Jr.  

A. RACIAL (ETHNIC) DISCRIMINATION:  

Pemberton v. Reyer, 19 F.3d 877 (3d Cir. 1994)  

Facts: The majority opinion allowing “peremptory challenges” by the prosecution of bilingual prospective jurors because of concerns that ability to understand Spanish would jeopardize jurors’ acceptance of evidence and reaching a decision that gives meaning to the VRA. 

Question: This holding would provide a vehicle for challenges based on ethnicity (i.e., Latinos more likely to speak Spanish) under the guise of “language concerns”. Why isn’t this unconstitutional as it relates to the purposes and structure of the right to jury, participate in government)? Why isn’t this unconstitutional as to the defendant per Batson precedent?  

B. VOTING RIGHTS ACT: JENNINGS v. MANNING, 115 F.3d 685 (3d Cir. 1997)  

Facts: The issue was the “at-large” election of school board members. After reversing an en banc decision affirming the District Court’s ruling that there was no violation of the VRA, the Third Circuit reconsidered and affirmed the District Court’s ruling. Judge Alito found that the Senate Factors were met when historically only 3 of 10 black candidates over a 10 year period were successful (one in a never-repeated plurality win and one by a black candidate defeating another black candidate). Would Judge Alito please elaborate on his “judicial philosophy” when it comes to VRA and “at-large” voting districts?  


Facts: The law was based on the premise that where historically only 3 of 10 black candidates over a 10 year period were successful (one in a never-repeated plurality win and one by a black candidate defeating another black candidate). Would Judge Alito please elaborate on his “judicial philosophy” when it comes to VRA and “at-large” voting districts?  

We find extremely troubling the consistency and predictability of Judge Alito’s hard-right views in an area that has been so critical to African Americans and where his views could become the decisive vote. The best evidence that Judge Alito is a judge of extreme views is the often strongly critical written opinions of his judicial colleagues. Faced with Supreme Court precedents upholding the Constitution, Judge Alito has sought instead to close the Federal courts to job discrimination claims by using unprecendented and arbitrary standards long rejected by the Supreme Court. For 40 years in an unbroken record of thousands of job discrimination cases, the Supreme Court and every federal circuit have left no doubt that discrimination claims must not be prematurely destroyed by requiring significant upfront evidence before trial. Consequently, the absolutist standards Judge Alito has advanced in Bray v. Marriot Hotels, Judge Alito’s hostility to non-fundamental rights long denied African Americans is put at risk by this nomination. For African Americans, the stakes don’t get any higher. Therefore, the members of the CBC are asking you and all of your colleagues to vote against the confirmation of Judge Alito.  

Sincerely,  

MELVIN L. WATT, Chair, CBC.  

ELEANOR HOLMES NORTON, CBC Judicial Nominations Chair.  

Mr. KERRY. I yield the floor and I support the motion that the President pro tempore submit to the courts (Nathanson v. Medical College of Pennsylvania). Considering the distance the Nation has come on race and the progress we have made, are we to choose a Supreme Court justice who would threaten the gains that have been made?  

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

Mr. SANTORUM. Mr. President, I rise today on this important question to alert the Senate, and more specifically Judge Alito to be an Associate Justice of the Supreme Court. I am sure that my colleagues will agree that we have never had a Supreme Court justice, as this country, for the most part, has had, in keeping with its constitutional traditions over the last 200-plus years.  

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

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

One of the things I want to cover is how I believe that his view of the role of a judge is very similar to John Roberts’ view of the role of a judge. In fact, in my opinion, and the way he approaches the law, which is remarkably similar to William Rehnquist, who is now a justice confirmed here in the Senate by 70-plus votes. I am somewhat at a loss to see why Judge Alito is not receiving similar support, because their records and their approach to the law are remarkably similar, in my mind. He is a judge who, when I met him, used very much the same terms as Justice Roberts—terms such as humility and modesty in dealing with the matters before them; that he was not to be a judge who was to impose his views on the case, but to listen to the evidence.

Many have tried to claim that somehow or another he is ideological. I don’t think there is anything in the Record that would indicate Judge Alito applies his own personal viewpoint to the case at hand. He looks at the law, looks at the facts of the case and does his best on the narrowest grounds possible to decide the cases before him. That is what a judge is supposed to do—no say, gee, here is my opinion. That is why I think his approach to the law is certainly the right approach to the law. He is, as I have heard, not a judge who rules for the little guy or the big corporations, or whoever it is, are you saying every action that comes before the Court where a little guy is in a case, he automatically should win? Is that what it is? If you were one of the big guys or one of the big corporations, it is true that somehow you don’t have a proper view of the law? This is a remarkable discussion I keep hearing. I heard over and over again in the Judiciary Committee about the result of these cases and who was on the side of the little guy. Is that somehow a point which is legitimate when it comes to a judge? The question is, is he an apologist jurist who was following the law? Was he properly applying the law to the case? It is not who won or lost the case. I find it very disturbing that we are reducing this confirmation process to whose side he ruled on and whether ideologically he fits a particular Senator’s view of a particular issue or particular issues. That is not how we have elected judges in the Senate. We do not keep scorecards of whether you side with the little guy or big guy or how you came down on cases. We certainly have not had ideological litmus tests in the past on judicial nominations.

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

One of the reasons I think these nominations are so important and maybe so contentious is because we are at a point right now where there has been movement to bypass the democratic process, bypass the people’s Houses and go to the courts to get an extreme agenda passed and into law in this country.

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

One of the reasons that I think these decisions are so important is that we will have an opportunity to return a balance of power in this country away from nine unelected judges who have the power to make substantive decisions as to how we should live our lives, how our economy will function, how laws will be written across the street in an unelected body as opposed to how the democratic process—how our laws collectively will be reflected in the laws.

If I can, for a moment, talk again about where we are in the context of the role of the judiciary in our democratic process. We often talk about the tyranny of the judiciary—many on our side of the aisle do—how the judiciary is running amok in its ever-unchecked quest to take responsibilities and decisions away from the elected democratic bodies of our country and hoist it onto the backs of the Supreme Court or the courts in our country. That is a very dangerous precedent we have seen over the last 30 and 40 years in our courts, that increasingly decisions are being made by the judicial system and, in so doing, barring the House, the Senate, and the President from regulating or legislating in that area in the future in a sense of substantive decisions as to how we should live our lives, how our economy will function, how our laws will be written across the street in an unelected body as opposed to how the democratic process—how our laws collectively will be reflected in the laws.

One of the reasons I think these nominations are so important and maybe so contentious is because we are at a point right now where there has been movement to bypass the democratic process, bypass the people’s Houses and go to the courts to get an extreme agenda passed and into law in this country.

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

One of the reasons that I think these nominations are so important is that we will have an opportunity to return a balance of power in this country away from nine unelected judges who have the power to make substantive decisions as to how we should live our lives, how our economy will function, how our laws will be written across the street in an unelected body as opposed to how the democratic process—how our laws collectively will be reflected in the laws.

If I can, for a moment, talk again about where we are in the context of the role of the judiciary in our democratic process. We often talk about the tyranny of the judiciary—many on our side of the aisle do—how the judiciary is running amok in its ever-unchecked quest to take responsibilities and decisions away from the elected democratic bodies of our country and hoist it onto the backs of the Supreme Court or the courts in our country. That is a very dangerous precedent we have seen over the last 30 and 40 years in our courts, that increasingly decisions are being made by the judicial system and, in so doing, barring the House, the Senate, and the President from regulating or legislating in that area in the future in a sense of substantive decisions as to how we should live our lives, how our economy will function, how our laws will be written across the street in an unelected body as opposed to how the democratic process—how our laws collectively will be reflected in the laws.

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modest approach to dealing with the problems with which the Supreme Court is confronted. We will not see cases where the Court could decide a case on a narrow issue and settle the dispute at hand and instead of doing so take the opportunity of “bolting” or “splitting” the Court which might overcome a majority of precedents they don’t need to overturn and create new legislation, if you will, through their judicial opinions. We see that happen time and again. It threatens the very foundation of our country. Thomas Jefferson understood that. Jefferson in 1821—this was after he was President, 5 years before he died, obviously a great student of our Constitution, obviously a great student of the powers of the Congress and the judiciary and obviously of the Presidency—he said, in reflecting on this very delicate system and the balance of power among the executive, the judicial, and the legislative branch:

The power of our Nation is in the power of the judiciary, an irresponsible body working like gravity by night and by day, gaining a little today and a little tomorrow, and by night quietly—drip, drip, drip—taking the power away from the people and ceding it to itself so that, to paraphrase Jefferson, they would be like the monarchs we left, ruling from their kings’ benches.

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

I know there are a lot of folks who are listening who say: I like the decisions the Supreme Court has made; that is why I am out here arguing, to make sure we can preserve that. I can say what is good for the goose is good for the gander. There may come a day when I hope it will not come—there may, indeed, come a day when this Court decides, since we have power to make laws in favor of those who like the recent decisions of the courts or decisions over the last 30, 40 years, there may come a time when they take that same authority and make a whole host of decisions that you don’t like.

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

There is no place for the Court imposing its will and making laws. There is no place for that in our Constitution. That is not their role.

I am very pleased the President understands that and that he has put forth judgments that I hope understand that point of view as a matter of the judiciary. I am hopeful that we will confirm Judge Alito and that we will continue this process of creating a better balance of powers among the Congress, the executive branch, and the judiciary, and by night, no one knows who like the recent decisions of the Supreme Court, and it is incumbent upon all of us to make sure we can preserve that. I can say, second or traditional standard, Judge Alito deserves overwhelming confirmation, without question.

The first reason Judge Alito should be confirmed is that he is highly qualified to serve on the Supreme Court. It matters that some parties to this debate practically ignore his qualifications altogether. They are so intent on manufacturing a case against this nominee that they brush aside this seemingly minor detail of his qualifications. Justice and as a highly regarded Federal judge, Judge Alito has served on the U.S. Court of Appeals for the Third Circuit since 1990, has participated in nearly 5,000 cases, and has written more than 360 opinions. He has more judicial experience than any Supreme Court nominee in the last three-quarters of a century.

The American Bar Association, which conducts perhaps the most comprehensive and exhaustive evaluation of Supreme Court nominees, interviewed more than 300 people who know and have worked with Judge Alito. The American Bar Association, after all those interviews, unanimously gave Judge Alito its highest well-qualified rating. Here, too, it is amazing how some Senators and leftwing interest groups brush aside this ABA rating as if they were dusting the mantel.

In the judicial appointment process has been controversial at times, certainly no one has ever charged it with a conservative bias—no one. It was my Democratic colleagues and their leftwing interest groups that once labeled the ABA rating as the ultimate gold standard for evaluating judicial nominees.

The criteria for the ABA’s highest well-qualified rating includes Judge Alito’s compassion, openmindedness, freedom from bias and commitment to equal justice under the law. Judge Samuel Alito is eminently qualified to serve on the Supreme Court of the United States.

The second reason Judge Alito should be confirmed is that he is a man of character and integrity. Anyone who has ever had to work with Judge Alito’s chambers and integrity are listening who say: I like the decisions the Supreme Court has made; that is why I am out here arguing, to make sure we can preserve that. I can say what is good for the goose is good for the gander. There may, indeed, come a day—although I hope it will not come—there may, indeed, come a day when this Court decides, since we have power to make laws in favor of those who like the recent decisions of the courts or decisions over the last 30, 40 years, there may come a time when they take that same authority and make a whole host of decisions that you don’t like.

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

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

The third reason Judge Alito should be confirmed is that he understands and is committed to the appropriately limited role of the judiciary. America’s Founders established a system of limited Government containing three branches, each with its category of power and ability to check the others.

The judicial branch is much a part of this system of Government and must remain as limited as the legislative and executive branches.

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

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

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

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

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

Others leave the political process behind and go to the courts, trying to persuade judges to impose upon the American people policies and priorities that they would not choose for themselves, or they could never get through the elected representatives of the people.
The fight over judicial appointments is whether we should have judges willing to take such political bait.

It is fashionable in some circles to put the Supreme Court on a pedestal, pretending that a few unselected judges are supposed to lead us to some kind of promised land.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Again, I quote Judge Alito: “I don’t think a judge should be keeping a scorecard about how many times the judge votes for one category of litigant versus another in particular types of cases. That would be wrong. We are supposed to do justice on an individual basis in the cases that come before us.”

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

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

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

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

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

Let me offer another revolutionary idea. Let me read it.

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

Let me speak again to my fellow citizens out there who are watching.

The first three words of the Constitution are “we the people.”

The Constitution belongs to the people.

It does not belong to judges.

The Constitution is an enduring document and its proper place in our system of government.

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

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

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

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

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

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

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

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

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

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

The disinformation was even worse in the media. The group in question, or at least some of its members, wanted to preserve President Alito's own image and opposed affirmative action—in other words, affirmative action.

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

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

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

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

Let me address a few of the other arguments by Judge Alito’s opponents. Yesterday, at the Judiciary Committee markup, the Senator from New York, Mr. Schumer, tried once again to paint Judge Alito as an out-of-control judge, wantonly disregarding and seeking to disrupt the circuit court’s past decisions. The political rhetorical value of the tactic is obvious. If Judge Alito played fast and loose with his present court’s precedents, the story goes he would certainly do so on the Supreme Court.

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

At Judge Alito’s hearing, the Senator from New York labeled a few cases in which colleagues disagreed with how Judge Alito treated the court’s prior decisions. The Senator from New York made no attempt whatever to determine whether Judge Alito’s position in those cases was right or wrong. He simply grabbed on that. But it is ridiculous, this guilt by association that went on, even in the committee, in something as important as the Judiciary Committee of the Senate.

What the Senator from New York never said was that Judge Alito has dissented in just 79 of the more than 5,000 cases in which he participated. That is a rate below the average for appeal court judges around the country.

Something else the Senator from New York has not revealed is Judge Alito has voted to overturn his own court’s decisions in his whole 15 years on the bench. In each of those cases in which all the judges of the circuit participated, Judge Alito was in the majority, and two of them were unanimous in each of those cases. He was in the majority, and two of them had a unanimous majority.

My colleagues will remember that seven of Judge Alito’s current and former judicial colleagues appeared before the Judiciary Committee. Who better to give the Senate real insight of Judge Alito’s approach to cases, his attitude toward litigants, and his perspective on the law? Better yet, what a unique opportunity to hear from those fellow judges about how Judge Alito handled precedent? I might add that earlier in the hearing, for example, the Senator from New York quoted a passage critical of Judge Alito from the majority opinion in Dia v. Ashcroft. Chief Judge Anthony Scirica was sitting right there in front of the committee.

The Senator from New York also quoted a passage critical of Judge Alito from Judge Leonidas Garth’s dissent in United States v. Perry. Judge Garth visited with us via teleconference from Arizona. That would have been a great opportunity to question the very judges on the side of the Senator from New York of evidence of Judge Alito’s activism and disregard for precedent. Hearing from them could be more meaningful than cutting and pasting a few selected quotes from poster board. Yet the Senator from New York did not ask those judges questions about this issue. In fact, he did not ask any questions at all because he did not attend that portion of the hearing. That was his right.

I asked him about it. I referred to the claims by the Senator from New York and asked the judges whether Judge Alito disregards precedent, whether he has an agenda to disrupt the court’s prior decisions. Judge Edward Becker, former Chief Judge of the Third Circuit Court of Appeals, participated with many other judges. Judge Becker said he never saw Judge Alito disregard or ignore precedent. Judge Alito followed precedent unless he believed the precedent was distinguishable or was what judges called dicta—in other words, not binding language in a particular case.

Another judge on that distinguished panel was Judge Ruggiero Aldisert, appointed nearly 40 years ago by President Lyndon Johnson, and still serving on the court. In addition to his many years of service in both the State and Federal courts, Judge Aldisert has written a well-known textbook on the judicial process. Judge Aldisert was a Democrat. I know him very well. I tried one of my first jury trials in front of Judge Aldisert in the common pleas court in the highest trial court in Pennsylvania. I got tears in my eyes when he appeared. But he, too, a Democrat, declared support for Judge Alito’s treatment of precedent.

I might add, chatting with Judge Aldisert afterwards, he had a number of health problems. He risked his life to come back to right this wrong that had been done to one of his colleagues on the Third Circuit Court of Appeals. Judge Aldisert, when I knew him, and I have known him all these years, but when I knew him as a young trial lawyer in Pittsburgh, Judge Aldisert was the national president of the Italian Sons and Daughters of America. And proudly so. I was very proud of him when he went to the Third Circuit Court of Appeals and have been very proud of him since and proud of the scholarship he has written. He knows he has been a good judge and a bad judge, and he has had a world of experience. I got very emotional when I saw him once again.

As I mentioned earlier, some of my Democrat colleagues are particularly fond of scorecards and tallies, thinking that tells anything useful about a judge’s approach to the law. Perhaps they can create something like a confirmation rate card listing the percentage of cases in different categories that the judge is supposed to win. Plaintiffs should win this percentage of employment discrimination, the prosecution is allowed to win this percentage of criminal cases, and so on.

Perhaps it can be a list titled “Whose Side Are You Supposed To Be On” as a judge. That is about the way it comes off. Before anyone dismisses this as ridiculous or farfetched, this is exactly what some of my Democrat colleagues and many of their leftwing interest groups have done to Judge Alito.

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

Mr. Kennedy himself admitted that his analysis was done under what he called considerable time pressure, rendering his conclusion only tentative and preliminary. And, of course, the Senator from Massachusetts did not examine any of the dissents on the merits. He let the calculator do the talking. Remember, these are appeals. Most of the appeals are upheld on appeal.

Actually, the Senator from Massachusetts went much further than that. On the basis of this one tentative and preliminary statistic from this one study, he claimed that “average Americans have had a hard time getting a
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fair shake in [Judge Alito's] courtroom." That is an outrageous claim, one that would not be at all justified even if the supposed evidence behind it were more legitimate.

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

Before the Senator from Massachusetts or anyone else using this tactic gets up on this floor and claims he never accused Judge Alito of bias, there is simply no other meaning to what was said.

I again call into contention the testimony of those seven judges, all circuit court of appeals Federal judges from all across the spectrum, who said Judge Alito has never demonstrated any bias toward anybody. I would much rather have their confirmation than any law professors in this country, especially law professors in this country, or conservative law professor. What else could the words "average Americans have a hard time getting a fair shake" actually mean?

