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House of Representatives

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

Senate

FRIDAY, JANUARY 27, 2006

The Senate met at 12 noon and was called to order by the President pro tempore (Mr. STEVENS).

PRAYER

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

Let us pray.

Almighty God, the center of our joy, prepare our spirits, clarify our minds, and stir our hearts for Your movements among us. Help us to feel Your presence in our opportunities to touch hurting lives. May Your whispers prompt us to deliver captives and bring healing to the bruised.

Abide in the hearts and minds of our Senators. Guide them with Your counsel that they may not stumble in darkness. May their hands touch Your Hand and find the leading that illuminates the road to peace.

Bless our families and our homes. Protect our loved ones from the perils of these uncertain times. We commit ourselves today to the One who came to give us salvation. We pray in His Holy Name. Amen.

PLEDGE OF ALLEGIANCE

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

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

RESERVATION OF LEADER TIME

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

EXECUTIVE SESSION

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

The 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.

RECOGNITION OF THE ACTING MAJORITY LEADER

The PRESIDENT pro tempore. The acting majority leader is recognized.

SCHEDULE

Mr. SESSIONS. Mr. President, today the Senate will continue to debate the nomination of Samuel Alito to the Supreme Court. Yesterday, the majority leader, Senator BILL FRIST, was forced to file a cloture motion to stop a filibuster from Senators on the other side of the aisle. That cloture vote will occur at 4:30 p.m. on Monday. It is our expectation that cloture will be invoked and that the Senate will then proceed to a vote, a final up-or-down vote, on the confirmation of Judge Alito on Tuesday at 11 a.m.

I have some remarks I wish to make on the Alito nomination, but before I do, I suggest the absence of a quorum.

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

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. SESSIONS. Mr. President, it is very distressing and disappointing that we are now looking at a filibuster of the nomination of Samuel Alito to be a member of the U.S. Supreme Court. He has served as a Federal appellate judge—outside of Washington, DC, not involved in any of the political issues here—for 15 years and during that time has assembled an incredibly strong group of admirers who have testified on his behalf to a degree that exceeds almost anything I have had the pleasure to see as a member of the Senate Judiciary Committee where we had hearings on this matter.

The American Bar Association interviewed 300 of his colleagues—lawyers who have litigated against him; lawyers who have worked with him; judges who have heard him, whom he practiced before; and his colleagues on the bench.

An African-American member of that ABA team—who represented the University of Michigan in defending their admissions policy that some called a quota policy—that individual said, quote: He was held in incredibly high regard. In fact, I am not aware of anyone who was interviewed that said anything bad about this nominee.

He was at the top of his class at Princeton, and the top of his class at Yale Law School where he served on the Law Review. He argued 12 cases before the U.S. Supreme Court. There is not more than a handful of lawyers in

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

this country who have argued even a single case before the Supreme Court, much less 12.

Then he was U.S. attorney, prosecuting criminal cases for the United States of America in New Jersey, where he prosecuted Mafia groups and drug dealers and people such as that. He has spent 15 years on the bench, demonstrating day after day the judgment, the intellectual integrity, and honesty it takes to be an outstanding judge.

He is a remarkable nominee. His father was an immigrant from Italy. He grew up in New Jersey, and has had the great honor to be one of those sons of immigrants who got to go to the great University of Princeton. He in every way represents the best there is in American law. And more than that, he understands what a judge's role is. He has expressed this in so many good ways. Without notes, he talked to us in that committee from his heart.

He summed up, time and again, question after question, his view that a judge has a responsibility to decide the case that is before them, not to set grand policy for America, but to try the case of the litigants that are before them. Somebody has a complaint, and they are complaining that the law or the Constitution has not been properly followed, and they are asking for relief. The judge decides each case based on the facts.

First, a judge must, with intellectual honesty, find out what the facts are, and, then, after the facts are determined, apply the established law to that fact situation and render a decision without regard to any personal or political views—whether he is a Republican or a Democrat, a liberal or a conservative—without regard to any personal, social, religious, or other views he may have. Then he renders that opinion.

As Alito said, he learned as a judge you should delay making up your mind. It is a habit of mind a judge learns. He hears those facts, he thinks about those facts, and considers those facts and makes up his mind—only after the full matter has been brought before him and has reached its full, ripe point to make a decision. I thought that was a very insightful and wise comment he made.

We had a unanimous highest possible rating from the American Bar Association. As I read last night, one can easily see the tremendous admiration and respect his colleagues on the Third Circuit Court of Appeals have for him. They were so impressive in the committee. Several of these judges were senior judges. Most of them had served the full 15 years with him on the bench. They have known him. They have seen him in private conferences. They said he is a man of intellectual honesty. He is a man who is fair, unbiased. He never raised his voice, never proselytized for his view, but is a man with incredible analytical ability to get to the heart of a matter and make a just decision.

What more could you ask for on the bench? Many of these judges were Democratic appointees. The Third Circuit is not a conservative circuit. It is probably one of the more liberal circuits. It sits in Philadelphia. And to say this man is extreme, outside the mainstream, unworthy of serving on the Supreme Court is in itself an extreme statement. It is not justified.

The President made a simple promise in this last election that he repeated at every stop he made: I want a judge who will show restraint, who will follow the law and not make law, who does not see it in their bailiwick to reset the social policy of America. And we have been seeing that type of judgement time and time again. Our colleagues who like what these judges are doing, our Democratic colleagues, apparently, are not happy with Alito's philosophy of judicial restraint.

Now let me tell you, President Bush—this Senator does not believe we should put a conservative activist on the bench, a judge who will utilize his opportunity on the bench to promote a conservative agenda. That is politics. That is what we do here in the legislative branch. That is what we are supposed to fight out in this Chamber. The American people have a role to play in it because they can vote us out of office. But if a judge on the Supreme Court of the United States uses that power to interpret the meaning of words in the Constitution to undermine the plain meaning of those words, undermine the meaning that the ratifiers and drafters had in mind, to make it say something they want it to say, then they are legislating, they are in this branch.

It is more dangerous than that because they do not legislate like we do. If we legislate, the next Congress can come in and change it. We can be voted out of office, and they can reverse it by 51 votes out of the 100 Senators. But what if a Supreme Court judge declares that no longer can States define marriage as a union between a man and a woman, that we are going to declare that any association of people can call themselves a marriage and say the Constitution says it? They have a lifetime appointment. They never have to answer to the public. They can stay on that bench as long as they desire.

What recourse do the American people have for that? Only a constitutional amendment, and that takes a two-thirds vote in the House of Representatives and the Senate and three-fourths of the State legislatures to overturn it—an incredibly huge task.

So it is critically important we have judges who are not activists on the bench, that we have judges who will faithfully apply the law according to the way the constitutional drafters and ratifiers intended it, and to follow faithfully the laws of the Congress, and respect those laws as long as the laws passed by the Congress or the States do not conflict with the Constitution, and show some respect to the States.

We have had so many of these activities that have gone on in our Court that show a lack of discipline. I pointed out last night that we are at the point where one of the courts of appeals that represents 20 percent of the people in the United States, the Ninth Circuit, has ruled that the Pledge we recited which says ''under God'' in it is unconstitutional. The U.S. Supreme Court did not reverse it. The U.S. Supreme Court simply said that the father who brought that case did not have standing because he did not have custody of the child. Now he has gone back and found somebody else and apparently has a plaintiff who does have standing. I am not sure what the Supreme Court is going to rule.

Will they next come in here with a chisel and take those words right up there on this wall—''In God We Trust''—off the wall of the Senate? It is not such an impossible suggestion. Our Presiding Officer came here shortly after Senator BYRD—but he was here in the Congress, I believe, as a Member of the House when we put ''under God'' in the Pledge. And we ratified that again, when this case first came out, in the Senate that we intend that remain the law. But the Court has the ability—just like that—to strike it down.

That is what this issue is about. We talk about the takings case, the Kelo case, where they redefined the meaning of words that a property can only be taken for a public use. Now they say it can be taken for a public purpose—a big change. It is one thing for the government to take your land to build a dam, or a highway or a public park, but to take your land to build a private shopping center was not what the Founding Fathers had in mind. But this is what the Supreme Court ruled, apparently believing that was too restrictive. It would be better if you could take land for private purposes as long as it had a public benefit and they approved that. Not good.

Regardless of what you think of the merits of that takings issue, it represented a lack of discipline, an activist trend on the Court by which the judges declared that their personal views would allow them to actually bend the plain meaning of the Constitution to have it say what they wanted it to say, not what it actually did say, not what was meant from the beginning.

I am disappointed that we have an objection, any objection to this fabulous nominee. President Bush in his campaign promised a judge who would show restraint, that he would be highly qualified and a man or woman of integrity. That is what he submitted. But now we are looking at a filibuster. I am not kidding. I thought we had settled that issue. But now we are facing a filibuster. They have put it in their news releases, Democratic Senators. Apparently, the former Presidential candidate for the Democratic Party in the last election, who obviously did not

win, called back from Davos, Switzerland, to say that they ought to filibuster. Count him in. He urged a filibuster. The assistant Democratic leader in the Senate, Senator DURBIN, apparently is supporting a filibuster of this nomination. It is not right. This is a solid, mainstream judge who was rated, unanimously, the highest rating the American Bar Association gives. He has the unanimous support of his fellow judges on the Third Circuit, Democrats and Republicans. He has an extraordinary record and resume in every respect. They want to filibuster this nomination. I know the People for the American Way want it. I know the National Abortion Federation and other abortion groups want it.

