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

The Republican stamp on the current Court is undeniable, and clearly the prospects of the Court becoming more moderate in the near future are unlikely. Upon this backdrop, I have evaluated the decisions and writings of Judge Alito, closely watched the nomination hearing in the Senate Judiciary Committee, and listened to the statements of many colleagues on his nomination. I have come away from this review with a number of concerns.

First, Judge Alito did not provide complete answers on many important topics. And it was for a reason that is not only for this generation but for the next generation and the following. It is on a nomination for the Supreme Court of the United States and whether we are going to move ahead and have a final vote tomorrow.

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

Third, Judge Alito’s record includes troubling decisions on vital issues such as search and seizure, reproductive rights, the power of Congress, civil rights, and affirmative action. Because of these facts, I have concluded that the addition of Judge Alito to the Supreme Court would unacceptably shift the balance of the Court on many critical questions facing our country, such as:

- Are there limits on the power of the presidency?
- Can the Congress regulate the activities of the states?
- How expansive is the right to privacy?
- What deference should be given to legislative acts of the Congress?
- How the Court addresses these questions goes to the heart of what we stand for as a country, which is why this nomination is so important.

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

I yield the floor.

---

**EXECUTIVE SESSION**

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

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will proceed to executive session and resume consideration of Calendar No. 490, which the clerk will report.

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

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

That is where I looked with regard to this nominee. That is why I came to the conclusion that this judge is not going to be friendly to the average worker, friendly on women’s rights, friendly on the issues of race, friendly on the issues of the environment, and would no doubt be willing to accede to a Presidential plan to rubberstamp decisions of the Supreme Court.

I remember the time when the President announced the nomination of Judge Alito. It was in the early morning. I happened to be up in Massachusetts and was not aware that an announcement would be made. I didn’t know Judge Alito. Certainly the representation was that there is a wide open kind of net that has been spread out across the country to try to find the very best in our Nation who would be a good nominee. I have voted for seven Republican nominees for the Supreme Court. We have had a great many of those nominees who were virtually unanimous in this body—Democrats and Republicans voting together. That is what I think all of us were hoping for. We had seen the fiasco that had taken place with Harriet Miers. We saw groups in this country that were prepared to exercise a veto. We have seen groups in or outside the Senate that were prepared to exercise a litmus test. We have seen groups that have said absolutely, no, we are not going to have Harriet Miers. These are the same groups that indicated for so long that nominees are entitled to a vote up or down. We ought to be able to look at a nominee’s judicial philosophy and all the rest. All of those issues went right out the window when Harriet Miers was nominated. The reason was because Harriet Miers didn’t pass a litmus test. Now we have Judge Alito. Before the announcement ended, we see this extraordinary wave of support that has come over in terms of support for this nominee. I wonder how people could be so opposed to Harriet Miers and, as soon as Judge Alito was announced, how they could be so overwhelmingly in favor of him. What did they know? Who knew?

One of the things I think of is what our Founding Fathers wanted. What did the Constitution say on this issue? The Founding Fathers, in debating the Constitution, considered the issue of appointment of judges four different times. On three occasions they gave all the authority to this body here, the Senate, to recommend and appoint. The last important decision at the Constitutional Convention—10 days before the end of the power—was with the Executive having the power to appoint and the Senate having the power to give advice and consent. You cannot read the debates, which I have read, and not understand that it was a shared responsibility, a shared idea, namely that the Senate is supposed to be a rubberstamp. I know it suits their interest, but our Founding Fathers wanted the shared responsibility.

Remember the checks and balances, the checks on the Constitution of the United States? When they give authority and power in one place, they give authority and power to the other—the Commander in Chief, Executive, making of war; with the Congress, the power of the purse, and the rest of the issues we all are familiar with. This is a shared responsibility, and we in this Senate have a very important constitutional obligation to review the recommendation. The real question for us is whether we have a nominee is to find out—not for ourselves, but as instruments for the American people—what the beliefs of this nominee are; what are the real beliefs are of the nominee for the Supreme Court of the United States; do we have the assurances that this individual is the best of the best. We have seen that. President Reagan gave us Sandra Day O’Connor, who was the best of the best. The list went on. We have had extraordinary jurists in the past. We approached this to try to find out these things on the Judiciary Committee. We have a pretty good sense that the executive branch knows the philosophy of this nominee. They have made the recommendation and obviously they have inquired of this nominee, so they know where he is.

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

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

IN ALITO, G.O.P. REAPS HARVEST PLANTED IN 82

(By David D. Kirkpatrick)

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

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

I “boxed in,” one lawyer present during the strategy meetings said with pride in an interview over the weekend. This lawyer and others present who described the meetings were grants of confidentiality because the meetings were confidential and because the team had told its allies not to exult publicly until the confirmation vote was cast.

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

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

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

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

Judge Alito’s confirmation is also the culmination of a disciplined campaign begun by the Reagan administration to seed the lower federal judiciary with like-minded jurists who could reorient the federal courts toward a view of the Constitution much closer to its 18th-century authors’ intent, including a much less expansive view of its application to individual rights. That was a philosophy promulgated by Edwin Meese III, attorney general in the Reagan administration, that became the goal of the Federalist Society and the nascent conservative legal movement.

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

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

As each progressed in legal stature, others were laying the infrastructure of the movement. While the defeat of the Supreme Court nomination of Judge Robert H. Bork conservatives vowed to build a counterweight to the liberal forces that had mobilized them.

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

During their narrow and politically costly victory in the 1991 confirmation of Justice Clarence Thomas, the Federalist Society lawyers forged new ties with the increasingly sophisticated network of grassroots conservative Christian groups like Focus on the Family in Colorado Springs and the American Center for Law and Justice in Atlanta. Multi-story offices like the John M. Olin Foundation, the conservative bar association, plant- ing organizers, public relations specialists, and legal strategists met to prepare a battle plan to ensure any vacancies were filled by like-minded jurists.

So the right wing had a plan. They knew what they were going to do. The article continues:

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

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

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

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

This lawyer and others present who described the meeting were granted anonymity because the meetings were confidential and because the team had told its allies not to exult publicly until the confirmation vote was cast.

This is it. This is the story. Although I was surprised that—and this would be my 23rd Supreme Court nomi-inee—the nominee was up in the Capitol last week thanking Senators for their support and receiving congratulations prior to the time we even vote on him. It has been debated for less than a week on the floor of the Senate. Twenty-five Senators from our side have spoken. Only half of our caucus had a chance to speak. They will not speak now if we cut it off. They have not had a chance to talk. Again, the article says:

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

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

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

They drew from a newly formed group, the Judicial Confirmation Network, to coordinate grassroots pressure on Demo- cratic senators from conservative states. And they used constant contact with scores of conservative groups around the country toBrief them about potential nomi-}

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

They then will pop the champagne and say we pulled one over on you. And it continues: “They laid out a two-part strategy to roll out behind whoever the President picked, people present said. The plan: first extol the nonpartisan legal credentials of the nominee—steering the debate away from the nominee’s possible influence over hot-button issues. Second, attack the liberal groups they expected to oppose any Bush nominee.”

They drew from a newly formed group, the Judicial Confirmation Network, to coordinate grassroots pressure on Demo- cratic senators from conservative states. And they used constant contact with scores of conservative groups around the country to Brief them about potential nomi-
... steering the debate away from the nominee’s possible influence over hot-button issues. Second, attack the liberal groups they expect to oppose any Bush nominee.

There it is, that is the strategy. It is not that we are going to nominate the best possible nominee but that is what we are going to work with Republicans and Democrats alike to make sure the American people understand how this nominee is going to protect your constitutional rights and liberties. That is what Judge Alito were inclined to shrug off the Alito confirmation hearings. He had a number of statements about the Constitution. This was not what the American people expect and what they are entitled to.

But, oh, no, this group is already saying we know how we are going to handle this, whoever it is. We are going to exalt the assets of this nominee. The other thing is we are going to launch our attacks on other people before the nominee is even out there. This is the confirmation process for the Supreme Court of the United States for a nominee who is going to make the decisions on your rights and liberties for the next 30, 40 years? Attack them as soon as the nomination is out there. Exalt the nominee’s professional credentials. We do not know who it is, but you better get them out there doing it, and we have our network wired around the country to make sure they are going to come out right on it. This for the Supreme Court of the United States? This is the confirmation finding out.

It continues:

Mr. Leo and other lawyers supporting Judge Alito were inclined to shrug off the memorandum.

This is the 1985 memorandum of Judge Alito that he used in an application for a job with the Justice Department. He was 35 years old. He had argued 15 cases before the Supreme Court. He had a number of statements in there that were provocative. I will come back to that.

This memorandum was provocative because it indicated that he was against a woman’s right to choose, he was against reapportionment, which, of course, has had enormous importance in terms of ensuring people’s right to vote and have that vote counted in a meaningful way. There was some concern whether this was going to have any impact. This was his real, true view about the Constitution. This was a document which showed his real view about the Constitution. This was a big deal that could become the centerpiece of the Democrats’ attacks, one of the people said.

Those lawyers supporting Alito said we will shrug off the memo:

... which described views which were typical of people involved in the effort said. But the Conservative Response Concepts, the team’s public relations firm, quickly convinced them it was “a big deal” that could become the centerpiece of the Democrats’ attacks, one of the people said.

Creative Response Concepts. Who is this Creative Response Concepts? The Creative Response Concepts, if you look them up on the Web, right above the Alito confirmation hearings is the Swift Boat Veterans for Truth—Swift Boat Veterans for Truth, the ones who made the distortions and misrepresentations about my colleague and friend, John Kerry, and his war record. They’re right. They’re wrong.

They are now advertising the Alito confirmation hearings. They say, Let us get in it, and into it they go.

The American people are entitled to listen to those who believe in the nominee, and look on the other side. No, we are getting our message right through a PR firm, Creative Response Concepts. We are getting our truth right through them. The American people are going to understand his views of constitutional rights and liberties from Creative Response Concepts. When we finish doing the Swift Boat Veterans for Truth, we have the Alito nomination right here. This is what the American people are entitled to?

The team’s public relations firm quickly convinced them it was “a big deal” that could become the centerpiece of the Democratic’s attacks, one of the people said.

The article continues:

This is a difficult process to make a judgment and be fair to the nominee and also carry forward our responsibilities. But when we have the kind of action on the outside and the failure to be responsive on the inside, in terms of his response to questions, this is a disservice to the American people.

This has been a longstanding campaign. It has been a stealth campaign. I daresay that is not what the Founding Fathers intended, that is not what they expected, and the American people deserve a great deal better.

I hope people will have the chance to read the whole article. I am not going to go through it now. I have given the example of how this nominee was selected, why he was selected, and how that campaign for him was conducted.

As the American people are trying to make a judgment on this through their elected representatives today and tomorrow, all we are asking for is an opportunity to have the kind of full discussion and full debate that we ought to and that Members of the Senate who have not had a chance to speak have an opportunity. It is not asking too much.

I have been in the Senate when we really had filibusters. The idea that we are here on a Monday and this came to the Senate last Wednesday and the opposition is saying, Oh, well, this is delaying the work of the Senate—what is important to the Senate than a vote for a Justice of the Supreme Court of the United States? What is more important? This is the issue, this is the time, this is the nominee, and we find out how it has been treated.

This body deserves better, and the American people deserve better. That is what this vote is this afternoon. That is what it is about. Let’s really find out. Let’s have a chance to go through these cases and this nominee.

We know that the right wing now has its campaign in full gear. Their mission is to cover up the truth. So we do need a full debate to bring out the truth on Judge Alito. What is wrong with debate? Are they afraid of what Americans would do if they really heard the full record? That is what the issue is, and that is why people are entitled to the time.

We have been in the Senate for a few hours on Friday. The people of my State were talking to me, in the few hours I was there, about the prescription drug bill that they just cannot navigate. There are 35 different drug plans from which to choose. There are situations where if an individual signs up for a particular program—it is interesting, the plan itself can change the premiums and the formularies, but the person cannot get off that plan. Once they are in it, they are in it. Or if they do get off the plan, then they are going to have to try to get on to another. The plan can change deductibles and copays. They are very troubled elderly people.

There are heart wrenching stories. People up there care about the cost of health care. They are measuring it through the roof. People care about that in my State. People are absolutely in disbelief over how a part of America in New Orleans, Mississippi, and Alabama can be left out and left behind. They are continually pained by the continued loss of sons and daughters from my State and from across the country in the Iraq war with really no end in sight. They are bothered by all of this. They are bothered by the whole issue of lobbying and lobbying corruption.

They are working hard because the middle class is having a more and more difficult time just trying to make ends meet. They are finding that prescription drugs have gone up, heating has gone up, education has gone up, food has gone up, and their wages have not gone up. It has been 9 years since we increased the minimum wage. Seven times we have increased our own pay, by $30,000, but we cannot afford to increase the minimum wage by a dollar. Hard-working people are hurting in my State of Massachusetts. Today, they are wondering whether tonight they are going to have food on the table. Now we are asking them to shift their focus to Judge Alito. Judge Alito—how is that going to affect what my family is faced with? It will affect a great deal your children and your children’s children’s future.

Here are some of the issues Supreme Court decisions affect.

Supreme Court decisions affect the ability of Americans to be safe in their homes from irresponsible search and seizures and other government intrusions. We had those cases come up in the hearings. I will come back and spend some time on them. It is difficult to believe.

Supreme Court decisions affect whether the rights of employees can be...
protected in the workplace. If you are a worker, you should be concerned about this nominee.

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

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

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

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

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

The decisions affect whether Americans' most private medical decisions will be a family matter or subject to government interference. Terri Schiavo is a classic example. We have governmental solutions to these issues, or should these matters be left to the family, and when we get the chance to talk about disabilities and disability rights in this body, it is always amazing—not amazing, it is always interesting to me that we give such little attention to those who have the greatest challenges and disability needs and we give such little attention and assistance to them.

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

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

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

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

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

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

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

I think with respect to the prescription drug bill we will have to come back and redo it. I think we should. We have said that a few times. There is going to be a prescription drug bill. Americans are entitled to that. Seniors are entitled to it. We got it wrong when, effectively, the conference was hijacked by the drug companies and the HMOs. There were extraordinary payoffs. It was written in the Washington Post last week about the payoff—it was $46 billion to the HMOs back in 2003, now it is $67 billion.

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

We can come back and deal with those. People can deal with those in the elections next fall. I understand that. You win or lose and we come back to it, but not on the Supreme Court of the United States. You get one opportunity. It was written up in the Washington Post. It was written up in the Washington Post.

I certainly hope, with the leadership of Senator Domenici, certainly myself, Senator Harkin, and many other Members, that we will have a chance to vote on that issue this year. It is long overdue.

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

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

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

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

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

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

I think with respect to the prescription drug bill we will have to come back and redo it. I think we should. We have said that a few times. There is going to be a prescription drug bill. Americans are entitled to that. Seniors are entitled to it. We got it wrong when, effectively, the conference was hijacked by the drug companies and the HMOs. There were extraordinary payoffs. It was written up in the Washington Post last week about the payoff—it was $46 billion to the HMOs back in 2003, now it is $67 billion.

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

We can come back and deal with those. People can deal with those in the elections next fall. I understand that. You win or lose and we come back to it, but not on the Supreme Court of the United States. You get one opportunity. It was written up in the Washington Post.
issues and women’s privacy issues, which are so at risk at this particular time with this nominee. All of those issues are out there. All we are saying is, don’t we think we ought to try to get it right? Don’t we think we ought to have the chance to lay this out just a little more.

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

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

Other judges, on issues about whether there is discrimination in employment—including some Republican judges who sat with Judge Alito and said if we follow Judge Alito’s reasoning and rationale we would effectively—’eviscerate’ is the word that was used—title VII, title VII being the provisions we passed in the 1964 act to make sure we were going to do away with discrimination in employment.

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

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

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

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

It seems to me we ought at least to have the opportunity to make sure the American people understand this. It takes time. It took some time for the American people to understand what was really happening in Iraq. It took some time to understand what was really happening here, too. People are working hard. They are busy with their jobs and their families, and they are trying to do what is right and play by the rules. It takes some time for them to understand what is going on. It takes them some time to affect their lives and their well-being in the future. But there is nothing more important. There is nothing more important here in the Senate. There is nothing more important in the unfinished business of the Senate.

Just pick up the calendar and look at the unfinished business of the Senate. Nothing comes close to it. If you said right behind this is the Defense appropriations bill, this is going to delay a whole series of things, someone who has had the background to evaluate that.

Nothing comes close to it. If you said that the government. Cass Sunstein said that.

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

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

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

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

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

The Senator from Wyoming.

Mr. THOMAS. Mr. President, I appreciate the opportunity to talk a little bit about the judge issue that is before us. I have not done so until now. I have watched this debate with interest because I think it is one of the most important things we do.

The system, of course, is for the President to nominate and for the Senate to confirm or reject. So that is really one of the important issues before us.

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

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

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

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

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

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

Another question was: Do you believe the Constitution and the rule of law.

The candidate said:

No person in this country is above the law. And that includes the President and it includes the laws that are enacted under the Constitution of the United States. Our Constitution applies in times of peace and war, the judge said:

It is particularly important that we adhere to the Bill of Rights in times of war and in times of national crisis, because that’s when there’s the greatest temptation to depart from them.

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

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

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

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

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

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

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

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

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

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

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

I must confess I am getting a little concerned about the Senate confirmation process. We ought to take another look at our role and not deviate from that role for other unrelated reasons. So I hope Members have not taken us down the path of setting a bad precedent, and I am sure that is not the case. I am looking forward to completing this hearing this afternoon and completing it tomorrow.

I think we have before us a great opportunity to confirm one of the most capable persons that we could have on our Supreme Court.

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

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

The legislative clerk proceeded to call the roll.

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

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

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

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

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

I remember the story in the Washington Post when John Roberts was proposed where they described those groups that were opposed to the President gathering with their press releases to attack the nominee, who were forced to strip out the name of the person they thought the nominee would be and put in John Roberts’ name so that they could issue the press releases as soon as the name was made public. They had prepared their ammunition to attack the President’s nominee before they knew who he was, and they were embarrassed by the fact that they had guessed wrong. But they did not change a single word of their attack once they knew that the actual nominee was someone different than they had anticipated.

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

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

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

So I have sympathy with the Senator from Massachusetts when he complains about the groups on the right that were marshaled in advance of the nomination to defend the nominee. But I say to him they were marshaled to defend the nominee because they saw what happened when such previous activity was not carried forward. With the way in which the Chief Justice, John Roberts, has been on both sides having their say but ultimately the public demonstrating a sense of revulsion about this whole “Borking”
January 30, 2006

CONGRESSIONAL RECORD — SENATE

process, and now with Judge Alito moving forward in a manner far more dignified than we have seen in the past, I hope “Borking” would become a historic artifact and would disappear and that groups on the far left and the far right would finally realize that the Senate is not moved by those kinds of tactics; that the ads that are run, television ads attacking the nominee boomerang.

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

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

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

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

The PRESIDING OFFICER. The Senator is correct.

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

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

Listening to a lot of my colleagues on the committee, and last week, I am extremely disappointed that they are looking now at an attempt by Senators—and they are all on the other side of the aisle—to delay and filibuster this nominee. It is too bad Majority Leader Frist had to take the extreme position of filing cloture on this very important nomination. No Supreme Court nomination has ever been defeated by filibuster if a majority of the Senators stood ready to confirm the nominee. The only reason that is not the case here because we already know a bipartisan majority of Senators will vote to confirm Judge Alito if we get to that point tomorrow at 11 o’clock. We also know we have had plenty of time to do this nomination. It is unfortunate that certain Senators will vote against this nominee because they think doing so is a good political issue for them. These Senators are applying a very different standard to what has been the history and the tradition in the Senate of considering Supreme Court nominees. The position being taken by these Senators is that Judge Alito ought to somehow share Justice O’Connor’s judicial philosophy in order for him to fill that seat where she has been for the last 25 years.

That sort of thinking is totally at odds with what the Constitution requires, but more importantly than what the Constitution requires, what has happened in the last 225 years, and that is that Judge Alito does not have to be Justice O’Connor’s judicial philosophy soulmate to deserve confirmation by this Senate. Because the Supreme Court does not have seats reserved for one philosophy or another. That kind of reasoning is completely antithetical to the proper role of the judiciary in our system of Government.

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

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

Recent history, of course, is proof of that because in my years in the Senate, but as recently as 10, 12 years ago, when Ruth Bader Ginsburg was before the Senate, we gave overwhelming confirmation to her—a former general counsel of the very liberal group, the ACLU. She is a former conservative Justice, Byron White, on the Court at that time. The Senate confirmed Justice Ginsburg. Why? Because President Clinton won an election, campaigning on the basis of the kind of people he was going to nominate, and President Clinton did that. That is what the Constitution says the role of the President, the role of the Senate is.

Many colleagues have said elections have results and the Constitution says the President gets to nominate Supreme Court candidates. Of course, Justice Ginsburg, whether you agree with her or not, had the requisite qualifications to serve on the Court.

Right after her, Justice Breyer came to the Supreme Court, a liberal as well, appointed by President Clinton. But the Senate confirmed that Justice by a big vote. The President made his choice, sent it to the Senate, the Senate found him qualified, and he was confirmed on an up-or-down vote. No filibuster was ever talked about, and no one talked about maintaining any ideological balance on the Court.

Under the Constitution, historically, is not the place to play politics. The Court is supposed to be, and as far as I know, is free of politics. But the Democrats and liberal outside interest groups want to change the rules because they did not win at the ballot box. They want to implement their agenda from the Court. Of course, that is a dangerous path, making the Supreme Court a superlegislature. The Constitution does not presume that.

Under our checks-and-balances system of Government, we do not want to go down that path. Going down that path will create a standard that will seriously jeopardize the independence of the judiciary and distort our system of Government, a system based upon the judiciary being the arbiter of the war that often—I should say continually goes on between the executive branch of Government and the legislative branch of Government.

Democrats want the Supreme Court to assume an expansive role well beyond what was originally intended by the Constitution and its writers. They want the Court to take on a role that is closer to the role of the legislative branch, which is to make policy and bring about changes in our society.

Now, this has consequences when you go down this road. It has brought about the politicization of the judicial confirmation process that we have seen in recent instances. The Senate’s tradition has been to confirm the President’s nominee, but also on the Roberts nomination, or go back 3 years previous to the holding up of several circuit court nominees before this body through the threat of filibuster or not just the threat but the use of the filibuster.

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

Americans want what the Constitution truth is. Judges don’t have the authority to change the Constitution. The whole theory of judicial review that we have, think, is contrary to that notion. The Constitution is an enduring document, and the Constitution doesn’t change. It does contain some important general principles that have to be applied to new factual situations that come up. But in doing that, the judiciary has to be very careful not to inject its own views into the matter. It has to apply the principles that are in the Constitution to the situations that come before the judiciary.

To quote Judge Alito again:

A judge can’t have any agenda. A judge can’t have any preferred outcome in any particular case. And a judge certainly doesn’t have a client or a party, and it’s a solemn obligation—is to the rule of law, and that what means is that in every single case, the judge has to do what the law requires.

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

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

He said:

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

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

One of his colleagues, Judge Aldisert, testified:

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

Former Judge Gibbons, who now represents clients against the Bush administration over its treatment of detainee rights in Guantanamo, doesn’t believe that Judge Alito will “rubber-stamp” any administration’s policy if it violates the law and Constitution. He said:

I’m confident, however, that as an able legal scholar and a fairminded justice, he is not going to bend or be influenced by political pressure. The only way to have judicial independence is to be independent.

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

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

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

Judge Lewis, one I have not quoted yet, described himself to the committee to be “openly and unapologetically pro-choice” and “a committed human rights and civil rights activist.” But yet a person coming from this end of the legal continuum fully endorsed Judge Alito to the Supreme Court, testifying:

I cannot recall one instance during conference or during any other experience that I had with Judge Alito, but in particular during nomination hearings, he exhibited anything remotely resembling an ideological bent.