Another example last week, Thursday, in Massachusetts was claimed that while on the appeals court Judge Alito literally bent over backwards to "help the powerful."

He said:

The record is clear that the average person has a difficult time getting a fair shake in Judge Alito's courtroom.

These are his words, not mine. Saying that Judge Alito bends over backwards to help the powerful means only one thing. Saying that a category of litigants will have a hard time getting a fair shake before Judge Alito means only one thing. If Senators wish to accuse Judge Alito of bias, they should do so up front, not through innuendo or hiding behind statistics.

Even a judge with a calculator is wrong, misguided, and misleads our fellow citizens about what judges do and the role they play in our system of government. Again, I call attention to the judges who appeared, all of whom spoke in favor of Judge Alito. In all honesty, let me choose the most liberal of those judges. He has some very interesting things to say. That was Judge Lewis who is retired now. He said:

I am openly and unapologetically pro-choice and always have been. I am openly—and it's very well known—a committed human rights and civil rights activist and actively engaged in that process as my time permits.

I am very, very much involved in a number of endeavors that one who is familiar with Judge Alito's background and experience may wonder,"Well, why are you here today saying positive things about his prospects as a justice on the Supreme Court?"

And the reason is that having worked with him, I want to respect what I think are the most important qualities for anyone who puts on a robe, no matter what court they will serve on, but in particular the United States Supreme Court.

He went on to say:

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

He endorsed Judge Alito in no uncertain terms.

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

They did it. We have seen millions of dollars spent week after week on petition drives, television ads, rallies, phone banks, and grassroots lobbying. The net result of that barrage of propaganda has been that support for Judge Alito's nomination among American people has steadily increased—not a very good return on their investment.

In early November, Newsweek found that 40 percent of Americans thought Judge Alito's nomination should be confirmed. In December, even polls conducted for liberal groups found that support had risen to nearly 50 percent. And this month, polls by CNN, FOX News, and Reuters find support even higher with Americans backing the nomination by a ratio of more than 2 to 1. A New Gallop poll conducted after Judge Alito's hearing last week shows support has risen by about 10 percent since early December. This is particularly significant because Judge Alito's opponents have issued all sorts of apocalyptic warnings and predictions. They have cast Judge Alito as a radical extremist, a threat to the environment and individual rights.

The Senator from Vermont has repeatedly said that all by himself, Judge Alito is a threat to the rights and liberties of all Americans literally for generations to come. The critics have said that Judge Alito would give the executive branch a blank check to invade your privacy, strip search children, and tap your phones.

According to the critics, if Judge Alito has his way, machine guns will flood our streets, big business will pollute the air and water, and the poor and down trodden will be unable to find justice.

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

Pennsylvania governor Ed Rendell, a past general chairman of the Demo-crat National Committee, yesterday described a confirmation standard that I hope his fellow Democrats would once again embrace.

He said that if a nominee is qualified and passes the test of integrity, elections matter and disagreement with some nominees positions or decisions are not enough to deny the President his appointment.

That was the standard that allowed President Clinton to appoint two liberal justices with minimal opposition.

My Democratic colleagues would follow Governor Rendell's lead. Finally, Mr. President, I am encouraged that Judge Alito will indeed be confirmed.

A highly qualified judge, a man of character and integrity, and someone who understands and is committed to the judiciary's properly limited role, will soon join the Supreme Court of the United States.

Judge Samuel Alito becomes Justice Samuel Alito, our system of limited government under the rule of law will be stronger and the freedoms that system makes possible will be more secure.

I urge my colleagues to vote to confirm Judge Samuel Alito to the Supreme Court.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, we have Senators who have spoken today.

On several occasions but publicly and privately, I have asked the distinguished senior Senator from Utah if he purports to quote me, try to to at least get within the ballpark of accuracy. I realize that is probably a failing and useless request after hearing him misquote me again the last few minutes, but I renew the request, and I hope that he would do that.

Mr. HATCH. Will the Senator yield?

Mr. LEAHY. To suggest that I have said—I would like to find the quote where I said that Judge Alito, all by himself, would do away with all the liberties of Americans.

I see the distinguished senior Senator from Florida, and I yield to the Senator from Florida.

The PRESIDING OFFICER. The Senator from Florida.

Mr. NELSON of Florida. Mr. President, some things can get hot here, particularly when we get into personal issues. Well, the senior Senator from Florida came here not to speak about personalities but to talk about the substance of the issue in front of us.

In the Good Book, the Gospel promises all of us impartiality at judgment. And I would suggest impartiality—or justice for all—is a principle embedded deep in our constitutional democracy.

I believe in an America where courts address injustice and correct it. I believe in an America where our judges serve the people by interpreting the Constitution, without agenda. I may have no greater responsibility in the Senate than to be charged by our Constitution with advising the President
on his picks for the U.S. Supreme Court. And in assuming this awesome responsibility, I rise to oppose Judge Alito’s confirmation to the Supreme Court.

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

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

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

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

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

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

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

In Chittister v. Department of Community and Economic Development, he ruled that State employees could not sue for damages to enforce their rights under the Federal Family and Medical Leave Act. The Supreme Court later reversed this ruling by a vote of 6 to 3. I might say that both of those acts were not only wrong but contrary to the basic principle of this Court.

As Justice O’Connor has recognized, it is vital to our long-term health that Establishment Clause protections remain in place: “At a time when we see around the world the violent consequences of the assumption of religious authority by the Government, Americans may count themselves fortunate: Our constitutional understanding of the separation of church and state must therefore answer a difficult question: Why would we require a system that has served us so well for one that has served others so poorly?”

In the Establishment Clause area, replacing Justice O’Connor with Judge Alito likely would have a profound effect on the religious freedoms that our dual constitutional commitments to free exercise and separation of church and state have long ensured. Both the straightforward holdings and the underlying tenor of Judge Alito’s decisions in Establishment Clause cases contrast sharply with Justice O’Connor’s views. Throughout her career on the Court, Justice O’Connor has been keenly attuned to the plight of religious minorities in society as a whole, and most especially in the public square. Judge Alito’s focus has been elsewhere: on religious majorities’ ability to express their views through governmental instrumentalities, at government owned facilities, and in government-organized enterprises like the public schools.

Judge Alito has been vocal about his belief that the First Amendment allows the Government to broadcast their religious messages without regard for the competing rights and interests of religious minorities. Because Judge Alito has not extended the same protections to all Americans that he has granted to politically powerful religious minorities, the Senate must confirm his appointment as an associate justice of the U.S. Supreme Court.
If you have any questions on Americans United’s position on this nomination, please contact Aaron D. Schuham, Legislative Director.

Sincerely,

RIVEREND BARRY W. LYNN, Executive Director.


DEAR SHERIDAN CO.,

DANIEL S. MARIASCHIN, Chief Executive Officer.

Dear Senator Sheridan:

Thank you for your letter dated December 15, 2005, regarding United's views on the appointment of Judge Samuel Alito to the United States Supreme Court. That letter, as well as previous letters from other leading Jewish organizations, caught us by surprise. Our organizations have long supported the principles of Judge Alito's rulings in United States v. Citizens for Tax Justice and Landmark Communications, Inc. v. Ginzburg, but those principles have been long established in United States law and precedent.

As a result, we have decided to withdraw our support of Judge Alito's nomination. We now oppose this nomination as well. We believe that Judge Alito’s philosophy is not consistent with the values of our communities.

We are committed to supporting candidates who will respect the rights of all Americans and who will uphold the values that we hold dear. We believe that Judge Alito’s philosophy is not consistent with those values.

We thank you for considering our views.

Sincerely,


UNITARIAN UNIVERSALIST ASSOCIATION OF CONGREGATIONS URGES OPPOSITION TO THE CONFORMATION OF JUDGE SAMUEL ALITO JR. TO THE UNITED STATES SUPREME COURT

DEAR SENATOR: On behalf of the over 1,000 congregations that make up the Unitarian Universalist Association, I urge you to oppose the nomination of Judge Samuel Alito Jr. to the United States Supreme Court.

American judge—allowing a race discrimination case to go to trial. McKee said that Alito’s position would “impose an employer from the reach of Title VII if the employer’s belief that it had selected the best candidate, was the result of conscious racial bias.”

Judge Alito has narrowly construed statutes in gender discrimination cases. In In Re: E.I. Du Pont De Nemours Co., Alito was the only judge to dissent from a ruling clarifying the nature of evidence permitting a jury to find an employer engaged in discrimination. Alito’s position would have denied the plaintiff the opportunity to go to trial despite significant evidence of discrimination.

Judge Alito’s dissents would have made it harder for victims of discrimination to prove their cases. In Nathanson v. Medical College of Pennsylvania, the majority lamented that under Alito’s restrictive standard for proving discrimination based on disability under the Rehabilitation Act of 1973, “few if any Rehabilitation Act cases would survive summary judgment.”

Reproductive Freedom: Dissenting in Planned Parenthood v. Casey, Alito wrote that the right to reproductive freedom does not prevent states from requiring women to notify their spouses, except in “limited circumstances arising out of the abortion.” Justice O’Connor cast the deciding vote rejecting Judge Alito’s position. Joined by Justices Kennedy and Souter, O’Connor held that the states must provide “the opportunity to choose.”

Limiting Access to the Courts: Among the particular dissents, we have concluded that Judge Alito does not show sufficient respect for civil liberties. His decisive vote on the court could undermine fundamental rights for decades.

The decision to take a position on a judicial nominee is not one the UUA takes up lightly—or frequently. Indeed, it was only in 2004 that our Democracy-making body approved language explicitly stating that the Association would oppose nominees whose records demonstrated insensitivity to civil liberties. We did not take a position on the confirmation of either Judge John Roberts or Harriet Myers.

The nomination of Judge Samuel Alito Jr. is significantly different, in that he has an extensive judicial record—more than 15 years on the 3rd Circuit Court of Appeals—that clearly reveals his judicial philosophy on a wide range of issues. After extensive research, the Unitarian Universalist Association staff agreed that Judge Alito’s rulings demonstrate a pattern of views that were outside the mainstream and hostile to established precedent favoring civil liberties. In case after case, Judge Alito found against the rights of individuals to work in government or corporations. In at least six cases, the Supreme Court voted to overturn decisions of the Third Circuit or Alito’s dissent in Third Circuit cases. Notable cases and patterns are mentioned below.

Police Power: In the case of Doe v. Grooby, Judge Alito dissented from a Third Circuit decision permitting the police to conduct a clearly established constitutional rights. Police had strip-searched a mother and her ten-year-old daughter while executing a search warrant based on the search of her husband and their home. Then-Third Circuit Judge Michael Chertoff, now Secretary of Homeland Security, held that the unauthorized and illegal search was a violation of the woman’s constitutional rights. Alito disagreed, arguing that even if the warrant did not authorize the search, an officer still could have read the warrant as allowing it.

Religious Liberty: In the case of ACLU-NJ v. Schundler, Judge Alito held that religious symbols displayed on government property during the holiday season (in this case a creche and menorah) were not unconstitutional when “secular” decorations such as “snowy trees,” “a reindeer,” or “a snowman” were subsequently added to the display. While Justice O’Connor has voted to allow secular holiday displays, she has rejected efforts for religious symbols, including the Ten Commandments, to stand alone in public display.

In ACLU of New Jersey v. BlackHorse Pike Regional Board of Education, Judge Alito joined a dissent from the Third Circuit’s ruling which struck down a public school board policy allowing high school seniors to vote on whether to include student-led prayer at high school football games.

Limiting Access to the Courts: Among the most troubling pattern is Judge Alito’s consistent finding that plaintiffs in discrimination cases did not have enough evidence to bring their cases to trial. By denying even the opportunity for judicial remedies, Judge Alito’s philosophy undermines one of the most fundamental checks and balances in our system of government. For example:

Judge Alito has strongly disagreed with Third Circuit rulings protecting the civil rights of women. In In Re: E.I. Du Pont De Nemours Co., Alito dissented from a ruling allowing it.

In Bray v. Marriot Hotels, Alito ruled in favor of the U.S. Supreme Court, holding that the Court could not find a “clearly established” constitutional right to abortion, despite the fact that the case involved a decision by a state court that such a right existed.

In addition to his record on civil liberties, Judge Alito has been criticized for his views on social issues. In Planned Parenthood v. Casey, Judge Alito sided with the majority in upholding the constitutionality of Pennsylvania’s partial-birth abortion ban. However, he has also been criticized for his views on other issues, such as same-sex marriage.

In summary, Judge Alito’s philosophy is not consistent with the values of the Unitarian Universalist Association. We urge you to oppose his nomination to the United States Supreme Court.

Sincerely,

ROBERT C. KEITHAN, Director.
no 2006

WOMEN OF REFORM JUDAISM,

Hon. PATRICK J. LEAHY,
Ranking Member, Senate Committee on the Judiciaries,
U.S. Senate, Hart Senate Office Building, Washington, DC.

DEAR SENATOR LEAHY:

Recognizing the profound significance of the Judiciary Committee's hearing and its role to consider nominees to key positions on the federal bench, we are concerned that the nomination of Samuel Alito, Jr. to the United States Supreme Court for the future of jurisprudence in the United States, Women of Reform Judaism, comprising 1.5 million Reform Jews in 900 congregations across North America urges you to oppose his confirmation.

Women of Reform Judaism rarely opposes judicial candidates whose record demonstrates opposition to the core values, rights and principles supported by our organization. In the years in the Reagan Administration and on the Third Circuit Court of Appeals, Judge Alito has been a strong and consistent voice for restricting women’s rights, extending police powers in the name of national security and reinforcing barriers to separating church and state in schools and in community religious displays. Judge Alito has also taken anti-affirmative action positions on race and gender in discrimination cases. Judge Alito’s vote could be a crucial one on the court in all these areas and more, replacing the balance provided by Justice Sandra Day O’Connor with a marked shift that would endanger the civil liberties and civil rights of the people of the United States.

Committed to the precepts of our tradition and adhering to the words of Deuteronomy, which tell us to pursue justice (Deuteronomy 16:20), we look to the Supreme Court to protect the civil liberties and civil rights of all Americans. Based on his record, we are concerned that Judge Alito will be unable to put aside his private views to dispense equal justice for all and oppose his confirmation.

Respectfully,

SHELLEY LINDAUER,
DEAR SENATORS SPECTER AND LEAHY: As you consider the nomination of Judge Samuel Alito Jr. to the Supreme Court of the United States, we write on behalf of the Union for Reform Judaism, encompassing 1.5 million Reform Jews in 900 congregations across North America, to express our opposition to Judge Alito’s nomination.

Our Union, like many other Reform Jews, was concerned that Judge Alito’s nomination was not taken lightly. During the debate on the nomination at our recent Biennial General Assembly Reform Jews old enough to remember the significant role the Supreme Court played in extending basic human and civil rights to all Americans cautioned the delegates about the danger of a Court whose members have records in opposition to defending those rights. Our Movement’s youth spoke of cherished constitutional traditions upheld by one Supreme Court justice’s vote changing the balance of the court, could be undone, altering their lives and those of the generations to follow. The older generation spoke of this legacy, and the youth did not want to inherit it.

In 2002, the Union for Reform Judaism adopted a resolution that established our criteria for considering nominees to the federal courts. Under these criteria, which are not limited to issues of personal or professional competence, we will oppose a nominee in those rare cases in which after consideration of what the nominee has said and written, and his or her record, it can be made that the appointment would threaten protection of the most fundamental rights which our Movement supports. On these criteria, in November of 2005 we also resolved to oppose the nomination of Judge Samuel Alito Jr. to the Supreme Court of the United States.

Judge Alito’s elevation to the Supreme Court would threaten protection of the most fundamental rights which our Movement supports including, but not limited to, reproductive freedom, the separation between church and state, protection of civil rights and civil liberties, and protection of the environment.

On choice, women’s rights, civil rights, and the scope of federal power (particularly as it relates to civil rights and environmental protection), Alito’s record has historically been committed to maintaining a strong wall of separation between church and state; safeguards that have been the linchpin protesting religious liberty for all Americans. So often our nation’s courts ensure civil rights and civil liberties that are otherwise unprotected by flawed systems and discriminatory actions. In order to continue administering justice and equality for all, individuals with grievances must have access to the courtroom. Here, too, the record suggests that Judge Alito does not share our commitment to maintaining a strong wall of separation between church and state, and adhering to the words of Deuteronomy, as he expressed while working at the Department of Justice, demonstrate to us that he does not share our commitment.

As a religious minority, our community has historically been committed to maintaining a strong wall of separation between church and state. Under these criteria, Judge Alito’s background to suggest he shares our commitment. In fact, in his 1985 job application to the Reagan Justice Department, Judge Alito wrote that one of the very reasons he became interested in constitutional law was his “disagreement” with the Warren Court’s decisions regarding the Establishment Clause. In sitting judge cases, Alito has been consistent with this claim. In ACLU-NJ v. Schundler, Judge Alito said it was constitutional to have a holiday display consisting of a croche (a representation of the infant Jesus in the manger), a menorah, a Christmas tree, and other “secular holiday” displays in front of the entrance to the main city government building. In his dissent, demonstrating opposition to the core values and principles supported by our Movement during research, he expressed that “a woman had no right to marry a woman.”

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

Respectfully,
RABBI DAVID S. SAPERSTEIN, 
Director, Religion and 
Action Center of 
Reform Judaism.
JANE WISNICKI, 
Chairwoman, 
Social Action of 
Reform Judaism.
NATIONAL COUNCIL 
of JEWISH WOMEN, 
November 29, 2005.
HON. ARLEN SPECTER, 
Chairman, Senate Judiciary Committee, Hart 
Senate Office Building, Washington, DC.

DEAR CHAIRMAN SPECTER: I am writing to you on behalf of 90,000 members and 
supporters of the National Council of Jewish Women (NCJW) to express our strong opposition to the nomination of Judge Samuel A. Alito, Jr. to fill the seat of Justice Sandra Day O’Connor on the U.S. Supreme Court.

We have decided to oppose Judge Alito for many reasons, most notably because of his record concerning the right to privacy, his views on a child’s rights and women’s equality, and his support for weakening the wall of separation between religion and state. In light of that record, NCJW believes that Judge Alito should not be confirmed for a lifetime position on the Supreme Court.