We are Senators. We have to ask ourselves: Is this where we are heading? Is this what we are about, that we are now going to take nominees with the kind of respect Judge Alito has and subject them to a filibuster? It was discussed in this past election. The American people, I am convinced, strongly support the kind of judge Judge Alito will be. They don't want an activist judge setting social policy. They absolutely understand this issue.

I had the pleasure to follow one of our most outstanding young Senators last night, Mr. JOHN THUNE of South Dakota. He made a remarkable speech. He concluded it by saying he campaigned on this issue in South Dakota. He promised to vote for this kind of judge. I am thinking, whom did he beat? He beat the former Democratic leader of the Senate, the former majority leader for a short time, Senator Tom Daschle, who was leading filibusters to obstruct up-and-down votes on highly qualified nominees. I submit to the Members of this body that the people of South Dakota were not happy with that. In large part, Senator THUNE is here today because of the obstruction of the Democrats over the last several years of highly qualified nominees who simply believe a Federal judge should show restraint and follow the law. That is all we want. That is all the American people want. That is what we have a right to expect in Federal judges.

What kind of filibuster is this we are seeing? It is almost amusing. Where are the Senators? I was here last night. I followed three Republicans talking. We were supposed to be in session until 8. Nobody from the other side of the aisle showed up to talk. I am not sure there are any around today to complain. They are supposed to be telling us why this man should not be on the bench. We have been here for 2 days, and fewer than 25 Democratic Senators have come to the Senate floor. It has been a pretty vacant situation. Republicans shut down the Senate each night. Nobody seems to want to come and raise the issues and debate them. If they want to filibuster, if they have serious concerns, I suggest they come down and express it. Let's talk about it.

My colleague, Senator SPECTER, during the Judiciary Committee hearings gave the Democratic Senators every opportunity they desired to raise, for as long as they wanted to, any issues they had with Judge Alito. He allowed them to call a whole host of witnesses who would be critical. The truth is, I don't think any of them knew Judge Alito. Most of them had axes to grind one way or the other from some political agenda they had. Even out of that group, I don't think but one or two actually said they were against him. Laurence Tribe raised some concerns, but he never said he was against the nominee or that he should not be confirmed. He is a professor himself, and he knows the legal expertise Judge Alito brings to the court.

If you have something to filibuster about, come on down. Why put us through this? Senator JOHN CORNYN has called this effort needless and strange. That is a good definition. Other words come to mind: pointless, political.

The Democratic leader, Senator HARRY REID, went before the Democratic caucus, according to the New York Times, just last week and urged his colleagues to vote against this nomination. They made it a political agenda item to block this nomination. Is it Presidential politics or politics in general? I submit both. Senator REID's spokesperson, when asked, said: Well, they want to get as many votes as they can against him to make it an issue in the election—for politics, not a question of whether the judge is ready, qualified, and able to serve.

Maybe this is some sort of theory that, We can reward our base—the National Abortion Rights Action League, the People for the American Way, the Alliance for Justice, some of those leftwing groups that have been driving the process for years. Maybe it will keep them happy. Maybe they will keep sending money. Maybe they will keep attacking George Bush and saying he is appointing extremists to the bench. Maybe that is what they are trying to do.

There is no basis to object to this nominee. There is absolutely no justification for denying him an up-or-down vote, which is what the filibuster attempts to do. We can all agree, I suppose, that it is an international filibuster because it was apparently hatched in Davos, Switzerland, where Senator KERRY now is with those masters of the universe trying to figure out the world economy. Maybe they ought to spend more time trying to get gasoline prices down than worrying about conjuring up a filibuster of a judge as able as Judge Alito. They are not here in the Chamber, and that is what we have every right to expect.

Maybe, since they are abroad, they are worried about Judge Alito's position on foreign law. We have seen a trend with members of the U.S. Supreme Court. Recently, Justice Ruth Bader Ginsburg went to New York and made a speech in some great detail—shocking, to me; I have recently read the speech—in which she defended the citation and consideration of foreign law to determine how to interpret American law. This is contrary to our American legal system. A judge's duty is to apply the plain meaning of the words, if there is some dispute about it, to look to the legislative history or maybe the background of the bill from an American perspective, not a European perspective.

For example, in Roper v. Simmons in 2005, the case held that the execution of individuals who were under the age of 18 at the time they committee a capital crime violates the 8th and 14th amendments, overruling a previous precedent of the Supreme Court. Our liberal colleagues have been very strong in claiming that we should stick to precedent, particularly when they talk about abortion. But in that case, the court reversed Stanford v. Kentucky.

The majority of the Supreme Court, trying to interpret the Constitution of the United States, spent almost 20 percent of its legal analysis discussing the laws of Britain, Saudi Arabia, Yemen, Iran, Nigeria, and China.

We have a lot of complaints. People are not happy with rulings of the Court. Many times, those rulings are justified and we are simply unhappy with the result. We are concerned about it. Maybe it is not justified. But I believe the American people understand that this is a dangerous trend by the Court that they would seek to interpret American law by looking to Nigeria and China—red China, last I heard—Yemen, where there are terrorists, and Iran, a pariah to the international community. They are quoting them, discussing what their views of our Constitution are relative to cruel and unusual punishment. Regardless of what one believes about the merits of the case, legislatures absolutely should discuss the age at which an execution should occur, but what does the Constitution say about it? That is what the Supreme Court is supposed to be deciding, not what they think ought to be done.

In Grutter v. Bollinger in 2003, Justice Ginsburg looked outside the Constitution to make her decision, noting with approval that the International Convention on the Elimination of All Forms of Racial Discrimination allowed for such discriminatory practices or ''maintenance of unequal or separate rights for different racial groups.''

This is a question under our Constitution which says that every American, whether they are of minority or majority ancestry or background, is entitled to equal protection of the law. That raises some questions about quotas and matters of that nature. So in her decision, did Justice Ginsburg look at our Constitution, which guarantees every citizen, regardless of their race, equal protection of the law? What did she look at? She considered the

International Convention on the Elimination of All Forms of Racial Discrimination. That is not a basis for an American Justice to lay an opinion. We have seen a lot of that.

Let me briefly cite what Judge Roberts said about that:

If we're relying on a decision from a German judge about what our Constitution means, no President accountable to the people appointed that judge and no Senate accountable to the people confirmed that judge, and yet he's playing a role in shaping a law that binds the people in this country. I think that's a concern that has to be addressed.

Absolutely, he is correct. He goes on to say:

In foreign law, you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever. As somebody said in another context, looking at foreign law for support is like looking out over a crowd and picking out your friends. You can find them, they're there. And that actually expands the discretion of the judge. It allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent because they're finding precedent in foreign law, and use that to determine the meaning of the Constitution. I think that's a misuse of precedent, not a correct use of precedent.

I say to the President pro tempore that if he chooses to speak at this time, I would be glad to yield if he would like.

The PRESIDENT pro tempore. The Chair is happy to accept that offer.

Mr. SESSIONS. Before I yield, I have been making humor here about Senator KERRY over in Davos, Switzerland, calling for a filibuster back here. One of the issues we have with regard to the confirmation of judges is that judges show restraint and be faithful to our law, not ''foreign law.'' There is no doubt that Judge Alito and Justice Roberts do not agree that we ought to be quoting foreign law to justify legal opinions in the United States. Judge Alito said this:

I don't think we should look to foreign law to interpret our own Constitution.

Amen to that.

He said this:

Our Constitution does two basic things. It sets out the structure of our Government and it protects fundamental rights. The structure of our Government is unique to our country, and so I don't think that looking to decisions of supreme courts of other countries or constitutional courts in other countries is very helpful in deciding questions relating to the structure of our Government.

Amen to that.

He went on to say:

As for the protection of individual rights, I think we should look to our own Constitution and our own precedents. . . . Our country has been the leader in protecting individual rights.

Are we going to look to China, Yemen, or Iran on that issue? He goes on to say:

I don't think that it's appropriate or useful to look to foreign law in interpreting the provisions of our Constitution. . . . I think the Framers would be stunned by the idea that the Bill of Rights is to be interpreted by taking a poll of the countries of the world.

That is the kind of judge we need on the bench. That is the kind of judge President Bush promised to nominate. That is the kind of judge he sent up here, and he deserves confirmation.

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

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

The assistant legislative clerk proceeded to call the roll.

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

The PRESIDING OFFICER (Mr. ISAKSON). Without objection, so ordered.

Mr. LEAHY. Mr. President, I have spoken before, of course, on this nomination. I want to emphasize some of the points I have made.

The Constitution, as we know, gives the Senate a central role in the confirmation of a Supreme Court Justice. Nothing in our makeup, nothing in the history of this country assumes that the Senate would be a rubber stamp for the President's nominees. After all, it was the Senate that turned down some nominees of George Washington—the most popular President and the greatest President in this country's history—because it would not be a rubber stamp. It was an overwhelmingly Democratically controlled Senate at the time of Franklin Roosevelt, and it was that Senate that said to Franklin Roosevelt: You cannot pack the Supreme Court.

I have said, also, many times that the Senate should be the conscience of the Nation. After all, we are the only 100 people in this country of 295 million Americans who get a chance to vote on lifetime positions to the Supreme Court—people who will affect our personal rights for decades to come.

Now, I have voted on every one of the current nine members of the U.S. Supreme Court. I actually voted on some who are no longer there. I approach each one the same way. Is this going to be a Supreme Court Justice for all Americans? That is what I asked about Judge Alito.