The testimony of Judge Lewis continues:

If I believed that Sam Alito might be hostile to civil rights as a United States Supreme Court, I guarantee you that I would not be sitting here today. . . . I believe that Sam Alito will be the type of justice who will listen with an open mind and will not have any agenda-driven or result-oriented approach.

Justice Aldisert summarized these judges’ testimony best on the day they appeared before the committee when he said:

We have heard his probing questions during oral argument, we who would have been privy to his wise and insightful comments in our private decisional conferences, we who have observed at firsthand his impartial approach to decision-making and his thoughtful judicial temperament and know his carefully crafted opinions, we who are his colleagues are convinced that he will also be a great justice.

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

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

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

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

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

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

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

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

I take this constitutional responsibility very seriously, as I know my colleagues who closely committed to doing Judge Alito’s written opinions, his testimony, as well as the hearing transcript. I commend Senators SPECTER and LEAHY for conducting the hearings in a respectful and bipartisan manner. The Constitution grants all Americans, as we know, the same rights and liberties and freedoms under the law, which is why it is so important that we get this right.

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

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

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

In case after case, whether it is about job discrimination, pensions, illegal searches, or privacy, Judge Alito has been an activist judge who has tilted the scales against the little guy. Often, he has been criticized by his colleagues as trying to legislate from the bench in order to reach the result he desires. His views are way outside the mainstream, especially in his dissent opinions. There are numerous cases where Judge Alito was the only dissenter, which means he felt strongly enough about his personal views that he objected to what the other 10 judges supported and even wrote his own separate opinion on an issue. These dissents give insight into what I believe is an extreme ideology on the most basic of American freedoms, liberties, and rights.

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

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

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

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

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

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

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

Judge Alito dissented, arguing that the first period of employment, a total of 11 years of hard work, should not count, essentially cutting the workers’ pension benefits. If his dissent had prevailed, the law was calculating his pension benefits, regardless of the break in service. If you are working and then you need to take a break, whether it is illness, caring for a loved one—regardless of the circumstances—if you stop working under the pension system, you work until retirement, all of the years you worked hard should be counted toward your pension.

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

Changes in legislation in legislation in legislation in legislation in legislation that Congress and if our interpretation of what Congress has said so plainly is now disfavored, it
is for Congress to cure. We do not sit here as a policy-making or a legislative body.

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

The Sixth Circuit found that the law was constitutional, but in his memo, Judge Alito argued that the case was “wrongly decided” and that this was an issue that should be left to the State legislatures.

The Justice Department did not file a brief in this case, and the Supreme Court ultimately rejected Judge Alito’s position and found the law unconstitutional, writing:

It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that a police officer who is in sight escapes in a slow motion does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.

In Doe v. Groody, Judge Alito dissented from a majority holding that allowed by now Homeland Security Secretary Michael Chertoff to uphold the search of a 10-year-old girl and her mother, even though neither was a criminal suspect, presented any risk or was named in the search warrant.

The search warrant specifically limited the search of persons to the suspect, John Doe, but when police arrived, they only found Jane Doe and her 10-year-old daughter inside the house. They took the mother and the little girl to another room and strip-searched them, having them lift their shirts, drop their pants, and turn around.

Judge Chertoff held that the warrant clearly limited police authority to the search of John Doe and not all occupants in the house. Judge Alito dissented, accusing the majority of a “technical” and “legalistic” reading of the warrant. The warrant was clear, but Judge Alito argued for a broad de-interpretation of what was actually written in the warrant in a way that would favor governmental intrusion.

I hear my colleagues from across the aisle saying over and over again that they want judges who will follow the law and not legislate from the bench. Judge Alito ignored the plain language of a search warrant in order to allow the strip search of a 10-year-old girl. How is this not legislating from the bench?

Judge Chertoff certainly thought so. He criticized Judge Alito’s view as threatening to turn the requirement of a search warrant into “little more than the cliche rubberstamp.”
In another case deeply concerning to me, a family of dairy farmers was being forced off their farm by a bankruptcy court. This was in Pennsylvania. It could easily have been in Michigan or anywhere else in the Midwest. When they refused to go on their farm, seven U.S. marshals and a State trooper arrived at their home to evict them by pointing shotguns and semiautomatic rifles at the family. The marshals grabbed a family friend who was also at the house and used him as a human shield. They then took him from the house and used him as a human shield. They put a gun to the man as a human shield was not an unreasonable search under the fourth amendment because the marshals never told him that he wasn’t free to leave.

A fellow judge on the court dissented and called the marshals’ conduct “Gestapo-like” since seven marshals had detained and terrorized the family and friends and ransacked a home while carrying out an unresisted civil eviction. But Judge Alito’s decision made sure the family never got a trial.

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

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

Justice O’Connor eloquently summarized the problem with Judge Alito’s position, writing, “women do not lose their constitutionally protected liberty when they marry.”

These cases are not isolated instances. They are part of a long and consistent record of siding with powerful interests over Americans—people who have had their rights violated, people who have been injured, people who have been victimized and are asking the court to make things right, make things whole, women in this country who want to know they are respected in their privacy and their most personal decisions, just like men.

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

A disabled student had to drop out of medical school because of her severe back pain that made it difficult for her to sit in classes for hours at a time. The school failed to accommodate her request, and the Third Circuit ruled that her case should go forward, she should have a duty to give her this opportunity. Judge Alito dissented, arguing that the case should not go to trial; she should not get her day in court. The majority wrote that “few if any Rehabilitation Act cases would survive” if Judge Alito’s view prevailed.

A college student died at a varsity lacrosse practice. None of the team’s coaches were trained in CPR. The nearest phone was 200 yards away on the other side of an 8-foot fence, and there was no ambulance on the field. The Third Circuit ruled to allow the case to move forward, for the family to have their day in court. But once again, Judge Alito said no.

A worker with severe injuries after being thrown through the windshield of a garbage truck after the brakes of the truck failed. He brought a products liability lawsuit, arguing that the damaged hydraulic brake lines were a design defect. The Third Circuit ruled in favor of the injured worker, but Judge Alito sided with the company.

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

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

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

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

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

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KERRY. Mr. President, on countless nominations Democrats have joined Republicans and Republicans have joined Democrats to send a judicial nomination to the floor with a bipartisan vote. And, Senator Alito, the President has chosen to send a Supreme Court nominee who comes directly out of a revolt by the ideological wing of his party in order to satisfy their demand for ideological orthodoxy.

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

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

All of this is to be contrasted with the standard set out by Justice Potter Stewart in his farewell speech. Stewart said:

The mark of a good judge is a judge whose opinions you can read and . . . have no idea if the judge was a man or a woman, Republican or Democrat, a Christian or Jew . . . . You just know that he or she was a good judge.

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

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

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

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

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

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

It is important to remember that the rights we are expressing concern about didn’t come easily. Access to the court house, civil rights, privacy rights, voting rights, antidiscrimination laws—all of these were hard fought for. They came with bloodshed and loss of life. Their achievement required courage and commitment for vigilance is one of the cornerstones of these freedoms.

We should remember that even though the 13th, 14th, and 15th amendments outlawed slavery, provided for equal protection under the law, guaranteed citizenship, and protected the right to vote for African American Americans, the fact is the Federal Government failed to enforce them until the 1960s. Few politicians were willing to take a stand—to fight for the rights of African Americans. Something besides grassroots pressure was ultimately needed to prompt the Congress into action. That something was the unanimous Supreme Court decision in Brown v. Board of Education.

Imagine if the Court had not enforced the equality guaranteed by the 14th amendment. Imagine if it still had the ideologically-driven—indeed, regrettable—decisions of 1896. Segregation would still be a fact of life. African American children would be forced to attend their own schools, would be receiving an inferior and inadequate education. And, there would have been no catalyst to start the civil rights movement.

A nomination for a Supreme Court nominee is in fact a vote for the rights and freedoms we care about and fight for. That is exactly what this vote is.

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

Let me share with you the story of David D. Chittister. On February 14, 1997, David requested sick leave from the Pennsylvania Department of Community and Economic Development, where he worked. He was granted leave, but approximately ten weeks later, his leave was revoked, and he was ultimately fired. David knew that the Family Medical Leave Act guaranteed him 12 weeks of sick leave. So he sued the Pennsylvania Department of Community and Economic Development for firing him during that time—precisely while he was on leave. Imagine that you become sick. You become so sick that you are hospitalized, completely unable to work. The only reason that you can afford your treatment is because you are still employed. And also, you believe you are protected by the Family Medical Leave Act.

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

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

So I ask my colleagues who voted for the Family Medical Leave Act: didn’t we do exactly what we meant to do? Didn’t we need to protect all workers? So is it right, now, to put a person on...
the Supreme Court who will undo the good that we did with that legislation? Take another example. Many of us have talked on the floor about how Judge Alito routinely defers to excessive government power. And how he is willing to overlook clear fourth amendment violations in the process. This may seem abstract to a lot of people right now, but listen to the facts of this case.

A family of farmers, the Mellotts, fell on hard times. They had to declare bankruptcy and were ordered to leave their lot of farmland. The Mellotts, knowing that raising their own food was the best bet for the family, appealed and were denied. They asked that their farm be returned to them, but were ordered to leave. They were not armed nor dangerous, the use of force was “clearly impermissible.”

When Bonnie Mellott answered the front door, a deputy marshal entered, pointed his semi-automatic gun, and said: “You are under arrest.” Another deputy marshal, with a pump shotgun, shoved it in her face and . . . When she continued talking, the marshal put his gun “to the back of her head” and repeated the order.

I won’t go into further details, but you get the picture. Now obviously the Mellotts were in the wrong to stay in their home. But that wasn’t all. Another marshal ran into the kitchen where a guest was on the telephone with a local sheriff. He “pumped” his semi-automatic gun, “stuck it right in [her] face and . . . said: ‘Who are you talking to, hang up the phone’.” When she continued talking, the marshal put his gun “to the back of her head” and repeated the order.

What do you come out on this? Which view do you want on our Supreme Court? Let me also share another story this one about Beryl Bray. Beryl was an African-American female who worked her way up from a room attendant to a Housekeeping manager for Marriott Hotels in less than three years. When the position of Director of Services opened up, Beryl applied. A Caucasian woman got the job, and Beryl sued claiming discrimination.

Now, as a Housekeeping manager, Beryl probably did not make a lot of money. She probably used a lot of her resources to bring her discrimination claim. She wanted her day in court. If Judge Alito had his way, she wouldn’t have gotten it. Critical facts were in dispute. Facts which, if resolved as Beryl claimed they should be, would establish a clear case of discrimination. As the lawyers here know, the factual disputes should have been resolved by a jury. But in favor of her prior entitled to her day in court. Judge Alito, however, did not agree. He would have resolved the facts on his own in favor of Marriott Hotels. He would have ended the case then and there.

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

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

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

On appeal, a divided three-judge panel reversed the trial judge’s decision. Two of Judge Alito’s colleagues believed that Mr. Glass should have been allowed to present the evidence of racial discrimination to the jury. Judge Alito, however, disagreed. He thought that allowing Mr. Glass to tell the story of his struggle of discrimination would have been an abuse of dis- crimination plaintiff from showing evidence of discrimination? I think most reasonable people would disagree with Judge Alito. I believe that is the problem here: Judge Alito has demonstrated a pattern of looking at discrimination claims with a high degree of skepticism. In the dozens of employment discrimination cases involving race that Judge Alito has participated in, he has ruled in favor of African Americans on the merits in only two instances. He has never authored a majority opinion favoring African Americans in such cases. He has dissented from rulings of his colleagues in favor of African American plaintiffs, and in doing so has required an unrealistic amount of evidence before he is willing to step in on behalf of wronged individuals. He is not willing to give them the benefit of the doubt even to just let a jury decide their case.

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

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

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

That is the opinion of those who have studied his record. Similarly, Knight-
Ridder concluded that Judge Alito “has worked quietly but resolutely to weave a conservative legal agenda into the fabric of the nation’s laws” and that he “seldom-sided with . . . an employee alleging discrimination or consumer problems.”

Judge Alito may believe that it is his duty to keep these types of cases away from the jury. He may, and in fact probably does, believe that he is doing the right thing. That is his right. But, it is my right to judge the facts of these cases and to determine the rightness or the wrongness. And it is my right to say that the record of his reaction to the same facts should not be elevated to the Supreme Court.

A fair amount has been said about Judge Alito’s endorsement of the unitary executive theory. This is a complicated and somewhat abstract theory of constitutional interpretation, but if it is ever endorsed by a majority of the Court, it will have a significant practical impact on our everyday lives.

One is that the President alone is responsible for enforcing the laws. At its most simplistic, it seems somewhat reasonable: Congress makes the laws, the President enforces the laws, and the judiciary interprets the laws. But, the fact, dates back to the administration of Franklin Roosevelt, and it has been championed by liberal and conservative scholars and judges alike. During Judge Alito’s tenure, the Reagan administration developed new uses for the theory. It was used to support claims of limitless presidential power in the area of foreign affairs—including the actions that became the Iran-contra affair. And, this view of Presidential power has been carried on by the current Bush administration, claiming in Presidential significance, that the President can ignore antitorture legislation overwhelmingly passed here in Congress. Not only is the substance of that message incredible, but the idea that the President can somehow alter congressional intent—the meaning of legislation agreed upon by 100 Senators—with a single flick of a pen is absolutely ludicrous. It turns the meaning of legislative intent on its head.

In Senate hearings, Judge Alito attempted to downplay the significance of this theory by saying that it did not address the scope of the power of the executive branch, but rather, addressed the question of who controls the executive branch. Don’t be fooled by that explanation. The unitary executive theory has everything to do with the scope of executive power.

In fact, even Stephen Calabresi, one of the fathers of the theory, has stated that “[t]he practical consequence of this theory is dramatic.” It is just common sense that if the unitary executive theory means that the President can ignore laws that Congress passes, it necessarily expands the scope of Presidential power—and reduces the scope of Congress.

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

We all understand that under article II, the President has primary responsibility for the conduct of foreign affairs. But, the idea that the President can, through his use of the theory, define statutory limits at will in the areas of foreign affairs, national security, and war is a startling one. And it is one that I cannot accept.

We needed to know what limits Judge Alito would place on the executive branch. We needed him to go beyond simple recitations of Supreme Court case law. We needed to know what he actually thought.

Sadly, however, Judge Alito did not give us those answers. In fact, he failed to give us answers on many questions of critical importance. He refused to answer questions from Senator LEAHY, Senator KENNEDY, Senator FEINGOLD, and Senator RUIDEN on the question of the power of the presidency. He refused to answer questions from Senator SCHUMER, Senator DURBIN, and Senator FRANKENSTEN on whether Roe v. Wade was settled law—an answer that even Chief Justice Roberts never thought to give. He refused to answer Senator LEAHY’s questions on court stripping; Senator LEAHY’s and Senator FEINSTEIN’s questions on congressional power and the commerce clause; Senator FEINGOLD’s questions on executive and criminal law; Senator SCHUMER’S questions on immigration.

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

Why are we supposed to think that is OK? Since when is it acceptable to secure a lifetime appointment to the Supreme Court by hiding behind a smoke-screen of nonanswers? I understand that, for many, voting for cloture on a judicial nomination is a very difficult decision, particularly on this Supreme Court nominee. I also understand that, for some of you, a nomination must be an “extraordinary circumstance” in order to justify that vote. I believe this situation is an extraordinary circumstance. What could possibly be more important than this?

This is a lifetime appointment to a Court where nine individuals determine what our Constitution protects and what our laws mean. Once Judge Alito is confirmed, we can never take back this vote. Not after he prevents many Americans from having their discrimination cases heard. Not after he allows more government intrusions into our private lives. Not after he grants the President the power to ignore Federal law under the guise of protecting our national security. Not after he shifts the balance of the Court far to the right.

As I have said before, Judge Alito’s nomination was a direct result of the right-wing’s vehement attacks on Harriet Miers, an accomplished lawyer whose only failing was the absence of an ideologically bent record. The right-wing didn’t wait for the next nominee. The right-wing attacked with every option available to them the Harriet Miers’ confirmation, secure in their conviction that it was the right thing for them to do.

We believe no less. And we should do no less. We did allow the confirmation of the more stalwart ap- pellate court nominees. There was no talk of prolonged debate on Chief Justice Roberts. Now we are presented with a nominee whose record raises serious doubt about serious questions that will have a profound impact on everyday lives of Americans. What on Earth are we waiting for?

Many on my side oppose this nomination. They say they understand the threat he poses, but they argue that cloture is different. I don’t believe it is. It is the only way that those of us in the minority have a voice in this debate. It is the only way we can fully complete our constitutional duty of advice and consent. It is the only way we can stop a confirmation that we feel could cause irreparable damage to our country.

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

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

Equally important is his deserved reputation for fairness and for integrity and his measured approach to the
law. The American Bar Association, hardly a bastion of conservatism, found this out during its exhaustive review of its record. The ABA solicited the views of 2,000 people, including 130 Federal judges and every Supreme Court Justice. The ABA awarded Judge Alito its highest rating, unanimously well qualified. What that means is that every member of the committee of the ABA gave Judge Alito the highest possible mark. It is like getting straight A’s on your report card.

Let me repeat that since some who are watching and listening have undoubtedly heard the attacks by Judge Alito’s most vociferous opponents: The ABA, the largest professional association of lawyers in the country, found Judge Alito to be unanimously well qualified for the Supreme Court. In the past, this rating was referred to by our friends on the other side of the aisle as the gold standard.

More insightful than the ABA’s rating is the testimonials of those who know Judge Alito best, his colleagues and his coworkers. Although they possess effective, intellectual philosophies, Judge Alito’s colleagues enthusiastically praise him as “thoughtful, intelligent, and fair” and a judge who “has a great respect for precedent-setting decisions.” To most people, that sounds like the kind of Justice we would want on the Supreme Court.

Judge Timothy Lewis served with Judge Alito for 7 years during which Judge Lewis typically voted with the court’s liberal members. He recounted how on the Third Circuit in 1992 he consulted his mentor, the late Judge A. Leon Higginbotham, Jr., who was a Carter appointee, a former chief judge of the court and a scholar of U.S. racial history. According to Judge Lewis, Judge Higginbotham said:

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.

That is the late Judge Leon Higginbotham. Judge Lewis added his own experience borne out Judge Higginbotham’s evaluation. Judge Lewis said Sam Alito “does not have an agenda” and “is not result-oriented. He is an honest conservative judge who believes in judicial restraint and judicial deference.” He “faithfully showed a deference and deep respect for precedent.”

That is liberal Judge Lewis of the Third Circuit.

Another former chief judge of the Third Circuit, Edward Becker, similarly praised Judge Alito. Here is what he had to say:

I found him to be a guy who approached every case with an open mind. I never found him to have an agenda. I suppose the best example of this is in the area of criminal procedure. He was a former U.S. attorney, but he never came to a case with a bias in favor of the prosecution. If there was an error in the trial, or a flawed search, he would vote to reverse.

Judge Becker noted that Judge Alito is “very principled, very analytical, never decides more than he has to in a case. He does believe in judicial restraint in the way he writes opinions, with no ideological overtones.”

The Third Circuit’s current chief judge, Anthony Scirica, succinctly said:

. . . whatever quality you think a judge ought to have, whether it’s scholarship or an ability to deliberate, or fairness or temperament, Sam has each of these to the highest degree.

That is the current chief judge of the Third Circuit.

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

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

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

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

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

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

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

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

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

In spite of many Republicans and Democrats, I had hoped this sad chapter of trying to deny judicial nominees a simple up-or-down vote would recede into memory as a mere footnote in a long and proud history of the Senate. Unfortunately, today’s vote is another try to revive it with the Alito nomination.

We stand today on the brink of a new and reckless effort by a few to deny the rights of many to exercise our constitutional duty to advise and consent, to give this man the simple up-or-down vote he deserves. The Senate should repudiate this tactic, and it will have an opportunity to do that at 4:30 this afternoon.

There is a role for the filibuster for legislative matters. Although I may disagree with its application in a particular legislative case, I neither deny the tactic nor begrudge it when a colleague employs that tactic when there is good reason to do so. I have done so on many occasions. I have not seen a good reason for employing it in the context of judicial nominations. Nor did any Senate prior to the last Congress find that tactic should be employed for judicial nominations.

It certainly is not warranted in the case of Judge Alito. He is clearly qualified. His friends, his peers, and, indeed, his entire life story tell us so.

During his hearings and despite the best efforts of those opposed to his nomination, he aced his performance admirably. Over 18 hours of testimony he was asked 677 questions and was able to answer 659 of them—truly an impressive feat. In doing so, Judge Alito demonstrated an impressive command of the law and a model judicial temperament.

Now, while Judge Alito conducted himself with grace and dignity, unfortunately, some Senators did not. In fact, those who listened most attentively to the outside pressure groups, such as one whose top lobbyist declared “you name it, we’ll do it to defeat Judge Alito,” could have learned a thing or two about grace and dignity.
by watching Judge Alito perform in the face of the most absurd and baseless charges.

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

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

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

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

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

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. CHAMBLISS. Mr. President, the Committee on the Judiciary has recommended that we consent to the President’s nomination of Samuel A. Alito, Jr. as Associate Justice of the Supreme Court of the United States. I concur in that recommendation. I am convinced that Judge Alito will make an outstanding addition to the Supreme Court, and that such action would be consistent with the oath of judicial office to him. I also hold that such an action is consistent with the law as I understand it.

First, I wish to commend Chairman Specter and my former colleagues on the Judiciary Committee—including the Presiding Officer—for conducting nomination hearings which established clearly Judge Alito’s fitness to serve on the Nation’s highest Court. I followed closely Judge Alito’s responses to questions during the hearings. I was impressed by his profound patience, sincerity, and dedication to the ethical restraints which compel all nominees to refrain from prejudicing any matter which may come before the court.

Many of my colleagues have complained that Judge Alito “did not answer some questions.” Their real complaint rather is that they simply did not like his answers. Judge Alito quite properly declined to have all prior nominees to the Court, to address in advance specific matters which may come before them. As Judge Alito stated:

“If a judge or a judicial nominee announced before the recess the briefs or getting the case or hearing the argument what he or she thought about the ultimate legal issue, all of that would be rendered meaningless, and people would be confused about the judicial system, and with justification, because that’s not the way in which members of the judiciary are supposed to go about the work of deciding cases.”

That statement, and the time-honored concept which it embodies, is profoundly important. Surely, those of my colleagues who have criticized Judge Alito in this regard know better. Surely, they do not want Justices on the Supreme Court of the United States to speak in such a manner.

Judge Alito, as a member of the Third Circuit, but his commitment to the rule of law without respect to his or her personal, ideological, or political preferences in deciding matters which come before them; at a time when too many within the legal, media and political elites have sought to recast the role of the judiciary into a superlegislature, appropriate of, and even urging judges to supplant their views for those of the elected representatives of the American people—we should be reminded that such actions and such views on the part of some are anticonstitutional and contrary to the rule of law itself.

Describing his own fidelity to the Constitution and to the rule of law, Judge Alito told the Committee on the Judiciary:

“A judge can’t have an agenda. A judge can’t have a preferred outcome in any particular case. And a judge certainly doesn’t have a client. A 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.

“The standard for rendering advice and consent, which I outlined in my statement concerning Chief Justice Roberts, is the standard I will apply to Judge Alito as well. That standard—demonstrated commitment to the rule of law and fidelity to the Constitution—is amply met by Samuel A. Alito, Jr. I am pleased to support his nomination and will certainly vote to confirm him as Associate Justice of the Supreme Court. I urge my colleagues to do likewise.

“Make no mistake about it. The American people do not want to see an obstructionist attitude in their legislative body. The American people are not benefited by an obstructionist attitude. An obstructionist attitude towards Judge Alito means not moving forward with a confirmation hearing and then confirming Alito to be Associate Justice of the Supreme Court. The American people are best served by a bipartisan attitude in this body. I hope when the cloture vote is made at 4:30 we will see a strong bipartisan vote in support of moving ahead with giving Judge Alito an up-or-down vote on the floor of the
Senate. And tomorrow morning, when we consider the confirmation of Judge Alito, I certainly hope that once again we will see a strong bipartisan vote confirming Judge Alito as the next Associate Justice of the Supreme Court.