When Justice Sandra Day O’Connor announced her intention to retire from the Supreme Court, NCJW called upon President Bush to seek a mainstream consensus nominee that he might appoint to the highest court. Instead, he has selected a nominee who is deeply ideological with a demonstrated commitment to pulling the court to the far right.

Judge Alito is clearly not a nominee in the tradition of Justice O’Connor, who sought to balance majority and minority viewpoints and adopted a pragmatic approach to the law. Rather, over the course of his career, Judge Alito has ruled to severely restrict a woman’s constitutional right to abortion and against civil rights protections for both women and minorities. He has shown a cramped view of the power of Congress to legislate, ruling, for example, that Congress lacked authority to ban fully automatic machine guns and that Congress overstepped its bounds in passing the Family and Medical Leave Act.

With the withdrawal of the nomination of Harriet Miers to the Supreme Court, it became clear that Judge Alito’s right-wing wing was determined to see a justice confirmed who would implement their agenda from the bench. Judging from his record, Samuel Alito appears to fit such a nominee. We are extremely disappointed that the President chose this path and gave in to those forces demanding a nominee dedicated to rolling back fundamental constitutional rights, rather than protecting them. We urge the Senate to reject Judge Alito’s nomination.

We applaud your intention to hold hearings that will thoroughly explore Judge Alito’s views and judicial philosophy. While we hope that he will be candid in his answers, the hearing is only part of the record that senators must take into consideration as they determine whether or not a nominee is fit to be confirmed to be an Associate Justice of the Supreme Court. With the stakes so high, it is all the more critical that the Senate Judiciary Committee, led by President Bush, must immediately turn over all of the records of Judge Alito to the senators. Judge Alito must now be forthcoming regarding his judicial philosophy and views on settled legal principles.

NCJW believes that the most basic qualification for a lifetime seat on the federal bench is a commitment to fundamental rights and freedoms. What we know of Judge Alito’s record raises sufficient doubt that he meets that essential qualification and therefore we urge the Committee to reject his confirmation.

Sincerely,
PHYLLIS SNYDER,
NCJW President.

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

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

The Constitution makes the Senate an active partner, along with the President, in the confirmation of a Supreme Court nominee. Article II, section 2, clause 2 of the Constitution states that nominees to the Supreme Court shall be confirmed by "the Advice and Consent of the Senate.” The Senate’s role in the confirmation process places an important democratic check on America’s judiciary.

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

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

In addition, a nominee to the Supreme Court must live up to the spirit of the Constitution. A nominee must not only commit to enforcing the laws, but to doing justice. A nominee must give life and meaning to the great principles of the Constitution: equality before the law, due process, freedom of conscience, individual responsibility, and the expansion of opportunity. It is the responsibility of the Supreme Court to give life and meaning to these constitutional principles in a rapidly changing world.

In my view, Judge Alito has not met this test. In his personal writings from his time in the Reagan Department of Justice, Alito has outlined a view of the Constitution that is narrow, restrictive, and backward-looking on issue after issue. He has pursued this vision through both the clients he has chosen to represent and the causes he has chosen to advocate.

In addition, his opinions on the Third Circuit Court of Appeals have shown the impact of his personal philosophy on his role as a judge. Too many times he has read constitutional clauses and statutes in a narrow and cramped way to protect the Government or big corporations instead of ordinary Americans. In case after case, and in his testimony before the Judiciary Committee, Judge Alito has failed to show a commitment to protecting the spirit of the Constitution.

Indeed, during his hearings, he had a chance to answer questions about his prior writings and rulings in a clear manner. Instead, Judge Alito opted to speak in broad generalities and failed to answer key questions in a manner that would qualify or put in adequate context his prior writings and rulings.

Part of the genius of the Constitution that our Founding Fathers drafted is that it fulfills two functions at once. It is a blueprint for our Nation to govern itself through checks and balances. It is also a charter of the rights and liberties of the American people. I am deeply concerned about Judge Alito’s views in both of these areas. Judge Alito’s record on the Third Circuit shows he has joined or agreed with a movement to undermine the ability of Congress to protect the American people through restrictive interpretations of the Commerce Clause and the 14th amendment. The Supreme Court, in recent years, has strictly construed the Commerce Clause, but Alito’s views on that have been more reactionary than ever before. By narrow 5-to-4 margins, in cases such as United States v. Lopez and United States v. Morrison, the Court has drifted from long-standing Supreme Court precedents to invalidate portions of the Gun-Free School Zones and the Violence Against Women Acts.

Judge Alito would go even further. In his dissent in the case of United States v. Rybar, he advocated striking down Congress’s ban on the transfer and possession of machineguns. Alito’s opinion demonstrates not just his ideology, but his lack of any concern for the importance of separation of powers to our democracy.

Yet Judge Alito argued that he was not binding those Congress’s findings on the impact of machineguns on interstate commerce. He substituted his own policy preferences in a way that the Third Circuit majority found was, in their words, “counter to the deference that the judiciary owes to its two coordinate branches of government.” Ever other circuit has since disagreed with Judge Alito’s views on this case, and the Supreme Court has concurred in these circuit court decisions.

Judge Alito’s divergence from mainstream precedent on this issue is particularly disturbing because it echoes personal views on congressional authority he has expressed in other contexts. For example, while...
working in the Reagan administration, he argued in a memo that the Truth in Mileage Act of 1986 “violates the principles of freedom” and should be vetoed by the President. This Federal law requires a seller to disclose the vehicle’s mileage on the title when ownership is transferred. Congress enacted the law to prohibit odometer tampering and to protect consumers from mileage fraud. Samuel Alito argued that it was the States, and “not the federal government,” that should protect American citizens.

Not only does Judge Alito have an unusually narrow view of the Commerce Clause, it also appears that he would restrict Congress’s ability to pass laws under section 5 of the 14th amendment. This clause states that “Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” Those provisions include some of our most fundamental constitutional principles, including due process and the equal protection of the law.

Congress has acted under the authority of this clause to protect the rights of women and minorities, to ensure religious freedom, and to guarantee civil rights for the elderly and the disabled. But based upon his writings and rulings, Judge Alito would severely limit the meaning of this clause. In Chisister v. Department of Community and Economic Development, he found the sick leave provisions of the Family and Medical Leave Act to be unconstitutional because he believed that 12 weeks of leave was “out of proportion” to the gender discrimination that Congress wished to remedy. Here again, Judge Alito relied on his own policy preferences to strike down the measured judgment of Congress.

In the case of Nevada Department of Human Resources v. Hibbs, the Supreme Court explicitly upheld the family leave provisions of the act by a 6-to-3 vote. But Judge Alito had questioned the judgments of Congress, the Hibbs majority, including Justices Rehnquist and O’Connor, found that, in their words:

“The Family Medical Leave Act is narrowly targeted at the fault line between work and family—precisely where sex-based overgeneralization has been and remains strongest. The possible consequences of this tendency by Judge Alito to second-guess the policy judgments of Congress and to replace them with his own policy preferences are profound. They go beyond any single act of Congress or any single area of policy. As just one example, Judge Alito has questioned the constitutionality of the Clean Water Act. These cases challenge whether Congress can protect wetlands and tributaries through its commerce clause power. If the Supreme Court, with a recently more restrictive view of the commerce clause and the 14th amendment, it could limit our ability to protect our country’s wetlands, let alone our national interests in area after area.

At the same time that Judge Alito has advocated for a narrower vision of Congress’s constitutional authority, he has argued that the powers of the executive are unlim-

ited. In a 2001 speech to the Federalist Society, Judge Alito stated that since the 1980s, he had believed in the “the-

tory of the unitary executive.” In the Judiciary Committee hearings, Judge Alito denied any connection between the unitary executive theory and the scope of Executive power. But scholars and judges have drawn from this theory to advance expansive views of the executive.

For example, in Hamdi v. Rumsfeld, the Supreme Court reviewed the President’s claim that he could indefinitely detain an American citizen without bringing charges or giving him a day in court to challenge the detention. Eight of the nine Supreme Court Justices rejected the claim, and Justice O’Connor wrote in her plurality opinion that “a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.”

In a lone dissenting opinion, Justice Thomas deployed the unitary executive theory to support broad Presidential powers. He wrote that congressional or judicial interference in foreign affairs or national security “destroys the purpose of vesting the primary responsibility in a unitary Executive.”

In view of the long scope of American constitutional history, the unitary executive theory is a relatively recent inven-


tion. It was a creation of the Reagan Justice Department in the 1980s. And according to his speeches, Judge Alito has subscribed to it since working there. While he worked in the Reagan administration, Judge Alito proposed a particular idea to, in his words, “increase the power of the Exec-

utive to shape the law.”

In a 1986 memorandum, Alito argued that the President should issue state-


tements when signing a bill because the President’s “understanding of the bill should be just as important as that of Congress.” The administration has fol-

lowed Judge Alito’s 1986 advice. For ex-


treme example, just recently, the President issued a signing statement regarding the McCain amendment which pro-

hibits warrantless searches. In his statement, the President wrote that he would construe the McCain amendment “in a manner consistent with the constitutional au-

thority of the President to supervise the unitary executive branch.”

The practice Judge Alito first advo-


cated in the mid-1980s arguably helps the executive to thwart the will of Con-

gress when it passes a law. While the current Supreme Court has not given weight to these signing statements inter-

preting the meanings of acts of Con-

gress, Judge Alito would have us view these Presidential statements should they come before him on the Supreme Court.

I think Judge Alito’s view of the unitary executive is wrong and violates the text and the spirit of the Constitution. In Federalist Paper No. 47, James Madison explained how the Constitu-

tion deliberately divided power among the branches of Government. Rather than create a unitary executive, the Framers created a careful and thought-

ful system of checks and balances be-

tween all three branches of Government. They were very weary of concentra-

ting too much power in one branch of Government. As the McCain amendment demonstrates, Congress plays a vital role in placing limitations on Executive power, but so do and must the courts.

In the near future, the Supreme Court will hear further cases in this area. Perhaps the President’s claimed authority to conduct warrantless surveillance of Americans in violation of other laws will come to the Supreme Court. In this time of crisis in particular, we need to have Supreme Court Justices committed to the balance and separation of powers between the three branches of Government. Judge Alito’s statements that no one is above or beneath the law, Judge Alito’s record and views on the unitary execu-

tive give me pause. If Judge Alito be-

lieves that under the Constitution the President can deny other laws apply to him and how they apply, then he is essentially giving away the power of the Supreme Court as well as the power of Congress.

Ever since Marbury v. Madison, it has been “emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of ne-

cessity expound and interpret that rule. If two laws conflict with each other, the court must decide on the application of each.” That settled doc-

trine, Marbury v. Madison, clashes with this notion of a unitary executive who can declare the law for himself and thus make himself exempt from the law.

Judge Alito’s support for a powerful and unitary executive is exacerbated by his 15-year circuit court record of repeatedly deferring to government offi-


cials when American’s civil rights and liberties lie in the balance. As I mentioned earlier, this is the other function the Founding Fathers created for the Constitution. The Framers in-

cluded the fourth amendment in the Bill of Rights to protect Americans against unreasonable government searches and seizures. It was a response to the abuses of the British in the years leading up to the American Revo-


lution. Yet time and again, Judge Alito has deferred to poll, prosecutors, and other governmental agents instead of ordinary Americans.

Judge Alito wrote in his now famous 1985 job application essay that he disagreed with the Warren Court’s crimi-


nal procedures decisions. These include famous cases in the development of American liberties—for example, Mi-


randa v. Arizona, which sets forth
rights for the accused; or Katz v. the United States, which prohibited warrantless electronic surveillance; or Gideon v. Wainwright, which guaranteed every American the right to a lawyer. There is little doubt that Judge Alito’s personal views in this arena far exceed his colleagues on the Third Circuit. These include cases where there were defective warrants, where agents conducted warrantless electronic surveillance, or where police used excessive force against unarmed individuals. Indeed, the Washington Post found that Judge Alito had sided with the government in these cases over 90 percent of the time, whereas other appeals court justices nationwide only sided with the government 54 percent of the time. In the face of general officers, the Founders’ vision of the judiciary’s role in protecting our freedoms, autonomy, and rights of individual Americans have carried less weight for Judge Alito.

As just one example, his dissent in the 2004 case of Doe v. Grooby would have required a flip of a coin search of a mother and her 10-year-old daughter even though they were not named in the search warrant for the house. Judge Michael Chertoff, who wrote the majority opinion in the case and who is now the Homeland Security Secretary, said that Judge Alito’s opinion of the case, if adopted, could “transform the judicial officer into little more than the cliche ‘rubber stamp.’” Judge Chertoff’s quote is an apt summary of my concern over the nomination of Judge Alito. American courts cannot become a rubber stamp blotting out the constitutional rights of our citizens. But from women’s rights to workers’ rights and reproductive freedom to school prayer, Judge Alito’s writings and rulings reveal insensitivity to the judiciary’s role in protecting the charter of freedoms enshrined in our Constitution.

The first amendment protects Americans’ religious liberties through two clauses that work in tandem: the free exercise clause and the establishment clause. I worry that if confirmed, Judge Alito would upset the careful balance the Founders sought in constructing this amendment. Judge Alito seems to interpret the establishment clause as a rarely applicable part of the first amendment. He applies the free exercise clause on a much broader basis, often interpreting establishment clause cases as free exercise cases. He seems to see a plaintiff’s complaint of establishment clause violations as attempts to block the free exercise of religion.

Judge Alito’s views appear to have been developed well over 20 years ago on these issues. In his 1985 job application essay, Judge Alito wrote that he disagreed with the Warren Court’s establishment clause decisions. These rulings prohibited government-sponsored prayer in public schools, protected students who are members of minority religious faiths, and prevented State interference with and entanglement in America’s religious liberties.

Judge Alito’s record on the bench supports a troubling view of the establishment clause. For example, he joined a dissenting opinion in the case of ACLU of New Jersey v. Black Horse Pike Regional Board of Education, supporting a school-sponsored school graduation ceremonies. The Supreme Court, in an opinion joined by Justice O’Connor, has since explicitly rejected this approach in Santa Fe Independent School District v. Doe and as recently as last year has sought a careful balance in establishment clause cases such as ACLU v. McCreary County.

In summary, in ACLU of New Jersey v. Black Horse Pike Regional Board of Education, Judge Alito’s dissent determined that a student-led prayer at a graduation ceremony violated the establishment clause. Judge Alito joined the dissent in arguing that the establishment clause prohibits a school graduation prayer. The school board involved had decided to allow graduating students to vote whether they wished to have a prayer, a moment of silence, or neither at their graduation ceremony. The Supreme Court held that the Equal Access Act—and requiring the active involvement of school officials, which could claim an appropriately coercive effect.

Although I could discuss more cases, the basic point I want to make here is that I believe Judge Alito would upset the careful balance between the Free Exercise and Establishment Clauses of the First Amendment, allowing majority religious views to prevail over minority views, and leading to an inappropriate Government coercive effect on religious practice.

As Justice O’Connor states in McCreary: At a time when we see around the world the violent consequences of the assumption of religious authority by government, American courts should be cautious. Our regard for the constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served us so poorly? I believe Judge Alito would make that trade. Consider another area. The Federal Courts play an important role in enforcing American workers’ access to fair and safe working conditions, while protecting their right to organize, and providing a forum for remedying wrongful discrimination. Yet, as a judge, Alito has consistently tried to limit the reach of Congress’ workplace statutes, and to make it more difficult to bring suits to bring. For example, in RNS Services v. Secretary of Labor, the Third Circuit majority found that the Mine Safety and Health Review Commission had jurisdiction over the work and safety conditions of employees at coal processing sites. But Judge Alito disagreed, siding with the employer by interpreting the statute and case law restrictively. One academic study has found that Judge Alito has sided with the employee or union in only 5 out of 35 labor opinions he has written. These are cases that have real world effects on working people, as the recent mining accidents in West Virginia demonstrate all too clearly.
As far as a woman’s right-to-choose is concerned, in his 1985 job application, Samuel Alito wrote that he was proud of his work in the Reagan administration advancing a “legal position” that he “personally believe[d] very strongly that the Constitution does not protect the right to an abortion.” Let me make clear, he did not say that he thought abortion was wrong; he wrote that the Constitution did not protect a woman’s right to choose. This is precisely what he testified as a lawyer and then a circuit judge, and that he did nothing to dispel in his Judiciary Committee hearings.

In his work for the Reagan Justice Department, Alito wrote a memo with a strategy for “bringing about the eventual overruling of Roe v. Wade” by chipping away gradually at privacy and reproductive rights. In the case of Planned Parenthood of Southeastern Pennsylvania v. Casey, Judge Alito used his dissent to argue for a constitutional view that he did not just that, chip away at the protections for the freedom to choose. The Supreme Court explicitly rejected Alito’s opinion, with Justice O’Connor writing that the State “may not give to a man the kind of dominion over his wife’s body that the State ‘may not give to a man’.”

In his application to the Reagan Judiciary Committee, he responded with obfuscating statements about the judicial process.

The Supreme Court has been a leader in safeguarding all kinds of civil rights, through momentous cases like Brown v. Board of Education, which has repeatedly used procedural and evidentiary requirements to make it more difficult for plaintiffs to vindicate their civil rights claims. One study of discrimination cases heard by Judge Alito in which the panel was divided concluded that he sided against civil rights protections 86 percent of the time, more than any other judge on the Third Circuit.

For example, in the case of Bray v. Martrub Hotels, the Third Circuit said that an African-American woman denied a promotion in favor of a white woman, when the company had not followed its policy, should have a chance to present her case before a jury. Judge Alito disagreed, saying that this would “allow disgruntled employees to impose the costs of trials on employers.”

As far as a woman’s right-to-choose is concerned, he also demonstrated his contempt for the rule of law. In the hearings, Judge Alito’s response to the Supreme Court’s rejection of Alito’s view of Roe v. Wade, was “leaves an enormous amount to be desired.” Yet the Supreme Court has consistently rejected Alito’s mistaken view that Roe v. Wade was constitutional.

Given his lengthy record and his obfuscating statements about the Constitution, the burden was on Judge Alito to convince the Senate that he would be a judicious and balanced member of the Supreme Court.