He came before our Senate Judiciary Committee with a record he has created over the last 30 years. As a judge, and before that as a high-ranking Government official appointed to a succession of posts by Republican Presidents, Judge Alito seemed consistently to defer to Executive power and to show little empathy for the plight of ordinary Americans. His record also suggested a pattern of saying what he needed to say to get to the next job. Certainly, nothing in his record, nothing in his job application indicated he felt very strongly about checks and balances and the three branches of Government.

Now, in the course of this nomination and the hearings, he sought to retreat from his own words; but even trying to retreat, he did not. The hearing provided him with an opportunity to explain his record. It was an opportunity he chose to squander. The President's supporters and many Republican Senators on the committee urged him not to be forthcoming. My gracious, the 18 members of that committee are the only ones who get to ask him questions on behalf of all 295 million Americans, and some urged him not to answer questions. He had the chance to answer some of the troubling questions that his past words and actions raised. He had the opportunity to demonstrate that his replacement of Harriet Miers was not what it appeared to be—the President selecting somebody whom he knew he could count on to support Government power and the expansive doctrine of the ''unitary Executive,'' and someone the extreme faction in the President's party felt assured would march with Justices Scalia and Thomas in their culture war.

So it was an opportunity to answer questions—an opportunity he did not take. The hearings and the whole confirmation process left us with more questions and greater concerns than we had before. I have discussed his failure to assure us that he would be an effective check and balance on Executive power. He failed to show me or the American people that when he recited platitudes such as ''nobody is above the law,'' he was not telling us what he thought he needed to say to get one more promotion.

When I voted for John Roberts as Chief Justice, a conservative Republican nominated by a conservative Republican, I voted for him because I looked at him and I thought, ''Would George Bush or PATRICK LEAHY, or George Smith or Patrick Jones, get fair treatment? And would we be heard on what the facts and the law would be?'' I believed we would. But I don't have that same confidence with Judge Alito.

One question for the Senate is whether Judge Alito takes seriously his promises to the Senate and his obligations to avoid the appearance of impropriety. He had an opportunity to talk about his numerous failures to recuse himself from cases during the nomination period, and he didn't accept that opportunity.

In 1990, Mr. President, Judge Alito came before the Senate. I was here at that time. He was seeking confirmation to the Third Circuit Court of Appeals. He made a pledge—and they are made under oath—that he would recuse himself from five categories of cases: cases involving three different financial companies with whom he had dealings, cases in which his sister's law firm represented a party, and cases he had overseen as the U.S. Attorney in New Jersey. Someone in that circumstance who would not make such a pledge might not have been confirmed. But I was disappointed to discover that, despite making this explicit promise to disqualify himself in these cases, he failed to disqualify himself in

at least four of the five categories from which he had sworn he would disqualify himself. In fact, he apparently failed to put several of the companies on the so-called recusal list. These were companies from which he said he would recuse himself if matters involving them came up before the Third Circuit. He did not even give their names to the clerk to make sure that happened.

I don't suggest that he in any way got any financial benefit from this. I doubt that he did. But, again, he was making promises to get promoted to the next job. Once he got promoted, the promises were forgotten.

One case we have heard a lot about involving the Vanguard funds, in which he had invested hundreds of thousands of dollars, and which he expressly included in his 1990 pledge to the Senate, is particularly troubling—not just because of his involvement but for the various reasons he gave, shifting reasons, for why he did not recuse himself. First, he said he didn't realize it was a case involving Vanguard. The word ''Vanguard'' appears in the case name three times and in the case papers many more times. He said the clerk had moved to a computerized recusal system, so there was a computer glitch, and that may have been why he was assigned the case. Well, he would have seen Vanguard in the case name three times. He said: Well, I didn't benefit from it. We were getting a little bit into ''the dog ate my homework.'' Why not just say, ''I screwed up?''

After significant investigatory work and pressing for answers, we found that Vanguard was not on his computerized list to identify conflicts, so a computer glitch could not have occurred. He finally acknowledged—and I give him credit for this—having stated for weeks and weeks that there was a computer glitch, he finally acknowledged that there was not. Why not say, ''I screwed up'' and accept the responsibility? He acted like the Bush Administration most often does when it errs, by blaming others: his surrogates attacked those raising questions, while he proffered numerous conflicting excuses.

For example, one of his many explanations was contained in a letter he wrote to Chairman SPECTER. He contended that the 1990 promise he had made to the Judiciary Committee in order to become a Circuit judge only applied to his ''initial service'' and that he later, apparently secretly and unilaterally, decided that his promise to this Committee had been ''unduly restrictive'' and that he need not follow it anymore. He did not so inform the Judiciary Committee or the Senate of these determinations at any time before his 2005 nomination to the Supreme Court. Moreover, it is wholly inconsistent with his finally adding the Vanguard companies to his recusal list in December 2003. This letter seems more like self-serving, after-the-fact rationalizing than it does a truthful explanation for what had happened in 2003. As we discovered through due diligence, Vanguard and Smith Barney were not on the judge's automatic recusal list even in 1993. There is no reason to think they were on there before that. It certainly does not seem that Judge Alito tried to live up to his sworn commitment to the Senate even during what he would have to concede was his ''initial service'' period as a Circuit judge.

Moreover, the ''initial service'' excuse makes no more sense with respect to his Vanguard investments than it would with respect to his sister. She did not cease being his sister after some ''initial service'' period of his on the bench. In fact, his Vanguard investments significantly increased over the period of his service on the bench. The ''initial service'' concept in the Judiciary Committee's approach to recusal applies to transition from a law practice to the bench. Thus, for example, once the cases on which he had been involved while the U.S. Attorney in New Jersey had run their course, he was not prohibited for all time from hearing cases from that office. Eventually, even he had to acknowledge at the hearing that this ''initial service'' argument was not the real reason he failed to recuse from the Vanguard case, even though that had been the argument he made in a written response to our Committee's chairman.

To the end, Judge Alito has failed to take responsibility for his action. Instead, the best he can do is to admit at his hearing that he ''just didn't focus on the issue of recusal'' and that ''no light went off.'' There was no remorse, no apology, and no embarrassment for the string of conflicting and inaccurate explanations he gave during the course of this nomination. Accordingly there is no reason to think that if he becomes a Supreme Court Justice he will focus any better on conflict of interest and appearance of conflict issues, in a system without accountability. I voted against the nomination of Justice Rehnquist to become Chief Justice in large measure because of his involvement in a case in which he should not have been. I take these matters very seriously. It is apparent that this nominee does not.

In his 1985 job application for a job in the Reagan administration—one that he said he was careful in doing—he very proudly included his membership in the Concerned Alumni of Princeton, or CAP, which he termed ''a conservative alumni group.'' Actually, he named only two groups he had been associated with, that one and the Federalist Society. He was also a member at the time of the Princeton Club in Washington. He didn't include that. He didn't include anything else. The reason I mention this is that he knew exactly what memberships to what clubs would appeal to those in the Meese Justice Department. Some would say that is being wise. But why emphasize membership in a group such as the Concerned Alumni of Princeton? Nobody would suggest that in his hiring practices or in the way he lives Judge Alito is biased against women or minorities, but the Concerned Alumni of Princeton received national attention for resisting the admission of women and minorities—African Americans and others—into Princeton. Why brag about being part of such an organization?

These same people only a generation earlier surely would have resisted the admission of people from Italian immigrant families. I take that rather personally. My mother's family were Italian immigrants. I still have relatives in Italy today, uncles, aunts, and cousins, who talk about how proud they are of their sons and daughters who have gone to America.

I also think of a different era when my Irish father, as a teenager, had to face signs: ''No Irish need apply'' or ''No Catholics need apply.'' As a result, we grew up in a family where we learned that all discrimination was wrong.

Why brag about even a loose affiliation with a group that advocated any kind of discrimination?

Because it had been in the press, I thought I would help the judge out. I asked him about this. I figured it would be a simple explanation; that he would make it very clear that he was opposed to them. Instead, he said: I don't really remember that group. We alerted him ahead of time that he was going to be asked that question. He said: ''I don't remember that,'' even though it was on his application.

Then he said: Well, I think it was because of the concern that ROTC was not being allowed on the Princeton campus. Good explanation, except, of course, by 1985 ROTC was back on the Princeton campus. Neither CAP's own materials nor media accounts suggest that ROTC was a primary focus for CAP at the time. And of course, that was not an answer to my question. My question was why he touted his membership in 1985. He never answered my question.

Those little facts, inconvenient facts, that come in. They were not inconvenient at the time he was applying for a job with Edwin Meese. Then it was something of which to be proud. Now applying for a job on the U.S. Supreme Court it is: I don't remember why I did it.

I will give him the benefit of the doubt. I will accept he was not very active in the group. But then that goes all the more to why he emphasized it in his job application especially to that administration, to the Meese Justice Department. That was the most ideological and partisan administration we had seen until the present time. So it is logical to think that he proudly proclaimed his membership in CAP and the Federalist Society, as well as his support of Republican candidates and conservative causes and his recent submission of articles to the American Spectator, to establish his right-wing credentials to help win that coveted

promotion. It seems apparent that he said all this in 1985 to show those making promotion decisions that he was not just a traditional conservative, but a ''movement conservative,'' and that the activists in control of political promotions at the Meese Justice Department and the White House could rely on him.

I am concerned he tried too hard back then to fit in with those in power, and it makes me wonder, when he was being screened for this job, when he met in that private closed-door meeting with Vice President CHENEY, Karl Rove, and Scooter Libby, what he said to them. In this time of Executive overreaching, illegal spying, and expanding Government power, what the American people need is a Supreme Court that is willing to stand up for the liberties and rights of all Americans, not someone who curries favor with the powerful.