I rise to speak about a very important issue: the competitiveness of the United States and our future standard of living and whether we are going to develop the brainpower in America to meet the challenges of the future.

I compliment two Senators who initiated the legislation. I am encouraged by Senator DOMENICI, former president of Lockheed Martin. Many people know of him in many capacities. That report and the whole idea of keeping America the preeminent site for investments in new or expanded businesses is help keep our edge in science and technology.

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

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

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

PROTECTING AMERICA’S COMPETITIVE EDGE

Mr. DOMENICI. Mr. President, today I rise to speak about a very important issue: the competitiveness of the United States and our future standard of living and whether we are going to develop the brainpower in America to meet the challenges of the future.

I compliment two Senators who initiated the legislation. I am encouraged by Senator DOMENICI, former president of Lockheed Martin. Many people know of him in many capacities. That report and the whole idea of keeping America the preeminent site for investments in new or expanded businesses is help keep our edge in science and technology.

Mr. ALEXANDER. Mr. President, I ask unanimous consent that a letter from Senator BINGAMAN and myself, encouraged by Senator DOMENICI, to the National Academy of Sciences on May 27, 2005, and a two-page summary of the Domenici-Bingaman-Alexander-Mikulski legislation, which has 54 cosponsors, be printed in the RECORD.

I do not see any objection, so I ask unanimous consent that the material be so ordered to be printed in the RECORD, as follows:

Mr. ALEXANDER. Mr. President, I ask unanimous consent that a letter from Senator BINGAMAN and myself, encouraged by Senator DOMENICI, to the National Academy of Sciences on May 27, 2005, and a two-page summary of the Domenici-Bingaman-Alexander-Mikulski legislation, which has 54 cosponsors, be printed in the RECORD.

If you want good manufacturing jobs, one thing you could do is educate more engineers. We had more sports exercise majors graduate than electrical engineering majors last year.

Based on that statistic, he added: If you want to be the massage capital of the world, you are well on your way.

That is very interesting. With that, out of my time, I yield to the Senator from Tennessee 3 or 4 minutes to speak to this bill, which is called the PACE legislation.

The PRESIDING OFFICER. The Senator from Tennessee is recognized.

Mr. ALEXANDER. Mr. President, I thank the Senator from New Mexico. First, there is nothing more important, along with the war on terror, than finding a way to keep our jobs from going to China, India, and other countries around the world. They have figured out how to increase their standard of living, and it has to do with brainpower.

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

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

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

So it is my privilege today to ask unanimous consent on behalf of Senators DOMENICI, BINGAMAN, and myself to add as cosponsors Senators LUTHERBERG, JOHNSON, McCONNELL, SNOWE, and now Senator SPECKER of Pennsylvania, who have asked to be added to S. 2197, S. 2198, and S. 2199 as cosponsors, as well as Senator REED of Rhode Island who has asked to be added as a cosponsor of S. 2197, so that we now have 54 cosponsors of these important pieces of legislation.

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

Mr. ALEXANDER. Mr. President, I ask unanimous consent that a letter from Senator BINGAMAN and myself, encouraged by Senator DOMENICI, to the National Academy of Sciences on May 27, 2005, and a two-page summary of the Domenici-Bingaman-Alexander- Mikulski legislation, which has 54 cosponsors, be printed in the RECORD.
Your answers to these questions will help Congress design effective programs to ensure that America remains at the forefront of scientific capability, thereby enhancing our ability to shape and improve our nation’s future.

We look forward to reviewing the results of your efforts.

Sincerely,

LAMAR ALEXANDER
Chairman, Energy
Subcommittee
JEFF BINGaman
Ranking Member, Committee on Energy and Natural Resources

PACE ACT: PROTECTING AMERICA’S COMPETITIVE EDGE

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

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

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

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


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

Protecting America’s Competitive Edge through Tax Incentives (PACE-Finance): Increasing K-12 science/Math Education

Scholarships for Future Teachers of Math & Science: Each year, up to 10,000 bright students would receive a 4-year scholarship to earn a bachelor’s degree in science, engineering or math, while concurrently earning teacher certification for those who want assurances—there is no doubt that those who threaten filibuster, I believe there is a serious question.

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

I personally believe this is a dangerous course, and I hope and pray that this will be the last time we follow such procedure. But I doubt that it will be. As long as filibusters are a Supreme Court Justice and to the administration.

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

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

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

Mr. DOMENICI. Mr. President, let me say what a privilege it is today to speak once again to the nomination of Judge Alito to the Supreme Court of the United States. In my time here, I have voted to confirm them all. I based my vote, first, on the fact that the President of the United States recommended them and second, on whether they were qualified. I determined whether they were qualified based upon outside evaluations and personal observations of those who knew, trained and taught that particular nominee. For example, I found Justices Ginsburg and Breyer, who were confirmed 96-to-3 and 87-to-9, to be qualified. In my opinion, neither of those judges, based upon the way the Senate is doing things these days, would have come close to getting those kinds of votes. As a matter of fact, for those who threaten filibuster, I believe there is a serious question.

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

I personally believe this is a dangerous course, and I hope and pray that this will be the last time we follow such procedure. But I doubt that it will be. As long as filibusters are a Supreme Court Justice and to the administration.

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

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

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

Mr. DOMENICI. Mr. President, let me say what a privilege it is today to speak once again to the nomination of Judge Alito to the Supreme Court of the United States. In my time here, I have voted to confirm them all. I based my vote, first, on the fact that the President of the United States recommended them and second, on whether they were qualified. I determined whether they were qualified based upon outside evaluations and personal observations of those who knew, trained and taught that particular nominee. For example, I found Justices Ginsburg and Breyer, who were confirmed 96-to-3 and 87-to-9, to be qualified. In my opinion, neither of those judges, based upon the way the Senate is doing things these days, would have come close to getting those kinds of votes. As a matter of fact, for those who threaten filibuster, I believe there is a serious question.

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

I personally believe this is a dangerous course, and I hope and pray that this will be the last time we follow such procedure. But I doubt that it will be. As long as filibusters are a Supreme Court Justice and to the administration.

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

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

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

Mr. DOMENICI. Mr. President, let me say what a privilege it is today to speak once again to the nomination of Judge Alito to the Supreme Court of the United States. In my time here, I have voted to confirm them all. I based my vote, first, on the fact that the President of the United States recommended them and second, on whether they were qualified. I determined whether they were qualified based upon outside evaluations and personal observations of those who knew, trained and taught that particular nominee. For example, I found Justices Ginsburg and Breyer, who were confirmed 96-to-3 and 87-to-9, to be qualified. In my opinion, neither of those judges, based upon the way the Senate is doing things these days, would have come close to getting those kinds of votes. As a matter of fact, for those who threaten filibuster, I believe there is a serious question.

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

I personally believe this is a dangerous course, and I hope and pray that this will be the last time we follow such procedure. But I doubt that it will be. As long as filibusters are a Supreme Court Justice and to the administration.

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

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

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

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

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

There are no guarantees. Those who are making this a partisan fight won’t say: We don’t have any guarantees, on Roe v. Wade and many other issues, that Judge Alito is not going to vote the way we want him to—they won’t say they are doing that. They will use other words like “I am bothered,” but that is really their argument.

Now, as to the cloture vote this afternoon—we are going to do that. I have never had to make that vote in 34 years—on 11 Supreme Court nominees. I never had to make that vote. Why? Because this Senate has not used the filibuster on Supreme Court Justices. Some have said, yes we have had, but that is really not true. We did not. And we surely didn’t when a majority was for the man or woman. That is the case here.

To have to take this route, I believe the process is headed in the wrong direction. To require cloture is not the way to do it. It is not in tune with the history of the Senate. It contradicts the significance of this body as a fair-minded, deliberative body. I regret to say that this is not the kind of a job that would be done, this person. And so there was a process set up, nonpublic in nature, where the chairman of the Judiciary Committee conferred with the President and his people and waded through lots of names that, in the judgment of the distinction, these names were not appropriate. Now we have two Members on the Supreme Court whom I think have distinguished themselves.

I wish we could have a procedure like that in the future. I think, I repeat, it is undemocratic. It is not appropriate. Now we have two Members on the Supreme Court whom I think have distinguished themselves.

The hearings of Ginsburg and Breyer were short and directly to the point. I hope in the future we can do more of that. I extend my apologies and congratulations to the Senator from Utah. No matter what happens in the future regarding the long career of the Senator from Utah in the Senate, this, as far as I am concerned, will be an important chapter in his public service.

The President’s State of the Union Message

Mr. President, tomorrow night, the President of the United States will come to the Capitol and deliver his fifth State of the Union Address. This is an important moment for the President and for the country. Some say, reading the op-eds over the last week or so, this may be the most difficult speech the President will ever give.

The President comes to the Capitol in the midst of a time when some write about as the greatest culture of corruption since Watergate. Public trust has dropped significantly in this culture in Washington, and I need not run through all the problems, but I will run through some.

The majority leader in the House of Representatives was convicted three times of ethics violations. They even went so far as to change the rules so he could stay in his position after having been indicted. They changed the rules back because the hue and cry of the American people was so intense.

For the first time in 135 years, some of those convicted work in the White House. Mr. Safavian, appointed by the President to handle Government contracting—hundreds of billions of dollars a year—is led away from his office in handcuffs as a result of his dealings with Jack Abramoff and others.

I think in his message the President is obligated to the American people to show that he is committed to restoring the bonds of trust and repairing the damage done by this corruption.

Americans know the country can do better today, and after the year we had, a year of trying to privatize Social Security, Katrina, failures in Iraq, Terri Schiavo, and a heavy heart I have, Mr. President, as a result of what a good woman was—I would not say deceased—because there is a chance—this is stronger than that. But Harriet Miers, how she was treated is unbelievable. A good woman was treated so poorly, and the people who tried to destroy her are the ones being rewarded now with the nominations. This is worse than the past year we had Medicare prescription drugs come into being, which is a puzzle that no one can figure out.

So the American people, after this year we have had, simply will not longer be able to blindly accept the President’s promises and give him the benefit of the doubt.

Americans will be looking past his rhetoric tomorrow night and taking a hard look at the results he intends to deliver. The President’s State of the Union Message is a credibility test. Will he acknowledge the real state of our Union and offer to take our country down a path that unites us and makes us stronger, or will he give us more of the same empty promises and partisanship that has weakened our country and divided Americans for the last 5 years?

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

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

Our first signal that the President intends to move our country forward will come in his assessment of the state of our Union. It is not credible for the President to suggest the state of the Union is as strong as it should be. The fact is, America can do much better. From health care to national security,
this Republican corruption in Washington has taken its toll on our country. We can see it in the state of our Union.

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

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

We have a national debt climbing past $8 trillion. I have a letter I received a short time ago from the Secretary of the Treasury saying the debt is at $8.2 trillion and we need to raise it more. Over $9 trillion is what they are talking because the President squandered the strongest economy in the history of this country with reckless spending and irresponsible tax breaks for special interests and multimillionaires.

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

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

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

Our second clue that the President is committed to moving America forward will come in his remarks about national security. Tuesday night, it is not credible for the President to tell us he has done all he can to keep Americans safe for the last 5 years. We know that he had war on the brain many times. We know the Pentagon is stretched—stretched entirely too thin. The President’s refusal to change course in Iraq has made progress in 2006 harder to achieve. He has made it more difficult to spread democracy around the world because he has been undermining it right here at home.

As Katrina made clear, he failed in the 4 years after 9/11 to prepare America for the threats we face. New Orleans could have been any place in America. The difference with Katrina is we had warning it was coming. But other threats, that won’t be the case. America can do better. Tomorrow night, the President needs to provide a new way forward. Partisan attacks will only divide us. What we need is for the President to rally the country around our most important goal: protecting our people and our way of life.

Democrats have always been willing to work with President Bush to make America more secure. We know our nation has paid a great price for political games. Democrats look forward to hearing how the Commander in Chief will govern and hope we have seen the swagger and partisanship of the “campaigner in chief” for the last time.

Our third signal that President Bush understands what it will take to make the State of the Union strong will come when he talks about health care. Again, we are the wealthiest Nation in the history of the world. Shouldn’t we be the healthiest? We are not. Because of the President’s inaction on health care over the last 5 years, America faces a health care crisis of staggering proportions. There are 46 million Americans with no health insurance and millions more who are underinsured.

The cost of health care premiums has doubled since 2001. Manufacturing giants such as Ford and General Motors are laying off tens of thousands of people for lots of reasons, but one reason is health care costs have skyrocketed.

With a record such as that, it is not credible for the President to claim he has a vision to make health care affordable. He needs to present us new ideas that will move America forward, not trot out the same tired old policies that serve special interests and not the American people.

Press reports, I fear, indicate we are in for the same old tired ideas. It is rumored that President Bush will again focus on something called health savings accounts.

This administration has taught me that I learned in graduate school that George Orwell has some validity today. We have Orwellian doublespeak such as the Healthy Forests Initiative, a piecemeal of legislation that was for clearing of trees and timber sales to make our forests less healthy; our Clear Skies Initiative, which polluted the skies; Leave No Child Behind, which is leaving children behind; and the Deficit Reduction Act of 2006. Talk about Orwellian doublespeak: using the President’s own numbers, the Deficit Reduction Act increased the deficit by $50 billion.

Now he comes up with Health Savings Accounts. That is classic Bush doublespeak. It is not a credible solution to the health care crisis. This plan will force most Americans to spend more on health care while making it less available to millions of others. HSAs are nothing more than another give-away to the rich. The President has favored over hard-working Americans for the past 5 years. In fact, remember Social Security privatization? HSAs, or Health Savings Accounts, are a lot like that. They do nothing to solve the problem. They make the situation worse for the American people and they create a financial windfall for the President’s friends: HMOs, insurance companies and, of course, Wall Street, that will set up all these accounts.

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

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

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

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

I mentioned records—he holds all kinds of records. That was the 47th tournament he won—quicker than anyone else has done it in 50 years. He won the Buick Open four times. That is what he won yesterday. He holds record after record. I mention these records because President Bush holds all the records. The highest deficit, he holds them all. There is not a close second. He has them all.

It is not a record the American people envy, such as that of Tiger Woods. His financial record has bankrupted this country. We are going to be asked in a few years to increase the deficit ceiling—over $8.2 trillion.

Here is another doublespeak Orwell would be proud of. I am likely to hear tomorrow night. I am sure we are going to talk about the Bush competitive agenda. The President can talk all he wants about making America competitive, but for 5 years he has done nothing to keep America in the game. From what we have read in the press, this plan sounds like more empty rhetoric from a man who has spent 5 years slashing the funding we need to stay on the cutting edge. He shut the doors to thousands of college students by supporting cuts in student aid. He has allowed our country to fall further behind our trading partners. It is no accident that what is happening in South America, President Reagan, President Clinton, and the first President Bush worked hard to democratize Central and South America. These countries are losing their democracy edge because we have so neglected them.

He has lavished billions on big oil instead of investing in American technology and know-how to make us more energy independent. We need to hear new economic ideas tomorrow night. The President needs to tell us how he is going to begin paying down the debt, his debt, so our children and our grandchildren do not pay the price for his reckless fiscal record.

It is so stunning to me that Republicans—when I started my political career, they were the ones concerned about deficits. They have created them. They don’t complain about President Bush. They do not want to return to me. The President has not vetoed a single spending bill. Of course, he hasn’t vetoed anything, but why should he? We don’t have separate branches of Government while he is here; the Republican Congress does whatever he wants. Maybe beginning the sixth year that will not be the case.

We need the President to speak honestly about tax relief, about middle-class families and how they deal with these energy prices. The truth about the Bush tax cuts is multimillionaires stand, with his newest proposal, to get over $100,000 while the average working family will receive pennies on that. The President’s priorities are upside down. It is time for him to join us and bring fairness to our Tax Code.

Democrats are ready to work with President Bush, but he needs to commit to policies that put the needs of hard-working Americans first. One final signal that President Bush is ready to move toward America stronger will come on the issue of reform. Because of connections to the culture of corruption and stonewalling about Jack Abramoff, it is not credible for President Bush to claim the moral high ground on values as an honest government. President Bush needs to set an example, if he is going to lead our country forward tomorrow night. He needs to come clean about his connections to corruption, with Abramoff—as Republicans have done for HAGAN THUNE—Republican Senators have called for this. Too many Republicans have shown in recent days that we are going to obscure the facts and move on.

There is legislation pending. We do not need a task force. We need Senators LIEBERMAN and COLLINS to go ahead with the hearings and decide what needs to be done. Our legislation may not be perfect, but it is legislation we need to start with.

It is time for leaders who control the White House where men are willing to break the law and ignore America’s best interests so they can protect their political power. Safavian, Libby, Rove—it is Republicans who control the Congress which sold its soul to special interests and a Republican right-wing base, a base that has its sights set on stacking our courts with extremist judges. They have acknowledged that. It has been K Street, the so-called K Street Project, that has conspired with the White House to undermine the Court. I hope President Bush will join us in putting progress ahead of politics so we can have a State of the Union that is as honest and strong as the American people.

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

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

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

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

I often hear many concerns from my constituents about how powerless they feel in the face of insurance companies, employers, and the government. That is the side he came out for when he sided against the little guy—when he lined up against giant corporations or unchecked power and the power of the Presidency. That means that is the law as it is seen by Judge Roberts, Chief Justice. The current administration claims a power beyond the laws that Congress has set. It is an administration that believes it can spy on any American without a warrant, despite specific laws to the contrary. These are the kinds of abuses that caused the citizens of New Jersey and the other American colonies to rise up against King George III.

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

The question before us is not a generic question of whether Judge Alito is qualified for the Supreme Court. The real question is whether Judge Alito is the right person for this seat on the Supreme Court. The seat at issue is Day O’Connor’s seat. It is a seat held by a middle of the road, balanced justice.

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

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

Take the constitutional law professors who will disagree with my analysis, as I said before, I am more concerned about the effect of this nomination on everyday people in New Jersey and across the country. I am proud that there is a Federal courthouse in Newark that carries my name. It was while I was absent from the Senate a while that that was done. But I fought hard to get an inscription put on the wall of that courthouse. I wrote it. It reads: “The true measure of a democracy is its dispensation of justice.”

This Nation of laws has to continue to be just that, and people have to know that they are treated fairly and that their personal rights are protected and that they can bring courses of action if their rights are damaged.

So, if he is confirmed to the Supreme Court we ask ourselves the question: Will Judge Alito make it more difficult for the everyday people to protect themselves and their families against the power of big business and unchecked government officials and others in a position of government authority?

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

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

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

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

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

Those are Washington’s words. But they have a real resonance today. The current administration claims a power beyond the laws that Congress has set. It is an administration that believes it can spy on any American without a warrant, despite specific laws to the contrary. These are the kinds of abuses that caused the citizens of New Jersey and the other American colonies to rise up against King George III.

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

The question before us is not a generic question of whether Judge Alito is qualified for the Supreme Court. The real question is whether Judge Alito is the right person for this seat on the Supreme Court. The seat at issue is Day O’Connor’s seat. It is a seat held by a middle of the road, balanced justice.

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

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

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

I am proud that there is a Federal courthouse in Newark that carries my name. It was while I was absent from the Senate a while that that was done. But I fought hard to get an inscription put on the wall of that courthouse. I wrote it. It reads: “The true measure of a democracy is its dispensation of justice.”

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

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

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

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

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

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

Yet home State pride is not a sufficient reason for supporting a nominee. For a Supreme Court appointment is a lifetime appointment. When the Supreme Court decides, it is the law of the land and their decisions affect the lives of millions of Americans. So, it’s not where you come from that matters, but where you will take the nation.

Sam Alito has served his entire legal career in public service, and for that he is to be commended. His work as a prosecutor and as an appellate judge for the past 15 years has given him substantial experience. In his hearings and his meeting with me, he demonstrated that he has a keen intellect. Judged simply by that standard, Sam Alito is ready to serve.

But competence and intellect is the very least we should expect from someone seeking a lifetime appointment to the highest court in the land. Indeed, competence alone might be enough for a nominee for one of a myriad of other appointments, but this is about the Supreme Court of the United States. The Supreme Court, alone among our courts, has the power to revisit and reverse its previous decisions. So surely, we should also demand that our justices fairly interpret the law, respect judicial precedent, and properly balance the rights of individuals and the power of the state. Above all, we should demand that they check their personal beliefs at the door.

The heart of Judge Alito’s hopes to fill is one of great importance. Justice O’Connor has been the deciding vote in key cases protecting individual rights and freedoms on a narrowly divided Court, and the stakes in selecting her replacement are high. I have not agreed with every one of her decisions. But she has shown throughout her tenure a respect for law over ideology and a commitment to deciding each case not on the personal views she brought to the bench, before or after the decision, but on the best explanation of the law for her. When some on the court sought to inject an activist political philosophy into judicial decision-making and to turn back the clock on the liberties afforded the American people under the Constitution, Justice O’Connor blocked their path.

I had hoped Judge Alito would clearly demonstrate that he shares the commitment to protecting the individual rights and freedoms that Justice O’Connor so often cast the deciding vote to defend. Decades of progress in protecting basic rights, including privacy, women’s rights, and civil rights, are at stake with this nomination. The burden was on Judge Alito to be forthright and unambiguous in his answers. Unfortunately, his testimony was not reassuring and his record makes clear what kind of justice Judge Alito would be. A justice who would vote to overturn a woman’s right to choose, a justice who would allow our government to seek out and time again sided with corporations and against average Americans, a justice who would allow this administration to continue to stretch and potentially violate its legal and constitutional authority. Especially with a Nation facing today and will face tomorrow, America cannot afford that kind of justice.

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

At a time when we are fighting for the security of our country’s history, Presidents under the cloak of Commander-in-Chief have exercised excessive authority that has eroded individual rights and freedoms in the name of protecting the Nation. Over 200 years ago, our Founding Fathers purposefully established our Nation’s government with three distinct coequal branches to help prevent this concentration and abuse of power. An independent judiciary, part of our country’s history of checks and balances, is the only thing that stands between the executive branch and these potential threats to our rule of law.

In 2004, the Supreme Court stood up for the rule of law when it found that the President cannot ignore the Constitution and confine American citizens indefinitely without the ability to challenge their detentions. Decisions such as this, which recognize that our nation’s security is enhanced rather than undermined by respect of the rule of law, are what has always made the United States the envy of people around the world.

The bias Judge Alito has shown in favor of the executive branch threatens to undermine the freedoms that our judiciary has historically protected. From his work as a government lawyer to a speech before the Federalist Society in 2000, he consistently favors the concentration of unprecedented power in the hands of the President, even endorsing the so-called “unitary executive” theory that even many conservatives view as being at the fringe of judicial philosophy. It virtually gives the presidency exclusive powers that historically have belonged to either Congress or the courts. This theory is an activist theory, not a theory that reflects mainstream American thinking or values. In fact, the Supreme Court has largely rejected it.

Judge Alito has also backed granting absolute immunity to high-ranking Government officials who authorized illegal, warrantless wiretaps of American citizens, which is another position the Supreme Court has rejected. As far back as the Reagan administration, he has advocated that the President issue signing statements in an effort to shape the meaning of legislation. President Bush has often used this practice, most tellingly in December when he claimed the administration could ignore the new law banning torture whenever he sees fit. This undermines one of the coequal branches of our government, the people’s elected representatives of the United States Congress.

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

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

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

If it’s not where you come from that matters, but where you will take the
nation, does a Supreme Court with Justice Alito take the nation forward or move our Nation back? Back to a time when a President suspended the writ of habeas corpus; back to a time when a President ordered the internment of individuals based upon their ethnicity; and back to a time when a President ordered the unlawful breakins and wiretaps against his opponents.