Alito’s plea that we should not evaluate him based on the constitutional views he advanced through political positions.

I also have not been convinced by Judge Alito’s vague rhetoric during the hearings about the judicial process, or his begrudging acknowledgment that important Supreme Court cases were indeed “precedents of the Court.” While judges on the Federal circuit courts are circumscribed by Supreme Court precedent, there is no higher court to bind the Justices of the United States Supreme Court. Decisions of the Supreme Court are binding on all lower courts, so even if a circuit judge disagrees with well-established precedent about the rule of law, he or she must follow that law. But this is not true of the Supreme Court.

As Justice Frankfurter once wrote: “It is because the Supreme Court wields the power that it wields that appointment to the bench is a matter of the highest concern and not merely a question of the profession. In truth, the Supreme Court is the Constitution.”

It goes without saying that the constitutional views of the Justices determine the rulings of the Supreme Court. In response to questioning during the hearings, Judge Alito pledged to put aside his personal views. But in his writings and speeches, including his 1985 job application, Judge Alito didn’t just record his personal political views; he wrote down his views about what the Constitution means—about what rights it contains, and what limits it places on Government. This is exactly what it means to serve on the Supreme Court and interpret the Constitution.

America’s courtrooms are staffed with judges, not machines, because justice requires human judgments. This is particularly so on the Supreme Court. Of all the hundreds of thousands of cases filed in American Federal Courts each year, only about 80 reach the Supreme Court. The Justices divide the country’s lower courts. These are cases where one constitutional clause may be in conflict with another; where one statute may influence the interpretation of another; and where one core national value may interfere with another. These cases often divide the Justices of the Court by close margins. Surely the Justices on both sides of a 5 to 4 case can claim to be following the judicial process and respecting the precedents of the Court. What divides their opinions is the set of constitutional values that they bring to the case. Judge Alito’s testimony before the Judiciary Committee suggests a failure either to understand or to acknowledge the impact of his own constitutional views on the outcome of cases that he hears.

Given his lengthy record and his obfuscating statements about the Constitution, the burden was on Judge Alito to convince the Senate that he would be a judicious and balanced member of the Supreme Court.
The questions he was asked by members of the Judiciary Committee gave him numerous opportunities to do so. Judge Alito did not meet this burden. He failed to inform this body of his views on important constitutional issues, he evaded fair and important questions by offering honest and insightful answers, and he in no way demonstrated that he would uphold not just the letter of the law, but also its spirit.

As a result, I cannot support his lifetime nomination to the highest court in America.

I yield the floor.

The PRESIDING OFFICER. The Senator from Washington is recognized.

Mrs. MURRAY. Mr. President, I rise this evening to discuss my vote on the confirmation of Judge Samuel Alito, Jr., to the U.S. Supreme Court. After meeting with Judge Alito and studying his record and comparing his answers to my criteria for judicial nominees, I have decided to vote against confirming this nominee. If confirmed, Judge Samuel Alito, Jr., as an Associate Justice of the U.S. Supreme Court will not be an adequate check on the Executive branch of the federal government.

The next Justice will have the power to change the Court, change the country. As a result, our rights are on the line. Judge Alito has a very troubling record. In his hearing and in our private meeting he did not show that he will be an independent judge who will uphold the rights and liberties of all Americans, instead of our rights and freedoms on the line. I will not take a chance on Judge Alito because I have serious questions about his independence and his commitment to protecting our rights and our liberties.

As with past nominees, I have evaluated this nominee based on my long-standing criteria, which ask: Is the nominee qualified, ethical, and honest? Will the nominee be fair, evenhanded, and independent? And will the nominee uphold the rights and liberties of all Americans?

Personally, I got involved in politics because of another Supreme Court nomination, that of Clarence Thomas. At the time, I was frustrated that average Americans didn’t have a voice in the process that affects them so much. I have worked to be the voice of working families in my State, and I have asked the questions they would ask. I am voting to protect their interests.

A lifetime appointment to the Supreme Court is a tremendous grant of unchecked power. If the Supreme Court rules incorrectly, there is no option for appeal. There is no backstop. Any seat on the Supreme Court can affect our rights for generations. But there are three factors involved in this particular nomination that make it even more significant. Those factors are the times that we live in, the nominee, and the Supreme Court.

First, I am well aware that we are living in historic times. Each day, it seems that the rights of the individuals and the power of government are being tested. We are at war overseas, we face terrorism here at home, and the current administration is pushing the bounds of governmental power in remarkable ways.

The Bush administration has arrested U.S. citizens and held them without access to the courts. It has run secret prisons around the world. It has expressed views on torture that put our own troops at risk. As we recently learned, the administration has been spying on American citizens without prior approval from a court. These are grave issues which will likely come before the Supreme Court. How that Court rules will affect the rights of our citizens, the balance of power between the branches of our Government, and the balance of power between our citizens and Government.

So as I make my decision on this nominee, I am very mindful of the historic times we are living in and the serious questions this Supreme Court will address in the years ahead.

Secondly, I am very mindful of the seat that is open on the Supreme Court and its significance. Justice Sandra Day O’Connor was a pioneer in the field of law, and her decisions will shape the lives of the American people for generations to come.

As I said when she announced her resignation, we live in a better America due to her 24 years of service on the Court. Justice O’Connor was often a swing vote on important decisions. Her successor could easily change the balance of power on the Court, which could dramatically shift the Court’s ruling on so many issues. Because this is a swing seat that could tip the Court’s balance of power, we need to make sure that the person we confirm is someone who will protect our rights and liberties.

Some have suggested that I should just go along and support the President’s nominee. I reject that is not the way I make decisions. I have criteria that I use to evaluate all judicial nominees, and Judge Alito is no different.

Third, I am also well aware of how Judge Alito came to be the President’s nominee. The President, as we all remember, had nominated his counsel, Harriet Miers, to the High Court, but Ms. Miers was not acceptable to the rightwing of the President’s party. I found it very interesting that before her nomination, Republicans were demanding that the President nominate and Senate floor for anyone the President nominated. But when President Bush nominated Ms. Miers, suddenly we stopped hearing that urgent call for an up-or-down vote. In fact, Ms. Miers’ nomination was killed by the President’s own party, apparently because she did not meet the ideological test of the extreme right.

I grant this history tonight not to diminish Judge Alito but to point out that his nomination comes before the Senate in the context of an ideological battle that has been created by the rightwing. When the President nominated Judge Alito, the rightwing was confident that he would vote their way. That reaction gives me pause as to whether this nominee can keep an open mind on the issues that come before him. If the rightwing is so confident that he is going to vote their way, how can all of us be confident that he will put our country’s needs first? That alone does not suggest that Judge Alito cannot be fair, but it did lead me to explore those questions diligently.

Given the importance of the Supreme Court and the background of the times and the seat and the process, I began to evaluate how Judge Alito measured up to my standards for judicial nominees. Judge Alito’s record contains some disturbing statements, rulings, and pronouncements that require detailed explanations. Does he still hold some of those views? In many cases, we don’t know. I wish Judge Alito had been more forthcoming during his hearing. At the same time, many of the things he said and refused to say spoke volumes.

As I noted earlier, my standards are simple: Is the nominee qualified, ethical, and honest? Will the nominee be fair and evenhanded and independent? And will the nominee uphold the rights and liberties of all Americans?

I am very comfortable that Judge Alito is qualified, he is honest, and he is ethical. But whether he will be fair and independent is a separate question. And, as was discussed at his hearing, he does have a troubling record for fighting for the government and corporations against individuals. He seems to favor the entrenched power over the little guy. His record does not give me the confidence that everyone who comes before the Court will be treated fairly.

I am also deeply concerned about Judge Alito’s independence. We rely on our federal courts as a critical check and balance against government abuse. That independent check helps to protect our rights. This is especially important today because of the growing questions of the expansion of Executive power.

The Supreme Court will need to evaluate whether recent Executive actions are constitutional. Here Judge Alito’s unbalanced minority view of the scope of Executive power tells me he does not have the independence to be an adequate check on the Government’s abuse of power.

Finally, I have serious doubts that Judge Alito will uphold our rights and liberties. One example is his hostility...
to the right of privacy. In the hearings, he refused to say that Roe v. Wade is settled law, and he did not adequately explain his 1985 statement that the Constitution does not protect a right to an abortion. Later, when I voted to confirm, yes, Chief Justice John Roberts, I said I was choosing hope instead of fear and that Judge Roberts, through his answers, inspired such hope. Judge Alito, through his writings, his rulings, and his mannerisms, does not inspire confidence in me that he will protect all our rights. Because so much is on the line, because I do not believe he will be sufficiently independent or will uphold our rights and liberties, I will respectfully vote against his confirmation to the U.S. Supreme Court.

Mr. President, I ask unanimous consent to print in the RECORD a letter from teachers around the country who have opposed this nomination.

The projection, the material was ordered to be printed in the RECORD, as follows:

SOCIETY OF AMERICAN LAW TEACHERS, January 9, 2006, Re: The Society of American Law Teachers’ Opposition to the Nomination of Samuel Alito to the United States Supreme Court.

Hon. ARLEN SPECTER, Chair, Committee on the Judiciary, U.S. Senate, Washington, DC.
Hon. PATRICK LEAHY, Ranking Minority Member, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR SENATORS SPECTER AND LEAHY: The Society of American Law Teachers (SALT) opposes—and urges all members of the Senate Judiciary Committee to vote against—the nomination of Judge Samuel Alito to the United States Supreme Court. SALT is the largest organization of law professors in the United States, representing more than 900 professors at more than 160 law schools. SALT has taken a position opposing only a very few judicial nominations. It did not oppose the nomination of Justice Roberts or Harriet Miers. However, it is deeply committed to civil rights, individual rights and liberties, and an interpretation of federalism that would protect these rights. Judge Alito’s work in the United States Department of Justice and fifteen year record on the United States Court of Appeals for the Third Circuit evidence his disregard for all three. Replacing Justice Sandra Day O’Connor with Judge Alito will result in the Court shifting profoundly to the right.

A Knight-Ridder comprehensive review of published opinions written by Judge Alito concludes: "Alito’s opinions are devoid of expansive language and appear to reflect a dispassionate application of law to facts, he has used legal craftsmanship and existing precedents to develop his own results. Without the rhetoric of legal formalism, Alito’s opinions are void of defining legal principles and do not serve to advance the debate on the law. Judge Alito’s opinions are devoid of expansive language and appear to reflect a dispassionate application of law to facts, he has used legal craftsmanship and existing precedents to develop his own results. Without the rhetoric of legal formalism, Alito’s opinions are void of defining legal principles and do not serve to advance the debate on the law."

Judge Alito’s opinions have undermined the protections of civil rights laws, devalued individual rights, overturned or weakened federal statutes, and narrowly interpreted precedent in the name of dispassionate application of the law. Judge Alito has frequently cast doubt on the legitimacy of most discrimination claims and an unwarranted belief that discrimination is rare in our society. In three cases in which Judge Alito would have dismissed claims of harassment, he displayed a lack of understanding of the dynamics of harassment and hostile environment discrimination and their impact on a victim’s workplace environment and psychological well-being. In one case, writing for the court, he even asserted: "the report in no way put the City on notice that Dickerson was harassed." In another case, Pirolli v. World Flavors, Inc., there was an undisputed evidence that an employee with mental disabilities had suffered sexually motivated, physically abusive workplace harassment. The trial court dismissed Pirolli’s claim, calling the quite horrifying harassment mere horseplay. In a 10–1 en banc decision, the Third Circuit reversed and sent the case back for trial. Judge Alito dissent, not because Pirolli had failed to meet the legal standard for sexual harassment, but because his brief never explicitly asserted that he suffered from a work environment that a reasonable person without mental retardation would find hostile or abusive, even though all the necessary facts had been alleged. In other words, Judge Alito would have dismissed the case for sloppy brief writing. Additionally, he would have reversed the majority’s finding of reasonableness than the law requires. Judge Alito would have compared Pirolli to a reasonable person without mental retardation. The Supreme Court had previously emphasized in Sanderson Plumbing Products, Inc. v. s. that the employer’s evaluation that a white woman was the best candidate was the result of discrimination. In spite of conflicting evidence, Judge Alito would have simply accepted the employer’s judgment of who was the best candidate. The majority accused Judge Alito of overstepping his judicial role and acting as a fact finder in resolving the conflicting evidence in favor of the employer. Judge Alito’s hostility toward some employment discrimination cases was reflected in his dissent:

“I have no doubt that in the future we are going to get many more cases where an employer is choosing between competing candidates—not for the color of his skin and the candidate who is not hired or promoted. I have little doubt that most plaintiffs will be unable to use the discovery process to uncover the inconsistencies in the employer’s evaluation that they failed to follow its internal procedures to the letter. We are allowing disgruntled employees to impose the costs of trial on employers who, although they have not acted with the intent to discriminate, may have treated their employees unfairly. The cases reflect a palpable hostility toward plaintiffs in employment discrimination cases.

DISCRIMINATION IN JURY SELECTION

Judge Alito has written troubling opinions in sex discrimination cases. In several cases, Judge Alito has sided with the plaintiff and presented evidence of a non-discriminatory reason for its action and would have required additional evidence of discrimination. Judge Alito’s approach interpreted a Supreme Court case, St. Mary’s Honor Society v. Hicks, regarding litigants’ shifting evidentiary burdens in Title VII cases. The majority’s interpretation of Hicks was reaffirmed by the Supreme Court. SALT has taken a position opposing only a death penalty. Justice O’Connor was the swing vote in capital cases. The Supreme Court had previously emphasized in O’Connor v. Sundowner Offshore Services, Inc., that the seriousness of discrimination will have their day in court. Sanderson Plumbing Products, Inc. Although the dispute in Sanderson appears to be highly technical, it is central to whether victims of discrimination will have their day in court. In another discrimination case in which Judge Alito dissented from the reversal of a grant of summary judgment, the majority said: “The VII would be unequivocally apparent reason for its action and would have required additional evidence of discrimination. Judge Alito’s approach interpreted a Supreme Court case, St. Mary’s Honor Society v. Hicks, regarding litigants’ shifting evidentiary burdens in Title VII cases. The majority’s interpretation of Hicks was reaffirmed by the Supreme Court. SALT has taken a position opposing only a death penalty. Justice O’Connor was the swing vote in capital cases. The Supreme Court had previously emphasized in O’Connor v. Sundowner Offshore Services, Inc., that the seriousness of discrimination will have their day in court. Sanderson Plumbing Products, Inc. Although the dispute in Sanderson appears to be highly technical, it is central to whether victims of discrimination will have their day in court. In another discrimination case in which Judge Alito dissented from the reversal of a grant of summary judgment, the majority said: “The VII would be unequivocally apparent reason for its action and would have required additional evidence of discrimination. Judge Alito’s approach interpreted a Supreme Court case, St. Mary’s Honor Society v. Hicks, regarding litigants’ shifting evidentiary burdens in Title VII cases. The majority’s interpretation of Hicks was reaffirmed by the Supreme Court. SALT has taken a position opposing only a death penalty. Justice O’Connor was the swing vote in capital cases. The Supreme Court had previously emphasized in O’Connor v. Sundowner Offshore Services, Inc., that the seriousness of discrimination will have their day in court.
January 25, 2006

CONGRESSIONAL RECORD — SENATE S91

While picking a grand jury in Ramsey v. Beyer, the judge announced that he was not randomly selecting jurors because he was trying to pick a cross section of the community, noting that a disproportionate number of jurors including at least two African Americans, to sit separately in the body of the courtroom. An en banc Third Circuit ruled against Judge Alito and his colleague in an equal protection violation. Judge Alito wrote a separate concurrence, making the astounding assertion that defendants have no constitutional basis to challenge the random selection of racial groups were treated differently in order to get a cross section jury. Equally dismaying, he suggested that defendants may not be aware that they have a racial base discrimination against prospective black jurors. Judge Alito completely discounted the statistical evidence, writing that there was no language that might support the upholding of Roe or inhibit the ability to further narrow the right to choose.

Just as Judge Alito has denied the liberty rights of women to control their bodies, his decision striking down the Family and Medical Leave Act demonstrates that he has no understanding of the distinctive burdens women face in juggling work and family. Judge Alito completely discounted a lack of understanding of the dynamics of sexual harassment and its detrimental impact on victims of harassment. Even in cases involving sexual harassment, Judge Alito's solicitous suits to apply only to married couples. He has shown a lack of sympathy for protection of people and concerns which are the primary focus of the most important civil rights, consumer protection, worker protection, and environmental protection laws. Judge Alito argued that the majority’s theory would lead to the conclusion that Congress may ban purely intrastate possession of just about anything. He cited Roe v. Wade, saying that there were no congressional findings or statutory bases for the law, thus imposing a new stringent fact-finding requirement for Congressional justification of its laws. He ignored common sense—the facts involved a licensed gun dealer selling machine guns at a gun show—transactions which involved interstate commerce. Additionally, he ignored references in conference reports and on the floor of Congress concerning the effect of the ban on interstate commerce. Judge Alito and his colleagues accused of institutional disrespect by requiring the “coordinate branches of government” to “play” the constitutionality of the law. He ratios his decision in part by claim- ing to the prosecutor, materials that would have been acknowledged, the Act attempted to remedy sex discrimination, and therefore suffers severe consequences alleged. In other words, a woman must show her willingness to become a martyr in order to prevail in the typical gender-based asylum case.

An Expansive View of the Police Power at the Expense of Individual Rights

In cases involving gender discrimination, Judge Alito has written troublesome decisions in which he appears to accept traditional notions of the subservient role of women in society and to deny the separate rights of women to control their own desi-

tiny. Judge Alito’s record, both prior to and subsequent to his appointment, reflects clear

testimony that he does not support the constitutional right to choose and that his elevation to the Supreme Court would endanger this funda-

mental authority is his dissent in Doe v. Groody, where he voted to approve the strip search of a mother and her ten-year-old daughter, even though the search warrant obtained by the police did not name or refer to a parent. In a concurring opinion, Justice Michael Chertoff wrote, Judge Alito’s position threatened to turn the Constitution’s search warrant requirement into little more than a “rubber stamp.”