I am especially interested in these circumstances because, as you know, Mr. President, Judge Alito was the third person President Bush nominated for this particular seat. The second one, Harriet Miers, he nominated and then got a firestorm of criticism from Republicans, not from Democrats, but from Republicans, from some within the Republican Party who made it very clear to the President: You can't nominate her because we are not sure how she will vote. We are not sure that she will vote the way we want her to.

Finally, the President—in a humiliation for him—was forced to withdraw her name. He came forth with Judge Alito, and those same people said: He is great. We are confident about how he will vote. We are fine with him.

I am concerned, as well, about his failure to be forthcoming in answer to my questions about CAP. I would have been more willing to give Judge Alito the benefit of the doubt if he had taken the opportunity the hearings provided to come clean about all this. He gave me no adequate answers. When Senator SCHUMER raised the matter of his inclusion of CAP on his job application again, on another day, later in the hearing he hinted at what he had done in 1985 but still would not own up. He said:

> [Y]ou have to look at the question that I was responding to and the form that I was filling out. I was applying for a position in the Reagan Administration, and my answers were truthful statements, but what I was trying to outline were the things that were relevant to obtaining a political position.

But he stopped far short of answering because he had gotten himself into another box by his previously saying to us that he had no recollection of CAP. He concluded with the following:

> Well, Senator, since I don't remember this organization, I can't answer your question specifically, but I think that the answer to the question lies in the nature of the form that I was filling out and the things that I put.

Regrettably, when he had been asked by ABA representatives about his putting CAP in his 1985 job application and whether he was ''pandering,'' he failed to take that opportunity to reflect on what he had done and own up to the matter, as well. Instead, according to Marna Tucker's testimony, he answered that he put CAP on that application because ''it would be improper to not tell the truth on an application'' and ''that he was a member of that organization.'' That answer says a lot.

He is right that it is ''improper to not tell the truth on an application,'' but that does not explain why he chose to list CAP. The form does not call for him to list all clubs and affiliations. The form used to seek political advancement during the Reagan Administration asked for something else, a demonstration of partisan, political commitment. It said: ''Please provide any information that you regard as pertinent to your philosophical commitment to the policies of this administration,'' and asked applicants whether ''you ever served on a political committee or been identified in a public way with a particular political organization, candidate or issue.'' That is why he included CAP, an organization that in the mid-1980's was a place that activists like Dinesh D'Souza and other rising stars in the conservative movement favored.

Regrettably, at his hearing, and under oath, Judge Alito evaded. He could not remember, tried to say the right things about discrimination, stood by while his supporters attacked the question and then watched as his supporters pushed so hard that they made his wife break down in tears. I do not think that the Republican Senator who pressed that awkward line of defense intentionally meant to upset Mrs. Alito, but Republican partisans have turned that moment that they created into a partisan weapon.

Like the matters of recusal, the CAP issue is another that Judge Alito could have put to rest by being more forthcoming at the outset. He has never answered the question of why he touted his membership in CAP in 1985. To me the true answer seems obvious. Indeed, in a news account that appeared on the last day of the hearings, his mentor at the Department of Justice in those days admitted what was really going on in that 1985 application. Charles Cooper, who was the Assistant Attorney General for the Office of Legal Counsel and Samuel Alito's supervisor, said:

> The only purpose of that essay was to satisfy the Office of Presidential Personnel that he was simpatico with the Reagan Administration's legal policy agenda. He went on to call Samuel Alito's 1985 statement ''his essay of his political bona fides.''

Judge Alito's 1985 job application is an ideological manifesto that goes a long way to explain why the same people on the far right who shot down the President's nomination of Harriet Miers, because they were not assured how she would rule, rushed to support Judge Alito when his nomination was announced.

I looked at his job applications. He wrote:

> [I]t has been an honor and source of personal satisfaction for me . . . to help advance legal positions in which I personally believe very strongly. I am particularly proud of my contributions in recent cases in which the government has argued in the Supreme Court that racial and ethnic quotas should not be allowed and that the Constitution does not protect the right to an abortion.

These are his words. He was eager to highlight his work in the Solicitor General's Office, which should be a place where lawyers honor working in a nonpartisan and professional manner, rather than seek to twist it to partisan political ends.

We have seen a few of the documents he produced in that office, but the Bush administration's regime of secrecy has prevented the Judiciary Committee and, of course, the Senate, and, of course, the American people from reviewing most of his work from his time there. This was work done during a Republican administration that litigated and lost the famous Bob Jones University case about tax breaks for institutions that discriminate; that lied to Congress about the EPA and Iran-Contra; that sought to overrule Roe v. Wade; and that sought to roll the clock back on fundamental rights to equal protection.

The hearing gave Judge Alito an opportunity to do either of two things. He could have embraced his statement from 1985 and his record as a judge and set out to explain why his deferential view of presidential power and his restrictive view of individual rights are appropriate for a justice who is supposed to be there for all 290 million Americans. We could have had the great ideological debate that so many on the far right seemed to want to have when the President's nominee was Harriet Miers. Or he could have disavowed the 1985 job application and much of his record as a judge and told us that he would in fact be a check on the President and protect the fundamental constitutional rights of all Americans. He did neither. Instead he refused to share his views and tried to finesse his statements in the 1985 application and limit them ''technically.'' He was so unresponsive that commentators from across the political spectrum have called for an end to Supreme Court confirmation hearings since they reveal so little about the nominee's thinking.

For example, he said that his statements about privacy represented his views at the time, but that he would view the issue with an ''open mind'' as a justice with the authority to cut back, or overrule the rights expressly recognized in Roe v. Wade. Judge Alito never disavowed his 1985 statement that in his legal view the Constitution does not protect a woman's right to choose. In fact, he responded to Chairman SPECTER that his statement in 1985 was a ''true reflection of [his] views at the time'' and ''the position that [he] held at the time.''

We also have his multi-page memorandum on the Thornburgh case from his days in the Solicitor General's office—one of the handful that slips through the veil of secrecy that the Bush Administration sought to construct—in which he asserts his legal view that Roe was wrongly decided and should be overruled, but that tactically the better approach would be to incrementally undermine its legal authority.

This one memo is enough to demonstrate why such material should have been produced rather than hidden by this Administration so that the Senate and the American people would have the nominee's views and record. The Bush Administration refuses to produce Samuel Alito's work at the Solicitor General's office and at the Office of Legal Counsel. Who can tell what those other writings would reveal about the nominee's legal views? The Washington Post recently reported that Charles Cooper has now indicated that Samuel Alito worked on defending the Reagan Administration in connection with the Iran-Contra crimes by working on legal theories so that they would not have to inform the Congress which was investigating in its oversight capacity. What else did Samuel Alito work on that is being hidden from the Senate and the American people?

On the issue of a woman's right to choose, we also have Judge Alito's opinion in Casey in which he follows the script he laid out in his memorandum to the Solicitor General and finds no state regulation an undue burden on a woman's right to choose. Of course, the Supreme Court, including Justice O'Connor herself, were in place then to hold the line in Casey, reaffirm Roe and reject Judge Alito's position.

He would not testify what his legal view is today. He made it very clear he continues to believe that Roe v. Wade was wrongly decided. In describing how to decide a case where there is a precedent, he left out a step. He left out the step where the Justice, knowing there is a controlling precedent, decides whether the precedent was correctly or incorrectly decided. If a Justice believes the preceding case was correctly decided, he has no reason to go on to make the other calculations about weight and reliance and all the other factors that a Justice is to consider when deciding whether to overrule past precedent. He did not mention that step, though. In other words, Judge Alito's testimony presupposes that he continues to believe now what he believed in 1985, that Roe v. Wade was wrongly decided. Otherwise his answers make no sense. A justice does not waste time worrying about factors and weight and reliance when he considers the precedent correctly decided; that happens only when he is considering whether to overrule or limit that precedent.

I mention this as just one more case. Much has been said about Roe. But for this Senator, it goes way beyond the question of Roe. It goes to the question of, to what extent would you allow a President to step aside from checks and balances? All his writings indicate a President should be able to do that. He is one of the strongest proponents I have heard in my life speaking about the so-called ''unitary Executive.''

What does that mean in real life? It means this President, more than all Presidents in history—all Presidents in history—has used the Alito theory to say: Even though I signed a law, even though I signed something into law, I don't have to follow it because I am the President.

There are only two Presidents I have heard say that something is not illegal if the President does it: One is Richard Nixon, and the other is George W. Bush, and President Bush has used the Alito theory to make this argument 103 times.

That means he can sign a law saying the United States must obey our own laws, our treaties on torture, and then quietly write a separate page saying: However, as President, I will decide when we will follow that law.

Judge Alito's contradictory testimony at the hearing about his view were revealing. He went to great lengths to distance himself from his public endorsement of Judge Bork's unsuccessful nomination to the Supreme Court. He had called Judge Bork one of the most qualified nominee of the last century and was effusive in his praise—until asked about it at the hearing. There he sought to backtrack. He sought to excuse his comments as those of a political appointee supporting his employer's nominee, but had to concede that was not an accurate explanation for his comments. Only when pressed did he concede that he indeed thinks highly of Robert Bork's candidacy.

And when Senator KOHL asked him for his views of whether the Supreme Court should have taken the case of Bush v. Gore, his evasiveness reminded me of when I asked Clarence Thomas whether he had ever discussed Roe v. Wade with anyone. Senator KOHL was not even asking his views on the holding of that case.

We are in a pivotal constitutional moment in our history with a single fundamental question: Will the Senate serve its constitutional role and preserve the Supreme Court as a constitutional check on the expansion of Presidential power?