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

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

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

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

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

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

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

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

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

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

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

In five split decisions involving a claim of sexual discrimination, Judge Alito has sided with the person accused of the sex discrimination every time. In Sheridan v. E.I DuPont de Nemours, a woman brought a gender discrimination lawsuit after being denied a promotion. A jury ruled in her favor, but the trial judge threw out the verdict. The full complement of the Third Circuit voted 10-1 to reverse the judge’s decision in this sex discrimination case and remand the case for reconsideration. A majority held that the plaintiff did not prove her case, arguing that the case should be dismissed. If Judge Alito’s view was the law of the land, virtually no female employee would have her day in court. In the areas of race discrimination, Judge Alito voted in dissent against the plaintiff in both split decisions cases. The Third Circuit held that the plaintiff in Bray v. Marriott Hotels had shown enough evidence of possible racial discrimination to merit a trial before a jury. As in Sheridan, Judge Alito dissented, saying that the plaintiff had not produced enough evidence even to get to a trial of a jury of their peers. If Judge Alito’s view was the law of the land, virtually no person of color would be able to pursue discrimination based on race in the courts of our nation.

From the bench, Judge Alito has participated in five significant decisions in the area of disability rights law and he sided with the defendant four out of the five times. In Nathanson v. Medical College of Pennsylvania, relating to a college’s knowledge of and response to the disability needs of a student, the majority held that under the Americans with and Disabilities Act of 1990, a college had a duty to allow a jury to hear her claims. Judge Alito disagreed with the majority, writing that Nathanson failed to prove that the college acted unreasonably in its responses to her requests for alternative seating arrangements. If Judge Alito’s view was the law of the land, virtually no disabled person denied alternative accommodations could seek relief from the court.

These are only symbolic of the many cases where Judge Alito would say no to the average American citizen.

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

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

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

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

The confirmation of a Supreme Court justice is one of the two most important responsibilities that a Senator is called upon to make during their term of office, the other being the decision on war and peace, which is also about life and death. The other is deciding who will have a lifetime appointment to the Court that decides the laws of the land.

Make no mistake about it, Judge Alito is a decent, accomplished intelligent man. A man who is proud to call our shared State of New Jersey home. But it is not enough to come from New Jersey—the test is—will you represent the values of New Jersey and this Nation on the highest court in the land?

In New Jersey we value creating opportunity, we cherish the idea of individual freedom and responsibility, and
we believe that justice is a force that should level the playing field between the individual and the powerful.

I have given careful consideration to this nomination, and I entered the process with hopes of supporting Judge Alito. This is not the first vote in this Senate, and I had hoped to cast it in support of this nominee, but after reviewing his record, and his testimony before my fellow Senators, I cannot.

The question for me has been will he tilt the court in its ideology so far that he will place the justice of the law over his personal beliefs. I do not believe that answer is yes. In good conscience, I regrettably cannot support his nomination for a lifetime appointment to be an Associate Justice of the Supreme Court of the United States.

I yield the floor.

The PRESIDING OFFICER (Mr. COLEMAN). The Senator from Missouri.

Mr. BOND. Mr. President, on the question of the confirmation of Judge Samuel Alito, when you boil everything down and clear away all of the other issues, the most important thing each of us wants from a judge is fairness and impartiality. None of us would want a court that prejudges an issue before it hears the case.

We would not get a fair trial if we faced a judge who had already made up his mind before hearing our case. Whether we are rich or poor, weak or strong, but especially if we are poor or weak, victim or defendant, we need to know that the judge will apply the law, not personal beliefs, not political ideology, not his personal agenda.

Judge Alito has told us how he believes a judge cannot prejudge an issue, a judge cannot have a agenda, a judge cannot have a preferred outcome in any particular case.

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

That would not be justice, and that would not be Judge Alito.

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

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

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

Judge Alito has told us he will look at the facts with an open mind and then apply the Constitution and the laws as written. He will not make up the law when he wants, he will not change the law when he needs.

Judge Alito also knows the law, as many of my colleagues on the Senate Judiciary Committee have pointed out. At every stage of his life, he has excelled at knowing and applying the law. As a law clerk to a Federal judge, Department of Justice official, Federal prosecutor, and now a Federal appellate judge, he has made an impression on the bench. Judge Alito is one of the most qualified ever nominated for the Supreme Court.

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

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

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

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

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

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

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

I thank the Chair and yield the floor.

The PRESIDING OFFICER. The Senator from Texas.

Mr. CORNYN. Mr. President, I have in my hand a number of endorsement letters that have been written, starting with the Grand Lodge of the Fraternal Order of Police. I ask unanimous consent that these letters be printed in the Record.

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

GRAND LODGE, FRATERNAL ORDER OF POLICE, Washington, DC, November 18, 2005.

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

Hon. PATRICK J. LEAHY, Ranking Member, Committee to the Judiciary, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN AND SENATOR LEAHY: I am writing on behalf of the membership of the Grand Lodge of the Fraternal Order of Police to advise you of our strong support for the nomination of Samuel A. Alito, Jr. to be an Associate Justice on the United States Supreme Court.

Judge Alito has a long and distinguished career as a public servant, a practicing attorney, and a Federal jurist. He currently serves as a judge on the U.S. Court of Appeals for the Third Circuit, the very same court before which he heard arguments on the nomination of Samuel A. Alito to the U.S. Court of Appeals for the Third Circuit. The Senate confirmed him unanimously on a voice vote.

The F.O.P. believes that nominees for the highest court in our land should be above partisan politics. Judge Alito is an example of a retired jurist who can be trusted to apply the Constitution to the facts of each case fairly and impartially.

The F.O.P. believes that nominees for the highest court in our land should be above partisan politics. Judge Alito is an example of a retired jurist who can be trusted to apply the Constitution to the facts of each case fairly and impartially.

The F.O.P. believes that nominees for the highest court in our land should be above partisan politics. Judge Alito is an example of a retired jurist who can be trusted to apply the Constitution to the facts of each case fairly and impartially.

The F.O.P. believes that nominees for the highest court in our land should be above partisan politics. Judge Alito is an example of a retired jurist who can be trusted to apply the Constitution to the facts of each case fairly and impartially.
Alito meets both of these important criteria. In his fifteen years as a Federal judge, he has demonstrated respect for the Constitution, for the rights of all Americans, for law, and for the rule of law as applied by those who enforce it. He has made it very difficult to successfully assert their rights as employees. Judge Alito demonstrated his keen understanding of this in a case about the police department of Newark, New Jersey (Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 1999). The Newark Police Department sought to force officers to shave their beards, which they wore in accordance with their religious beliefs. Judge Alito ruled in favor of the officers in this case, correctly noting that the department's policy unconstitutionally infringed on their civil rights under the First Amendment.

The F.O.P. is also very supportive of Judge Alito's decision in a 1993 decision filed by a coal miner seeking disability benefits under the Black Lung Benefits Act (Curt v. Director, Office of Workers' Compensation Programs). Judge Alito ruled in favor of a coal miner, holding that the Benefits Review Board which denied the miner's claim had misapplied the law regarding disability. He ordered that the case be remanded for an award of benefits, instructing that the Board could not consider any other grounds for denying benefits. Members of the F.O.P. and survivor families who have been forced to appeal decisions which denied benefits understand the importance of programs like the Public Safety Officer Benefits (PSOB) know first-hand just how important it is to have a jurist with a working knowledge of applicable law and a strong identification with the claimants as opposed to government bureaucrats looking to keep costs down.

Judge Samuel A. Alito, Jr. has demonstrated that he will be an outstanding addition to the Supreme Court, and that he has rightfully earned his place beside the finest legal minds in the nation. We are proud to support his nomination and, on behalf of the more than 321,000 members of the Fraternal Order of Police, I urge the Judiciary Committee to expediently approve his nomination. Please do not hesitate to contact me, or Executive Director Jim Pasco, through our Washington office if we may be of any further assistance.

Sincerely,

CHUCK CANTRELL
National President

November 9, 2005.
these editorials be printed in the RECORD.

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

[From the Dallas Morning News, Jan. 14, 2006]
CONFIRM ALITO: NOMINEE DESERVES SENATE’S BACKING

After hearing Samuel Alito testify this week, this editorial board’s assessment is that the appellate judge has the intellectual breadth and legal depth to sit on the Supreme Court. With few exceptions, he fielded Senate Judiciary Committee questions with a ready wit and nuanced insight.

He also came across as quite reasonable. Just as Clinton nominee Stephen Breyer struck senators as a mainstream liberal, Mr. Alito resides within the 40-yard lines of conservatism.

We offer this conclusion—and our recommendation of him—after comparing his testimony with several questions we raised Monday.

First, his embrace of judicial precedent was strong enough to conclude he wouldn’t rush to overturn Roe vs. Wade. He didn’t go as far as John Roberts in saying the abortion rights case is settled law. But he rejected entirely his belief in building upon previous decisions.

True, factors could lead him—or any justice—to reconsider a ruling, but they would be extraordinary ones. We’ll sum it up this way: Based upon his testimony, we’d feel very misled and deeply disappointed if he joined in an overthrow of Roe.

Second, he played down yet prefers presidential power. He left wiggle room on issues such as where the president can declare wartime and a narrow interpretation of the regulatory authority of Congress. Judge Alito likely will help move the court rightward, and some senators, including Senators Kent Conrad and Russ Feingold, find this a compelling reason to vote against him.

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

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

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

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

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

That’s because, though we would have preferred Alito to be more open about his judicial philosophy, he did make one case quite effectively. He is a conservative jurist. This is what the electorate, albeit narrowly, indicated it wanted when it reelected George W. Bush as president.

Democrats have no reasonable claim that voters did not know this to be a likely consequence of their votes.

Yes, Alito’s views peg him as closer to a constitutional originalist than one with more expansive views of that document, a view parallel to Alito’s is likely not the wild-eyed, knee-jerk ideologue his critics have depicted. Instead, a broad view of his writings, rulings and character indicate a judge capable of giving proper and due weight to the law. Alito is scholarly, intelligent and eminently qualified to sit on the bench, as attests his rating as such by the American Bar Association.

This is not to say that there isn’t a roll-of-the-dice quality to this choice for the Supreme Court. But this is so with most, if not all, judicial nominations. Just ask Republicans, many of whom now have buyers’ remorse over Justice David Souter and Anthony Kennedy.

Alito’s 1985 stance, writing as a lawyer within the Reagan administration, that the Constitution does not support abortion rights is troubling. Unlike John Roberts during his recent chief justice confirmation hearings, Alito refused to state that Roe vs. Wade is settled law. He did assert that it is settled in the American “Constitution and the Rule of Law” and should be respected as precedent.

A stronger statement would have been more reassuring, but in a living, breathing constitution, much, if not all, is set.

Were it so, then Plessy vs. Ferguson, which the Supreme Court used in 1896 to enable decades of segregation under a separate but equal rule, could not have been undone by the court in 1954.

Americans should take some comfort in Alito’s acknowledgment of a right to privacy in the Constitution. His refusal to be pinned down more concretely on this point is defensible given that the court will rule on abortion as it sees fit.

Similarly, the public should take some solace from his contention that no president is above the law, given the controversies President Bush is engendering in the war on terrorism.

Wisconsin is fortunate to have two early votes on judicial nominations. Democratic Sen. Herb Kohl and Rep. Ron Kind are both Judiciary Committee members. Both acquitted themselves ably in questioning the nominee. And both should vote the nominee out of committee.

Kohl properly probed on abortion and one-person, one-vote and inquired about Alito’s comments on Robert Bork, denied a Supreme Court seat in 1987 after he was asked necessary questions on executive powers, Alito’s ruling in a case involving a mutual fund in which he invested and on the death penalty. Together, they helped ensure the hearings were more than a GOP lovefest for the nominee.

But Alito handled himself well in answering. If not as forthcoming as would be ideal, he offered enough assurances to warrant his confirmation. Democrats, however, are most upset over what Alito didn’t say rather than what he said. This is not an entirely acceptable standard.

We’re aware that this nomination carries a weighty significance because the nominee will be a swing vote in a divided court. And Alito is still an open book on important issues. But, again, elections have consequences. Voters know what these are. It is not as if he is not demonstrably beyond the pale of the U.S. mainstream.

Alito—and Roberts—could disappoint, of course, and renge on their own claims of open-mindedness. If they do, they will have betrayed a trust to the American people. But it is not at all as assured as critics have contended that Alito or Roberts will do this.

Confirm Alito. It’s not risk-free, but it’s the right thing to do.

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

The Senate should confirm Judge Samuel A. Alito Jr., President Bush’s nominee for the Supreme Court.

Alito, a member of the Philadelphia-based Third Circuit Court of Appeals, demonstrated during three days of questioning by the Senate Judiciary Committee that he does not bring a precast agenda to the job.
He does bring a cast of mind that causes some legitimate concern. But Alito showed he has the experience, modest temperament, reverence for the law, and mastery of his profession that commands respect on the highest court.

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

This endorsement is not enthusiastic. Alito is a more conservative nominee than anyone concerned with the nation’s drift toward excessive executive power and disdain for civil liberties would prefer.

But the Supreme Court should not be stocked with justices all of the same political persuasion, left or right. As the replacement for a great jurist, Sandra Day O’Connor, Alito might very well move the court perceptibly to the right. But his methodical, just-the-facts approach to the law does not portend a shocking shift, and would not justify a filibuster of his nomination.

Alito did fail to allay some important concerns. On abortion, he rebuffed entreaties by Democrats to characterize Roe v. Wade as settled law. Chairmen Alan Specter (R., Pa.) commended Alito for discussing the issue in more depth than did Chief Justice John Roberts, Jr., but this extra effort was less than encouraging. Alito, who wrote in 1985 that the Constitution doesn’t guarantee the right to abortion, would not say why he’s wrong today.

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

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

At the hearings, Alito sought to temper the enthusiasm for presidential prerogatives he showed in writings that some critics believe will be the standard visitation in which President Alito approaches cases, labeling a conservative ideology portrayed in a recent article by Knight Ridder reporters Stephen Henderson and Howard Minta (“Alito Opinions Reveal Pattern of Conservatism”).

I am a registered Democrat who supports progressive causes. (To my wife’s consternation, I still can’t bring myself to take my “Kerry for President!” bumper sticker off of my car.) I clerked for Judge Alito from 1997 to 1998, and was happy to work with Judge Alito, until I read his 1985 Reagan job application statement. I could not tell you what his politics were. When we worked on the same death cases, we reached about 66 percent of the time. When we disagreed, it was largely due to the fact that he is a lot smarter than I am (indeed, than most people) and is far more experienced.

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 jurist.

One example that I witnessed of Judge Alito’s ability to approach cases with an open mind occurred in the area of criminal law, an area in which Judge Alito—a former federal prosecutor—had particular expertise. One time, I was looking at a set of legal briefs in a criminal appeal. The attorney for the criminal defendant had submitted a sloppy brief, a very slip-shod affair. The prosecuting attorney had submitted a neat, presented brief. I suggested (in my youthful naivete) that this was an easy case to decide for the government.

Judge Alito stopped me cold by saying that if he had set aside his conservative ideology and had conducted the necessary additional research needed to ensure that the defendant received a fair hearing before the court.

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

Another example, which reached a result that some might consider a conservative ideologue, was a case I worked on with Judge Alito (U.S. v. Kithcart) in which Judge Alito reversed a conviction of a black male, holding that he had a legal right to be in a parking lot. Judge Alito reversed this conviction on the basis that the initial arrest lacked probable cause, stating, “The mere fact that Kithcart is black and the perpetrators had been described as two black males in a black sports car” was insufficient probable cause to arrest the driver of the car. Notwithstanding the driver’s guilty plea, Judge Alito held that the initial arrest lacked probable cause, stating, “The mere fact that Kithcart is black and the perpetrators had been described as two black males in a black sport’s car was insufficient probable cause to arrest the driver of the car.”

This is hardly the work of a conservative ideologue.

As a former clerk to Judge Alito, I can attest that Alito approaches each case with an open mind, and abides respect for precedent and the important role of stare decisis—the doctrine that settled cases should not be continually revisited. Judge Alito has served on the U.S. Court of Appeals for the 3rd Circuit for 15 years, and has compiled a distinguished record that conclusively demonstrates respect for precedent.

The best indicator of how a justice may act on the Supreme Court is the judicial record the justice had before elevation to the court. But Alito has served and practiced litigation in the 3rd Circuit for 15 years. As a judge, Alito has consistently adhered to precedent for 15 years while on the Court of Appeals—even in cases that reached results that would seem incorrect to a conservative ideologue—such as with a civil liberties case, with which I saw him approach cases, labeling Judge Alito an “ideologue” would be unfair and distorts his record on the bench.

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

There really is no pretense that this tactic of delay for delay’s sake is needed for extended debate. Judge Alito was nominated months ago, and we have been debating this nomination without interruption since last Wednesday. Not only has Judge Alito been investigated by the Senate Judiciary Committee. He has been investigated by the Senate Judiciary Committee, on which I am proud to serve, and been through extended televised hearings. Not only is, even the most liberal, the Democrat leader, conceded “[t]here’s been adequate time for people to debate” this nomination.

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

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

I think it is also a mistake to waste the valuable time of the Senate, time we could be using to address other real and urgent needs that no doubt the President will address tomorrow night in his State of the Union speech, which are well known to each of us here. We have more important things to do than to stage events to facilitate fundraising by special interest groups. I urge all of my colleagues to stand up against these interest groups and to put the American people first by voting against the filibuster.

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

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

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

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

What are these views? Well, one organization I think makes the point. The American Civil Liberties Union is one example. They represent child pornographers because they believe that child pornography is free speech. Yet at the same time, they litigate against schoolchildren who want to recite the Pledge of Allegiance because it invokes “one nation under God.”

They believe the Constitution protects the right to end the life of a partially born child. Yet at the same time, they believe the Constitution does not protect marriage between only one man and one woman.

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

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

The liberal special interest groups and those who agree with them in this body to oppose Judge Alito do so because Judge Alito’s America is not the America they wish to play a role in.

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

He wrote:

If I’d been born a little earlier, Sam Alito probably would have been a Democrat. In the 1950s, the middle-class and lower-middle-class whites in places like Trenton, N.J., where Alito grew up, were the heart and soul of the Democratic Party.

But by the late 1960s, cultural politics replaced New Deal politics, and liberal Democrats were driven from white ethnic voters. Big-city liberals launched crusades against police brutality, portraying working-class cops as thuggish storm troopers for the establishment.

The liberals were doves; the ethnic voters were hawks. The liberals had “Question Authority” bumper stickers; the ethnics had been taught in school to respect authority.

The liberals thought that an unjust society caused poverty; the ethnics believed in working their way out of poverty.

Sam Alito emerged from his middle-class neighborhood about that time, made it to Princeton and found “very privileged people behaving irresponsibly.”

Alito wanted to learn; the richer liberals wanted to strike. He wanted to join the ROTC; the liberal Princetonians expelled that organization from campus. He was orderly and respectful; they were disorderly and disrespectful.

Mr. Brooks continues:

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

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

If forced to choose, most Americans side with the party that err on the side of the Constitution.

If you listened to [Republicans], you heard [Senators] alarmed by the threats posed by anti-American terrorists. If you listened to [Democrats], you heard Senators alarmed by the threats posed by American counterterrorists.

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

He concluded:

Alito is a paragon of the old-fashioned working-class ethic. In a culture of self-aggrandizement, Alito is modest. In a culture of made-for-TV sentimentalism, Alito is reticent. In a culture of flexing its muscles, Alito refuses to emote. In a culture that celebrates the rebel, or the fashionable pseudo-rebel, Alito respects tradition, order and authority.

I read a lengthy excerpt from Mr. Brooks’ column because I could not have said it better. This is Judge Alito’s America. It is a place where if we err, we err on the side of the Constitution. It is a place where we err at all, we err on the side of the law, not on the side of those who break the law, where we fight terrorists, not those who try to stop those terrorists, where we work hard to get ahead, where we are more interested in getting the job done than getting credit for it.

In other words, these are the middle-class traditional values of America, Sam Alito’s America, and, I believe, our America. They are now apparently so foreign to many in the Democratic Party, particularly the liberal special interest groups and their supporters, that they will stop at nothing to oppose someone such as Judge Alito who embodies those values. You name it, whether smears, distortions or even denying the decency of an up-or-down vote, and some will do it. Judge Alito’s treatment by this hard core of left-leaning groups and their supporters says more about them than it does Judge Alito.

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

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

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

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

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

Second, opposition to cloture on the Fortas nomination was almost evenly bipartisan, with 23 Republicans and 19 Democrats. As we are about to see, opposition to cloture on the Alito nomination will be entirely partisan. The most important reason why the Fortas cloture vote is no precedent for this one is that there had not yet been full and complete debate on the nomination when the vote ending debate occurred. Senator Robert Griffin of Michigan stated clearly at the time that not all Senators had had a chance to speak and that the debate was being kept from the public. Moreover, the many serious issues and concerns raised by the Fortas nomination. Senators were debating, not obstructing, the nomination.

The same cannot be said today. Those raising this last-minute call for a filibuster have had a full and fair opportunity to air their views about this nomination. Let us not forget that debate over a nomination, especially to the Supreme Court, begins as soon as the President announces his intention to nominate. The Judiciary Committee chairman, Senator SPECTER, accommodated Democrats and waited to hold the hearing on the Alito nomination until January. In fact, the 70 days between announcement and hearing exceeded the average time for all of the current Supreme Court Justices by more than 60 percent. Nonetheless, committee Democrats insisted on delaying the nomination for an extra week.

The nomination has now been on the floor for nearly a week. While the Senator from Massachusetts, Mr. KENNY, says that Senators need still more time to debate, I recall the long, repeated quorum calls last week when Senators who could have spoken chose not to do so. I agree with the distinguished minority leader who last Thursday said that “there has been adequate time for people to debate. No one can complain in this matter that there hasn’t been sufficient time to talk about Judge Alito, pro or con.”

In fact, the last-ditch call for this filibuster came not from this floor or even from this country. The Senator from Massachusetts, Mr. KERRY, called for this filibuster from Switzerland. There is a difference between not having an opportunity to debate and not winning that debate. Nothing is being shortcircuited here. This floor has been wide open for debate. No one can even suggest that the debate has not been a full and fair one.

To their credit, some of my Democratic colleagues who oppose the nomination itself have nonetheless said that this 11th-hour filibuster attempt is not in the best interest of the Senate.

The Senator from Illinois, Mr. OBAMA, said over the weekend that the better course for Democrats is to win elections and persuade on the merits, rather than what he called overreliance on procedural maneuvers such as the filibuster. I agree.

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

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

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

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

As I will explain, Judge Alito’s views on precedent are sound, traditional, and properly limited. When the Judiciary Committee hearing on this nomination opened, I outlined several rules which should guide the confirmation process. The first was that we should take parts or elements of Judge Alito’s record on their own terms, in their own context for what they really are. That certainly applies to Judge Alito’s views regarding the issue of precedent.

Rather than acknowledging what Judge Alito believes, however, some of his opponents have created a caricature of those views, which serves their political purposes but which misleads our fellow citizens about both Judge Alito’s record and the views important precedents on which he now sits. I assume that, by this suggestion, they want people to believe that
January 30, 2006

CONGRESSIONAL RECORD — SENATE

S291

Judge Alito would play fast and loose with Supreme Court precedent once he joins the Court. The suggestion is certainly false.

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

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

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

That said, a court strengthens the presumption that a precedent will be followed when the court actually does reaffirm or uphold, even when a decision at the same time, Judge Alito has said that adhering to prior decisions is not an inexorable command. Those are not his words. As he pointed out at his hearing, the Supreme Court has repeatedly used and reaffirmed precedents in the past and over again that adherence to precedent is not an inexorable command.

This only makes sense. While following prior decisions is a presumption, it is a rebuttable presumption. Here’s where Judge Alito’s opponents cry foul the loudest and where they expose their real agenda.

Many of Judge Alito’s opponents do not really care about legal doctrines; they only care about political agendas. For them, the political ends justify the legal means, and so-called principles are infinitely flexible so long as the political goal is achieved. They do not care about precedents in general; they only care about certain precedents in particular.

While Judge Alito has presented a thoughtful, principled approach to handling any prior decision, his opponents have but one simple, hard, political rule: Out of the political heavy lifting they want to keep. Their rule seems to be stare decisis for me but not for thee. Reaffirm decisions we like; overrule ones we oppose. This one-way ratchet is simply a device for getting the courts to do the political heavy lifting and preserving particularly the Supreme Court’s role as policymaker in chief.