Other dissenting decisions of Judge Alito suggest that he views individual and other constitutional rights as stopping at the prison door. He would have upheld a Pennsylvania law prohibiting certain inmates from having newspapers, magazines, and photos of the opposite sex. In Planned Parenthood v. Casey, Judge Alito held that there is no reason for a woman notify her husband before having an abortion. He discounted the liberty and bodily integrity of the woman while showing sympathy for protection of people and concerns which are the primary focus of the most important civil rights, consumer protection, worker protection, and envi- ronmental protection laws. Judge Alito argued that the majority’s theory would lead to the conclusion that Congress may ban purely intrastate possession of just about anything. He cited Roe v. Wade, saying that there were no congressional findings or statutory bases for the law, thus imposing a new stringent fact-finding requirement for Congressional justification of its laws. He ignored common sense—the facts involved a licensed gun dealer selling machine guns at a gun show—transactions which involved interstate commerce. Additionally, he ignored references in conference reports and on the floor of Congress concerning the effect of the ban on interstate commerce. Judge Alito and his colleagues accused of institutional disrespect by requiring the “coordinate branches of government” to “play” the constitutionality of the law. He ratios his decision in part by claim- ing to the prosecutor, materials that would have been acknowledged, the Act attempted to remedy sex discrimination, and therefore suffers severe consequences alleged. In other words, a woman must show her willingness to become a martyr in order to prevail in the typical gender-based asylum case.

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testimony that he does not support the constitutional right to choose and that his elevation to the Supreme Court would endanger this funda-

mental authority is his dissent in Doe v. Groody, where he voted to approve the strip search of a mother and her ten-year-old daughter, even though the search warrant obtained by the police did not name or refer to a parent. In a concurring opinion, Justice Michael Chertoff wrote, Judge Alito’s position threatened to turn the Constitution’s search warrant requirement into little more than a “rubber stamp.”

Other dissenting decisions of Judge Alito suggest that he views individual and other constitutional rights as stopping at the prison door. He would have upheld a Pennsylvania law prohibiting certain inmates from having newspapers, magazines, and photos of the opposite sex. In Planned Parenthood v. Casey, Judge Alito held that there is no reason for a woman notify her husband before having an abortion. He discounted the liberty and bodily integrity of the woman while showing sympathy for protection of people and concerns which are the primary focus of the most important civil rights, consumer protection, worker protection, and envi- ronmental protection laws. Judge Alito argued that the majority’s theory would lead to the conclusion that Congress may ban purely intrastate possession of just about anything. He cited Roe v. Wade, saying that there were no congressional findings or statutory bases for the law, thus imposing a new stringent fact-finding requirement for Congressional justification of its laws. He ignored common sense—the facts involved a licensed gun dealer selling machine guns at a gun show—transactions which involved interstate commerce. Additionally, he ignored references in conference reports and on the floor of Congress concerning the effect of the ban on interstate commerce. Judge Alito and his colleagues accused of institutional disrespect by requiring the “coordinate branches of government” to “play” the constitutionality of the law. He ratios his decision in part by claim- ing to the prosecutor, materials that would have been acknowledged, the Act attempted to remedy sex discrimination, and therefore suffers severe consequences alleged. In other words, a woman must show her willingness to become a martyr in order to prevail in the typical gender-based asylum case.
to make any findings that state statutes had discriminated against women. The preamble to the statute explicitly states that the purpose of the Act is to remedy sex discrimination. This is one of a long history of litigation striking down state statutes disadvantaging women in the workplace. Nevertheless, Judge Alito would require Congress to engage in unconstitutional activity, specifically directed at the FMLA. In a similar challenge, Nevada Department of Human Resources v. Hibbs the Supreme Court later held that state employees can enforce their right to damages pursuant to a violation of another provision of the FMLA.

ADVCATING AN EXPANSIVE SCOPE OF EXECUTIVE POWER

Since the Nixon Administration, the country has witnessed a legal battle concerning the scope of presidential authority under our Constitution. The present administration advances an extreme, expansionist theory of the scope of presidential power, both foreign and domestic. The theoretical underpinnings for the concept of the "imperial presidency" have been developed by writings of the Federalist Society. Judge Alito's 1985 application to serve as Deputy Assistant Attorney General of Legal Counsel (OLC) boasts of his regular participation in the Federalist Society, an involvement which continues to this day. OLC, during his tenure, has pursued an aggressive agenda about expansive presidential power. For example, OLC opined that the executive branch could ignore congressionally authorized procedures for federal procurement and determined that the President had constitutionally unfettered authority to determine when to tell Congress of his covert initiative with Iran. To attain arms sales—even though the power to regulate foreign trade is an express congressional authority—Judge Alito wrote during his time at the Justice Department, he argued in favor of expanded government authority to intercept computer messages and broader authority for government agents to set up shell companies to help with undercover operations. He also told the FBI that it was not bound by two district court decisions restricting the Bureau's power to invest in undercover employees whose jobs were not critical to national security.

During his tenure on the bench, Judge Alito has been adversarial to assertions of presidential power, particularly in the area of criminal law, and has gone out of his way to place limitations on Congress's legislative power, even when the power of the courts has spawned unprecedented claims of Executive power. It is this line of thinking that way to place limitations on Congress's legislative powers would dangerously expand the power of the executive and the states; shrink the power of Congress to protect the health, safety, and welfare of this nation's citizens; and diminish the role of the courts in guarding against discrimination and undue government intrusion into individual rights. Justice Alito's judicial philosophy is characterized by a commitment to a limited role. . . . It should always be observed that "although the judiciary has a very important role to play, it's not the limit role. . . . It goes just to the executive branch. Speaking on his judicial philosophy and commitment to the rule of law. Specifically, I pledged to support judicial who rule on the law and facts before them—not judges who attempt to legislate from the bench. Judge Alito's judicial philosophy corresponds with that promise. Judge Alito recognizes the limited role of the judicial branch, having observed that "although the judiciary has a very important role to play, it's a limited role... It should always be asking itself whether it is straying over the bounds, whether it's invading the authority of the legislature, for example, whether it is making policy judgments rather than interpreting the law. Like his view of the limited role of the judicial branch, Judge Alito also recognizes the limits on the powers of the executive branch. Speaking on his understanding of the "unitary Executive," Judge Alito explained, "the idea of the unitary Executive is that the President is the head of the executive branch. . . [it] goes just to the question of control. It doesn't go to the question of scope." Further, Judge Alito recognizes that "[n]o person in this country, no matter how powerful or powerful is also a coequal. . . . If the law, and no person in this country is echanted in the law." This statement reflects his commitment to a principle so fundamental to justice in this country that it is carved in stone over the entrance to the Supreme Court: "Equal justice under law."

Consistent with the principle of equal justice under law, Judge Alito does not
allow his personal opinion to decide the outcome of a case. He says “[a] judge can’t have any agenda. . . . The judge’s only obligation—and it’s a solemn obligation—is to the rule of law, and what that means is that in every single case, the judge has to do what the law requires.”

I believe that each of my colleagues would agree that judges should be held to this standard. Yet, at the same time, some criticize Judge Alito’s record for living up to it. For example, Groovy Judge Alito argued in dissent that a search warrant authorized law enforcement officials to search everyone inside a drug dealer’s house, including the wife and daughter. Even though he personally “share[d] the majority’s visceral dislike of the intrusive search,” Judge Alito’s unwavering commitment to the rule of law led him to do what he believed the law required, despite his personal beliefs on the outcome.

In summary, Judge Alito will serve as an effective steward of the law and Constitution. His record evidences a deep respect for the separation of powers and other fundamental principles envisioned by our Founding Fathers. I have no reason to believe Judge Alito will be deferential to anyone or anything other than the law and the facts before him.

As a representative of Colorado, I also appreciate the uniqueness of the issues that are important to our State and the West. The departure of Justice O’Connor and Chief Justice Rehnquist marks the loss of a Western presence on the Supreme Court.

Earlier this year, I asked President Bush to nominate a judge who could capably decide issues important to Colorado and the West, such as water and resource law.

When I asked Judge Alito about his understanding of Western resource and water law, I was pleased to learn that he grew to appreciate the importance and complexity of these issues while working in the U.S. Solicitor General’s Office. He assured me that he understands the uniqueness to the West of such issues as water rights, the environment, and public lands.

In conversing with Judge Alito, I couldn’t help but be reminded of my meeting with now Chief Justice Roberts. Judge Alito is a man of great restraint, thoughtfulness, candor, and thorough responses to my many questions—a further reflection of his view of the limited role of a judge.

Although America was already aware of Judge Alito’s distinguished record, the Judiciary Committee hearings were helpful in shedding additional light on his character, temperament, and integrity, particularly in trying circumstances.

During the nearly 18 hours of questioning, Judge Alito was both open and candid. He answered 97 percent of the nearly 700 questions that were asked of him, declining to answer only 3 percent. By comparison, Justice Ginsburg declined to answer 20 percent of questions. Justice Ginsburg received 96 votes in favor of her confirmation.

Throughout the course of the demanding process, Judge Alito demonstrated great patience, humility, and respect for all News points of temporary desirable for a Supreme Court justice.

The hearings were also an opportunity for Judge Alito to set the record straight—his rigorous attempts to impugn his integrity. Laid to rest is the claim that he acted improperly by participating in a case involving Vanguard, his mutual fund company. Shares in Vanguard mutual funds are not an ownership interest in the Vanguard company, and Judge Alito had no legal or ethical obligation to recuse himself. His ultimate decision to do so—beyond what the law requires—should be praised, not attacked.

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The Senate debate should reflect that the job of a judge is to review cases impartially, not to advocate issues. Judges should be evaluated on their qualifications, judicial philosophy, and respect for the rule of law.

It would be unfortunate and irresponsible of my colleagues to continue to politicize the judicial confirmation process. Judge Alito is eminently qualified, and he deserves a swift up-or-down vote.

I intend to vote in favor of Judge Samuel Alito’s nomination as the 110th Justice to the United States Supreme Court and I strongly urge my colleagues to do the same.

I believe that Judge Alito will not be an activist judge and supports limits on the judiciary.

I ask unanimous consent to have printed in the RECORD a letter from attorney William Banta in which he discusses judicial independence, judicial activism, and judicial usurpation, now referred to by many of us as just judicial activism.

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

Englewood, CO, September 6, 2005.
Re: A Lawyer’s Duty—Judicial Independence, Judicial Activism, and Judicial Usurpation.
Hon. WAYNE ALLARD,
U.S. Senate, Dirksen Senate Building, Washington, DC.

DEAR SENATOR ALLARD: Recently there has been an outcry from the established bar in defense of judicial independence. However, little has been said against judicial activism, which used to be referred to as “judicial usurpation.” Because of the present tension between them, it behooves us lawyers to understand the relationship between judicial activism and judicial independence.

Marbury v. Madison is a good place to begin. While Marbury is typically used to justify a court’s right to decide a case, the power of the president, is chilling given the current debate on domestic surveillance and the balance of powers among the branches of government. Alito’s dissent in this case, which could inspire disbelief, such as his defense of a police officer who strip-searched a 10-year-old girl whose father was wanted on drug charges.

We urged President Bush to choose a centrist to succeed retiring Justice Sandra Day O’Connor, but once his first choice, Harriet Miers, was never too revealing, Alito demonstrated his qualifications for the high court, and he’s likely to be confirmed. We wish we could be enthusiastic about this, but the record in Alito is mixed in some areas such as reproductive rights, privacy and executive power. If he rises to the Supreme Court, we hope Alito will follow the letter and not the call of ideology or the urging of special interests. Associates who have worked with Alito over the years offer welcome assurances that he can be an impartial figure and not a clone of Clarence Thomas on the far right side of the bench.

We tend to agree with Sen. Dianne Feinstein, D-Calif., who said on Sunday, “This is a make or break, vote with. That doesn’t mean he shouldn’t be on the court.” Like Feinstein, we don’t believe the arguments against Alito merit a filibuster.

Alito’s majority to win confirmation unless opponents try to extend debate indefinitely; then 60 senators must agree to a vote. Republicans have 55 senators, willing to ban judicial filibusters if that’s what it takes.

In the end, Republicans will probably support Alito en masse and most Democrat senators will vote no, reflecting both parties’ expectation of his future role. Much attention is being paid to the “Gang of 14,” the coalition (including Colorado Sen. Ken Salazar) to hold filibusters against under extraordinary circumstances. This isn’t one of them; Alito has served capably on the 3rd U.S. Circuit Court of Appeals for 15 years, and his confirmation should rise or fall on a majority vote.

We hope Alito will moderate his views if voted to the court of last resort. His statements about Roe vs. Wade suggest he opposes abortion-rights, which we favor, while his support for the “unitary executive” theory, which the power of the president, is chilling given the current debate on domestic surveillance and the balance of powers among the branches of government, is our concern.

The point is this: when a court takes it upon itself to engage in political experimentation, or baseless lawmaking contrary to the Constitution, the American people, if not the established bar, tend to hold that court accountable. In holding judicial feet to constitutional fire, critics are not threatening judicial independence; they are representatives of those, whose courts are thought to be following the Constitution and are subject to the Constitution.

Mr. ALLARD, Mr. President, I am pleased to see that these Colorado publications join me in recognizing that Judge Alito is the type of judge that Coloradans—and all Americans—deserve.

In conclusion, Judge Alito is one of the most qualified judicial nominees ever. He is deeply committed to the rule of law, recognizes the limited role of the judiciary, and he has the judicial temperament fitting of a Supreme Court justice.
best judicial traditions." Too often we justified baseless decisions on the unsteady promise of political results or indulged the sentiment that the Constitution is whatever a court deems it to be. Incidentally, we are encouraged to rejoice in the passage of the American people. Judge Alito's open-mindedness . . . "Judicial independence is in my judgment the most important thing that can be said about him. I have heard his probing questions during oral argument, and he has been frank and insightful in our private decisional conferences, we who have observed at first hand his impartial approach to decision-making and his thoughtful judicial temperament and know his carefully crafted opinions." Judge Alito's performance all along, the established bar must now be careful not to excuse judicial activism with judicial independence. The risk of confusing judicial activism with judicial independence could compound our problem so that the public loses track of the whole truth and the public duty of the bar is so that, as Judge Miner would prefer, "the Constitution is our bedrock foundation or recognize the oath to support."

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

The PRESIDING OFFICER. The Senator from Arizona is recognized.

Mr. KYL. Mr. President, I ask unanimous consent to have an item printed in the RECORD.

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

SENATE REPUBLICAN POLICY COMMITTEE: FOLLOW JUDGES TESTIFY IN SUPPORT OF ALITO NOMINATION

On January 12, 2006, five sitting and two former judges from the U.S. Court of Appeals for the 3rd Circuit testified on behalf of Judge Alito's nomination to the Supreme Court. The judges included nominees of Presidents Lyndon Johnson, Richard Nixon, Ronald Reagan, George H.W. Bush, and Bill Clinton. Collectively they have served with Judge Alito for more than 75 years, watching him work and evaluating his intellect, character, independence, and judgment. Their unerring devotion to the Supreme Court is a testament to the whole truth that a judge must be asked to see the whole thing as a judge must be asked.

The judges included the following individuals:

Mr. BECKER. Judge Becker, appointed by President Ronald Reagan in 1981, is a Senior Judge on the 3rd Circuit and formerly its Chief Judge. Judge Alito's open-mindedness . . . "Like a good judge, he considers all the arguments and weighs them carefully. He is a man of measured and thoughtful opinion."

Mr. STARR. Judge Starr, appointed by President George H.W. Bush in 1988, is a Senior Judge on the 3rd Circuit.

Mr. MINER. Judge Miner, appointed by President John F. Kennedy in 1967, is a Senior Judge on the 3rd Circuit.

Mr. ALDERSERT. Judge Aldersert, appointed by President Gerald Ford in 1977, is a Senior Judge on the 3rd Circuit.

Mr. NUNN. Judge Nunn, appointed by President Jimmy Carter in 1978, is a Senior Judge on the 3rd Circuit.
"And the reason is that having worked with him, I came to respect what I think are the most important qualities for anyone who puts on a robe, no matter what court they will sit on, certainly the United States Supreme Court."

Judge Lewis on Judge Alito's honesty and integrity... "As Judge Becker and others have pointed out, the Senate's Judiciary Committee have heard oral argument and are not propped up by law clerks—we are alone as judges, discussing the cases—that one really gets to know, gets a sense of the thinking of our colleagues. And I cannot recall one instance during conference or during any other experience that I had with Judge Alito, but in particular, when he exhibited anything remotely resembling an ideological bent."

Judge Lewis on Judge Alito and civil rights... "If I believed that Sam Alito might be hostile to civil rights as a member of the United States Supreme Court, I guarantee you that I would not be sitting here today... My sense of civil rights matters and how courts should approach them jurisprudentially might be a little different. I believe in being a little more aggressive in these matters—perhaps a restrained approach. As long as my argument is going to be heard and respected, I know how to respect it... And believe me 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."

Judge Lewis on why he endorses Judge Alito... "I am here as a matter of principle and as a matter of my own commitment to justice, to fairness, and my sense that Sam Alito is uniformly qualified in all important respects to serve as a justice on the United States Supreme Court."

Mr. KYL. Mr. President, I ask unanimous consent that the attached editorial by the Arizona Republic, dated January 24, be printed in the RECORD of this debate on the confirmation of Judge Samuel Alito to the U.S. Supreme Court. The editors' support for Judge Alito is welcome, and their statement that "Judge Alito is a superior candidate for the high court..." is absolutely true.

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

[From the Arizona Republic, Jan. 24, 2006]

ALITO: WISE IN THE WAYS OF "WHYS"

If America is not on pins and needles over today's Senate Judiciary Committee vote on Samuel Alito for the U.S. Supreme Court, perhaps this headline on Monday helps provide an explanation: "Feingold unsure of Alito"—WSAW-TV, Wausau, Wis.

If one of the Senate's most solidly liberal members, Sen. Russ Feingold, D-Wis., remains uncertain about President Bush's nominee one day prior to his scheduled Judiciary vote, prospects for derailing the nomination in the full Senate would seem dim.

We'll see how the votes pan out. Still, it is worth wondering: Did we do the drama?, asks this WSJ.

The most obvious answer among many is that Alito is a superior candidate for the high court regardless of his political leanings. After 15 years on the bench, Alito has established a lengthy track record as a fair jurist who has struck a proper balance between his own constitutional interpretations and the views of other judges and courts.