The reason Presidential power issues have come to dominate this confirmation is because we clearly have arrived at this crucial juncture in our Nation and at our highest Court over one simple question: Is the President of the United States above the law? I feel very strongly none of us are. You, Mr. President, are not, I am not, the President of the United States is not, the other 98 Senators are not, judges are not.

The Framers knew that unchecked power leads to abuses and corruption, and the Supreme Court has to be the ultimate check and balance in our system. Vibrant checks and balances are instruments in protecting both the security and the liberty of the American people.

This great, wonderful country of ours has existed for well over 200 years because we have those checks and balances and because we protect the liberties of individual Americans—all Americans, not just those who fit into one narrow political ideology, but all Americans, all Americans, all Americans, from any part of this country: Americans who express popular ideas or unpopular ideas, a free press, free observation of religion, a free people. We have to have the Supreme Court as the ultimate check and balance, and the independence of the Court is crucial to our democracy and way of life.

The Senate, as I said before, should never be allowed to become a rubber stamp and neither should the Supreme Court. We owe it to the American people today and Americans in generations to come to ask several essential questions:

Can this President, or any President, order illegal spying on Americans?

Can this President, or any President, authorize torture in defiance of our criminal statutes and our international agreements?

Can this President, or any President, defy our laws and Constitution to hold American citizens in custody indefinitely without any court review?

Can this President, or any President, choose which laws he will follow and which he will not, by quietly writing a side statement when he signs a bill into law?

These are some of the most vital questions of our time, and they are among the most vital questions that confront the Senate in considering this nomination to our highest Court. Judge Alito's record, and his responses—and his failure to adequately answer questions about these issues—are deeply troubling.

Regrettably, Judge Alito approached the question of a lifetime appointment to succeed Sandra Day O'Connor on the U.S. Supreme Court as a job application process that resembled a political campaign with two distinct parts. First, he had to get the nomination, which he sought as a committed arch-conservative and as a reliable vote in favor of Government power. That mission was accomplished when he was named to replace the nomination of Harriet Miers with the support of the President's most extreme supporters. That was his primary campaign. The Senate confirmation process is more the equivalent of a general election in which he strives to appear as middle-of-the-road as possible. Unfortunately, what he did not do successfully was to reconcile the two roles.

I will vote against this nominee. I believe the President picked him for his demonstrated legal views which are a stark contrast to the image the White

House and the handlers and supporters have attempted to create.

Mr. President, I see the distinguished senior Senator from Alaska. I appreciate his courtesy and yield the floor.

The PRESIDING OFFICER. The Senator from Alaska is recognized.

Mr. STEVENS. Mr. President, I first want to comment about the chairman of the Judiciary Committee, Senator ARLEN SPECTER. Knowing the health challenges he has faced in the past, witnessing this Senator's strenuous schedule in the last few months has been something to watch, to have the opportunity to witness his commitment to the Senate and to his role as chairman of the Judiciary Committee.

I commend him very much for his dedication to his job and to his function as chairman of the Judiciary Committee. He has come through some very serious medical periods in his life, but he has distinguished himself in recent months in demonstrating his total commitment to the work of the Senate. I honor him for the job he has done in conducting these hearings.

Mr. LEAHY. Mr. President, will the Senator yield on that one point? I totally agree with what he said about Senator SPECTER, who has been an example not just to the other 99 Senators but to the whole country.

I am going to be honored to present him with an award, Tracy's Kids, awarding him for, among other things, primarily the example he has set for the rest of the country that somebody can face a very serious crisis and handle it with courage, dignity, and stalwartness. To all the people who suffer various forms of cancer—the distinguished Senator knows personally, and I know a dear member of my family—this kind of inspiration helps a great deal.

I cannot thank the Senator from Alaska enough for the words he just said.

Mr. STEVENS. Mr. President, I thank the Senator who serves with the chairman with great dignity on the Judiciary Committee. I cannot appear here without recognizing the serious illnesses that Senator SPECTER has gone through and survived and the energy he has shown despite those illnesses.

To me, there is no doubt that Judge Samuel Alito is well qualified to serve on the Supreme Court. He has served as Assistant to the Solicitor General and as U.S. attorney for the District of New Jersey. He was unanimously confirmed by this Senate to serve on the U.S. Court of Appeals for the Third Circuit, and he has argued some 12 cases before the Supreme Court. He is well respected by our Nation's legal community. Seven of his current and former colleagues on the U.S. Court of Appeals for the Third Circuit testified in support of his nomination, and one of the former circuit judges who testified supporting his nomination was the former judge Jim Gibbons, who was a classmate of mine at law school and is a man whose judgment I respect very much.

Judge Alito also received a unanimous ''well-qualified'' rating from the American Bar Association, and our majority colleagues on the Judiciary Committee have reported his nomination to the Senate favorably on a unanimous basis.

In my some 38 years now in the Senate, I have voted to confirm 16 nominees to the Supreme Court and 2 to the position of Chief Justice. In each instance, I have followed the advice of the Judiciary Committee on these votes, and I have always voted for a nominee based upon his or her qualifications. I have not been influenced by a Justice's personal political beliefs or the party affiliation of the President who sent the nomination to the Senate.

For me, the decision to vote for Judge Alito is not a simple one. I am proud to come from a family with a long line of very strong pro-choice women, and I have reflected their judgment here in the Senate. I am from a different generation. I remember well when a woman's right to choose to have an abortion was not recognized by our law. The reversal of Roe v. Wade would be destabilizing for our country and for our Federal system. It could and probably would lead to a battle to amend the Constitution to reassure American women of their rights, their constitutional rights. Such a battle is unnecessary as long as the Justices of the Supreme Court honor the doctrine of stare decisis.

I asked Chairman SPECTER to give me some of the pertinent portions of the testimony before the Judiciary Committee, and over the past few days I have spent much time reviewing Judge Alito's answers to the questions posed to him by members of the Judiciary Committee. Those answers reflect a deep respect for precedent and for the doctrine of stare decisis.

On the third day of his confirmation hearing, Judge Alito told the Judiciary Committee this:

> Roe v. Wade is an important precedent of the Supreme Court. It was decided in 1973, so it has been on the books for a long time. It has been challenged on a number of occasions . . . and the Supreme Court has reaffirmed the decision; sometimes on the merits; sometimes—in Casey—based on stare decisis.
>
> And I think that when a decision is challenged and it is reaffirmed, that strengthens its value as stare decisis for at least two reasons.
>
> First of all, the more often a decision is reaffirmed, the more people tend to rely on it. Secondly, I think stare decisis reflects the view that there is wisdom embedded in decisions that have been made by prior justices who take the same oath and are scholars and are conscientious. And when they examine a question and they reach a conclusion, I think it's entitled to considerable respect. And, of course, the more times that happens, the more respect the decision is entitled to.

Another portion of Judge Alito's testimony also influenced my thoughts on this vote. On the second day of the hearings, Judge Alito told the Judiciary Committee that if a case involving abortion comes before the Supreme Court while he serves on that Court:

> The first question that would have to be addressed is the question of stare decisis . . . and then, if I were to get beyond that, if the Court were to get beyond the issue of stare decisis, then I would have to go through the whole judicial decision-making process before reaching a conclusion.

This quote reflects the process Judge Alito stated he will follow to evaluate the cases that come before him if he serves on the Supreme Court. I understand his comments to mean he will seek consensus among his colleagues on the Supreme Court regarding the issues involving stare decisis. While serving on the Third Circuit Court of Appeals, Judge Alito ruled on three cases related to abortion. In each of these cases, he demonstrated a respect for and a deference to established rules of law. He did what he believed the law required; he did not seek to enact a personal political agenda. In fact, he told Senator SESSIONS during the confirmation hearings, in answer to a question of Senator SESSIONS:

> If I had been out to implement some sort of agenda to uphold any abortion regulation that came along, then I would not have voted the way I did in that Elizabeth Blackwell case.

Based on his past rulings and his testimony before the Judiciary Committee, I believe Judge Alito would respect stare decisis on the issue of Roe v. Wade or on any issue that comes before the Court where that should be respected. And as I vote to confirm his nomination, I do so on the assumption that Judge Alito will uphold this commitment, which he stated on the record, to stare decisis, a process he outlined for reviewing cases involving stare decisis.

I yield the floor.

Mr. ENZI. Thank you, Mr. President. I rise today in support of the nomination of Judge Samuel A. Alito, Jr., to be an Associate Justice on the U.S. Supreme Court. As a Senator, I have enjoyed the rare privilege of serving while the Senate considered two nominations to the U.S. Supreme Court in a short period. However, I am saddened to lose the knowledge and expertise of two experienced jurists from the Nation's High Court.

The nominations of Chief Justice Roberts and Judge Alito have given us an opportunity to reevaluate the current relationship between the three branches of Government in comparison with the intentions of the Constitution. The evaluation shows that we have shifted into an era of judges who legislate. We must return to the elementary doctrines that recognize the important and distinct roles of each branch. Congress is elected by the public to represent them as legislators. Through voting, the public may reaffirm or replace office holders. There is no such check on federal judges. They are not elected by the public and they

should not use their positions to legislate.

In Judge Alito, President Bush has nominated a judge who recognizes the difference between his role and the congressional role. During his nomination hearings before the Senate Judiciary Committee, Judge Alito shared his thoughts on the judicial role:

''The judiciary has to protect rights, and it should be vigorous in doing that, and it should be vigorous in enforcing the law and in interpreting the law . . . in accordance with what it really means and enforcing the law even if that's unpopular. But although the judiciary has a very important role to play, it's a limited role. . . . It should always be asking itself whether it is straying over the bounds, whether it's invading the authority of the legislature, for example, whether it is making policy judgments rather than interpreting the law. And that has to be a constant process of re-examination on the part of the judges.''