The real issue for Judge Alito’s opponents is not that he rules too often for this group or that group, as if judges are supposed to make the numbers satisfy some political interest group rather than faithfully apply the law. It is not really about theories such as what has become known as active judges, which to Judge Alito apparently means nothing more unusual than that the head of the executive branch should be able to control and lead the executive branch. It is not about guilt-by-association or assertions of affiliation with groups wanting to preserve Princeton’s all-male tradition by Senators belonging to all-male clubs.

No, Mr. President, this is about abrogation. That is the be-all and end-all issue of those who oppose Judge Alito. I admit there may be an exception or two over there, but I really believe it comes down to that. That is what is driving this, and that is what the outside special interests, the leftwing groups, are driving them. The 800-pound room in the room is Roe v. Wade. That is the decision Judge Alito’s opponents want left alone at all costs.

Many Senators and leftwing interest groups have demanded to know whether Judge Alito, if confirmed, would ever vote to overrule Roe v. Wade. I applaud their creativity in getting as close as possible to directly asking him that question. For most of Judge Alito’s opponents, Roe v. Wade was correctly decided doesn’t matter. Whether it was a legitimate interpretation of the Constitution does not matter. No, abortion advocates take a fluidly flexible approach to precedent, at least until they get the one they want. Then they become the most rigid and doctrinaire defenders of precedent, insisting on keeping what they have. This all seems like a judicial version of heads I win, tails you lose.

Mr. President, I am glad to say that Judge Alito put it:

‘‘...I think anybody would want a rule in constitutional cases as in nonconstitutional cases...’’

---

The judiciary must be guided by principles, not by politics. The Supreme Court has repeatedly said that the role of precedent is actually the weakest in constitutional cases. In such cases, certainly very simple reasoning. When the Supreme Court construes one of our statutes incorrectly, we can correct that error in short order. When the Supreme Court interprets the Constitution incorrectly, correction comes only through the cumbersome constitutional amendment process or the Court’s willingness to review its past decisions.

I find it extraordinary that a list of Supreme Court decisions affirming the principle that precedent is weakest in constitutional cases be printed in the Record.

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

**STARE DECISIS IS WEAKEST IN CONSTITUTIONAL CASES**


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


‘‘Stare decisis is not an inexorable command; rather, it is a prudential policy and not a mechanical formula of adherence to the latest decision.’’ This is particularly true in constitutional cases, because in such cases ‘‘connection through legislative action is practically impossible.’’


‘‘I have long recognized, of course, that the doctrine of stare decisis is less rigid in its application to constitutional precedents.’’


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


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


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

---

**St. Joseph Stock Yards Co. v. United States, 98 U.S. 38,94 (1879)**—Justice Day O’Connor.

‘‘In constitutional cases, in which all of the judges in the Court construes one of our statutes in-
of precedent. It is a very important legal doctrine that serves to limit judicial power. There is a general presumption that past decisions will not be overruled, but this is not an inexorable command.

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

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

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

Here is his contrarian view:

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

That was November 1, 2005.

Here is the conclusion of New York Newday, which is titled “Qualifications:"

Samuel Alito is a modest, decent man and an accomplished jurist, well within the country’s conservative mainstream. On that basis he should be confirmed. But the Nation will need him to be a strong guardian of the constitutional rights and protections that make this country special.

I ask unanimous consent that three other editorials from the Washington Post, Chicago Tribune, and the Newark Star-Ledger be printed in the RECORD. There being no objection, the material, ordered to be printed in the RECORD, as follows:

[From the Washington Post, Jan. 15, 2006]
CONFIRM SAMUEL ALITO

The Senate’s decision concerning the confirmation of Samuel A. Alito Jr. is harder than that of now-Chief Justice John G. Roberts Jr. Judge Alito’s record raises concerns across a range of areas. His replacement of Justice Sandra Day O’Connor could cause—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.

He believes that judges should rule on the law, not make law. If Democrats on the Judiciary Committee hoped to expose him as a right-wing ideologue, they failed. Their failure is demonstrated by the views of a long departed, long forgotten Princeton organization to which he, apparently, had the slightest of connections.

Some Democrats believe judges should rule on and on about matters that had nothing to do with the very important legal doctrine that serves to limit judicial power. There is a general presumption that past decisions will not be overruled, but this is not an inexorable command.

Judge Alito’s record is contains an important area 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.

He believes that judges should rule on the law, not make law. If Democrats on the Judiciary Committee hoped to expose him as a right-wing ideologue, they failed. Their failure is demonstrated by the views of a long departed, long forgotten Princeton organization to which he, apparently, had the slightest of connections.

Some Democrats believe judges should rule on and on about matters that had nothing to do with the very important legal doctrine that serves to limit judicial power. There is a general presumption that past decisions will not be overruled, but this is not an inexorable command.

Judge Alito’s record is contains an important area 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.

He believes that judges should rule on the law, not make law. If Democrats on the Judiciary Committee hoped to expose him as a right-wing ideologue, they failed. Their failure is demonstrated by the views of a long departed, long forgotten Princeton organization to which he, apparently, had the slightest of connections.

Some Democrats believe judges should rule on and on about matters that had nothing to do with the very important legal doctrine that serves to limit judicial power. There is a general presumption that past decisions will not be overruled, but this is not an inexorable command.
do with Alito’s fitness to serve on the nation’s highest court.

Despite the spectacle of the hearings, we are convinced Alito, a New Jerseyan who sits on the 3rd Circuit Court of Appeals, is eminently qualified to serve as an associate justice of the U.S. Supreme Court and should be confirmed by the committee and ultimately by the Senate. Democrats and Republicans, conservatives and liberals, many of whom, perhaps, philosophically disagree with Alito, have consistently maintained he is well-suited for the court.

We think they make a compelling case. Among those who speak highly of him are Representative Frank Pallone, Jr., Associate Dean Ronald Chen, an outspoken liberal who was just named by Gov.-elect Jon Corzine to be public advocate; retired Chief Judge John Gibbons of the 3rd Circuit; and ABA President Bill Clinton, who since leaving the bench has worked aggressively to eliminate the death penalty; well-known Democratic lawyer Douglas Eakley, who was President Bill Clinton’s choice to serve on the board of directors of the Legal Services Corp.; Democratic criminal defense attorneys Michael O. Leventhal and Michael A. Benjamin; and Democratic lawyer Douglas E. Kmiec, who served in President Reagan’s Justice Department.

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

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

Given our strong and long-standing support of the 3rd Circuit Court of appeals, we worry that Alito’s refusal to describe Roe vs. Wade as a constitutional decision means he would set aside legal precedent and legal process in the future. For example, he would perhaps be inclined to declare as constitutional decisions that were wrong when made, if that’s what the law requires. At the same time, there is no reason to believe his approach, if he became a Justice, would make the Court less fair than it has been in the past.

Similarly, the judges who sit with Alito on the 3rd Circuit in Philadelphia came forth in an unalike and unified way to support Alito’s fitness, that is, his ability, intelligence, and judicial temperament, but also modesty and integrity. The Senate should confirm Alito. He is well suited to serve on a Court that is noted for being both tough and fair. In short, we think the Senate should confirm Judge Alito to the Supreme Court of the United States.

Mr. HATCH. Mr. President, I also urge all colleagues to support the nomination of Samuel Alito to the Supreme Court of the United States, as the Senate prepares for the confirmation of this qualified and modest judge. We urge the Senate to hold an up or down vote and confirm Judge Alito. I am proud that all the questions that should be asked of this nominee were asked and answered.

I urge my colleagues to preserve this body’s tradition by rejecting this desperate filibuster attempt, and then in a vote tomorrow, I urge my colleagues to honor the judiciary’s important but limited role in our system of government by confirming this qualified and honorable man to the Supreme Court of the United States of America.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania is recognized.

Mr. COCHRAN. Mr. President, it is time for the debate on the nomination of Judge Alito to end. It is time for the Senate to act on the President’s nomination of Samuel Alito to serve as a Justice on the U.S. Supreme Court.

We have had ample time to review this nomination. The Judiciary Committee has conducted a thorough review of Judge Alito’s background and qualifications. Senator SPECTER, as chairman of the Judiciary Committee, ensured that all the questions that should be asked of this nominee were asked and answered.

The Judiciary Committee thoroughly reviewed the story of Judge Alito’s life and questioned him on a wide range of issues. In the process, he demonstrated his ability, intelligence, and his fitness to serve as a Justice on the U.S. Supreme Court.

In almost 3 months of intense scrutiny and over 18 hours of personal testimony before the Senate Judiciary Committee, Judge Alito provided clear and candid answers to all the questions that were asked.

All Senators have had an opportunity to meet with Judge Alito, to review the opinions he has written in law reviews and other publications, to become familiar—as familiar as anyone can—with his thinking, his judicial philosophy, his past performance as a judge, as a solicitor, as a lawyer in private practice, as a student in law school, and as a fellow judge. Judge Alito has more judicial experience than any Supreme Court nominee in over 70 years.

In my opinion, the most impressive and persuasive testimony at the hearing came from the panel of judges with whom he served on the Third Circuit Court of Appeals. They testified before the committee...
and discussed the way Judge Alito approached questions before that court, the way he acted during deliberations among other members of the court about the decision that should be reached in each case, and generally the way he went about discharging the enormously important duties he had as a member of that court. And despite differences in politics and viewpoints and backgrounds among some of the judges with him, they were all enthusiastically supporting his confirmation for service on the Supreme Court.

Judge Alito has earned the respect of those who know him best—his colleagues on the Federal courts, as well as his current and former law clerks, and the members of the bar who have appeared before him in court. He is widely respected for his even temperament, his integrity, his sound legal judgment, and his respect and courtesy for others.

I am confident Judge Alito will serve with great distinction as a Justice on the Supreme Court. I think reciting Judge Alito’s own words is the best way for me to conclude my remarks. He said:

Fifteen years ago, when I was sworn in as a judge of the Court of Appeals, I took an oath. I put my hand on the Bible, and I swore that I would administer justice without respect of persons, that I would do equal right to the poor and the rich, and that I would carry out my duties under the Constitution and the laws of the United States. And that is what I shall do to the very best of my ability for the past 15 years. And if I am confirmed, I pledge to you that that is what I would do on the Supreme Court.

It is time to confirm the President’s nomination of Judge Samuel Alito.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The Senator from Kansas.

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

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

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

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

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

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

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

He is a known commodity—well known, well respected, and well regarded across the board. I do think where he is going to contribute to the country, the Republic, is in the areas of religious freedom and free expression. This has not gotten much review, but it is one of the areas he has written the most extensively on and in which he is a legal scholar.

He believes in a robust public square, a public square where we can celebrate faith, and where faith can be presented. He believes in this for all faiths and faith traditions. You see that in cases where he has ruled in favor of menorah candles being put forward, Christmas trees, and Mr. Jefferson’s wall. He is able to dress appropriately to their religion and still be able to be police officers.

He believes in a separation of church and state, but he also believes this is a country full of people of faith and that they should, under the free expression clause, be allowed to express and to live that faith and to be able to show it. I think he is very clear and thoughtful.

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

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

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

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

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

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

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

One area we talked about that has not again gotten much review, but needs a lot, is the area of judicial restraint. We need a judiciary that will restrain itself. There are three separate branches of Government, each having a sphere and not to overlap the other. The judiciary has not restrained itself in the past. Judge Alito, along with John Roberts, previously coming before the committee and this body, both spoke significantly and clearly about the need for judicial restraint. I believe if we don’t start seeing a judiciary that shows some restraint and says it is not an all-powerful judiciary in every area, it cannot appropriate money, that is left to the Congress, that we will start seeing those bodies remove judicial review by the Congress, as Congress opposed in the Constitution. It is not an area that has been used much, but I think we are going to start seeing it used much
more, if the judiciary does not show some level of restraint. This has been expressed by both John Roberts and Samuel Alito.

I believe Judge Alito will be an outstanding jurist if we are able to get closure in this body to end debate, to get the facts out into the public. He is one of the most qualified individuals we have had. His is a beautiful story of immigrant parents coming to the United States and working hard to get a good education. He is one of learning character. Probably one of the saddest chapters that has taken place is the challenge to his character, which is nothing short of sterling. This is a gentleman who has worked all his life to uphold the traditions of his family, to make his family proud and see his dad pleased that his son stood for right against wrong.

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

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

I support the nomination and yield the floor.

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

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

The PRESIDING OFFICER. The Senator from Massachusetts.

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

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

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

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

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

These are things that we must consider here in the United States Senate. These are things that are on the line in this vote this afternoon. And these are the things that the Americans want us to consider. We have to consider whether a judge will place barriers in the way of addressing discrimination, whether he will serve as an effective check on the abuse of executive power, whether he will roll back women’s privacy rights or whether he will enforce the rights and liberties that generations of Americans have fought and bled and even died to protect. None of the rights we are talking about came easily in this country. There were always those in positions of power who fought back and resisted. What we need in a Justice is somebody who is sensitive to that history. Senator after Senator has described specific cases and the way in which Judge Alito has had a negative impact in these areas—often standing alone, in dissent against mainstream beliefs.

This long record is a record that gave the extreme right wing cause for public celebration with his nomination. That just about tells you what you need to know. The vote today is whether we will take a stand against ideological courtpacking. Nothing can erase Judge Alito’s record. We know who he is getting. No one will be able to say, in 5 to 10 years, that they are surprised by the decisions Judge Alito makes from the bench. People who believe in privacy rights, those who fight for the rights of the most disadvantaged, those who believe in balancing the power between the President and Congress need to take a stand now.

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

This is a lifetime appointment to a Court where nine individuals determine what our Constitution protects and what our laws mean. Once Judge Alito is confirmed, we can never take back this vote. No matter what he does, he has the potential to prevent Americans from having their discrimination measured, to protect women’s privacy, to continue to take a stand with their vote. I thank those who have stood to be counted in this effort and who will continue to take a stand with their vote. I particularly thank my senior colleague from Massachusetts, Senator Kennedy. I think the remainder of the time Senator Kennedy will use.

Mr. KENNEDY. I have 7 1⁄2 minutes. Am I correct in that?

The PRESIDING OFFICER. The Senator is correct.

Mr. KENNEDY. I will yield myself 7 minutes.

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

People in my State at this particular time are concerned about the difficulties they are having with prescription drugs. They are concerned about the problems they are having in paying their oil bills. They are concerned about their problems in paying for the education of their children. They are troubled by what they see as a result of Katrina. They are bothered by what they hear about the corruption in Washington and are deeply troubled by what is happening in Iraq. They have not had a chance to focus on what is the meaning of this vote in the Senate this afternoon.

But all you have to do is look back into history. Look back into the history of the judiciary. Look back to the history of the Fifth Circuit that was making the decisions in the 1960s. Look at the record of Justice Wisdom, Judge Tuttle, Judge Johnson of Alabama and the courage they demonstrated that said at last we are going to break down the walls of discrimination in this country that have gripped this Nation for 200 years. Our Founding Fathers, the Constitution of the United States. The institution that protects it is the Supreme Court of the United States.

... and it matters greatly. The vote the legislative body will make this week is not the vote on the next measure on the calendar? Asbestos? What is the next business? What is the next vote on the court? Abortion? No, it is not Judge Alito. No, it is not going to be a friend of the disabled—it is not going to be Judge Alito.

Finally, if you believe it is more important than spending time and permitting the American people to understand this issue? I don’t believe so, and that is what our vote at 4:30 is about.

If you are concerned and you want a Justice who is going to stand for the working men and women in this country—it is not going to be Judge Alito. If you are concerned about women’s privacy rights, about the opportunity for women to gain fair employment in America, it is not going to be Judge Alito. If you care about the disabled, the Rehabilitation Act that we passed, the IDEA Act to include children in our schools, that we passed, that has been on the books for 25 years, the Americans with Disabilities Act that we have passed to bring all of the disabled into our society, if you are looking for someone who is going to be a friend of the disabled—It is not going to be Judge Alito.

... the protection of Americans’ fundamental rights. The procedural vote just taken was in large measure symbolic. Its result confirms that a majority of the Senate, and of both sides of the aisle, will vote against the nomination of a successor to Justice Sandra Day O’Connor on the Supreme Court of the United States.

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

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

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

Filibusters of judicial nominees—and, in particular, of Supreme Court nominees—are hardly something new. When Judge Fortas was nominated by President Johnson to be the Chief Justice, a filibuster led by Strom Thurmond and the Republican leader resulted in an unsuccessful cloture vote and in that nomination being withdrawn. That was the most recent successful filibuster of a Supreme Court nominee. But that was not the first or last Supreme Court nomination to be defeated. President George Washington, the Nation’s first and most popular President, saw the Senate reject his nomination of John Rutledge to the Supreme Court at the outset of our history. Over time approximately one-fifth of Presidents’ Supreme Court nominees have not been confirmed.

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

Many myths have arisen about why the Senate rejected that nomination. I recall hot debate with other Senators, both Republican and Democratic, who voted to defeat that nomination, I know that the nominee’s views were the decisive factor in his failure. His judicial philosophy, as compared to the conventional right to privacy was a large part of his own undoing. Soon thereafter, President Reagan announced and withdrew the nomination of Judge Ginsburg and then turned to a conservative Federal appellate court judge from California named Anthony Kennedy. Justice Kennedy, though conservative, was confirmed overwhelmingly and in bipartisan fashion. He continues to serve as a respected Justice who has authored key decisions protecting Americans from unfair discrimination because of their sexual orientation.

When the Senate was considering a successor to Justice Powell almost 20 years ago, I believed a Supreme Court nominee’s judicial philosophy should play a central role in our consideration. I noted:

“There is no question that the nominee who is confirmed to succeed Justice Lewis Powell will be uniquely influential in determining the direction of the Supreme Court’s interpretation of the Constitution for years to come. There can hardly be an issue closer to the heart of the Senate’s role than a full and public exposition of the nominee’s approach to the Constitution and to the rule of the courts in discerning and enforcing its commands. That is what I mean by judicial philosophy.”

The same remains true today as we consider a successor to Justice Sandra Day O’Connor. I strongly believe that judicial philosophy and personal views do matter because judges should just apply the rule of law as it is.

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

Several Republican Senators said that judicial philosophy and personal views do not matter because judges should just apply the rule of law as it is. Senator Feinstein made this point extensively in the debate. Personal views and judicial philosophy often come into play on close and contentious cases. We all know this to be true. Why else did Republican supporters for President Bush to withdraw their support of this vacancy, Harriet Miers, before she even had a hearing? She failed their judicial philosophy litmus test.

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

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

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

This is a President who has been conducting secret and warrantless eavesdropping on Americans for more than 4 years. This President has made the most expansive claims of power since American patriots fought the war of independence to rid themselves of the overbearing power of King George III. He has done so to justify illegal spying on Americans, to justify actions that violate our values and laws against torture and protecting human rights, and in order to detain U.S. citizens and others on his say so without judicial review or due process. This is a time in our history when the protections of Americans’ liberties are at risk as are the checks and balances that have served to constrain abuses of power for more than 200 years.

Judge Alito’s opening statement skipped over the reasons he was chosen. He ignored his seeking political appointment within the Meese Justice Department by proclaiming his commitment to an extreme and activist right wing legal philosophy. Four Senators—Meese Justice Department. The job application that was the subject of some question at the hearing is most revealing. I will ask that a copy of that job application be printed in the Record before a single minute of debate or the debate with that attack. He said this before a single minute of debate or opening statement by any Democratic Senator. The opportunity to ask questions ring hollow and are particularly inappropriate after President Bush was forced by an extreme faction in his own party to withdraw his nomination of Harriet Miers.

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

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

This President continues to choose confrontation over consensus and to be a divider rather than being the uniter that he promised to be. This is in stark contrast to President Clinton’s selection of Justices Ginsburg and Breyer after real consultation. In his book, “Square Peg,” Senator HATCH described how in 1993, as the ranking minority member of the Senate Judiciary Committee, he advised President Clinton about the relatively unknown nominees. Senator HATCH recounted that he warned President Clinton away from a nominee whose confirmation he believed “would not be easy.” He wrote that he then suggested the names of Stephen Breyer and Ruth Bader Ginsburg, both of whom were eventually nominated and confirmed “with relative ease.” President Bush, who had promised to be a uniter, not a divider, has failed to live up to the example of his predecessor, as described by Senator HATCH. The result is that, rather than sending us a nominee for all Americans, the President chose a divisive nominee who raises grave concerns about whether he will be a check on Presidential power and whether he understands the role of the courts in protecting fundamental rights.

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

So what do we know about the Samuel Alito who graduated from Princeton about the Solicitor General of the United States? We know that he wanted political advancement and was committed to the radical legal theories of the Meese Justice Department. The job application that was the subject of some question at the hearing is most revealing. I will ask that a copy of that job application be printed in the Record at the conclusion of my statement so that the American people can see it.

This confirmation process is the opportunity for the American people to learn about the White House’s wiretapping of Americans, to justify actions that violate our values and laws against torture and protecting human rights, and in order to detain U.S. citizens and others on his say so without judicial review or due process. This is a time in our history when the protections of Americans’ liberties are at risk as are the checks and balances that have served to constrain abuses of power for more than 200 years.

This is a President who has been conducting secret and warrantless eavesdropping on Americans for more than 4 years. This President has made the most expansive claims of power since American patriots fought the war of independence to rid themselves of the overbearing power of King George III. He has done so to justify illegal spying on Americans, to justify actions that violate our values and laws against torture and protecting human rights, and in order to detain U.S. citizens and others on his say so without judicial review or due process. This is a time in our history when the protections of Americans’ liberties are at risk as are the checks and balances that have served to constrain abuses of power for more than 200 years.

Judge Alito’s opening statement skipped over the reasons he was chosen. He ignored his seeking political appointment within the Meese Justice Department by proclaiming his commitment to an extreme and activist right wing legal philosophy. Four Senators—Meese Justice Department. The job application that was the subject of some question at the hearing is most revealing. I will ask that a copy of that job application be printed in the Record before a single minute of debate or the debate with that attack. He said this before a single minute of debate or opening statement by any Democratic Senator. The opportunity to ask questions ring hollow and are particularly inappropriate after President Bush was forced by an extreme faction in his own party to withdraw his nomination of Harriet Miers.

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

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

This President continues to choose confrontation over consensus and to be a divider rather than being the uniter that he promised to be. This is in stark contrast to President Clinton’s selection of Justices Ginsburg and Breyer after real consultation. In his book, “Square Peg,” Senator HATCH described how in 1993, as the ranking minority member of the Senate Judiciary Committee, he advised President Clinton about the relatively unknown nominees. Senator HATCH recounted that he warned President Clinton away from a nominee whose confirmation he believed “would not be easy.” He wrote that he then suggested the names of Stephen Breyer and Ruth Bader Ginsburg, both of whom were eventually nominated and confirmed “with relative ease.” President Bush, who had promised to be a uniter, not a divider, has failed to live up to the example of his predecessor, as described by Senator HATCH. The result is that, rather than sending us a nominee for all Americans, the President chose a divisive nominee who raises grave concerns about whether he will be a check on Presidential power and whether he understands the role of the courts in protecting fundamental rights.

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

So what do we know about the Samuel Alito who graduated from Princeton University and Yale Law School and obtained a plum job in the office of the Solicitor General of the United States? We know that he wanted political advancement and was committed to the radical legal theories of the Meese Justice Department. The job application that was the subject of some question at the hearing is most revealing. I will ask that a copy of that job application be printed in the Record at the conclusion of my statement so that the American people can see it.

This confirmation process is the opportunity for the American people to learn about the White House’s wiretapping of Americans, to justify actions that violate our values and laws against torture and protecting human rights, and in order to detain U.S. citizens and others on his say so without judicial review or due process. This is a time in our history when the protections of Americans’ liberties are at risk as are the checks and balances that have served to constrain abuses of power for more than 200 years.
fuels her continued service nearly 7 months after she announced her intention to retire.

As the Senate prepares to vote on President Bush’s current nomination—this third—for a successor to Justice O’Connor, we cannot be misled about her critical role on the Supreme Court. Her legacy is one of fairness that I want to see preserved. Justice O’Connor has been a guardian of the protections the Constitution provides the American people.