Even his obvious discomfort at the beginning of his Judiciary hearings worked to Alito's favor. The candidate is bookish and uncomfortable in the limelight! All the better for a position on the nation's most deliberative, most cerebral panel.

Many commentators have noted that the even-keeled Alito presents himself far differently from Robert Bork, the famously rejected conservative candidate in 1987.

Well, yes. Alito was not combative in the face of relentless grilling, as Bork was. And he wears no wicked-looking beard.

But it would seem that Alito's imminent success is less a matter of televised theatrics, facial adornment or even judicial philosophy than it is a reflection of the public's expectations of a more restrained approach.

Unquestionably, the public wants jurists to be fair, and it seems to believe that Alito will live up to that standard. The public wants a jurist who respects the judgment of other courts, but it also wants one who understands that Job 1 is to interpret the Constitution.

Sometimes, Supreme Court judges have found those two directives in conflict. The public, and most of the senators who represent it, seems to believe Alito will find his way through those conflicts fairly and intelligently.

But most of all, Alito appears to have won over converts because he has demonstrated the trait that increasingly seems to distinguish great jurists from mediocre-to-good ones: He can explain why.

We all wish to know why. With all due respect to President Bush's previous nominee, Harriet Miers, it was not enough that—wink—wink—her vote on the "right" issues was ensured. Indeed, that constituted the most damning argument against her.

Alito, by contrast, has won support because senators' decisions will be grounded and argued in the facts of the law, not in some predigested political prejudice that is unsupported by the case before him.

And that is a powerful argument for Alito all by itself.

Mr. KYL. Mr. President, I rise in support of Judge Alito's nomination to the Supreme Court and urge my colleagues to quickly confirm him.

I begin by observing that the party-line vote in the Judiciary Committee yesterday raises a troubling question for all of us, which is basic to our deliberations. What is the proper test for determining whether to confirm a nominee to the Supreme Court? Until very recently, the Senate has evaluated whether the nominee possessed the requisite experience, integrity, and temperament to serve. But a new test has been proposed by Judiciary Committee Democrats: will the nominee provide assurances that he or she will rule in a way that judges from competing constituencies of the U.S. Court of Appeals for the Third Circuit had to say. Seven current and former judges on Judge Alito's behalf—judges who were nominated by Presidents Johnson, Nixon, Reagan, the first President Bush, and Clinton. Collectively, they have served with Judge Alito for more than 75 years. They praised his integrity, his open-mindedness, his temperament, his intellect, and his devotion to the rule of law.

Finally, a Supreme Court Justice must know the difference between the judicial role and the legislative or executive function. This qualification is sometimes difficult to decipher, but there are several clues that can guide us.

First, a long judicial record helps. As Judge Alito goes, that is not a trace of judicial activism in his record.

Second, a judge cannot have a policy agenda. He or she must defer to the political branches on policy questions. Judge Alito agreed, testifying, "We [judges] are not policymakers and we shouldn't be implementing any sort of policy agenda or policy preferences that we have." Judge Alito's colleagues on the Third Circuit appeals court confirmed this. For Judge Aldisert testified that "at no time during the 15 years that Judge Alito has served with me and with our colleagues on the court, and the countless number of times that we have sat together in private conference after hearing oral arguments..." Judge Alito Expense Report."

Third, a judge must not twist statutes or constitutional provisions to reach a result he favors. As Judge Alito testified, "If I believed that Judge Alito was a jurist who respects the judgment of other courts, he would seem that Alito is a superior candidate for the high court..."
other words, a judge must accept that the Constitution will sometimes require him to make rulings that he might disagree with. Politicians are free to vote their convictions; judges must put their personal views aside. I will have more to say about this issue in a few moments.

Fourth, the judge must have the right understanding of the “living Constitution.” Our Constitution must always remain alive to new situations that the Founders did not contemplate. But the judge must apply the constitutional provisions in the way that most closely approximates the meaning of the text and the underlying principles as understood when drafted. The Constitution is not infinitely malleable. It is not a blank slate for the judicial branch to draw upon. It has no “trajectory” or “evolutionary theme.” It is a text—words with meanings. If the Constitution can be twisted to mean anything, then it ultimately means nothing, and we lose the rule of judges, not the rule of law.

Judge Alito respects the proper divisions within American constitutional government. As he explained in his testimony, the judiciary “should always be asking whether it is straying over the bounds, whether it’s invading the authority of the legislature [or] making policy judgments other than interpreting the law.” He emphasized that judges have a duty to police themselves, he called the “const-__stant process of re-examination on the part of the judges.” If all judges engaged in this process of re-examination, the quality of justice in this Nation would improve dramatically.

Judge Samuel Alito is not going to legislate from the bench or bend the Constitution to suit any political preferences that he might have. He is not going to rely on foreign law, but will look to our American traditions. He is not going to draw upon the judicial branch to enact policy results through the judiciary, not the rule of judges, not the rule of law.

As a final example, another Senator wanted Judge Alito to tell him that it was unconstitutional for the President to take major military action against Iran or Syria absent prior congressional authorization. He was exasperated that Judge Alito wouldn’t just prejudge the question, which the Senator called “basic,” and say that the President could not do so. But Judge Alito gave the judge’s answer. It was anything but “basic.” Judge Alito explained that he needed to consider the political question doctrine first, then to analyze the scope of the President’s authority under the War Powers, and then the history of the use of force absent congressional authorization—it’s a very complicated history—and then apply it to the facts before him. The Senator wanted a politician’s answer, a policymaker’s answer. In other words, he wanted to know how that case would turn out, before it was briefed and argued. But all we should be asking, is how he would approach the question. What principles would Sam Alito apply, not what kind of judge Sam Alito would make major military action constitutional.

Abortion, executive power in a time of war, congressional power, State sovereign immunity, the 4th amendment,
 advisable. Indeed, it appears that it has already become partisan. The confirmations of Ruth Bader Ginsburg and Stephen Breyer speak volumes about how this results-oriented approach is, in fact, a problem centered within the democratic caucus. Both of these nominees had a long history of liberalism. Both were Democrats with ties to the political left. Ginsburg was the former general counsel to the ACLU who had advocated taxpayer funding of abortion, and Breyer had been Senator Kennedy’s chief counsel and an academic promoter of an expansive role for the Court. Yet the Senators opposed the nominees to a Democrat President immediately, because they want to guarantee certain results out of the Court? That’s not law. That’s politics. It is the antithesis of the rule of law and constitutional government. Do we really just want policy makers in robes? I remember the President’s former White House Counsel, Lloyd Cutler, testified before the Judiciary Committee. His answer was a resounding “No.”

In conclusion, I remind the Senate of something Justice O’Connor said last September: the rule of law is “hard to create and easier than most people imagine to destroy.” That warning speaks directly to what we face today. If a partisan block of Senators continues down this path of politicization, it cannot be expected to apply to only one party. The ultimate loser will not be Republicans or Democrats, but the rule of law itself.

“Hard to create, and easier than most people imagine to destroy.” My friends, please—take a step back. The man is qualified. He has high integrity. He is fair. He deserves your vote.

The PRESIDING OFFICER. The Senator from Nevada is recognized.

Mr. ENSIGN. Mr. President, I rise today in support of the nomination of Judge Samuel Alito, Jr., to the U.S. Supreme Court.

One of the greatest honors and responsibilities of a Senator is a vote cast for a role not one that I take lightly. It is with deep respect for the laws of this Nation and for the highest Court in our land that I stand before the Senate today.

As Senators, we are tasked with the specific duty in the checks and balances system of our Government. It is with our advice and consent that a President’s nominee is confirmed or rejected. This is how it has worked since the Constitution was adopted. Our forefathers wanted to ensure that no one person wielded excessive power. However, at the same time, it is the President who selects a nominee. He earns that power as the elected leader of the United States. President Bush nominated Judge Alito. We are here to consider that nomination.

I had the opportunity to meet Judge Alito and I find he is extremely qualified to join the highest Court in this land. His experience, his temperament, his understanding of the role of the Court and his respect for the law make him an admirable candidate who I believe will serve this Nation well.

The single most important factor that went into my decision of whether to support Judge Alito has to do with the Justices’ role on the Court. The job of the judiciary is to apply and interpret the Constitution and the laws of the land. Unfortunately, not everyone believes that way. In the late 1970s, judicial activism has become so rampant in this country. In no way is it the judiciary’s purview to make laws. That is clearly the job of legislators. Legislators are to make the laws and judges are to interpret them to the best of their abilities.

Judge Maryanne Trump Barry has served on the Third Circuit with Judge Alito since President Bill Clinton appointed her in 1999. She also worked in the U.S. Attorney’s Office with Judge Alito. I think the testimony and support of her colleagues speaks volumes about what we can expect from Justice Alito.

Samuel Alito set a standard of excellence that was contagious—his commitment to
On day four of the hearings, January 12, 2006, four sitting and two former judges of the U.S. Court of Appeals for the Third Circuit testified on behalf of Judge Sam Alito’s nomination to the Supreme Court. They spoke about his independence, judgment, intellect, and character.

I remember listening to Judge Timothy Lewis tell us that Judge Alito will be the type of Justice who will listen with an open mind and will not have any agenda-driven or result-orientated approach. I think that is what we want in a judge.

What is interesting is that Judge Lewis is a Clinton appointee. He stated:

I am openly and unapologetically pro-choice and always have been.

Judge Lewis went on to state:

I am openly—and it’s very well known—a committed human rights and civil rights activist and am actively engaged in that process at my time permitted.

I am very, very involved in a number of endeavors that one who is familiar with Judge Alito’s background and experience may wonder—“Well, why are you here today saying positive things about Judge Alito’s qualifications. Consider his respect for the Constitution. Senator Kyl from Arizona preceded me on the floor. He talked about the dangerous precedent that would be set if this body were to depart from the standard of judging nominees based on their experience in favor of a partisan approach. Republicans, back in the 1990s, voted for two people they knew would be liberal. The basis on which Judge Alito’s confirmation is based will likely determine the basis by which all future nominees will be judged.

What I think is important to consider is not how someone will rule but rather on their judicial approach with respect to the words of the Constitution, at the writing of the Founders, at the principles on which America was founded. That is the judicial approach I want somebody to have on the Highest Court in the land. And that is the judicial approach I believe—no one knows for sure, but I believe—Samuel Alito has and how he will make judgments as an Associate Justice of the U.S. Supreme Court.

So I urge all my colleagues to support his nomination. Mr. President, I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. COLEMAN. Mr. President, I ask unanimous consent that the order for the question be rescinded.

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

Mr. COLEMAN. Mr. President, I have come to the Senate floor to discuss the nomination of Judge Samuel Alito. My purpose is to talk with my colleagues and the people of Minnesota my decision to vote to confirm Judge Alito and the reasons for it.

This is one of the most solemn and important events in the life of the Senate. For Minnesota, I watched and listened to the hearings closely. Judge Alito’s intellect and character are nothing short of remarkable.

Judge Alito brought to the table was not one that says here is what I believe and as a result this is what I will do, but, rather, what you would want a judge to do: What do the facts say, what does the law say, what does the Constitution say.

In being asked 700 questions, I think that is something like 500 more than Justice Ginsburg was asked. Senators on the committee who had previously counseled nominees not to answer specific questions on issues that will come before them on the Court on this occasion abused the nominee for not doing so. The American people know what this process is supposed to be about. The President nominates and the Senate confirms. The President, who was elected by all the people, did his job. Now it is time for us to do ours.

When we approach issues of greatest magnitude, the Senate should be at its very best. I like Stephen Covey’s advice to leaders when he wrote the Main Thing is to keep the Main Thing the Main Thing.

Despite all the distractions and attempted detours, there is a main thing to be focused on. This main thing is not a particular issue or political agenda. This main thing is to vote based on whether your party is in the White House. I hope that in my time in the Senate, if there is a President of a different party, I will bring to the judges that the President has nominated. My consistent standard throughout my time in the Senate will be this: Is the nominee qualified by relevant experience, proper judicial temperament, and ethical standards which are beyond reproach? Does he bring a perspective that says a judge is to be a judge or referee, not to bring his or her personal opinions to the table to create law as he or she sees it but, rather, does what Judge Alito does, looks at the facts, looks at the law, the Constitution.

I would submit that a quick search for the votes and record of judicial nominations over the last 200 years would indicate this is the historical standard almost all Senators have taken. The current circumstance of microscopic examination, politicizing, and threats of filibusters is a major historical aberration. For the sake of the judiciary and the whole constitutional system, I hope we find our way back to the way things have been for over the last 200 years plus, rather than the last 5 years.

In my view, Judge Samuel Alito is extremely well qualified to serve on the Supreme Court. He has an extraordinary legal mind. There is no doubt about it. He has demonstrated in his years in the bench and in hundreds of cases that he views the judicial role as following the Constitution and interpreting the law, not making the law.

Judge Alito told words that “no person in this country, no matter how high or powerful, is above the law, and no person in this country
is beneath the law.” He also told us that “our Constitution applies in times of peace and in times of war, and it protects the rights of Americans under all circumstances.”

On results-oriented jurisprudence, Judge Alito

Results-oriented jurisprudence is never justified because it is not our job to try to produce particular results. We are not policymakers. We shouldn’t be implementing any sort of policy agenda or policy preferences we have.

In effect, this was the same standard that Judge Roberts applied. I recall he was asked a question whether he was ruling on behalf of the little guy. And the comment was, if the Constitution says the little guy deserves to win, he will. And if it says that he doesn’t deserve to win, then he won’t. That is what judges should do. That is the way they should operate.

Advice and consent was never intended as a means for the Senate to impose its policy agenda on a future court. I worry that we are walking down a dangerous path when Senators start urging them to say, yes, I will rule a certain way or otherwise you will not get my vote.

Advice and consent was never intended as a means to grandstand or place oneself. I will proudly vote to support Judge Alito’s nomination. His career, his writings, and his class during this less-than-ideal confirmation process are proof that he will be an outstanding member of the high Court. The President has done his best to tip the scales of justice in America. In the last 10 years, 193 cases have been decided by the Supreme Court by the closest of votes, 5 to 4; and of the 193 cases, Justice Sandra Day O’Connor has been the deciding vote in 148; 77 percent of these closely divided decisions have been decided by Justice Sandra Day O’Connor.

First, as I mentioned this morning, Justice Sandra O’Connor, whose vacancy is being filled, has been the fifth and decisive vote on many issues central to our democracy. The Justice who takes her place is truly in the position to tip the scales of justice in America. In the last 10 years, 193 cases have been decided by the Supreme Court by the closest of votes, 5 to 4; and of the 193 cases, Justice Sandra Day O’Connor has been the deciding vote in 148; 77 percent of these closely divided decisions have been decided by Justice Sandra O’Connor.

Second, President Clinton selected Justice Ginsburg after a real, authentic consultation with Republicans in the Senate. This morning, I saw Senator HATCH early in the day and I said his book sales must be up because everybody is quoting him. It is a book he wrote entitled “Square Peg: Confessions of a Citizen Senator.” In that book, Senator Orrin Hatch of Utah described how in 1993, as the top Republican on the Judiciary Committee, he received a telephone call from President Clinton to discuss possible Supreme Court nominees. Senator HATCH recounted in his book—and still stands by it—that he warned President Clinton away from a nominee whose contacts with his Democratic colleagues was,我认为, was not perfect. He wrote in his book that he believed “would not be easy,” in his words. He wrote in his book that he suggested the names of Ruth Bader Ginsburg, whom President Clinton had never heard of, according to Senator HATCH, and Stephen Breyer. Senator HATCH wrote that he assured President Clinton that Ginsburg and Breyer “would be confirmed easily.”

What a contrast to the situation we face today. President Bush sends the names of nominees to the Senate without consulting. In fact, I may be mistaken on this particular nominee, Judge Alito, but I do recall Senator SPECTER saying he learned of Harriet Miers’ nomination when the news media announced it—or only shortly before. I think he said he was called within an hour or so before the news announcement. That is much different than the consultation that took place with Senator Orrin Hatch and President Clinton, where President Clinton went to the ranking Republican—not even the Chair at that moment—and asked him for advice and consultation on the next Supreme Court nomination.

Judge Alito was nominated not as a product of bipartisan consultation with the Senate but, rather, as a payoff—or at least a satisfaction to the radical right who had turned their back on Harriet Miers’ nomination.

There is another crucial difference between Judge Alito and Judge Ginsburg. Despite some Republican Senators’ efforts to rewrite history, Judge Ginsburg was viewed at the time of her nomination as a moderate and centrist judge based on her dozen years of service on the Federal bench. In a National Public Radio news story dated June 18, 1993, a reporter named Nina Totenberg said as follows:

Why did the Republicans feel so comfortable base with Judge Ginsburg? The answer is that her judicial record shows her to be the most conservative Carter-appointed judge on the U.S. Court of Appeals here in the District of Columbia.

She’s considered a centrist, a swing vote. And in fact, a statistical analysis done in 1987 of that Court’s voting pattern shows Judge Ginsburg voting substantially more often with the court’s conservative Republican bloc of judges, led by then-Judge Robert Bork, than with the liberal Democratic judges.

Judge Alito, by contrast, has never been called a centrist judge. At least those who looked at his record have not called him that. He is not a judge who votes more often with his Democratic colleagues than his Republican colleagues. Far from it. Judge Alito is a staunch conservative and the most frequent dissenter on his court. When he dissents, it is almost always in a rightward and more conservative direction.

I spoke earlier about Judge Alito’s track record on civil rights. I talked about some of the cases in which he showed a particular insensitivity to those who came before his court without the trappings of power. In fact, Judge Alito, in many of those cases, was the sole dissenting judge. Because Justice O’Connor was the fifth and deciding vote on so many cases involving civil rights and racial justice, Judge Alito would tip the scales of justice on those issues if he is confirmed.