I have carefully reviewed Judge Alito's qualifications and watched the recently completed Senate confirmation hearing. The testimony provided by Judge Alito and the other witnesses underscore his commitment to the rule of law and a fair and impartial judiciary that interprets the law rather than legislates from the bench.

Judge Alito has an excellent judicial reputation as being highly intelligent and fairminded. He was unanimously confirmed by the U.S. Senate to serve as U.S. attorney for the District of New Jersey. In that capacity, Judge Alito argued 12 Supreme Court cases and at least 2 dozen court of appeals cases and handled at least 50 others. In 1990, President George H. Bush nominated Judge Alito to the U.S. Court of Appeals for the Third Circuit, and he was again confirmed unanimously by the U.S. Senate.

I believe Judge Alito knows the difference between benches and bills, Courts and Congress. His appointment will move the Court back closer to the brand of justice the Framers of our Constitution intended, and I intend to support him.

The PRESIDING OFFICER. The Senator from Minnesota is recognized.

Mr. DAYTON. Mr. President, the most momentous votes I have cast during my years in this Senate were on two war resolutions, one against al-Qaida and the Taliban, which I supported, and the other against Iraq, which I opposed.

After those life-and-death decisions, I cannot recall another vote of more long-lasting importance than on the two nominees for the United States Supreme Court: Chief Justice Roberts and now Judge Alito. The statements of my colleagues which I have witnessed have evidenced the utmost seriousness with which we have undertaken this grave responsibility.

The Constitution does not prescribe any criteria which a President must consider in choosing his nominees for the Supreme Court. Neither does the Constitution prescribe any criteria by which Senators must consider those nominees and decide whether to vote for or against their confirmations. We must each establish our own measures, search our own consciences, and make our own individual decisions.

Most of this process has been appropriately dignified and respectful, as it was with Chief Justice Roberts. I myself was not troubled by the detailed questioning of either nominee during their Judiciary Committee hearings. That is the one and only opportunity for any Senators to question a nominee in a public forum, before all Senators must decide whether or not to confirm that person to be one of nine Supreme Court Justices for the rest of his or her life. No other public office in this country offers such longevity and almost irrevocable security as Federal judiciary.

I want to commend the members of the Judiciary Committee. I certainly want to associate myself with the remarks of Senator STEVENS regarding the distinguished chairman, Senator SPECTER, whose personal courage and integrity are examples for us all, and the ranking member, Senator LEAHY, who also holds himself to those high standards. I have read the transcripts from their confirmation hearings. Their questions, and the extensive research which informed them, brought, I believe, great credit upon them and their committee.

Judge Alito's answers were also illuminating about him, although not in the same way as committee members' questions. A New York Times headline best summarized for me Judge Alito's responses: It said, ''700 Answers; Few Glimmers.'' Again and again, his answers were evasive. Some were simply not believable.

I would find it difficult to support Judge Alito's confirmation, given his past opinions, as expressed during his 15 years as a Federal Circuit Court Judge and also prior to that time as an official in the Reagan administration. I find it impossible to support him, given his recent lack of candor and credibility before the Judiciary Committee.

Let me give some examples. On the critical question of whether he continues to believe, as he stated in 1985, that the Constitution does not provide a woman with the right to make her own reproductive decisions, regardless of how they affect her life or her health, Judge Alito would not give an answer. Nineteen times he was asked whether he believed Roe v. Wade was ''settled law,'' as Chief Justice Roberts affirmed during his Judiciary Committee hearings, as ''super precedent'' as the distinguished committee chairman suggested, or simply whether he had changed his 1985 position. He rejected the first two and refused to answer the third. My colleague, Senator SCHUMER, tried seven times to get a straight answer to a very straightforward question:

> In 1985 you stated—you stated it proudly, unequivocally, without exception—that the Constitution does not protect a right to an abortion. Do you believe that now?

Judge Alito's replies included:

> I would address that issue in accordance with the judicial process as I understand it and I have practiced it. . . .

and:

> Senator, I would make up my mind on that question if I got to it. . . .

The most Judge Alito would say about Roe v. Wade or the subsequent Casey Supreme Court decisions was that they were precedents. As my sons used to say, ''Well, duh.'' Everyone knows that every prior Supreme Court decision constitutes a precedent. Again and again—and again—Judge Alito invoked this platitude about respect for stare decisis, even though, as Senator COBURN pointed out, precedents have been overturned by the Supreme Court more than 170 times involving some 225 cases.

Senator COBURN had the candor to state clearly that he wants Roe v. Wade to be overturned, so I can only assume that his pointed historical references were intended to reassure all with similar views that they could continue to rely on Judge Alito to help form a Supreme Court majority which would reverse Roe v. Wade.

Judge Alito is certainly entitled to his personal views and constitutional interpretations. The American people are entitled to know what they are before he is placed on their Supreme Court for the rest of his life, because his views and interpretations will profoundly affect their lives and the lives of future Americans.

Unfortunately, Judge Alito denied most of us those answers. It is noteworthy, however, that the Senators who feel most strongly about overturning Roe v. Wade all support Judge Alito and seem comfortable with his nonanswers. I can't imagine such equanimity without other, private assurances that the nominee's bland platitudes belie a bedrock anti-Roe predisposition, as he stated candidly in 1985.

Certainly, the country's anti-abortion activists get it. The thousands of them who marched on the Capitol last Tuesday reportedly cheered every time Judge Alito's name was mentioned. Quoting parts of the New York Times and Washington Post reports:

> We must support the confirmation of Judge Alito and other jurists who will support a strict-constructionist view of the law and make it possible once and for all to end Roe v. Wade.'' Rep. Mike Pence (R–Ind.), a leading House conservative, thundered.
>
> While Mr. Bush made no explicit mention of his nomination of Judge Samuel A. Alito Jr. to the Supreme Court, the expectation that the judge would soon win Senate approval and join a majority in overturning Roe was clearly the overarching message of the rally. . . .

Most chillingly:

> Nellie Gray, the president of March for Life, the group that organized the rally, said reversing Roe was this year's theme. Speaking to the crowd in fiery tones, Ms. Gray predicted that the United States would hold the

equivalent of Nuremberg trials for ''feminist abortionists,'' calling support for a woman's right to choose ''crimes against humanity.''

Let me turn to other subjects. I agree with my colleague from Oklahoma, who told Judge Alito on the third day of the Judiciary Committee hearings:

Integrity, I think, is the No. 1 issue.

I always feel uncomfortable to stand in judgment of another person's integrity—or other matters of personal character—especially someone whom I do not know personally. No one is perfect. I like to say that there are no saints in politics—only shades of sinners.

Yet I agree with Senator COBURN about the importance of integrity in a candidate for such a high public office as the United States Supreme Court or the U.S. Senate.

So, I am very troubled by Judge Alito's answers to the Senate Judiciary Committee about two incidents: his membership in the Concerned Alumni of Princeton University and his initial failure to recuse himself from the case involving the Vanguard Group.

Judge Alito acknowledged to the committee that he himself listed his membership in the Concerned Alumni of Princeton University in his 1985 application for appointment by then-President Reagan to an important position in the U.S. Department of Justice. Presumably, he considered his membership to be a positive reason for his favorable consideration. Yet he repeatedly professed total ignorance of the organization's repeatedly expressed, very extreme prejudices against the admission of women and minorities to his alma mater. His only acknowledged glimmer of recollection was that he was concerned about the status of ROTC on the Princeton campus, even though, the committee research found ROTC had been readmitted by Princeton way back in 1973, and the only reference to it found in the Concerned Alumni's publication, Prospect, was in 1985, ''ROTC is popular again.''

I find it not believable that Judge Alito would have no recollection of the extreme and extremely controversial views of the Concerned Alumni at the time he joined the organization or listed it as one of his credentials for the Reagan administration 20 years ago. He is too intelligent. His mind is too sharp. He recalls in great detail his judicial decisions and writings during the past 15 years and their precedents from the previous 200 years. He remembers the details of decisions in 1969 about ''one person—one vote.'' He remembers the context for other controversial statements in his 1985 application and subsequently. Yet he professes to be unable to remember why he joined the Concerned Alumni of Princeton University, why the president of Princeton wrote to all Princeton alumni in 1984, calling the organization's extremist views ''callous and outrageous,'' or why he thought his membership would enhance his appeal to the Reagan administration. I find it absolutely unbelievable.

I am also troubled by many of Judge Alito's answers to questions about his initial failure to recuse himself from a case involving the Vanguard Group, in which he had a financial interest that preceded his appointment to the Third Circuit Court in 1990. During those confirmation hearings before the Senate Judiciary Committee, Judge Alito promised, in writing:

I would disqualify myself from any cases involving the Vanguard Companies. . . .

I could accept—with reluctance, but I could accept—Judge Alito's admission that his failure to recuse himself was an ''oversight'' for which he accepted responsibility, after he and the White House initially tried to pass it off as a computer glitch. As Senator FEINGOLD established, there is no evidence that Judge Alito ever registered his promise to the committee on the Court's recusal form in 1993, 1994, 1995, 1996, or any time before he failed to recuse himself in 2002.

Then, however, Judge Alito reached for the escape hatch that Senator HATCH offered him, i.e., that his 1990 promise applied only to ''conflicts of interest during your initial service in the position to which you have been nominated.''

In the committee transcript, Chairman SPECTER said:

You, in response to Senator HATCH, did not believe that you are bound by the promise, because you said in your mind that you felt that it was just for the initial aspects of it.