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

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

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

The Federal judiciary is unlike the other branches of Government. Once confirmed, Federal judges serve for life. There is no court above the Supreme Court of the United States. The American people deserve a Supreme Court Justice who inspires confidence that he, or she, will not be beholden to partisan interests. Her judgment has also been crucial in protecting our environmental rights. She joined in 5-to-4 majorities affirming reproductive freedom, religious freedom, Voting Rights Act, and each of these cases makes clear how important a single Supreme Court Justice is.

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

The Federal judiciary is unlike the other branches of Government. Once confirmed, Federal judges serve for life. There is no court above the Supreme Court of the United States. The American people deserve a Supreme Court Justice who inspires confidence that he, or she, will not be beholden to partisan interests. Her judgment has also been crucial in protecting our environmental rights. She joined in 5-to-4 majorities affirming reproductive freedom, religious freedom, Voting Rights Act, and each of these cases makes clear how important a single Supreme Court Justice is.

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

The Federal judiciary is unlike the other branches of Government. Once confirmed, Federal judges serve for life. There is no court above the Supreme Court of the United States. The American people deserve a Supreme Court Justice who inspires confidence that he, or she, will not be beholden to partisan interests. Her judgment has also been crucial in protecting our environmental rights. She joined in 5-to-4 majorities affirming reproductive freedom, religious freedom, Voting Rights Act, and each of these cases makes clear how important a single Supreme Court Justice is.

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

The Federal judiciary is unlike the other branches of Government. Once confirmed, Federal judges serve for life. There is no court above the Supreme Court of the United States. The American people deserve a Supreme Court Justice who inspires confidence that he, or she, will not be beholden to partisan interests. Her judgment has also been crucial in protecting our environmental rights. She joined in 5-to-4 majorities affirming reproductive freedom, religious freedom, Voting Rights Act, and each of these cases makes clear how important a single Supreme Court Justice is.

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

The Federal judiciary is unlike the other branches of Government. Once confirmed, Federal judges serve for life. There is no court above the Supreme Court of the United States. The American people deserve a Supreme Court Justice who inspires confidence that he, or she, will not be beholden to partisan interests. Her judgment has also been crucial in protecting our environmental rights. She joined in 5-to-4 majorities affirming reproductive freedom, religious freedom, Voting Rights Act, and each of these cases makes clear how important a single Supreme Court Justice is.

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

The Federal judiciary is unlike the other branches of Government. Once confirmed, Federal judges serve for life. There is no court above the Supreme Court of the United States. The American people deserve a Supreme Court Justice who inspires confidence that he, or she, will not be beholden to partisan interests. Her judgment has also been crucial in protecting our environmental rights. She joined in 5-to-4 majorities affirming reproductive freedom, religious freedom, Voting Rights Act, and each of these cases makes clear how important a single Supreme Court Justice is.

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

The Federal judiciary is unlike the other branches of Government. Once confirmed, Federal judges serve for life. There is no court above the Supreme Court of the United States. The American people deserve a Supreme Court Justice who inspires confidence that he, or she, will not be beholden to partisan interests. Her judgment has also been crucial in protecting our environmental rights. She joined in 5-to-4 majorities affirming reproductive freedom, religious freedom, Voting Rights Act, and each of these cases makes clear how important a single Supreme Court Justice is.

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

The Federal judiciary is unlike the other branches of Government. Once confirmed, Federal judges serve for life. There is no court above the Supreme Court of the United States. The American people deserve a Supreme Court Justice who inspires confidence that he, or she, will not be beholden to partisan interests. Her judgment has also been crucial in protecting our environmental rights. She joined in 5-to-4 majorities affirming reproductive freedom, religious freedom, Voting Rights Act, and each of these cases makes clear how important a single Supreme Court Justice is.

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

The Federal judiciary is unlike the other branches of Government. Once confirmed, Federal judges serve for life. There is no court above the Supreme Court of the United States. The American people deserve a Supreme Court Justice who inspires confidence that he, or she, will not be beholden to partisan interests. Her judgment has also been crucial in protecting our environmental rights. She joined in 5-to-4 majorities affirming reproductive freedom, religious freedom, Voting Rights Act, and each of these cases makes clear how important a single Supreme Court Justice is.

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

The Federal judiciary is unlike the other branches of Government. Once confirmed, Federal judges serve for life. There is no court above the Supreme Court of the United States. The American people deserve a Supreme Court Justice who inspires confidence that he, or she, will not be beholden to partisan interests. Her judgment has also been crucial in protecting our environmental rights. She joined in 5-to-4 majorities affirming reproductive freedom, religious freedom, Voting Rights Act, and each of these cases makes clear how important a single Supreme Court Justice is.
Mr. ROCKEFELLER. Mr. President, I rise today to share my thoughts and concerns about the President’s nomination of Judge Samuel Alito to be an Associate Justice on the U.S. Supreme Court.

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

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

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

I will not support a filibuster because I see it as an attempt to delay his certain confirmation. But I will register my grave concerns about Judge Alito’s answers in the Judiciary Committee to questions about the unitary executive tilt toward showing deference toward expanded and unchecked Presidential authority. His views on this issue concern me.

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

Over the years, I have supported about 97 percent of the nominees for the Federal court sent to us by President Bush. My record has been one of substantial support for the President’s nominees.

But for me, a nomination to the Supreme Court carries much more weight and greater potential consequences for the country.

Judge Alito is replacing Justice Sandra Day O’Connor on the Court. Justice O’Connor has been a key swing vote on so many issues that have been decided by a 5-to-4 vote in recent years.

I believe that Judge Alito’s nomination, if approved by the Senate, would tilt that Court in a direction that will restrict personal freedoms, strengthen the role of government and corporations in our lives, and allow the expansion of power of the Presidency.

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

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

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

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

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

I will not support a filibuster because I see it as an attempt to delay his certain confirmation. But I will register my grave concerns about Judge Alito’s answers in the Judiciary Committee to questions about the unitary executive tilt toward showing deference toward expanded and unchecked Presidential authority. His views on this issue concern me.

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

Over the years, I have supported about 97 percent of the nominees for the Federal court sent to us by President Bush. My record has been one of substantial support for the President’s nominees.

But for me, a nomination to the Supreme Court carries much more weight and greater potential consequences for the country.

Judge Alito is replacing Justice Sandra Day O’Connor on the Court. Justice O’Connor has been a key swing vote on so many issues that have been decided by a 5-to-4 vote in recent years.

I believe that Judge Alito’s nomination, if approved by the Senate, would tilt that Court in a direction that will restrict personal freedoms, strengthen the role of government and corporations in our lives, and allow the expansion of power of the Presidency.

For those reasons, I have decided to vote no on this nomination.
he was unanimously confirmed by the Senate in 1990. In total, Judge Alito has served our Nation for 30 years, using his legal experience and talents for public good rather than for personal profit. We should all applaud and support such a record of public service, especially when you consider the fact that Judge Alito has more judicial experience than any Supreme Court nominee in over 70 years.

Unfortunately, however, there are a number of my colleagues from across the aisle who somehow believe that this record of public service is something to deride and distort. Forget the fact that nearly everyone who has worked with Judge Alito or has taken an impartial review of this man’s record and credentials, such as the American Bar Association, supports this nomination wholeheartedly. Forget the fact that Judge Alito has garnered the near unanimous support of his colleagues on the Senate and lawmakers from both parties—including Governor Ed Rendell of Pennsylvania—who know him best. Forget the fact that Judge Alito has ruled in favor of minorities who have alleged racial discrimination or who were convicted of crimes. Forget that Judge Alito is known by those who have worked with him as a good and decent man who does not put ideology over public responsibility. Some of my colleagues do not want to consider any of these facts, or they try to smear the President’s nominee. And why? Well, because Judge Alito is simply that; he is President Bush’s nominee.

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

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

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

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

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

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

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

To avoid prejudging and to ensure impartiality, a nominee should not discuss cases of the law that are “live”—where cases are likely to come before the Court. Parties before the Court have a right to expect that the Justices will approach their case with a willingness to fully and fairly consider both sides.

The cases that come before the Supreme Court each year present legal issues of tremendous complexity and import, and Justices should not be expected to speculate as to how they would vote, or make promises in order to win confirmation. Justice Ginsberg stated during her hearing that a nominee may provide “no hints, no forecasts, no previews” on issues likely to come before the Court. Justice Ginsberg’s statement underscores, the Justices should reach a conclusion only after extensive briefing, argument, research, and discussion with their colleagues on the Court.

We must also recognize that there are limits to our ability to anticipate the issues that will face the Court in the future. Twenty years ago, few would have expected that the Court would hear cases related to a President’s political beliefs. The Justices need to remain open to make sense of copyright laws in an electronic age, or would face constitutional issues related to the war on terrorism.

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

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

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

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

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

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

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

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

As Judge Becker commented, “The result is that I have no reason to doubt that Judge Alito—Judge Alito in his legal skills, his integrity, his evenhandedness, and his dedication to precedent and the rule of law—is a real judge deserving the support and respect of his colleagues, his adversaries, and the public. . . Judge Alito is a real judge deserving the support and respect of his colleagues, his adversaries, and the public.”

Judge Friedel also noted, “Mr. President, I have no reason to doubt that Judge Alito is a real judge deserving the support and respect of his colleagues, his adversaries, and the public.”

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

Judge Breyer, a committed human rights and civil rights activist who described himself as “openly and unapologetically pro-choice,” said: “I cannot recall one instance during conference or during any other experience that I had with Judge Alito . . . that brought to mind a justice resembling an ideological bent. . . . If I believed that Sam Alito might be hostile to civil rights as a member of the
United States Supreme Court, I guarantee you that I would not be sitting here today.”

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

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

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

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

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

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

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

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

Yet, in 1992, all three of these Justices joined the Court’s majority opinion in Casey reaffirming Roe based on the “precedential force” of its central holding.

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

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

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

For these reasons, I will vote to confirm Judge Alito. I hope and expect that he will be confirmed and that his record on the Supreme Court will show the same deference to precedent, respect for the limited role of a judge, and freedom from ideologically driven decisionmaking that he has demonstrated during his tenure on the Third Circuit.

Mr. KYL. Mr. President, I explained last Wednesday that I would support the nomination of Judge Alito. Since then, I have been somewhat frustrated at how some colleagues debate the merits of his record on the Supreme Court.

First, let me address the case of Sheridan v. DuPont.

On January 26, the junior Senator from Colorado indicated that Judge Alito was unlikely to support plaintiffs’ claims under Title VII. He ruled against a female plaintiff in a gender discrimination case. The Senator said, “In Sheridan, Judge Alito registered the lone dissent among thirteen judges voting to prevent a woman who had presented evidence of employment gender discrimination to have her case go to trial.” The Senator’s summary of the case requires additional elaboration, though.

According to the record of that case, the plaintiff, Barbara Sheridan, was employed as head caption of the Green Room restaurant in the Hotel DuPont. Initially, she received good performance reviews, but DuPont claimed that her performance began to deteriorate in 1991. At that point, her manager met with her to ask her to stop using the restaurant bar for smoking and grooming. Apparently Sheridan was frequently late to work, and other employees had complained about food and drink quality. Even so, in January 1991, the hotel decided to reassign Sheridan to a nonsupervisory position that did not involve the handling of cash. She would not suffer any reduction in pay because of this job transfer. Rather than accept reassignment, she resigned in April 1992 and sued for gender discrimination.

When the case came before him on appeal, Judge Alito joined a unanimous three-judge panel that ruled for Ms. Sheridan. He held that she should go to trial because it was plausible that a jury could agree with her. Judge Alito explained, “a rational trier of fact could have found that DuPont’s proffered reasons for the constructive termination were pretextual.”

Later, however, the case was heard by the full Third Circuit. At that time, Judge Alito expressed doubt about the applicable Third Circuit precedent. Hesitant about the court’s broad rule that contracts were set aside with varying factual situations, he explained that when the employee makes out a case like this, she should usually, but not always, be accorded a trial. He reached this conclusion after parsing the Supreme Court’s 1993 decision in St. Mary’s Honor Center v. Hicks. And most importantly for present purposes, the Supreme Court later agreed with Judge Alito’s view in a unanimous opinion authored by Justice O’Connor.

That case, Reeves v. Sanderson Plumbing Products, can be found at 533 U.S. 133, and was decided by the Supreme Court in 2000.

The job of an appellate court judge is to faithfully interpret the Constitution and the Supreme Court’s interpretation of statutes. This case demonstrates that Judge Alito got it right when he examined pleading standards in title VII cases.

Let’s move on to another case, the 1996 case of U.S. v. Rybar, in which Judge Alito dissented.

On January 25, the Senior Senator from Rhode Island said that Judge Alito “advocated striking down Congress’s ban on the transfer and possession of machine guns.” He further said that Judge Alito had argued that he was “not convinced by Congress’ findings on the impact of machine guns 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 difference that the owes to its two coordinate branches of government.”

I discussed this case with Judge Alito during his confirmation hearings. The description we have just heard does not tell the whole story.

Judge Alito’s dissent in that case had nothing to do with being “convinced” by Congress’ findings. Rather, Judge
Alito based his dissent, in part, on the fact that Congress made no explicit findings regarding the link between the intrastate activity regulated by these laws, the mere possession of a machine gun, and interstate commerce. Rather, it was a careful application of the then-recent decision in United States v. Lopez, which reminded courts to take seriously the limits of Congress’s powers under the commerce clause. In Lopez, the Supreme Court had held that Congress’s power to regulate commerce among the several States did not include the power to regulate possession of a gun near a school where the gun never crossed State lines. It was for the Third Circuit to decide whether Congress’s power to regulate interstate commerce included the power to regulate possession of a machine gun where the machine gun never crossed State lines. In Judge Alito’s view, the Supreme Court’s decision “require[d] the court to invalidate the statutory provision at issue.” He relied on and cited Lopez at least 22 times in his 8-page dissenting opinion.

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

Let me add one last word on the Rybar case. It is often said that Judge Alito always sides with Mr. Rybar. Of course, he did not think of himself being on anyone’s side. He was just doing as he believed the Constitution required. And he added a requirement that the government prove that the firearm moved across State lines.

Let us now move on to another case, that of Riley v. Taylor. Speaking at the executive business meeting for the nomination of Judge Alito, the senior Senator from Illinois left a misimpression of the facts of this case, so I would like to clear up any confusion.

In that case, Judge Alito found there was sufficient evidence to support a criminal defendant’s claim that the prosecutor had violated his constitutional rights by striking three minority biases from the jury pool. The Senator said that the prosecutor had “in three previous murder cases, used every challenge they had to make certain that only white jurors would stand in judgment of black defendants.” That is not accurate. While it is true that the prosecutor made challenges on the anemic evidence that in three previous jury trials no African Americans ended up on the jury, it is also the case that the prosecutor had struck both Blacks and Whites from those juries. Indeed, the dissenting judge, in his decision that, of the excluded jurors in the previous trials, only 24 percent were African Americans. He suggested that this might not even be disproportionately high in a county where the most recent census indicated that 18 percent of the population was Black.

Most importantly, Judge Alito’s opinion rejected the selective use of statistics based upon the sample size of three trials. In so ruling, Judge Alito was right. All that the State and Federal judges who had heard the case before him. On the full Third Circuit, four other judges, half of them Democratic appointees, joined in his opinion on this point. Not a single judge thought the statistical argument settled the case.

As a postscript, when Riley was given a new trial by the Third Circuit, he was again convicted of all charges. When he again appealed, the Delaware Supreme Court found his petition was “wholly without merit.”

Let me turn to another case, one also discussed by the senior Senator from Illinois, but during his January 25 floor speech, that of Pirolli v. World Flavors. The Senator from Illinois stated: “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.” The Third Circuit rejected the Fifth Circuit’s decision that he found the fact that the plaintiff in this case, a man who had a mental retardation, made the difference.

Let us now move on to another case, that of Doe v. Groody. He said, “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 offensive they are. Groody,” the Senator from Massachusetts argued, “dissented from an opinion written by then-Judge Michael Chertoff because he believed that the strip search of a ten-year-old was reasonable.”

First, let’s get the legal question straight. The issue in Doe v. Groody was whether police officers should be able to be personally sued for money damages when they misunderstand the scope of the search warrant they were given.

Second, let’s look at what happened during the event in question. On March 6, 1998, as a result of a long-term investigation of a John Doe for suspected narcotics dealing, officers of the Schuylkill County Drug Task Force sought a search warrant for Doe and his residence. The typed affidavit in support of the warrant stated, among other things, that a reliable confidential informant had purchased methamphetamine on several occasions from John Doe at his residence. The affidavit sought permission to “search all occupants of the residence and their belongings.”

However, the printed sheet entitled “Search Warrant and Affidavit” contained an entry naming only John Doe under the question, “specific description of premises and/or persons to be searched.” When the officers entered the house to commence the search, they decided to search Jane Doe and her daughter, Mary, age 10, for contraband. A female officer removed both Jane and Mary Doe to an upstairs bathroom where she searched them for drugs. No contraband was found. Once the search was completed, both mother and daughter returned to the ground floor to await the end of the search.

As a matter of policy, the Court held that it is inappropriate to allow drug dealers to hide weapons and drugs on children in the home. Judge Alito acknowledged in his opinion that he found the fact that the
search occurred to be unfortunate. Accordingly, police officers sometimes request warrants that allow them to search all persons found during a drug bust.

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

Why did Judge Alito believe that the police officers should not be liable personally? He concluded that a reasonable police officer could think that the search warrant should be read in conjunction with the attached affidavit. Judge Alito reasoned that a “commonsense and realistic” reading of the warrant authorized a search of all occupants of the premises. Judge Alito found that the only case希尔 not exhibit incompetence or a willingness to flout the law. Instead, they reasonably concluded that the magistrate had authorized a search of all occupants of the premises.

So, under the law, Judge Alito did not, as he has been accused repeatedly over the past few days, authorize the strip-search of a 10-year-old girl. He just tried to sort out a practical, on-the-ground problem for law enforcement. It is said that the third problem Senate what Third Circuit Judge Edward Becker, who served with Judge Alito for 15 years, had to say on this point. He testified, “The Sam Alito that I have sat with for 15 years is not an ideologue. He’s not a movement person. He’s a real judge deciding each case on the facts and the law, not on his personal ideology or whims. He scrupulously adheres to precedent. I have never seen him exhibit a bias against any class of litigation or litigants.” As Judge Becker summarized Judge Alito’s career, “His credo had always been Mr. President, I want to turn to some of the mischaracterizations of Judge Alito’s past record as a government official. In her January 25 speech, the junior Senator from New York said that Judge Alito had written that “in his estimation it is not the role of the federal government to protect the health, safety, and welfare of the American people.

As best I can tell, the Senator is referring to a 1986 document addressing the Truth in Mileage Act, a bill to require States to change their automobile registration forms to include information every time it was sold. That document did not, as the Senator said, offer Alito’s “estimation” on anything. Judge Alito was drafting a veto message for President Reagan. Accordingly, he drafted that message in President Reagan’s voice and restated President Reagan’s policy on federalism. The first-person pronoun in that message is President Reagan, not Alito.

It is also worth nothing that Judge Alito did not challenge Congress’s powers. His cover memo acknowledged that “Congress may have the authority to pass such legislation.” He did point out that the legislation was “in large part commandeering the States and the District of Columbia do not already have” title forms that meet this requirement.

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

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

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

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

I will move on. Earlier today, the junior Senator from Michigan said that Judge Alito had “been criticized by his colleagues for trying to legislate from the bench in order to reach the result that he desires.” I am not aware of a single example of any member of the Third Circuit, or of any other court in the Nation, claiming that Judge Alito had any tendency toward quote, “legislating from the bench.” Just the opposite is true. It is especially surprising to hear such a claim given the testimony of Judge Alito’s colleagues on the Third Circuit.
Mr. SPECTER. Mr. President, there have been other misstatements and mischaracterizations of Judge Alito’s record. I can only respond to so many. I will simply encourage future students of this debate to look at the cases in question, and to carefully review the Committee record, before reaching conclusions based on floor debate.

I look forward to Samuel Alito serving on the Supreme Court for many years to come.

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

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded.

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

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

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

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

The objections which have been raised to the nomination turn on those who think he should have been more specific on certain questions. But to have been more specific, he would have had to in effect state how he would rule on cases to come before the Court, and that is going too far. He went about as far as he could go.

With the critical question of women’s right to choose, his testimony was virtually identical to Chief Justice Roberts, and he affirmed the basic principles of stare decisis, a Latin phrase which means “let the decision stand.”

He is not an originalist. He characterized the Constitution as a living document, as Cardozo did, reflecting the values of our country, the importance of the reliance on precedent, and articulated those views. He also indicated that he would look at the issue of a woman’s right to choose, notwithstanding what he had done in an advocacy role for the Department of Justice, notwithstanding any views he had expressed at an earlier date.

When it came to Executive power, as to how he would handle cases, he subscribed to Justice Jackson’s concurrence in the steel seizure cases, which is the accepted model. And here again, he went about as far as he could go in discussing the considerations and the factors which would guide his decisions.

When it came to Executive power, again he discussed the considerations which would guide him on his decisions but necessarily stopped short of how he would decide a specific case.

He disagreed with the Supreme Court of the United States, which has declared acts of Congress unconstitutional because of our method of reasoning. But to have been more specific, he is an A plus. When we look at his analytical style as a jurist, again he is an A plus. When you look at the traditional standard of character, again he is an A plus. When you look at the tradition of experience and public service, he is an A plus. When you look at his analytical style as a jurist, again he is an A plus.

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

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

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

My job is to bring Senators together, both sides of the aisle, to govern. That is why we are here, to govern with meaningful solutions to people's real problems, problems today, problems in the future, to identify what those problems are and then to resolve them and to secure America's future by honoring its past and by building on a record of accomplishment every day as we move forward.

Three years ago, when I assumed this position as majority leader, there was probably no single greater challenge or obstacle than the judicial confirmation process. In a word, it was broken. The minority party had decided to put partisanism in judicial confirmation process by, at that time, orchestrating regular, almost routine filibusters to block what we all know were highly qualified nominees from getting fair up-or-down votes. This partisan obstructionism was unprecedented. This routine use of the filibuster was wrong. Never in 214 years had a minority denied a nominee with majority support that fair up-or-down vote. The minority had used the filibuster to seize control of the appointments process. They used it unfairly to apply a new political standard to judicial nominees and to deny a vote to any nominee who did not subscribe to a liberal, activist, ideological agenda.

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

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

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

With the nomination of Sam Alito before the Senate, this Senate must again choose principle or partisanship. Should we choose to lead on the principle that judicial nominees, whether nominated by a Republican or a Democrat, deserve an up-or-down vote, or should we revert to the partisan obstructionism that has been sheathed because we are placing principle before politics, results before rhetoric.

Last week, the distinguished minority leader said there has been adequate time for people to debate. No one can disagree with that. But there has not been sufficient time to talk about Judge Alito, pro or con. I could not agree more with my colleague and friend. It is time to end debate. It is time to move on. Since President Bush announced Judge Alito's nomination on October 31, Senators have had 91 days to review his nomination, to review his records, his writings.

To put that in perspective, Chief Justice John Roberts' confirmation took 72 days, even including an extra week of debate on 10 different nominees. Each time, cloture failed. We spent more time debating judicial nominations during those 2 years than in any previous Congress. This partisan obstructionism was unprecedented. This routine use of the filibuster was wrong. Never in 214 years had a minority denied a nominee with majority support that fair up-or-down vote. The minority had used the filibuster to seize control of the appointments process. They used it unfairly to apply a new political standard to judicial nominees and to deny a vote to any nominee who did not subscribe to a liberal, activist, ideological agenda.

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

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

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

With the nomination of Sam Alito before the Senate, this Senate must again choose principle or partisanship. Should we choose to lead on the principle that judicial nominees, whether nominated by a Republican or a Democrat, deserve an up-or-down vote, or should we revert to the partisan obstructionism that has been sheathed because we are placing principle before politics, results before rhetoric.