At this point, I ask unanimous consent to have printed in the RECORD a letter of January 6, 2006, from the Leadership Conference on Civil Rights that has been submitted in opposition to the confirmation of Judge Alito, signed by Dr. Dorothy Height, chairperson, and Wade Henderson, executive director.
There being no objection, the material was ordered to be printed in the Record, as follows:


Hon. ARLEN SPECTER, Chairman.
Hon. PATRICK J. LEAHY, Ranking Member,
Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR CHAIRMAN SPECTER AND RANKING MEMBER LEAHY: On behalf of the Leadership Conference on Civil Rights (LCCR), the nation’s oldest and most diverse civil and human rights coalition, we write to express our opposition to the confirmation of Judge Samuel A. Alito, Jr. as Associate Justice of the Supreme Court of the United States. The Supreme Court’s jurisprudence over the past 50 years has often served to protect the fundamental constitutional rights of all Americans. Judge Alito’s decisions, however, often stand in direct contrast to that jurisprudence and embrace a much more limited and narrow view of constitutional rights and civil rights guarantees. A careful examination of Judge Alito’s record reveals a history of troubling decisions in the areas of civil liberties, and fundamental freedoms, decisions that undermine the power of the Constitution and of Congress to protect the civil and human rights of all Americans. LCCR believes that Judge Alito’s record does not demonstrate an adequate commitment to protecting fundamental rights and, therefore, urges the Senate to reject his nomination.

The Supreme Court is the final arbiter of our laws, and its rulings can drastically impact the lives, liberties, and rights of all Americans. LCCR believes that an individual should be confirmed to the Supreme Court unless he or she has clearly shown a strong commitment to the protection of and adherence to civil and human rights, privacy, and religious freedom. The evidence reviewed to date shows that Judge Alito’s record in these areas is highly troubling. His overall record reveals a jurisprudence in which whose views are clearly to the right of where most Americans stand on a number of issues. Including the reach of civil rights laws, the constitutional rights afforded those within our criminal justice system, and the power of Congress to protect Americans in the workplace and elsewhere. In addition, Judge Alito is a scary choice for the Supreme Court because he has written decisions that are wildly at odds with core civil rights and constitutional principles.

JUDGE ALITO’S ”DISAGREEMENT” WITH SUPREME COURT RULINGS ON REAPPORTIONMENT

In an essay attached to a 1985 application for a position within the Department of Justice, Judge Alito stated that he had been motivated by his opposition to, among other things, the Warren Court’s rulings on legislative reapportionment. Because those rulings first articulated the fundamental civil rights principle of “one person, one vote,” and paved the way for major strides in the effort to secure equal voting rights for all Americans, his stated opposition to them is extremely troubling. It is vital to understand the context in which these cases were decided.

Prior to the 1960s, as urban areas throughout the country experienced rapid population growth, many state and federal legislative districts were often left to rural voters with far more representation per capita—and thus far more political power—than urban residents. In Florida, for example, the small town of Apalachicola could elect a majority of the state senate. While unequal districts affected all voters, their impact was especially harsh in the South, where, along with discriminatory requirements like poll taxes and literacy tests, malapportionment virtually guaranteed the exclusion of racial minorities from the democratic process. Until 1962, the federal courts generally refused to intervene, dismissing such matters as “political questions.”

The Supreme Court’s ruling in Baker v. Carr broke new ground when the Court declared, for the first time, that the federal courts had a role to play in making sure that all Americans have a constitutional right to participate in the political process. Equal protection, Sanderson, the Court examined Congressional districts in the State of Georgia, which had drawn its legislative map so that 223,680 people in the Atlanta area were all represented by one Congressman, while a rural Congressman represented only 272,154 people. The Court held that these disparities violated the Equal Protection Clause of the 14th Amendment, and ordered that the districts be redrawn more evenly. In Reynolds v. Sims, the Court applied the principle of “one person, one vote” to state legislatures, which, in many cases, had even more drastic malapportionment than Congressional districts. For example, the Reynolds case itself challenged Alabama’s legislative districts, in which one county with more than 600,000 people had only one senator, while another county with only 15,417 people also had its own senator.

In articulating the concept of “one person, one vote,” the so-called “Reapportionment Revolution” cases equalized political power between rural and urban areas, and ensured that every citizen would have an equal voice in the legislative process. Along with the passage of the Voting Rights Act of 1965 and its subsequent amendments, the decisions also paved the way to far greater representation of racial and ethnic minorities, at both the state and federal levels of government. They also helped open the door for legal challenges to the “at-large” and “multi-member” districts that many Southern states established in an effort to circumvent the Baker decision. The U.S. Supreme Court made clear that black and African American voters had a role in the democratic process.

The Warren Court decisions that established the constitutional principle of “one person, one vote” were a catalyst for tremendous progress in our nation’s efforts to secure equal voting rights for all Americans, and quickly became so accepted as a matter of constitutional law that they could fairly be described as “superprecedent.” Yet two decades later, long after most of the nation had moved on from the battle over the Voting Rights Act, Judge Alito still boasted of his opposition to it.

The fact that he would use his opposition as a “selling tactic” for a job in 1985 is disconcerting. Judge Alito seems to be unequipped to fully grasp his overall legal philosophy that deserves extensive scrutiny.

JUDGE ALITO’S NARROW READING OF ANTI-DISCRIMINATION AND OTHER WORKER PROTECTION LAWS

Judge Alito’s record also raises concerns about whether he would be a strong enforcer of our nation’s civil rights and labor laws. His decisions thus far in such cases show a pattern of narrow interpretations of the law, thus granting greater rights to employers and plaintiffs to prove discrimination and making it harder for the government to protect workers.

In a number of cases involving race, gender, disability, and age discrimination, Judge Alito was clearly to the right of his colleagues on the Third Circuit. In Bray v. Johnson, for example, a Third Circuit ruled that an African-American plaintiff who had been denied a promotion had shown a prima facie case of discrimination, but that a party must be a member of a protected group in order to prevail. Judge Alito was the lone dissenter in the en banc decision. Judge Alito acknowledged that adding evidence of disparate treatment to the jury’s consideration may still be appropriate in some cases. But Judge Alito would have reversed the Third Circuit, which had upheld the plaintiff’s discrimination claim.

In affirming a jury finding of sex discrimination, the Third Circuit had found that an African-American plaintiff who had been denied a promotion had shown a prima facie case of discrimination. Judge Alito was clearly to the right of his colleagues on the Third Circuit. In Bray v. Johnson, for example, a Third Circuit ruled that an African-American plaintiff who had been denied a promotion had shown a prima facie case of discrimination, but that a party must be a member of a protected group in order to prevail. Judge Alito was the lone dissenter in the en banc decision. Judge Alito acknowledged that adding evidence of disparate treatment to the jury’s consideration might still be appropriate in some cases. But Judge Alito would have reversed the Third Circuit decision.

Judge Alito’s narrow reading of anti-discrimination cases is troubling. As the Department of Justice, he helped defend the government in lawsuits that were instrumental in securing gains for workers. By siding with the company in Sheridan v. Medical College of Pennsylvania, a prospective medical student filed suit under the Rehabilitation Act of 1973, claiming that the school failed to accommodate her for a back injury. The trial court granted summary judgment in favor of the school, but the Third Circuit reversed on the Rehabilitation Act claim because there were different factual assertions that necessitated a jury trial. Judge Alito dissented, prompting his colleagues to write that under his standard he articulated. To reach this result, Judge Alito not only gave the employer the benefit of the doubt but failed to consider some of the most important evidence brought by the plaintiff. In Sheridan v. E.I DuPont de Nemours and Co., a gender discrimination plaintiff was de

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ship, a woman and her children were searched as they were entering premises that were the subject of a search warrant. The search warrant specified a location but there was no warrant for the suspect's wife, which led the majority to conclude that the warrant was deficient under the requirements of the Fourth Amendment. Judge Alito went on to rule that absolute immunity did not apply in the broad, troubling view expressed in Judge Alito’s memorandum.

Judge Alito’s overly deferential attitude toward law enforcement at the expense of privacy rights has been also evident in his argument that the FBI only turned on the surveillance, but this ruling disabused the FBI to invade the suspect’s privacy at any time. In Baker v. Monroe Townships, a woman and her children were searched as they were entering premises that were the subject of a search warrant. The search warrant specified a location but there was no warrant for the suspect's wife, which led the majority to conclude that the warrant was deficient under the requirements of the Fourth Amendment. Judge Alito went on to rule that absolute immunity did not apply in the broad, troubling view expressed in Judge Alito’s memorandum.

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Judge Alito’s reading of the law, in INS v. St. Cyr, because such an interpretation would raise serious constitutional questions. Also troubling is a 1986 letter Judge Alito wrote, as Deputy Assistant Attorney General, to former FBI Director William Webster in which he suggested, inter alia, that “illegal aliens have no claim to nondiscrimination in education, according to the Constitution’s equal protection clause.” 11th Amendment. In fact, his decisions show that he would go even further than the current Supreme Court in undercutting Congress’ ability to protect Americans.

In United States v. Rybar, the Third Circuit upheld the conviction of a firearms dealer for violating the federal law regulating interstate commerce by selling machine guns. The high court joined six other circuits in finding that the federal law banning the transfer or possession of machine guns to be a valid exercise of Congress’ power to regulate interstate commerce. But Judge Alito dissented, arguing that the Supreme Court’s recent decision in United States v. Lopez foreclosed such an exercise. In the gun-free school zone ban, made clear that this court had not have such power. The majority distinguished Lopez because it dealt with a small geographic zone—whereas the law at issue in Rybar applied nationwide. Judge Alito would have taken Lopez a step beyond to place further restrictions on Congress’ power to use its Commerce Clause authority to protect Americans from machine gun violence. Judge Alito’s extraordinarily narrow perspective of Congressional power expressed in his Rybar dissent raises serious concerns about whether he will uphold major and historically effective pieces of civil rights infrastructure such as the ban on discrimination in public employment or public accommodation in the Civil Rights Act of 1964, and whether he will hold a restrictive view of laws to move the country forward with additional civil rights laws such as hate crimes and non-discrimination legislation.

In Chittister v. Department of Community and Economic Development, Judge Alito’s majority opinion would have denied a state employee the benefits of the Family and Medical Leave Act of 1993 (FMLA). In this case, a state employee had sued after being fired for taking medical leave that had been approved pursuant to FMLA. A jury ruled in the employee’s favor against the university. The court reversed the verdict on the ground that the state was immune from suit under the 11th Amendment. On appeal, Judge Alito affirmed the ruling, claiming that Congress had not abrogated state sovereign immunity. The Supreme Court later reached an opposite conclusion from Judge Alito’s holding in its 2003 decision in Nevada Department of Human Resources v. Hibbs. The Court held that state employees could in fact sue their employers under the FMLA, a decision that Judge Alito, in dissent, was satisfied by some courts to validate the constitutionality of the entire law.

Judge Alito’s record in ACLU of New Jersey v. Black Horse Pike Regional Board of Education, 332 F.Supp.2d 474 (D.N.J. 2004) is equally disturbing. In this case, a school district—the Board of Education—for the sale of outlawed machine guns, or otherwise participating in the activities of the group.” This supposed lack of any recollection of being a member of CAP seems difficult, at best, to reconcile with the statements made in his 1985 job application essay—a statement in which he not only cited his membership in CAP, but actually relied on this claim of membership in an effort to bolster his conservative credentials.

CONCLUSION

The stakes could not be higher. The Supreme Court is choosing from among individuals with very different opinions on civil rights and civil liberties. The American people want and deserve to know that any new Supreme Court justice will be committed to protecting the nation’s freedoms, and will put our freedoms ahead of any political agenda. Unfortunately, Judge Alito’s record not only fails to show such a commitment, but also raises serious doubts.

In addition, we also have doubts about whether Judge Alito will, at his confirmation hearings, address the above concerns in a fully open and candid manner. For instance, Judge Alito has given numerous shifting and conflicting reasons for why he does not, as he promised before being confirmed to the Third Circuit, recuse himself from cases involving the Vanguard companies, in which he had financial holdings. Furthermore, Judge Alito has also recently tried to dismiss a number of troubling statements in his 1985 job application, such as his disagreement with the Warren Court’s reapportionment cases, by suggesting that his statements should not be taken seriously because he was simply applying for a job. Finally, as discussed above, Judge Alito has also attempted to disassociate himself from the radical group Concerned Alumni of Princeton, even though he himself proudly claimed to be a member in 1986. These incidents only raise doubt about Judge Alito’s responses to tough questions about his record and his legal philosophy can be completely believed when his confirmation hearings begin next week.

For the above reasons, we must oppose his confirmation as Associate Justice. We appreciate your consideration of our views. If you have any questions, please feel free to contact LCCR Deputy Director Nancy Zirkin at (202) 263-2989, or LCCR Executive Director Wade Henderson, at 703-774-6038. We look forward to working with you.

Sincerely,

DR. DOROTHY L. LIGHTGHT,
Chairperson.

WADE HENDERSON,
Executive Director.
Mr. DURBIN. Mr. President, there is another aspect of Judge Alito’s record that is equally troubling, and that is his failure to show that he will protect the average American from the overreaching hand of government.

I quote him: He is dedicated to protecting the privacy rights of individuals from government officials in many critical areas of our lives. For example, I share the concern of many of my colleagues about Judge Alito’s decision in the case of a police officer who conducted a strip search of an innocent 10-year-old girl. The police officer, who did not have a valid search warrant in the opinion of a majority of the judges on Judge Alito’s court, took the 10-year-old girl and her mother into a bathroom, ordered them to empty their pockets, and then ordered the young girl and the mother to lift their shirts and drop their pants—a 10-year-old girl. A majority of the judges on Judge Alito’s court said that went too far; the search was not authorized law. Judge Alito saw it differently. He was the only judge on the court to say that the Constitution permitted this search.

The majority opinion in this case, incidentally, was written by Michael Chertoff, the current Federal Commissioner. Chertoff, a conservative Republican, today is in the President’s Cabinet as the head of our Department of Homeland Security. Judge Chertoff, writing the majority opinion, said that what was done was wrong, and Judge Alito’s decision was wrong.

In the context of reproductive freedom, I am troubled about whether Judge Alito accepts some of the basic rights of personal privacy. One of the cases which we should not forget was decided some 41 years ago by the Supreme Court. The case was Griswold v. Connecticut.

As hard as it may be to believe, there was a time when couples in the State of Connecticut and in many other States, including my home State of Illinois, at that time which made it a crime for a married couple to buy birth control devices or for a doctor to prescribe them or for a pharmacist to fill the prescription. It was a crime for married couples to engage in family planning by buying any type of birth control device. It is hard to believe. That was America in the 1960s.

The Supreme Court took a look at this case and said that is wrong. There was built into our rights as a citizen the right of privacy, and that privacy goes to those intimate, personal decisions made by individuals—in this case, husbands and wives—in the State of Connecticut. They struck down the Connecticut statute.

I asked Judge Alito what he thought about this Griswold decision and this right of privacy. He was willing to say that Griswold was settled law. But, of course, Griswold v. Connecticut and the right of privacy was the basis of a decision made a few years later in Roe v. Wade. In that particular case, the Supreme Court built on this concept of a right of privacy and said that for a woman making the most important and personal decision of her life, in terms of the continuing of a pregnancy, she had a protected status in certain stages of the pregnancy. That was a decision which was handed down over 30 years ago—33, as a matter of fact.

So we asked Judge Alito if he accepted that Griswold v. Connecticut, which established the right to privacy, was settled law in America, and did he also accept that which followed, was settled law? He repeatedly refused to provide us with that assurance about this landmark decision.

What a contrast to John Roberts, who, just a few months before when he was nominated for the Chief Justice position on the Supreme Court and was asked the same question, said that he believed Roe v. Wade was settled precedent in America. That is a defining difference between these two nominees and an important one.

If Judge Alito is confirmed, there are very serious questions about what will happen with the right of privacy in America, not just for the women who could be affected by these decisions but for everyone. If he confirms, Judge Alito will have to decide what limits, if any, the Constitution puts on the President’s authority over all of us.

Based on his record, I am concerned that Judge Alito will not be willing to stand up to a President who is determined to seize too much power over our personal lives. In speeches to the ultraconservative Federalist Society which Judge Alito bragged about belonging to in the 1980s, Judge Alito has said he is a “strong proponent” of the theory of “unitary Executive.” It is another phrase you won’t find in the Constitution. He even criticized the Supreme Court, specifically Chief Justice Rehnquist, for failing to defer to this theory. During his hearings, Judge Alito said he still supports key elements of the theory today and indicated he will follow it, to some degree, in making his decisions.

The same unitary executive theory has been the basis for many claims by the Bush administration that they had the Executive power to make some of the most controversial decisions of their Presidency, including the war on terrorism, the use of torture, and the power to eavesdrop on our phone conversations without court approval, as required by law.

Based on the unitary executive theory, the Bush administration has claimed the right to seize American citizens and imprison them indefinitely without charge. In his book, the Supreme Court, in an opinion written by Justice Sandra Day O’Connor, rejected this policy. Only one Justice
voted to uphold the administration's decision. That Justice, Clarence Thom- as, based his dissent on the unitary ex- ecutive theory, the same general the- ory to which Judge Alito says he sub- scribes.

It appears that if Judge Alito is ap- proved for the Court, he will join Jus- tice Thomas and Justice Scalia as only the third Supreme Court Justice who has announced public support for this fringe theory called the unitary executive theory which gives more and more power to the President and less restrains of law on his activities.

The Supreme Court is supposed to be a check on the power of the President. The Court's role is to interpret the Constitution, not to advance some marginal theory of the Federalist Soci- ety or any other special interest group. During his hearings, Judge Alito did attempt to distinguish his position on the unitary executive theory from the Bush administration's, but he refused to say whether he agreed with Judge Alito's dissent in Hamdi, and he repeatedly refused to say whether this President or any President has the right to disregard a law passed by Con- gress. Several Senators asked Judge Alito about this directly, and several times he gave the same carefully worded re- sponse—and I quote it:

The President must take care that the statutes of the United States that are con- sistent with the Constitution are complied with.

Here is what we don't know about that statement: If the President claims that a law is not consistent with the Constitution, can he ignore the law with impunity? And if Judge Alito is on the Supreme Court, is that how he would rule? That certainly is the way he answered the question.

Presidents often issue formal state- ments when they sign a law. When Judge Alito was an attorney in Presi- dent Reagan's Justice Department, he advocated the use of Presidential sign- ing statements to, in his own words, "increase the power of the Executive to shape the law." In this way, Sam Alito argued "the President will get in the last word on questions of interpreta- tion."