Senator KENNEDY said:

That's another issue, because initially was meant to include the investments that you had at that particular time. You might have those investments and then discard an investment and, therefore, no longer have a conflict. That is what the asker of the question had intended. But you've added another wrinkle to it. You've just indicated that when you made a pledge to the committee that you were going to recuse yourself, that you thought that at sometime you were going to be released. . . .

Judge Alito responded:

Senator, as I said, I can't tell you 15 years later exactly what I thought when I read that question. It refers to the initial period of service. And looking at it now, it doesn't seem to me that 12 years later is the initial period of service.

I know from my own experience—as Judge Alito should also know—that a financial conflict of interest lasts for as long as the financial interest. It is not in any way limited or mitigated by time. That is a matter of integrity, not interpretation.

In other areas, I am deeply troubled by Judge Alito's well-documented biases against individual Americans and in favor of large and powerful corporations and government organizations. The Knight Ridder Newspapers, which publishes two of Minnesota's three largest newspapers, did an excellent analysis of Judge Alito's judicial record. I would like to quote excerpts from it.

It begins:

A Knight Ridder review of Alito's 311 published opinions on the 3rd Circuit Court of Appeals—each of singular legal or public policy importance—found a clear pattern. Although Alito's opinions are rarely written with obvious ideology, he's seldom sided with a criminal defendant, a foreign national facing deportation, an employee alleging discrimination or consumers suing big businesses.

A review of Alito' s work on dozens of cases that raised important social issues found that he rarely supports individual rights claims. The primary exception has been his opinions about First Amendment protections. Alito has been a near freespeech absolutist in his writings, and he's been equally strong on protecting religious freedoms.

But even some of his First Amendment opinions underscore the bent in the rest of his work. He hasn't strictly enforced church-state separation, and his love of the First Amendment seems to stop at the prison walls. He has written opinions that would deny prisoners access to reading materials and curtail their rights to practice their religious beliefs.

In other areas, Alito often goes out of his way to narrow the scope of individual rights, sometimes reaching out to undo lower-court rulings that affirmed those rights.

Alito has been particularly rigid in employment discrimination cases.

Many conservative jurists set a high bar for plaintiffs who allege racial, gender or age bias in the workplace, but Alito has seldom found merit in a bias claim. In most of the employment discrimination cases, Alito succeeded in applying a standard higher than the Supreme Court requires to plaintiffs' claims, often forcing them to prove that bias was the motivation behind their misfortunes. In two cases, Alito dissented from 3rd Circuit rulings that allowed discrimination claims to proceed. In one, a racial discrimination case involving a black hotel maid, Alito agreed that the woman had been treated unfairly, but he said that the employer had produced enough evidence to show that the unfair treatment didn't amount to illegal discrimination.

Although Alito is the son of Italian immigrants, his record in immigration cases is similar to his perspective in criminal cases. He's demonstrated an inclination to defer to the judgment of the immigration courts, which are under the Justice Department's umbrella. As a result, a noncitizen fighting deportation is paddling upstream with Alito.

Legal scholars, and some of Alito's supporters, have pointed to his decision in the case of Parastoo Fatin, a young Iranian woman who was fighting deportation in the early 1990s, as evidence of his scholarship and his impact on immigration law. Alito ruled in Fatin's case that gender-based persecution could be grounds for asylum. But the ruling was a hollow victory for Fatin. She lost her case when Alito found that she hadn't shown enough factual evidence to prove that she'd be persecuted if she were sent back to Iran. It was typical Alito—an impeccably crafted decision that denied relief to an individual.

Finally, I am very concerned with Judge Alito's view of executive power which reigns supreme over Congress and the judiciary. That radical view threatens the checks and balances the Constitution created among the three coequal branches of government to protect our democracy and the rights of all American citizens.

All Senators—not just those on my side of the aisle—should be deeply troubled about Judge Alito's position on Executive power. He believes the President has the right to interpret laws as

he wishes, rather than as they are written.

As one illustration, while he served as Deputy Assistant Attorney General in the Reagan administration, Judge Alito recommended the use of interpretive presidential ''signing statements''—statements issued by the President when signing a bill not only to explain why the President signed it into law but also to provide his view of how the law should be interpreted.

The apparent purpose of such statements is to encourage the courts to pay as much attention to the President's interpretation of a law as they do to the legislative branch and give the President the ''last word on questions of interpretation.'' Judge Alito explained that such statements would ''increase the power of the Executive to shape the law.''

He also wrote in that memo: A ''President's understanding of a bill should be just as important as that of Congress.'' As a recent Los Angeles Times editorial stated, ''On its face, the assertion threatens to undermine the fundamental constitutional principle that it is for Congress to write the laws and for the executive to well execute them.''

President Bush has issued over 100 signing statements since 2001. The most notable was his signing statement a couple days after he signed into law H.R. 2863, the Department of Defense emergency supplemental appropriations, which contained Senator MCCAIN's amendment banning inhumane treatment of detainees by U.S. personnel. The President, in his signing statement, basically asserted he could ignore parts of the law he had just signed under his constitutional authority.

Nowhere in the Constitution does it say a President can ignore the parts of a law he doesn't like.

Nowhere in the Constitution is there mention of ''signing statements.'' The Constitution makes it very clear under article I, section 7 what the President can do with legislation that Congress has enacted. He can sign it into law as it is written by Congress or he can veto it. There is no other option.

For almost 190 years, our country's first 39 Presidents followed this very clear language of the Constitution. However, then-Deputy Assistant Attorney General Alito in 1985 decided that he could ignore all those precedents and try to fabricate this ill-considered power for the President.

As yet, the Supreme Court has not been called upon to decide whether this unprecedented exaggeration of Presidential power is Constitutional. Can there be any doubt, however, how Judge Alito would vote in such a case?

In closing, some critics are blaming the Senators who oppose Judge Alito for the absence of bipartisan unanimity in support of the President's nominee. Their blame is misplaced. The way to get broad, bipartisan consensus for a Supreme Court nominee is for the President to nominate someone from near the middle of the judicial mainstream, a nominee who promises to be a Justice for all of the American people, not just for those on one side of the social spectrum.

President Bush initially proposed someone who might have offered that possibility: Harriet Miers. In addition to her moderately conservative views, she would have maintained the Court's gender imbalance at two women and seven men. By contrast, if Judge Alito is confirmed, that appalling under-representation of America's women will become even worse. Our nation's highest court, the ultimate arbiter of the rights and protections for all citizens, will be comprised of eight men and only one woman, of eight Caucasians and only one minority.

Unfortunately, the activist extremists on the country's political right erupted against Ms. Miers. Their vicious denunciations of the nominee and threats of political reprisals against her supporters prevailed, before her capabilities could be reasonably considered.

Now some of that nominee's destroyers are sanctimoniously bemoaning the absence of unanimous support for this nominee.

Unfortunately, their sound and fury, as Shakespeare said, signify nothing. Sadly, their winning this confirmation will not be a victory for this country because, tragically, they profoundly misunderstand the essential reason for the Supreme Court, which is to protect each one of us from all the rest of us, to protect the ''life, liberty, and pursuit of happiness'' of a minority of Americans from the potential domination by the majority.

The nine men and women on the Supreme Court must protect everyone by belonging to no one. The goal of ''taking over'' the Supreme Court is shortsighted, narrow-minded, and wrong. Their success is America's peril. For our great Nation to continue to succeed, any and every such effort must fail. That failure is America's victory.

The PRESIDING OFFICER (Mr. ALLEN). The Senator from Massachusetts is recognized.

Mr. KERRY. I thank the Chair.

Mr. President, let me begin by congratulating the Senator from Minnesota for an absolutely superb presentation of the arguments that are at stake in this choice which the Senate faces. I think he has done a terrific job of summarizing a great many of those issues in the broad scope of those issues, and I particularly appreciate the last comments he made about the absence of unanimity and the divisions in the Senate over their vote.

None of us should forget the debate Harriet Miers met with a storm of criticism—not from this side but from the other, from the rightwing. In fact, she became more unacceptable to the Republicans because she did not make clear which ideological direction she would take the Court, rather than for the very broad-based appeal she would pose to the country.

The reason we are here with this decision is not because of a choice we have made. It is because of a choice the President has made. It is because that is the direction the President wants to move in. We have had countless opportunities in the Senate where we have had votes on nominees which have garnered 100 votes, 98 votes, 95, 90. Anyone who is watching understands that the Senate is divided on this nominee. At this pivotal moment in our country's history with the issues we face, that is not the way to tip the balance of the Court or to move the Court in an ideological direction.

The critical question here is, Why are we so compelled to accept in such a rush a nominee who has so clearly been chosen for political and ideological reasons? That is the real question. Our job is to advise and consent. No one understands better than I do the consequences of an election and what happens when a President wins. I have heard colleagues say: Well, the President won. He has a right to make his choice.

Yes, he does. And the choice he has made is an ideological choice to take the Court in a certain direction. That is his choice.

Our choice depends on our rights as Senators and depends on what the Constitution tells us we should do in terms of giving advice and consent. My question to the Senate is, What is our advice with respect to the rights of a young person to be strip-searched or with respect to people in their homes or with respect to a whole series of other critical things that define this country? What is the advice of the Senate in this year?

These are not small issues to be expedited away by some kind of a symbolic timetable, a State of the Union Message. Our advice and consent ought to be weighed just as carefully and as importantly as the impact this choice is going to have on the Court for years to come. This is not just the vote of Monday afternoon. This is a vote of history.