Last week, the distinguished minority leader said there has been adequate time for people to debate. No one can disagree with that. But there has not been sufficient time to talk about Judge Alito, pro or con. I could not agree more with my colleague and friend. It is time to end debate. It is time to move on. Since President Bush announced Judge Alito's nomination on October 31, Senators have had 91 days to review his nomination, to review his records, his writings.

To put that in perspective, Chief Justice John Roberts' confirmation took 72 days, even including an extra week of debate on 10 different nominees. Each time, cloture failed. We spent more time debating judicial nominations during those 2 years than in any previous Congress. This partisan obstructionism was unprecedented. This routine use of the filibuster was wrong. Never in 214 years had a minority denied a nominee with majority support that fair up-or-down vote. The minority had used the filibuster to seize control of the appointments process. They used it unfairly to apply a new political standard to judicial nominees and to deny a vote to any nominee who did not subscribe to a liberal, activist, ideological agenda.

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

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

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

With the nomination of Sam Alito before the Senate, this Senate must again choose principle or partisanship. Should we choose to lead on the principle that judicial nominees, whether nominated by a Republican or a Democrat, deserve an up-or-down vote, or should we revert to the partisan obstructionism that has been sheathed because we are placing principle before politics, results before rhetoric.

Last week, the distinguished minority leader said there has been adequate time for people to debate. No one can disagree with that. But there has not been sufficient time to talk about Judge Alito, pro or con. I could not agree more with my colleague and friend. It is time to end debate. It is time to move on. Since President Bush announced Judge Alito's nomination on October 31, Senators have had 91 days to review his nomination, to review his records, his writings.

To put that in perspective, Chief Justice John Roberts' confirmation took 72 days, even including an extra week of debate on 10 different nominees. Each time, cloture failed. We spent more time debating judicial nominations during those 2 years than in any previous Congress. This partisan obstructionism was unprecedented. This routine use of the filibuster was wrong. Never in 214 years had a minority denied a nominee with majority support that fair up-or-down vote. The minority had used the filibuster to seize control of the appointments process. They used it unfairly to apply a new political standard to judicial nominees and to deny a vote to any nominee who did not subscribe to a liberal, activist, ideological agenda.

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

Finally, early this year the Republican leadership said: Enough is enough: enough obstruction, enough partisanship, enough disrespect to these good, decent, and accomplished professionals. We put forward a very simple, straightforward principle. A nominee needed the support of a majority of Senators deserves a fair up-or-down vote. And we led on that principle. Because we did that, seven nominees who
With all the travel we do, we all live on the edge of something happening. I am so happy Senator Ensign is fine. He is a wonderful man. He has great faith. He is a good friend of mine and to all of the Senate. I know all of our thoughts and prayers will be with him. I am confident, job is going to be fine.

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

CLOTURE MOTION

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

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

The legislative clerk read as follows:

CLOTURE MOTION

We the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on the nomination of Samuel A. Alito, Jr., of New Jersey to be Associate Justice of the Supreme Court of the United States.

Bill Frist, Elizabeth Dole, Michael B. Enzi, Jim DeMint, Wayne Allard, Kit Bond, Jon Kyl, Orrin G. Hatch, Chuck Grassley, Bob Bennett, Lincoln Chafee, Lisa Murkowski, Norm Coleman, George Allen, Mitch McConnell.

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

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

The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. MCCONNELL. The following Senators were necessary absent: the Senator from Nevada (Mr. ENSIGN) and the Senator from Nebraska (Mr. HAGEL).

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

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

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

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

<table>
<thead>
<tr>
<th>YEAS—72</th>
</tr>
</thead>
<tbody>
<tr>
<td>KoHL</td>
</tr>
<tr>
<td>Johnson</td>
</tr>
<tr>
<td>Landrieu</td>
</tr>
<tr>
<td>Lieberman</td>
</tr>
<tr>
<td>Lankin</td>
</tr>
<tr>
<td>Lott</td>
</tr>
<tr>
<td>Logan</td>
</tr>
<tr>
<td>Martinez</td>
</tr>
<tr>
<td>McCain</td>
</tr>
<tr>
<td>Bayh</td>
</tr>
<tr>
<td>Biden</td>
</tr>
<tr>
<td>Boxer</td>
</tr>
<tr>
<td>Clinton</td>
</tr>
<tr>
<td>Dayton</td>
</tr>
<tr>
<td>Dodd</td>
</tr>
<tr>
<td>Durbin</td>
</tr>
<tr>
<td>Feingold</td>
</tr>
<tr>
<td>Feinstein</td>
</tr>
<tr>
<td>Hagel</td>
</tr>
<tr>
<td>Harkin</td>
</tr>
<tr>
<td>McCOllin</td>
</tr>
<tr>
<td>Murkowski</td>
</tr>
<tr>
<td>NELson (FL)</td>
</tr>
<tr>
<td>Peyer</td>
</tr>
<tr>
<td>Roberts</td>
</tr>
<tr>
<td>Rockefeller</td>
</tr>
<tr>
<td>Salazar</td>
</tr>
<tr>
<td>Santorum</td>
</tr>
<tr>
<td>Shelby</td>
</tr>
<tr>
<td>Smith</td>
</tr>
<tr>
<td>Snowe</td>
</tr>
<tr>
<td>Specter</td>
</tr>
<tr>
<td>Stevens</td>
</tr>
<tr>
<td>Talent</td>
</tr>
<tr>
<td>Thomas</td>
</tr>
<tr>
<td>Thune</td>
</tr>
<tr>
<td>Vitter</td>
</tr>
<tr>
<td>Voinovich</td>
</tr>
<tr>
<td>Warner</td>
</tr>
</tbody>
</table>

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

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

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

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

Mr. DE MINT. Mr. President, I do add that to the request.

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

The Senator from South Carolina is recognized.

STATE OF THE UNION ADDRESS

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

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

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

Today, Democrats gave what was their tired cliches from the minority leader. He talks about a credibility gap. Well, the largest credibility gap in American politics is between what Democrats say and what they do. Democrats promised months ago to bring forth their own legislative agenda, but the Nation is still waiting. Day after day, the Democrats launch attack after attack on Republicans and our agenda, but how are we to take them seriously when they cannot articulate a clear plan of their own? They have anything but get a media sound bite, but when it comes to solving today’s challenges, Democrats do nothing.

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

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

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

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

How are we to take seriously a party that has no legislative agenda, that has no solutions or ideas to solve America’s greatest challenges?

In stark contrast to the Democrats’ invisible agenda, Republicans have clearly articulated and delivered a bold agenda to secure America. And while we have had some victories in recent years, the truth is that Democrats have fought bitterly to block progress for America every step of the way. These same Democrats come to this floor and blame inaction on Republicans.

To give just one example, Republicans have been working for decades to secure America’s energy independence. However, Democrats, at the behest of extreme environmental activists, oppose real solutions to high energy prices such as increasing production of domestic oil and natural gas supplies and removing barriers to oil refinery investment such as onerous permitting requirements and a proliferation of boutique fuel blends.

Just last month, Democrats blocked energy exploration and production on the Coastal Plain of the Arctic National Wildlife Refuge which would provide millions of barrels of oil a day, or about 4.5 percent of the current U.S. consumption, with no significant environmental impact.

It is not just in Alaska where Democrats oppose efforts to access our Nation’s energy reserves. It has been estimated that enough natural gas lies under the Outer Continental Shelf and in the interior Western States to supply 27 years’ worth of natural gas consumption, the primary fuel used to heat America’s homes. Yet Democrats support policies that have closed these areas to exploration and production.

The administration has attempted to cut regulatory red tape, reduce regulatory costs, and streamline regulatory processes to allow more sensible use of our Nation’s energy resources while maintaining environmental standards—efforts that have been largely rebuffed by Democrats in Congress.
The obstacle to America's energy independence is clear: it is the blockade formed by the Democratic Party. In seeking to appease far-left interest groups, Democrats have blocked Republican efforts to reduce our dependence on foreign oil and have needlessly allowed prices to climb higher and higher for America's families.

Senator Reid likes to say Democrats can do better. I think he is right. Democrats should do better. They have been conducting a war of rhetoric for years without any substantive solutions to the public debate. Americans are rightly frustrated with a Democratic Party that will say anything but do nothing.

Now let me address what has become the favorite sound bite of the Democratic Party. Senator Reid said it today and many times over the last week, what he likes to call the “culture of corruption.” Apparently, Democrats believe this media strategy will carry them to a victory in November. I have news for my Democratic colleagues: The problem of outside influence on Congress is not a partisan issue. This is a bipartisan problem and requires a bipartisan solution.

For those hoping to usher in a new Democratic majority in Congress on a media sound bite, history teaches us that elections are won on ideas, not rhetoric. Americans are far too smart and are willing to listen to ideas that are tangible and serious for Democrats to expect they can coast to a victory in November with no solutions and no ideas.

Republicans learned this lesson long ago from one of our greatest teachers, Ronald Reagan. President Reagan always talked about ideas that still resonate with Americans today: limited government, personal freedom and responsibility, and peace through strength.

Republicans did not win on rhetoric in 1994. We won because Americans agreed with our solutions: lower taxes, fiscal responsibility, traditional values, and strong national defense.

President Bush has connected with the American people because he has run his campaigns on ideas. He promised to lower taxes, and he has. He promised to aggressively fight the war on terror to protect American families, and he has. He promised to nominate judges who will follow the law instead of creating it, and he has.

Yet, as Senator Reid demonstrated today, Democrats still do not understand that Americans want solutions, not more partisan rhetoric. I know there are some Democrats who do have some good ideas and desire to work together to improve the lives of Americans. I have talked to many of my colleagues on the other side of the aisle who do seem to understand the reality, but their leadership refuses to allow them to break free and try to find solutions.

I urge the Democratic Party to think long and hard about the war of rhetoric they are waging. It is poisoning the atmosphere in the Senate, and it is turning off Americans from the public debate. The consequences of these actions will be fewer and fewer Democrats returning next year. This has been proved out during the last elections, as I and my fellow freshman Republican Senators learned.

If Democrats sincerely want the opportunity to govern again, they need to abandon this “say anything, do nothing” stance and put forward some ideas and solutions. Regardless, the Republican establishment is clear: it is the block-and-tackle that will say anything but do nothing.

The PRESIDING OFFICER, the Senator from California.

Mrs. BOXER. Mr. President, I wish to amend the unanimous consent agreement to add an additional 10 minutes for Senator Baucus, which will give him 30 minutes.

The PRESIDING OFFICER. Without objection, it is ordered.

Tomorrow, we will cast our votes on the nomination itself, and I want the record to reflect why I will be voting no.

Mr. President. Every judicial nomination is important, but rarely are the stakes as high for the Nation as they are in the case of the nomination of Samuel Alito to be an Associate Justice of the Supreme Court.

We now have a divided Court, a divided Congress, a divided electorate, as evidenced in the last two Presidential elections. Unfortunately, we also have a President who failed to remember his promise, which he made in the campaign of 2000: to govern from the center—to be “a uniter, not a divider.” If he had kept that promise, he would not have nominated Samuel Alito.

Judge Alito was nominated to take the seat of Justice Sandra Day O'Connor, the first woman on the Court. She has long been the swing vote, and a commonsense voice of moderation, in some of the most important cases to come before the Court, including a case that would affect the right to choose, civil rights, and freedom of religion.

The right thing to do for the court and for the Nation would have been to nominate someone in the mold of Justice O'Connor, and that is what the President should have done.

Let me be clear: I do not deny Judge Alito's judicial qualifications. He is experienced, intelligent, and capable. His
family should be proud of him, and all Americans should be proud that the American dream was there for him and for the Alito family.

But these facts do not outweigh my deep conviction that Judge Alito’s extreme views of the law make him the wrong person for this job.

As a Senator, I have no more solemn duty than to vote on a nomination for the Supreme Court of the United States. These are lifetime appointments, with extraordinary power to shape the law of the land, and to affect the lives of Americans, not just those living now, but for generations to come.

In the 218 years since our Constitution was adopted, our Nation has made great strides toward achieving the more perfect Union that the Founding Fathers dreamed of Women were given the right to vote. African-Americans were given civil rights. A right to personal privacy has been recognized for women and families. The accused have a right to counsel. Congress has been recognized to have the power to enact laws protecting the health and safety of the people. This has led to a cleaner environment, safer workplaces and communities, and better health care for all Americans.

We who have enjoyed the fruits of this progress owe it to future generations to hold back away from his position. The Supreme Court did not protect the right of a woman to choose. When given the opportunity to strike it down because he saw the separation of powers.

Would 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 which he wrote that the Constitution does not protect the right of a woman to choose. When given the opportunity to strike it down because he said Congress lacked the power to enact such a law, this colleague of his on the court criticized him, saying his position ran counter to “a basic tenet of the constitutional separation of powers.”

Would Justice Alito vote to protect Roe v. Wade? Judge Alito wrote a memorandum proposing that the President assert his own interpretation of statutes by issuing a recess appointment. He said this would give the Executive branch the ability to determine what the law was. Under Judge Alito’s standard, a woman claiming discrimination in the workplace to get to trial.

Would Justice Alito be an effective check on an overreaching executive branch? Judge Alito’s record says no. In another 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 main cause of the employer’s action. Using his standard would make it almost impossible for a woman claiming discrimination in the workplace to get to trial.

Would Justice Alito be an effective check on an overreaching executive branch? Judge Alito’s record says no. As a Judiciary Department lawyer, Judge Alito wrote a memorandum proposing that the President assert his own interpretation of statutes by issuing “signing statements” when the laws are enacted. He said this would give the Executive “the last word” on interpreting the laws.

The administration is now 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 that ban torture.

We need Justices who will put a check on 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.”

During the hearings, we all felt great compassion for Mrs. Alito when she became emotional in reaction 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 whoever said 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 extreme 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 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 the workplace, when his claim of workplace harassment is dismissed by the court simply because his lawyer failed to file a well-written brief on his behalf.

These are real cases in which Judge Alito has spoken. Fortunately, his views were not in the headlines. But if he sits on the Supreme Court, he will have a much more powerful voice. His voice that will replace one of moderation and balance, and he will join the voices of other Justices who share his severe views.

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.

Listen to what he said about a case involving an African-American man convicted of murder by an all-white jury in a courtroom where the prosecutors had proclaimed 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 lefthanders have won five of the last six Presidential elections. When asked about this analogy during the hearings, he said it "went to the issue of statistics . . . (which) is a branch of mathematics, and there are ways to analyze statistics so that you draw sound conclusions from them. . . ." That response would have been appropriate for a college math professor, but it is deeply troubling from a potential Supreme Court Justice.

As the greatJurist and Supreme Court Justice Oliver Wendell Holmes, Jr. wrote in 1881:

"The life of the law has not been logic; it has been experience. The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. . . . 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 Nation's history.

That is why I must oppose this nomination.

The PRESIDING OFFICER. Under the previous order, the Senator from Montana is recognized.

Mr. BAUCUS. I ask unanimous consent the order for recognition of Senator BIDEN be withdrawn.

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

Mr. BAUCUS. Mr. President, on the corridor of the first floor of this Capitol building appear the words of Samuel Adams:

"Freedom of thought and the right of private judgment in matters of conscience direct their course to this happy country.

America still stands as the world's beacon of individual rights and liberties. Of that I know we are very proud. In large part, it is because of our Supreme Court, Our Founding Fathers wisely set up the separate branches of Government, including a very strong, independent judiciary, something many countries have struggled to attain, and their failure to achieve greatness is largely because they do not have a very strong, independent judiciary—and I mean independent.

The Senate protects the independence of the Supreme Court. How? By seriously exercising its responsibility to advise and consent on the nominations to that honorable Court. It is in the Constitution. We all take that duty seriously. We take it seriously by examining nominees. I personally have three criteria I use to examine nominees. They are professional competence, personal integrity, and a view of important issues within the mainstream of contemporary judicial thought. Let me review those three criteria.

First, professional competence. The Supreme Court must not be a testing ground for the development of a jurist's basic values. Nor should a Justice require further training. The stakes are simply too high. The nominee must be an established jurist already. Of that we must be very clear.

A second criteria is personal integrity. Nominees to our Nation's highest court must be of the highest caliber.

A third criteria is judicial philosophy. The nominee should fall within the broad mainstream of contemporary judicial thought. Justices must possess the requisite judicial philosophy to be entrusted with the Court's sweeping constitutional power that is vested in the Justices.

That is why I voted to support his confirmation.

Measuring Judge Alito against these three criteria, I have decided he does not meet these three tests. I do not think he is the right choice for my State of Montana or for our country.

This was not an easy decision. I grappled with it. I took my time. I have reviewed this nomination very carefully. I reviewed the Judiciary Committee testimony and I met with Judge Alito personally for over an hour.

Nominations to the Supreme Court rank among the Senate's most important decisions. Only the brightest, most objective minds should serve on the bench. But Judge Alito, in my judgment, stands outside the mainstream. I base my decision on what I think is right for my State and my country, and that is why I cannot support this nomination.

I reviewed the Judiciary Committee's hearings. The Judiciary Committee held 5 days of hearings. The Senate Committee questioned Judge Alito for 4 days. The committee heard from panels supporting and opposing his nomination. The Judiciary Committee members sought Judge Alito's views on many matters including States rights, anti-discrimination laws, immigrant rights, due process, privacy, equal protection, ethical considerations, and broad judicial philosophy. Judge Alito responded well, but not in the detail. Members of the Committee attempted to pin Judge Alito down on many of his views, but Judge Alito did not offer detailed answers to their questions, at least not enough information to get a sense of who he was and where he was. Judge Alito appeared well prepared for these hearings—very well prepared, I might add. He appeared to have been advised to say as little as possible.

On January 24, the Judiciary Committee voted to report Judge Alito's nomination on a party-line vote. Unfortunately, but that is how it turned out; again, I think in part because of the nature of the nominee's views.

The Senate Judiciary Committee staff examined Judge Alito's nomination in greater detail against the criteria I have laid out. First, professional competence. Mr. Alito received an excellent education. He holds an undergraduate degree from Princeton and a law degree from Yale School of Law. Judge Alito also has extensive experience as a judge, serving 15 years as a
judge on the Third Circuit Court of Appeals. In fact, he has served more years on the bench than many nominees to the Supreme Court.

Mr. Alito’s work prior to his judicial appointment focused exclusively on representing one client, the U.S. Government. Some have raised questions about Judge Alito’s experience protecting the rights of individuals rather than the Government. I conclude that Judge Alito is professionally competent to serve as a Supreme Court Justice.

Second, personal integrity. Several issues arise from Judge Alito’s promise to avoid conflicts of interest as a judge. Some raised questions about Judge Alito’s sensitivity to the avoidance of conflicts of interest, and some raised questions about how steadfastly Judge Alito keeps his commitments to the Senate.

In 1989, Judge Alito told the Senate Judiciary Committee that he would disqualify himself from any cases involving five matters with which he had personal connections. Those matters were the Vanguard Companies, the brokerage firm of Smith Barney, the First Federal Savings & Loan of Rochester, New York, his sister’s law firm, and matters that he worked on or supervised at the United States Attorney’s Office in New Jersey. In the period of 1995 to 2002, however, Judge Alito heard cases involving at least two of the matters.

Judge Alito initially blamed the conflicts of interest on a computer glitch. In subsequent correspondence with Senators on the Judiciary Committee, Judge Alito argued that his promise during his 1990 confirmation hearings referred to only his “initial service.” He argued that as his service continued, he found unduly restrictive his 1990 promise to recuse himself from cases involving entities in which he had a personal interest. And he argued that the mutual funds in which he was invested were not at issue in the case that he heard.

In his responses to questions concerning Vanguard, Judge Alito testified:

I think that once the facts are set out, I think that everybody will realize that in this instance I not only complied with the ethical rules that are binding on federal judges—and they are very strict—but also that I did what I’ve tried to do throughout my career as a judge, and that is to go beyond the letter of the ethics rules and to avoid any situation where there might be an ethical question raised.

But Judge Alito also admitted to Senator KENNEDY that “if I had to do it all over again, I would have handled this differently.”

Judiciary Committee members also asked about Judge Alito’s membership in an organization called Concerned Alumni of Princeton. In his 1985 job application to the Reagan Justice Department, Judge Alito listed Concerned Alumni of Princeton, and in his CV, he listed his extracurricular activities. Concerned Alumni of Princeton is an alumni group that took the extreme position of arguing against letting women and minorities attend Princeton. When questioned about Concerned Alumni of Princeton, Judge Alito claimed that he had no recollection of ever having been a member of the group.

Judge Alito testified:

I really have no specific recollection of that organization. But since I put it down on that statement, then I certainly must have been a member at that time. . . . I have tried to think of what might have caused me to sign up for membership, and if I did, it must have been around that time. And the issue that had ranked me about Princeton for some time was ROTC. I was in ROTC when I was at Princeton and then until it was expelled from campus, and I thought that was very wrong.

Judge Alito’s response about Concerned Alumni of Princeton raises concerns. In 1985, he apparently thought that his membership in this discriminatory organization was important enough to put on his page-and-a-half job application. His failure of memory now about the extracurricular position then raises questions about his credibility.

I am also disappointed that the White House has chosen not to release Judge Alito’s tax returns for review by the Joint Committee on Taxation. On December 13 of last year, I introduced a bill that would require all Supreme Court nominees to submit 3 years of tax returns to the nonpartisan Joint Committee on Taxation for review on a confidential basis. The Joint Committee would report its findings on the nominee’s tax compliance to the Finance and Judiciary Committees.

I might add that all nominees who are referred to the Finance Committee—from Cabinet Secretaries to Tax Court judges—have their tax returns reviewed for compliance. The reviews are discreet and confidential. We protect nominees’ personal information. And I might say that in several cases we found errors of facts, matters that had to be attended to—and they were.

I understand the administration does a “tax check” for all Supreme Court nominees. They say they already do one. But I believe it is important for Congress to do its own due diligence on a nominee’s tax returns. After all, this is a person who serves on the judiciary. That is a separate branch, not the executive, not the judicial. Both entities—namely both the Executive and the Judicial branches—should have a stake in making sure that the nominee’s tax returns comply with the law.

I might also say, as I mentioned earlier, many so-called tax checks the administration has taken on other nominees have been basis. Inadequate, full of mistakes, and we have had to correct them.

The Finance Committee views proof of the nominee’s tax compliance as a testament to the nominee’s integrity. What individuals do on their tax returns is a window on their ethical decision making. It is a good test of integrity and character.

The American people expect their national leaders to comply faithfully with the tax laws. A showing that leaders in the Federal Government faithfully comply with the tax laws sends an important message to people who might consider compliance on their own taxes.

On January 19, President Bush appeared to agree. He told small business leaders in Sterling, VA, that public officials’ tax returns should be public, because public officials have a “high responsibility to uphold the integrity of the process.”

When I met with Judge Alito, I asked him to release his tax returns for such a review. He initially agreed to do so. But the White House official present at the meeting immediately intervened to block the release saying that he cannot do so.

The President was right when he said in Virginia that the release of public officials’ tax returns contributes to the integrity of our whole tax system. And his White House was wrong to withhold that information on Judge Alito. I will continue to press future nominees to allow this kind of neutral review of their tax returns because I think it is the right thing to do.

Let me turn now to judicial philosophy.

I do not believe that a Senator should oppose a nominee just because the nominee does not share that Senator’s particular judicial philosophy. But the Senate must determine whether a nominee is in the broad mainstream of judicial thought. Is this a wise person, not an ideologue of the far left or the far right. The Senate must determine whether a nominee is committed to the protection of the basic Constitutional values of the American people.

What are those values? One is the separation of powers of our Federal Government—including the independence of the Supreme Court itself. Another is freedom of speech. Another is freedom of religion. Another is equal opportunity. Another is personal autonomy—the right to be left alone. And yet another is an understanding of the basic powers of the Congress to pass important laws like those providing for protection of the environment.

These are not unimportant matters. They are hugely difficult—all of these areas are.

The stakes are high. The Senate has a duty to ensure that the nominee will defend America’s mainstream Constitutional values.