The Framers of our Constitution didn't see it the same as Judge Alito. They said Congress was to have the last word.

The Bush administration has adopted Judge Alito's proposal. In more than 100 presidential signing statements, the Bush administration has cited unitary executive theory and pledged to uphold the law if it doesn't conflict with this theory.

Just 3 weeks ago, we saw a good il- lustration. The White House issued a Presidential signing statement claim- ing that the President could set aside the McCain torture amendment which Congress passed overwhelmingly in De- cember. Under what rationale could a President ignore a law that passed in this Chamber 90 to 9? The White House claimed the President has the power under the "unitary executive theory." So hold on to your seats, America. If Judge Alito goes onto the Court push- ing this theory that was inspired by the Federalist Society saying this President has ever had, it will consoli- date more power in the executive branch than our Founding Fathers ever imagined.

Does any President have the power to ignore the McCain torture amendment or FISA, the law that requires court approval to wiretap American citizens? Based on his record, I am fearful that Judge Alito, facing these questions, is more likely to defer to the President's power than defend our fundamental constitutional rights.

I will speak more to this issue about wiretaps in a moment.

I also fear that Judge Alito, if con- firmed, would blur the traditional line between church and state. In his 1985 job application essay, he indicated his disapproval of the Warren Court deci- sions on the establishment clause of the Constitution.

What is the establishment clause? In the first amendment, the Constitution makes clear that we have the freedom of religious belief. Of course, that means each of us has the right under the law, under our Constitution, to be- lieve any religious belief or to hold to no religious belief. That is our basic freedom. It says: Congress shall make no law respecting an establishment of religion. . . .

This was an understandable part of our Constitution because many of our Founding Fathers hailed from England, which had an official national church. They wanted to make it clear that there would be a separation, a clear wall of separation between church and state, as Thomas Jefferson said in the early 1800s.

The Warren Court, led by Earl War- ren, as Chief Justice, struck down govern- ment-sponsored prayer and govern- ment-sponsored devotional Bible read- ing in public schools, arguing that it violated the establishment clause. The decisions by the Warren Court were nearly unanimous. They stood for the proposition, as the Constitution said, that our government must be neutral toward religion in order to maintain this healthy separation of church and state.
That is the end of the quote, April 20, 2004, after the President had initiated this NSA wiretapping that is not approved by law and does not use a court order.

When President Bush concluded over 4 years ago that he wanted to eavesdrop on Americans without the court approval required by law, he had an obligation to come to Congress and ask us to change the law.

Congress has always been a willing partner when the President has requested additional authority to fight terrorism. I can recall the President, within days of 9/11, asking for an authorization for the use of force by this Congress to go after Osama bin Laden and al-Qaeda, which I readily voted for. There was unanimous support for a bipartisan resolution which passed the Senate.

Shortly thereafter, the President came to Congress and asked us to pass the PATRIOT Act. It was an act that gave the Government more authority, more tools, more legal ways to go after terrorism in the United States. It was overwhelmingly approved with only one dissenting vote in the Senate. Within the PATRIOT Act, the President asked for some changes in this FISA law to make it easier to wiretap terrorists.

So the administration at this point seems to concede the point that they were bound by this law and were looking for changes so they could use it, in their words, more effectively. We tried to accommodate them as much as we possibly could. We asked Congress to pass this bill, we cooperated with them. Members of Congress from both sides of the aisle were happy to work with the President to keep America safe.

That is not what the President has done here. Instead, we have learned that the President has not followed even the law that he asked us to change. He claims the power to eavesdrop on the phone conversations of Americans and e-mails without any court approval, without any legal authority.

That raises fundamental questions. Is this President or any President above the law? Does the President have the authority to disregard laws passed by Congress, whether it is the question of torture or eavesdropping? Can Congress place any limits on the President's power over our lives?

Tom Daschle is a distinguished minority leader, Senator HARRY REID, and my colleagues, Senators KENNEDY and FEINGOLD, and sent a letter to President Bush. We have urgently requested that the President notify us immediately of the changes in the law that he believes are necessary to permit effective surveillance of suspected terrorists and why these changes are needed.

I ask unanimous consent that this letter be printed in the RECORD.

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


President GEORGE W. BUSH, The White House, Washington, DC.

Dear President Bush: We strongly support efforts to do everything possible, within the limits of the law, to combat terrorism. We are, however, troubled that sometime in 2001, in apparent violation of federal law, you authorized the National Security Agency (NSA) to eavesdrop on Americans in the United States without court approval.

When you concluded over four years ago that existing law did not give you sufficient authority to conduct this program, you had an obligation to propose changes in the law to Congress. Rather than doing so, you have apparently chosen to ignore the law.

We urgently request that you notify us immediately what changes in the law you believe are necessary to permit effective surveillance of suspected terrorists, and why these changes are needed.

The Foreign Intelligence Surveillance Act (FISA) gives the government broad authority to wiretap suspected terrorists. Federal law provides that FISA and the criminal wiretap statute "shall be the exclusive means by which electronic surveillance . . . and the interception of wire, oral, and electronic communications may be conducted." 18 U.S.C. § 2511(2)(f). FISA makes it a crime, punishable by up to five years in prison, to conduct overseas electronic surveillance except as permitted by statute. 50 U.S.C. § 1809.

In fact, you have recognized that it is improper to subject Americans in the United States to warrantless wiretapping. In a speech on April 20, 2004, you said: "Now, by the way, any time you hear the United States government talking about wiretap, it requires—a wiretap requires a court order. Nothing has changed, by the way. When we're talking about chasing down terrorists, we're talking about getting a court order before we do so."

You and officials in your administration have repeatedly asserted that FISA does not provide adequate authority to monitor suspected terrorists. However, FISA authorizes monitoring suspected terrorists, who are the purported targets of NSA's warrantless wiretaps. Moreover, FISA includes an emergency exception for situations where there is insufficient time to obtain judicial approval before beginning a wiretap. This exception allows the government to conduct electronic surveillance immediately, as long as it seeks a court order within 72 hours. 50 U.S.C. § 1805(f).

FISA makes it clear that existing law did not give you enough authority to combat terrorism, you should propose changes in the law to Congress. You may not simply disregard the law.

In your December 19, 2005 press conference, you called FISA "a very important tool." FISA is more than a tool; it is a law, and we are a nation of laws. Under Article I of the Constitution, Congress has the power to make laws. Under Article 2 of the Constitution, you must take care that the laws are faithfully executed.

In order to win the war on terrorism, we must maintain the high ground by respecting the rule of law as embodied in our Constitution. To do otherwise makes us weaker as a nation and harms our national security.

The Supreme Court long ago rejected the notion that there is a wartime exception to the Constitution's separation of powers. As the Court concluded in the historic Youngstown Steel case: "The Constitution is neither silent nor equivocal about who shall make the laws. In the Declaration of Independence, the Founders of this Nation entrusted the lawmaking power to the Congress alone in both our national and our local government.

In light of the very serious nature of this matter, we request that you respond to this letter as soon as possible, and, in any case, no later than February 1, 2006.

Sincerely,

HARRY REID, U.S. Senator.

EDWARD M. KENNEDY, U.S. Senator.

RICHARD J. DURBAN, U.S. Senator.

RUSSELL D. FEINGOLD, U.S. Senator.

Mr. DURBIN. The President cannot continue to simply disregard the law.

At a press conference on December 19, 2005, President Bush called FISA "a very important tool." I would say to the President, FISA is more than a tool. It is a law, and we are a nation of laws.

Our Constitution separates powers between different branches of Government. Under article I of the Constitution, Congress has the power to make laws. Under article 2 of the Constitution, the President must take care that the laws are faithfully executed.

The Supreme Court has faced questions like this in the past, questions regarding the powers of the President in the midst of a war. During the Korean war, President Harry Truman violated the law by seizing America's steel mills to aid the war effort. In the historic Youngstown Steel case, the Court rejected President Truman's actions and concluded:

The Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times.

In order to win the war on terrorism, we must maintain the high ground by respecting our Constitution and repecting the laws of the land. To do otherwise makes us weaker as a nation and harms our national security.
And that is what is at stake with this Supreme Court nomination. Judge Sam Alito, from his early days in the Reagan administration, through the rulings in his court and his testimony before the Judiciary Committee, time and again seems to defer to the Executive's assertions of power. At this moment in history, like none other in recent times, that is a critical and timely issue. We have to ask the question, would this judge on the Court protect our basic personal freedoms, or would he give to this President power to ignore the law?

Last week Attorney General Gonzales issued a long memo supporting the administration's position on the NSA spying program. That memo went so far as to suggest that this administration is not even bound by the PATRIOT Act. It suggests that the President can use the powers authorized by the PATRIOT Act without even the limited checks and balances contained in the PATRIOT Act, regardless of what Congress says.

So what has happened is the administration has taken from the question of torture to this whole question of eavesdropping, and now has suggested that this President has the authority to do whatever he cares to do in the name of his power as Commander in Chief.

The Supreme Court in the past has not agreed with Presidents who have tried to seize that much power. President Truman learned that the hard way. I am hopeful this Supreme Court will respect the Constitution and reject the President's power to restrain this President or any President who tries to move that far and that fast.

So it comes down to this with the Alito nomination. I am afraid as we look carefully at his record it is clear that he would allow the Government to go too far, to intrude on our personal privacy and our freedoms. I am afraid that he would take the country in the wrong direction and when it comes to women's rights, that record is clear. I am afraid that his record, as I mentioned earlier on the floor today, is evidence that when he is given a choice between ruling in court for an established institution—whether it is a business or a government—or standing with a consumer or an individual, he consistently rules for the established institution. I am afraid that the 1985 memo, which became a large part of his recent hearing, still guides Judge Alito in many respects.

I think the fact that Harriet Miers was rejected by so many conservative groups and the President had to withdraw her nomination has to be taken into consideration here. Judge Sam Alito, the successful nominee. The same groups that had rejected her accepted Sam Alito. They know or believe they know what I have spoken of this evening, that his is a philosophy that is outside the mainstream, that is not consistent with the fine record written by Justice Sandra Day O'Connor.

Mrs. BOXER. Mr. President, yesterday in Burbank, CA, I gave a major address before my constituents announcing my opposition to the nomination of Samuel Alito to the Supreme Court of the United States.

To me it is not because I am announcing my opposition to the nomination of Samuel Alito to the Supreme Court of the United States.

According to article II of the Constitution, Justices of the Supreme Court are not appointed by the President without the advice and consent of the Senate. So it is our solemn duty to consider each nomination carefully, keeping in mind the interests of the American people.

This nomination is particularly crucial because the stakes have rarely been so high.

First, consider the context in which this nomination comes before us. The seat that Judge Alito has been nominated for is now held by Justice Sandra Day O'Connor, who came to the Court in 1981.

For years, Justice O'Connor has provided the tie-breaking vote and a commonsense voice of reason in some of the most important cases to come before the Court. I am very proud that the American dream was there for the Alito family.

But after reviewing the hearing record and the record of his statements, writings and rulings over the past 24 years, I am convinced that Judge Alito is the wrong person for this job.

I am deeply concerned about how Justice Alito will impact the ability of other families to live the American dream to be assured of privacy in their homes and their personal lives, to be secure in the governed, to live in their community, to have fair treatment in the workplace, and to have confidence that the power of the executive branch will be checked.

As I reviewed Judge Alito's record, I asked whether he will vote to preserve the fundamental American liberties and values.

Will Justice Alito vote to uphold Congress's constitutional power to pass laws to protect Americans' health, safety, and welfare? Judge Alito's record says no.

In the 1996 Rybar case, Judge Alito voted to strike down the Federal ban on the transfer or possession of machine guns because he believed it exceeded Congress's power under the Commerce Clause. His Third Circuit colleagues sharply criticized his dissent and said that it ran counter to "a basic tenet of the constitutional separation of powers." And Judge Alito's colleagues on the Fifth Circuit, the Sixth Circuit, the Eleventh Circuit, and the Supreme Court have all disagreed with him.

In a case concerning worker protection, Judge Alito was again in the minority when he said that Federal mine health and safety standards did not apply to a coal processing site. He tried to explain it as just a "technical issue of interpretation." I fear for the safety of our workers if Judge Alito's narrow, technical reading of the law should ever prevail.

Will Justice Alito vote to protect the right to privacy, especially a woman's reproductive freedom? Judge Alito's record says no.

We have all heard about Judge Alito's 1985 job application, in which he wrote that the Constitution does not protect the right of a woman to choose. He was given the chance to disavow that position during the hearings and he did not. He tried to say, as Judge Roberts did, that Roe v. Wade is settled law, and he refused. He had the chance to explain his dissent in the Casey decision, in which he argued that the Pennsylvania spousal notification requirement was not an undue burden on a woman seeking an abortion because it would affect only a small number of women, but he refused to back away from his position. The Supreme Court, by a 5 to 4 vote, found the Pennsylvania law unconstitutional.

Will Justice Alito vote to protect Americans from unconstitutional searches? Judge Alito's record says no.

In Doe v. Groody in 2004, he said a police strip search of a 10-year-old girl was lawful, even though the search warrant didn't name her. Judge Alito said that even if the warrant did not actually authorize the search of the
girl, "a reasonable police officer could certainly have read the warrant as doing so . . ." This casual attitude toward one of our most basic constitutional guarantees—the fourth amendment right against unreasonable searches and seizures—shocked me. As did Judge Alito’s own Third Circuit Court said regarding warrants, "a particular description is the touchstone of the Fourth Amendment." We certainly do not need Supreme Court Justices who do not understand this fundamental constitutional provision.

Will Justice Alito vote to let citizens stop companies from polluting their communities? Judge Alito’s record says no.

In the Magnesium Elektron case, Judge Alito voted to make it harder for citizens to sue for toxic emissions that violate the Clean Water Act. Fortunately, in another case several years later, the Supreme Court rejected the Third Circuit and Alito’s narrow reading of the law. Judge Alito doesn’t seem to care about a landmark environmental law.

Will Justice Alito vote to let working women and men have their day in court against employers who discriminate against them? Judge Alito’s record says no.

In 1997, in the Bray case, Judge Alito was the only judge on the Third Circuit to say that a hotel employee claiming racial discrimination could not take her case to a jury.

In the Sheridan case, a female employee sued for discrimination, alleging that after she complained about incidents of sexual harassment, she was demoted and marginalized to the point that she was forced to quit. By a vote of 10 to 1, the Third Circuit found for the plaintiff.

Guess who was the one? Only Judge Alito thought the employee should have to show that discrimination was the "determinative cause" of the employer’s action. Using his standard, it would make it almost impossible for a woman claiming discrimination in the workplace to get to trial.

Finally, will Justice Alito be independent from the executive branch that appointed him, and be a vote against power grabs by the president? Judge Alito’s record says no.

As a lawyer in the Reagan Justice Department, he authored a memo suggesting the President could invade another country, in the absence of an imminent threat, without first getting the approval of the American people, of Congress, Judge Alito refused to rule it out.

When asked if the President had the power to authorize someone to engage in torture, Alito refused to answer.

The admirably clear overreach in asserting vast powers, including spying on American citizens without seeking warrants—in clear violation of the Foreign Intelligence Surveillance Act—violating international treaties, and ignoring laws and treaties. We need Justices who will put a check on such overreaching by the executive, not rubberstamp it. Judge Alito’s record and his answers at the hearings raise very serious doubts about his commitment to being a strong check on an "imperial President."

In addition to these substantive matters, I remain concerned about Judge Alito’s answers regarding his membership in the Concerned Alumni of Princeton and his failure to recuse himself from the Vanguard case, which he had promised to do. During the hearings, we all felt great compassion for Mrs. Alito when she became emotional and reactive to the tough questions her husband faced in the Judiciary Committee. Everyone in politics knows how hard it is for families when a loved one is asked tough questions. It is part of a difficult process, and whose personal politics is not for the faint of heart was right.

Emotions have run high during this process. That is understandable. But I wish the press had focused more on the tears of those who will be affected if Judge Alito becomes Justice Alito and his out-of-the-mainstream views prevail.

I worry about the tears of a worker who, having failed to get a promotion because of discrimination, is denied the opportunity to pursue her claim in court.

I worry about the tears of a mentally ill woman who is forced by law to tell her husband that she wants to terminate her pregnancy and is afraid that he will leave her or stop supporting her.

I worry about the tears of a young girl who is strip searched in her own home by police who have no valid warrant.

I worry about the tears of a mentally retarded man, who has been brutally assaulted in his workplace, when his claim of workplace harassment is dismissed by the court simply because his lawyer failed to file a well-written brief on his behalf.

These are real cases in which Judge Alito has spoken. Fortunately, he did not prevail in these cases. But if he goes to the Supreme Court, he will have a very powerful voice—a radical voice that will replace a voice of moderation and balance.

Perhaps the most important statement Judge Alito made during the entire hearing process was when he told the Judiciary Committee that he expects to be the same kind of Justice on the Supreme Court as he has been a judge on the Circuit Court.

That is precisely the problem. As a judge, Samuel Alito seemed to approach his cases with an analytical coldness that reflected no concern for the human consequences of his reasoning.

When asked to what he said about a case involving an African-American man convicted of murder by an all-White jury in a courtroom where the prosecutors had eliminated all African-American jurors in many previous murder trials as well.

Judge Alito dismissed this evidence of racial bias and said that the jury makeup was no more relevant than the fact that left-handers have won five of the six Presidential elections. When asked about this analogy during the hearings, he said it "went to the issue of statistics ... (which) is a branch of mathematics, and there are ways to analyze statistics so that you draw sound conclusions from them."

That response would have been appropriate for a college math professor, but it is deeply troubling from a potential Supreme Court Justice.

The great jurist and Supreme Court Justice Oliver Wendell Holmes, Jr. wrote in 1981, “The life of the law has not been logic; it has been experience ... The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.”

What Holmes meant is that the law is a living thing, that those who interpret it must do so with wisdom and humanity, and with an understanding of the consequences of their judgments for the lives of the people they affect. It is with deep regret that I conclude that Judge Alito’s judicial philosophy lacks this wisdom, humanity and moderation. He is simply too far out of the mainstream in his thinking. His opinions demonstrate neither the independence of mind nor the depth of heart that I believe we need in our Supreme Court Justices, particularly at this crucial time in our history.

That is why I will oppose this nomination.