Judge Alito’s record calls into question his ability to act as a check on executive powers. Recently, many have noted with concern the National Security Agency’s surveillance of American citizens. At the Judiciary Committee’s hearing, a number of questions focused on Judge Alito’s interpretation of executive power, and hence the role of the court’s role as an effective check on overreaching presidential power and on government intrusion.
Judge Alito responded that “no person is above the law.” But he did not provide assurances that he would act on the Court to balance executive authority. His prior statements and court rulings indicate that he has an expansive view of the scope of executive power and an expansive view of Congress’s authority to legislate.

In a 1984 memorandum, Mr. Alito argued that the Attorney General serves blanket protection from lawsuits when acting in the name of national security when those actions involve the illegal wiretapping of American citizens.

In a 2000 speech to the Federalist Society, Judge Alito said that “the theory of a unitary executive . . . best captures the meaning of the Constitution’s text and structure.” Judge Alito said: “The President has not just some executive powers, but the executive power—the whole thing.” Some have thus interpreted the theory of a unitary executive as his 1985 job application to the Third Circuit Court of Appeals, as well as his 1985 job application to the Reagan Justice Department, do not indicate an expansive view of civil rights and civil liberties. In his 1985 job application, Judge Alito wrote that he developed a deep interest in constitutional law, particularly as it applied to the Warren Court. He has, in fact, issued 108 signing statements expanding his executive interpretation of the laws passed by Congress.

Judge Alito’s judicial rulings on the Third Circuit Court of Appeals, as well as his 1985 job application to the Reagan Justice Department, do not indicate an expansive view of civil rights and civil liberties. In his 1985 job application, Judge Alito wrote that he developed a deep interest in constitutional law, particularly as it applied to the Warren Court. He has, in fact, issued 108 signing statements expanding his executive interpretation of the laws passed by Congress.

Judge Alito has narrowly construed constitutional criminal procedure protections, such as the fourth amendment restrictions on search and seizure. In the case of Doe v. Grody, for example, Judge Alito wrote a dissent. He argued that the strip search of a minor girl by a police officer without a proper search warrant did not violate their constitutional rights. That is his dissent, that is his view.

Judge Alito also refused to agree that Congress cannot take away the Supreme Court’s ability to protect Americans’ First Amendment rights. In contrast, both Chief Justice Roberts and former Chief Justice Burger wrote in the position that Congress cannot take away the Supreme Court’s ability to protect Americans’ first amendment rights. This is sometimes called “court stripping.” It is extremely critical, extremely important. It is no academic matter. Basically it is that the Congress can say to the Supreme Court it does not have jurisdiction to hear any cases with respect to, say, the first amendment brought by an individual citizen; that is, Congress can take away the Court’s ability to interpret the Constitution with respect to the first amendment. That is what that view held. I think it is an outrageous view. I don’t understand how anybody can tentatively hold that view.

Judge Alito defended his viewpoint, saying this is an academic debate on which scholars are divided. I am astounded at that answer.

Judge Alito’s rulings on civil rights cases appear to set a high bar for proving unlawful racial discrimination. His record indicates that he frequently sides with the majority of the Supreme Court, wrote the majority opinion in Planned Parenthood of Southeastern Pennsylvania v. Casey. In that dissent, he argued that upholding Pennsylvania’s restrictive spousal notification requirement did not place an undue burden on women.

President Bush has employed this method of Presidential signing statements to document his interpretation of congressional legislation, again even though he is certainly not a member of Congress. He didn’t write the law. How could he say what Congress intended it to do? He has, in fact, issued 108 signing statements expanding his executive interpretation of the laws passed by Congress.

Judge Alito’s judicial rulings on the Third Circuit Court of Appeals, as well as his 1985 job application to the Reagan Justice Department, do not indicate an expansive view of civil rights and civil liberties. In his 1985 job application, Judge Alito wrote that he developed a deep interest in constitutional law, particularly as it applied to the Warren Court. He has, in fact, issued 108 signing statements expanding his executive interpretation of the laws passed by Congress.

Judge Alito’s judicial rulings on the Third Circuit Court of Appeals, as well as his 1985 job application to the Reagan Justice Department, do not indicate an expansive view of civil rights and civil liberties. In his 1985 job application, Judge Alito wrote that he developed a deep interest in constitutional law, particularly as it applied to the Warren Court. He has, in fact, issued 108 signing statements expanding his executive interpretation of the laws passed by Congress.
Judge Alito to clarify the discrepancy between answering cases about one-person one-vote, but not responding to questions about abortion and precedent. Judge Alito did not give a clear answer.

Judge Alito appears to support deference to the Framers’ original intent. Judge Alito testified:

I think we should look to the text of the Constitution, as we should look to the meaning that someone would have taken from the text of the Constitution at the time of its adoption.

That is called originalism.

Judge Alito’s judicial philosophy of original intent raises concerns about whether the Court could adapt to a changing society. And his philosophy indicates that he may not take an active role in extending Constitutional protections to new situations in the 21st century.

I have some concern about one ruling that Judge Alito issued related to the environment. In 2001, in the case of W.R. Grace & Company v. United States Environmental Protection Agency, Judge Alito threw out the Environmental Protection Agency order under the Safe Drinking Water Act for an asbestos-cleaning near Laning, MI. Judge Alito concluded that the government cleanup standard was “arbitrary and capricious.” He explained that the reason for not upholding the order was that the EPA lacked a rational basis for imposing the cleanup standards on the company. This case raises sensitivities for me, because in my home state, W.R. Grace has acted with complete disregard of the health effects for Montanans in Libby, where illness from tremolite asbestos caused by W.R. Grace has hit the community hard.

In 1988, Judge Alito commented that Robert Bork “was one of the most outstanding nominees of this century.” When I asked Judge Alito about that, he did not provide an adequate response. He ducked the question.

He did not respond adequately to many of my questions. He evaded my questions, questions I asked in good faith, intended to elicit what kind of Justice he might be.

He was vague. He seemed not to want to talk to me. He seemed not to want to have an honest discussion about what kind of person he is. That is why I find it very difficult to support this nominee.

I supported Judge Roberts for Chief Justice in large part because of Judge Roberts’ hearing testimony and responses when he met with me personally.

Judge Alito does not meet my standards for a Supreme Court Justice. Judge Alito has explained that he will be “the same person that I was on the Court of Appeals.” Judge Alito’s record demonstrates that he is a very conservative judge who rules often in favor of expanding executive authority and of limiting civil rights and civil liberties.

If the Senate confirms Judge Alito to Justice O’Connor’s seat, he could change the balance of the Court, tipping it in a direction that could reverse or restrict important constitutional protections.

Based on all this information, I will vote against this nomination. I believe that Judge Alito is out of the mainstream. He is not the right choice for our country.

On a corridor on the first floor of this Capitol building appear the words of former Supreme Court Justice Louis D. Brandeis, who said:

The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

I shall thus vote against this nomination to carry out seriously my responsibility as a Senator to Advise and Consent on nominations to that honorable Court. I shall vote against this nomination because I believe the nominee is well-meaning, but without sufficient understanding of the importance of our liberties and liberties.

And I shall vote against this nomination to help keep this great country the world’s beacon of freedom.

The PRESIDING OFFICER (Mr. CORKY). The Senator from Oklahoma.

The PRESIDING OFFICER. Under the previous order, the Senator from Connecticut is now recognized for up to 20 minutes.

Mr. DODD. Mr. President, I wish to commend my colleague, Senator MAX BAUCUS from Montana, before he leaves the Floor, for a very fine statement. I appreciate his thoughts and comments.

I rise today to discuss my vote on the nomination of Judge Samuel Alito to the United States Supreme Court. First of all, I wish to briefly comment on the cloture vote that occurred this afternoon. I voted not to invoke cloture on the nomination. I want to explain why.

As many of my colleagues know, I went through minor surgery to have a knee replacement before the holidays and I have been home in Connecticut recuperating. I looked forward to coming back to participate in the debate on the Judge Alito nomination and I followed the confirmation process closely from home. For this reason, I was somewhat stunned to learn that Senator Feingold filed a cloture motion on the nomination a day after it was voted out of the Judiciary Committee.

I try to be fair to the body for a quarter of a century and I have voted to confirm the majority of the judicial nominations that have come before this Senate. I, too, like my colleague from Montana, voted with enthusiasm for the nomination of Chief Justice Roberts only a few months ago. The majority leader’s action was surprising to me. It is exceedingly rare that a cloture motion is filed on debate regarding a Supreme Court nomination. In my experience, cloture motions have generally gotten frustrated with the minority for insisting upon extending debate—beyond a reasonable period of time. In this case, I feel strongly that there has not been a reasonable period of debate, let alone an extended debate.

But I am only one Member. Certainly, this institution cannot wait for one Member. I was allocated only 5 minutes to comment on this nomination. However, my flight was canceled out of Hartford, CT, and thus, I lost that small window of 5 minutes to be heard. I consider the matter of confirmation of a Supreme Court Justice with great seriousness and solemnity. In my view, some of the most important votes that we make in the Senate are to fill vacancies in the Judicial Branch, second only to declarations of war. Constitutional amendments are not far behind. Therefore, to be notified that I would have only 5 minutes to comment on the nomination of a Supreme Court Justice who will serve for life, far beyond the tenure of the Chairman of the Federal Reserve Board, far beyond the tenure of the President of the United States, far beyond the tenure of a Senator or Congressman, I found rather disturbing.

We have always respected one another here, at least we try to, and to recognize this is the Senate, different from the House of Representatives. We are a bicameral body for good reason. This is the place where we spend a little more time evaluating issues that come before the Senate. To ask for a few more days to have discussion about what the President of the United States believes is important in the country, seems little to ask.

Put aside the nominee for a second, put aside your decision to vote for or against the nominee, we should respect one another’s desire to be heard on these matters. Tomorrow is the State of the Union, and there will be a photo opportunity for the President. I am deeply disturbed that this Senate may have made a decision to rush this nomination, because, in order to provide a photo opportunity for a swearing-in ceremony prior to this President’s State of the Union Message.

I note the presence of my good friend and colleague from Texas in the chair of the Presiding Officer. He serves on the Judiciary Committee. He watched the gavel-to-gavel hearing proceedings. While I was at home rehabilitating this knee, I had a chance to watch my colleagues do their job. The circumstances around this nomination have been complicated. The nomination came up after Harriet Miers withdrew. We had the Thanksgiving holiday and the recess coming up. In fact, the Judiciary Committee met when we were out of town. Obviously, the desire was to move this along. I have no objection to that. That seems to be a reasonable request to have the committee meet when it did. Certainly, we all had an opportunity to watch those proceedings.

The majority leader stated earlier than we have consumed an excessive amount of time on this nomination.
I. I, like many of my colleagues, have supported the overwhelming majority of the current President’s judicial nominees. Of the current President’s 230 judicial nominees, only 5 have failed to be confirmed, a rather remarkable record.

In the course of my Senate career, I have never imposed a litmus test while reviewing Supreme Court nominees. But, due to the nature of a lifetime appointment, they are entitled to a higher level of scrutiny than other judicial nominees for the Federal bench.

I have three specific criteria that a Supreme Court must satisfy: First, I require that the nominee possess the technical and legal skills which we must demand of all Federal judges. Second, the nominee, in my view, must be of the highest character and credibility. And, finally, I vigorously examine the nominee’s record to see whether he or she displays a commitment to equal justice for all under the law, in order to protect the individual rights and liberties guaranteed by the Constitution of the United States.

Now, if the majority leader, 1 hour after the committee vote had occurred last week, and then, in an interview with my local press in Connecticut, indicated how he would vote on this nominee. I have always reserved the first judgment to be made by the committee. It seems to me to respect the committee process is very important, and the views of my colleagues which I either agree with them or not, I like to hear how they have arrived at their decisions.

So on Supreme Court nominees, I never have announced a view on a nominee until after the committee has completed its review. Hence, less than a week after the committee voted, I find myself having to rush to the floor to make a hurried statement on this nominee. I am denied the opportunity to debate back and forth with other members of the Senate.

I waited to make my decision because I felt that Judge Alito deserved a hearing before the Judiciary Committee. The framers intended for the Senate to take an active role in the confirmation process. However, the Constitution does not delineate the factors by which each Member of this body should determine thefitness of a judicial nominee to serve his or her lifetime appointment on the Federal bench. Thus, each Member of the Senate, each Senator, must determine for him or herself the acceptable criteria in judging a Supreme Court nominee.

I have never opposed a nominee solely because he or she holds different views than my own regarding the Constitution or the Court’s role in interpreting or applying it. I have supported seven of the last nine nominees to the Supreme Court, including the current President’s nomination of John Roberts to be our country’s Chief Justice. As a Democrat, I voted for Judge Alito.

Now, there is little question in my mind as to Judge Alito’s intellectual competence and legal experience, and all of that. If this were the only criteria, I would be for him.

Judge Alito received his legal education from Yale University School of Law in my home State of Connecticut. He served as a Government attorney in a number of positions including: Assistant Solicitor General, Deputy Assistant Attorney General in the Office of Legal Counsel, and U.S. Attorney for the District of New Jersey under President Reagan. In 1990, Judge Alito was nominated by George H.W. Bush to U.S. 3rd Circuit Court of Appeals. In the course of his hearings, Judge Alito has heard more than 3,000 cases. Furthermore, the American Bar Association has twice unanimously awarded Judge Alito with their highest rating of “well qualified.” I have great respect and admiration for his intellect, legal experience, and service to the American people as part of the Judicial Branch.

Next, I turn to character and credibility. The question is: Does Judge Alito possess the qualities of mind and temperament expected of a Supreme Court Justice? I do not question whether Judge Alito is personally decent or if he has integrity. I was impressed by the diverse group of former clerks and colleagues who testified before the Judiciary Committee who could not have given him higher praise.

Let me also say I know there were questions raised. I listened carefully regarding these concern including those regarding the Concerned Alumni of Princeton and the recusal issues that were raised by a number of committee members on the Judiciary Committee. These questions, while relevant, and certainly need to be explored, would not have decided my vote on this nominee. I do not minimize it. But if my decision were to be based solely on the recusal question or Judge Alito’s membership in the Concerned Alumni of Princeton issue, I would be here supporting this nomination.

Those are not the most important issues to this Member. But what is important, are others that were raised during this nomination. Indeed, I am troubled that throughout Judge Alito’s hearings, Judge Alito failed to provide clear and germane responses to legitimate questions.

A few examples. For instance, when Senator SCHUMER, from New York, asked Judge Alito if he still believed his statement from the 1985 memo that said the “Constitution does not protect the right to an abortion,” rather than reply with a simple yes or no answer, Judge Alito deflected the question and instead replied, “The answer to the question is that I would address the issue in accordance with the judicial process as I understand it and as I have practiced it.”

When Senator Feinstein of California asked Judge Alito if Roe v. Wade was the settled law of the land—not an unpredictable question, a fair one, one might ask about Brown v. Board of
Education. Griswold v. Connecticut, and there is a long list of cases that are considered established law, settled law—when she asked the nominee whether Roe v. Wade—one in that lit- any of cases—is settled law, instead of answering it directly one way or the other. Justice Roberts did, in very unequivocal terms—others might have said absolutely not; that would have been a very straightforward answer—what did we hear? He said—this is reminiscent of some comments that were made by his brother, Judge Breyer, in dissent in a number of cases. The answer would have been a very straightforward answer—what did this mean?—then it is a precedent that is entitled to respect of stare deci- sion. . . . then it is a precedent that is entitled to respect of stare deci- sion. That is troublesome to me. However, I must say, having said all of this—Judge Breyer used the phrase in our hearings—Judge Alito’s long record as a Third Circuit judge, particularly in cases involving questions of indi- vidual rights, indicates a personal in- tent on stripping away many of these so-called Wonder Romeo achieve- ments. In Reynolds v. Simms, for in- stance, Justice Warren wrote: The right to vote freely for the candidate of one’s choice is of the essence of a demo- cratic society, and any restriction “on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the electorate, or by breaking up the citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Yet, in Jenkins v. Manning, Judge Alito was part of a decision to dismiss a suit brought by African-American voters who argued that the district’s voting system diluted the voting strength of minorities. In that case, the dissenters argued that the decision failed to give effect to “the broad sweep of the Voting Rights Act.”

Judge Alito’s long record of opinions and dissent in these, and other divided cases lead me to believe that he has a legal philosophy which lies outside the mainstream. Several newspapers and scholars provided support for this con- cern. One study conducted by Univer- sity of Chicago Professor Cass Sunstein, found that when there was a conflict between institutions and indi- vidual rights, Judge Alito’s dissenting opinions were “remarkably in- terest over individual rights 84 percent of the time. Moreover, 91 percent of Alito’s dissents take positions more conservative than his colleagues—inc- luding those appointed by Presidents Bush and Reising.”

Judge Alito has set an incredibly high standard for individuals to meet when bringing a claim against the Gov- ernment or a Corporation. He has re- peatedly dissented in cases where the majority has ruled in favor of an indi- vidual with family responsibilities. In Bray v. Marriott Hote- lins, for example, a housekeeper man- ager alleged that she was denied a pro-

motion because she was black. While the Third Circuit Court of Appeals ruled that the plaintiff had established the essential elements of a case of race discrimination and therefore was enti- tled to go to trial by a jury, Judge Alito dissented. He argued for a height- ened evidentiary burden to protect employers who, in the future, would have to choose between—and I quote—‘competing candidates of roughly equal qualifications and the candidate who is not hired or promoted because of race discrimination. The majority again criticized Alito’s approach stat- ing that “Title VII would be evis- cerated if our analysis were to halt where the dissent suggests.”

I also fear that if confirmed, Judge Alito may pose a threat to the laws that protected disabled citizens from discrimination. In Nathanson v. Medical College of Pennsylvania the majority held that the plaintiff, a victim dis- abled by a terrible car accident, should be required to present evidence that the college had failed to make reasonable accommodation for her disability. Alito dissented, and again the majority reacted strongly to Alito’s analysis: “few if any Rehabili- tation Act cases would survive sum- mary judgment if such an analysis were applied to each handicapped indi- vidual’s request for accommodations.”

But, I am especially troubled about Judge Alito’s dissent in the Third Cir- cuit Case of Chittester v. Department of Community and Economic Develop- ment. That case involved an employee who was fired while taking sick leave and who sought to enforce his rights under the Family and Medical Leave Act, which became law in 1993. I was the original author of this law which has enabled more than 50 million work- ers to take leave for medical reasons or to care for a child or family member. A primary objective of the act is to en- sure that both male and female work- ers are allowed to access to benefits they were not punished or discriminated against because of their family respon- sibilities. However, Judge Alito found that the law was not a valid exercise of Congressional power to enforce the Equal Protection Clause. He said: Unlike the Equal Protection Clause, which the Family Medical Leave Act is said to en- force, the Family Medical Leave Act does much more than require nondiscriminatory sick leave practice. It creates a substantive entitlement to sick leave.

The decision reflects a proscriptively narrow conception of what “equal protection” required. Real equality cannot be achieved, and the very real effects of discrimination can be remedied, without meaningful, substantive ac- tion. This is precisely why Congress en- acted the Family and Medical Leave Act. The Supreme Court recognized this in Nebraska Department of Human Resources v. Hibbs. In a 6-3 decision authored by Chief Justice Rehnquist, the Court held that contrary to what Judge Alito said in Chittester, a work- er can sue a State employer who fired
him for taking family leave to care for his sick wife. This finding is critical to ensure that workers and their families can continue to take leave without fearing for their job. This right might be jeopardized if Judge Alito is confirmed, as during the hearing Judge Alito refused to reject evidence of discrimination in personal sick leave even though there is compelling evidence in the legislative history of this law.

In these cases, the very judges who talked about our nominee as being fair and not being an ideologue, in their majority opinions had very different things to say about their colleague on some very critical cases on which this Appellate Court Judge reached different opinions, such as I have cited here, as well as in several others that came before that circuit.

I am also concerned about Judge Alito’s ruling regarding the Family and Medical Leave Act, which I authored while I was the Medical leave Act has provided meaningful relief to millions of Americans. Judge Alito would have made significant changes, if not eliminated the law altogether, a great setback, in my view, The Supreme Court so far has not reviewed this case. Finally, I am troubled that the rights of privacy which are so deeply valued by Americans could be eroded by a Justice on the bench who does not appreciate the importance of these issues.

I deeply regret that I didn’t have the opportunity to engage in a fuller discussion. It is somewhat disturbing, that I was only allocated 20 minutes. I say this with regret because it will only be the fourth occasion in 25 years I will have voted against a nominee for the Senate Judiciary Committee, I must oppose this nomination. I have concluded that Judge Alito’s judicial temperament is out of step with our fundamental constitutional values and that his confirmation would not be in the best interests of the United States.

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

MR. DODD. Mr. President, for the reasons I have stated, I will oppose this nomination. I say this with regret because it will only be the fourth occasion in 25 years I will have voted against a nominee for the Senate Judiciary Committee, I must oppose this nomination. I have concluded that Judge Alito’s judicial temperament is out of step with our fundamental constitutional values and that his confirmation would not be in the best interests of the United States.

The PRESIDING OFFICER. The Senator from Oklahoma is recognized for up to 1 hour.

Mr. INHOFE. Mr. President, I say to my good friend from Connecticut, I was surprised to find out he was not a member of the conservative caucus. Now I know. But I would agree with him insofar as the significance of the confirmation vote that will take place...
tomorrow. There is nothing more solen, nothing more significant that we have to deal with than confirming judges, whether they are nominated by Democrats or by Republicans.

However, I respectfully disagree with the way Democrats have gone about it. I am looking forward to the successful confirmation of Judge Alito. I have had a chance to talk about him. I believe he will be a strict constructionist and will do a good job for the United States, specifically for my 20 kids and grandkids.

NATIONAL SECURITY

Mr. INHOFE. Mr. President, I am not here, people will be glad to know, to talk about Judge Alito. I am here as an assignment. Serving on the Senate Armed Services Committee, as is the keeper of the chair, I have been there for quite a number of years. I have taken an interest of giving a grade to what President Bush, prior to his State of the Union Message tomorrow night, has done in the way of national security and national defense. I am proud to say that I am very proud of the job he has done. In doing this, what I would like to do is break it down into three segments.

First, I want to talk about the problems this President inherited when he became President in terms of our national security; second, the solutions, the very serious problems facing the issues we face to those problems; third, the challenges he has for the future, for the next 2 or 3 years. In doing this, I know that I will come across as being very partisan. Quite frankly, when we are dealing with national defense, I am quite partisan. I think the most important thing we have to do here is to keep America strong, make sure that we have a strong national defense system. I hate to say it, but that becomes a partisan issue. However, it is too serious of an issue to try to be diplomatic, and we now are sending our kids out in strike vehicles.

During the time of the 1990s, during the Clinton drawdown of the military, one particular general comes to mind. I considered him to be a hero because it took courage. It is hard to explain to real people, as I go back to Oklahoma, how much courage it takes for someone to stand up against his own President if he is in the military. These are civilians, but they were not as strong in terms of a national defense. There are some reasons for this. One of the things we have in this country, which people don’t stop and really think through, is the convention system. It is kind of a miracle. In a living room in Broken Arrow, Rep. Rogers and others, and they have a strong national defense, they decide what delegates go to the county convention. So the most activist of each side, liberals and conservatives, become the people who end up going to the conventions. Then they go to the district convention, the State convention, and then the national convention. The bottom line is, if any Republican wants to run for the Senate or for the House or for a higher position, that person has to embrace the platform, at least partially, that is adopted by his party in the national convention of the Republican Party. It is a conservative agenda. For the Democratic Party, it is liberal agenda. That is a long way around the barn, but it kind of explains as to why these Members of the Senate from the Democratic side are not strong in terms of a national defense.

It is because if you really look at a liberal, they don’t think you need a military to start with. Liberals believe that if all countries would stand in a circle and hold hands and unilaterally disarm, all threats would go away. They don’t say that, but that is what they really think. So we have these people running for President on the Democratic side, and they don’t want to perform in terms of what the needs are from a national security standpoint.

Before we go any further, there are two things unique to America. The other one is, we are so privileged in this country. If people at home want to know how Jim Inhofe, as a Member of