Deciding on whether to confirm Judge Sam Alito to be an Associate Justice is one of the most important votes I will cast in the time I have been in the Senate because of what it means to the Court and to these critical choices. Confirming Judge Alito to a lifetime appointment on the Supreme Court would have irreversible consequences that are already defined if Senators will take the time to measure them.

In my judgment, it will take the country backward on critical issues. I will not talk about them all now; we do not have time. I know there is a preagreement. I understand that, and I respect that.

I am proud to join my friend, the senior Senator from Massachusetts, in taking a stand against this nomination. I know it is an uphill battle. I

have heard many of my colleagues. I hear the arguments: Reserve your gunpowder for the future. What is the future if it changes so dramatically at this moment in time? What happens to those people who count on us to stand up and protect them now, not later, not at some future time?

This is the choice for the Court now. I reject those notions that there ought to somehow be some political calculus about the future. This impact is going to be now. This choice is now. This ideological direction is defined now.

This fight is not a fight for the short term. This is a fight over two very fundamentally different views about what defines us, what is appropriate in the relationship between government and citizen, and the right of our citizens to be free from unlawful government action. These are not just words. This is not something we just casually throw out there. ''Unlawful government action'' is part of what motivated people to come here in the first place and to fight for what we love and cherish.

I used to be a prosecutor, and I worked closely with police. I loved my work with the police. I respect the police. They do unbelievably dangerous work on behalf of our country every single day. They may walk into a home, into a dark corner, not knowing who is there or what evil awaits. I understand that. I also understand when you assume that responsibility, you assume a responsibility to uphold the law, to uphold the Constitution, and to help protect people. That is part of the risk, part of what you take on.

What about the right to equal justice under the law? I heard one Senator the other day come to the Senate and say it isn't the job of a Supreme Court Justice to protect the downtrodden or the disenfranchised, it is their job to interpret the law. On countless occasions we all know the weight that comes to bear in that decision-making process between powerful interests and those who do not have a voice. That is also part of what defines us. What makes America different from every country on the face of the Earth is that the average citizen can go into a courthouse in America and hold the most powerful corporation to account for their safety, for their livelihood, for their welfare. These are rights that Americans care about deeply.

The importance of this choice is highlighted by focusing on the seat that this nominee has been chosen to replace. Look at Justice Sandra Day O'Connor, a deciding vote, a vote that will likely be lost if Judge Alito takes her place. Look at the case of Grutter v. Bollinger, which held that State colleges and universities have the right to use affirmative action in their admission policies to increase educational opportunities for minorities and promote racial diversity on campuses.

What about Tennessee v. Lane, which upheld the constitutionality of title II of the Americans with Disabilities Act that required that courtrooms be physically accessible to the disabled. Or Rush Prudential HMO v. Moran, which upheld State laws giving people the right to a second doctor's opinion if their HMO tries to deny them treatment. That is a classic example of power against the powerless. It happens every day in America. An HMO decides, no; an individual citizen wants the coverage they think they got. Will they have the right to have the access on that?

Hunt v. Cromartie, affirming the right of State legislatures to take race into account to secure minority voting rights and redistricting—we all know what has happened in this country, the challenge to the rights of minorities to vote. We still see it. As recently as in the last election we saw minorities denied opportunities to register, opportunities to have equal numbers of voting machines in their district. These are the things that define us.

Brown v. Legal Foundation of Washington, which maintained the key source of funding for legal assistance for the poor; Alaska Department of Environmental Conservation v. EPA, which allowed the EPA to step in and take action to reduce air pollution under the Clean Air Act when a State conservation agency fails to act—there is not an American that doesn't understand we are going backwards with respect to air quality. What are the rights of the EPA going to be where Justice Sandra Day O'Connor was the swing vote, 5–4, the only one who held the line on the right of the EPA to do that?

Stenburg v. Carhart, which overturned a State law that would have banned abortion as early as the 12th week of pregnancy without providing an exception to a woman's health—the list goes on. These are the issues which are at stake.

Throughout his legal career—these are not things that are made up. These are defined by the writings, by the decisions, by the memoranda, by the speeches that Judge Alito has made. In each of those, in all of those, there is a startling lack of skepticism that is healthy in judges towards government power that infringes on individual rights and liberties. Professor Goodwin Liu of the University of Berkeley Law School concluded after analyzing those:

> Judge Alito ''is less concerned about the government overreaching than Federal appeals judges nationwide, less concerned than Republican-appointed appeals judges nationwide, and less concerned than his Republican-appointed colleagues on the Third Circuit.''

Aren't we going to be concerned that he is less concerned than those of the same stripe? Not only is his record outside the mainstream of the judicial spectrum, but ''it is at odds with the Supreme Court's vital role in protecting privacy, freedom, and due process of law.'' That is Professor Liu.

In 1984, for example, Judge Alito wrote a Justice Department memorandum concluding that the use of deadly force against a fleeing unarmed suspect did not violate the fourth amendment. The victim was a 15-year-old African American. He was 5 foot 4. He weighed 100 to 110 pounds. This unarmed eighth grader was attempting to jump a fence with a stolen purse containing $10 when he was shot in the back of the head in order to prevent escape. The Sixth Circuit Court of Appeals found the shooting unconstitutional because deadly force can only be used when there is ''probable cause that the suspect poses a threat to the safety of the officers or a danger to the community if left at large.'' That is what we teach law enforcement officials.

But Judge Alito disagreed. Judge Alito said: No, he believed the shooting was reasonable because ''the State is justified in using whatever force is necessary to enforce its laws''—even deadly force. That is his conclusion. That is the standard that is going to go to the Supreme Court if ratified. It is OK to shoot a 15-year-old, 110 pounds, a 5-foot-4-inch kid who is trying to get over a fence with a purse, shoot him in the back of the head.

Otherwise, Judge Alito believed that any suspect could evade arrest by making the State choose between killing them or letting them escape. That is the conclusion. Think about that. Judge Alito believed that the State could use whatever force was necessary to enforce its laws regardless of whether the suspect was armed or dangerous. Does the Chair believe that? Do the other Senators believe that? I don't think so. Do mainstream Americans believe that?

Lucky for us, we did not have to answer that question. Why? Because in 1985, Justice White rejected Judge Alito's position, and the court held that deadly force is not justified ''where the suspect poses no immediate threat to the officer and no threat to others''. The court stated unequivocally, ''a police officer may not seize an unarmed, nondangerous suspect by shooting him dead.''

So Judge Alito is out of touch with mainstream juris prudence with respect to the use of force in America. Becoming a Federal judge did not make Judge Alito any more protective of an American's personal privacy and freedoms when it comes to government intrusion. That ought to concern every conservative in this Nation. Every conservative in America ought to care about the government's power to just walk into your home, to intrude on the rights of individual Americans.

In Baker v. Monroe Township, over a dozen local and Federal narcotics agents raided the apartment of Clement Griffin, just as his mother and her three children were arriving for a family dinner. Officers forced the family down to the ground, pointed guns at them, handcuffed and searched them. Two Reagan appointees to the court held that a jury should decide whether

excessive force was used, but Judge Alito disagreed. He agreed that the search was ''terrifying'' and ''most unfortunate''. But he did not believe that the family had a right to make their case to a jury in court. He would have denied those American citizens, terrified as they were, their day in court.

Judge Alito, I regret to say, often goes out of his way to justify excessive government actions. Many have talked in the Senate about Doe v. Groody, where Judge Alito, dissenting in an opinion by our current head of the Department of Homeland Security, then-Judge Michael Chertoff, concluded that the strip-search of a 10-year-old girl was unreasonable. That was the conclusion of Judge Chertoff. Judge Alito concluded that the strip-search of a 10-year-old girl was reasonable. He reached this astonishing conclusion on a technicality. Rather than relying on the search warrant to determine whether the strip search of a child was authorized, Judge Alito argued that the court ought to look to the police officer's supporting affidavits.

As a rule, however—now, I can say this as a former prosecutor because we used to labor over those warrants very carefully, knowing they were going to be scrutinized—affidavits are not part of the search warrants unless the trial judge decides they are. That ''goes to the heart of the constitutional requirement that judges, not the police, authorize the warrants. But Judge Alito said: No, no, no, no, it is OK to go look behind what they were intending, and decided they must have intended to include the search of the entire family, including a 10-year-old child. Is that the standard we want on the Court?

Judge Alito's minimalist view of the fourth amendment's right to privacy is not limited to claims of excessive force. In United States v. Lee, he upheld the FBI's installation of a video and audio surveillance device in a hotel room in order to record conversations between the target of a bribery sting and a police informant. The FBI conducted the surveillance without a warrant, arguing, first, that the target had no expectation of privacy in a hotel room, and, second, that the device was turned on only when the informant was in the room. Judge Alito accepted the FBI's argument, and found no constitutional violation.

His eagerness to buy the FBI's arguments, particularly in light of the Supreme Court decisions to the contrary, raises serious questions about how he would approach serious constitutional violations to the National Security Agency's program of domestic eavesdropping. Americans across the board are concerned about the violation of the law with respect to what we passed in the Congress overwhelmingly. After all, with the eavesdropping in Lee and the eavesdropping being conducted now, we see some startling similarity. Both are defended on the basis of Executive discretion and self-restraint.

The fourth amendment is not defined that way. It is defined by judicial restraint itself, not the Executive restraint, and by judicial review.

We also should never forget, as we think about this issue, the words of an eminent Justice, Justice Brandeis, who said:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

I believe that is what we need to protect ourselves against. That is what the Framers created the judiciary to do. And that is what I fear the record shows Judge Alito has not been willing to do.

Now, if his judicial opinions and legal memoranda do not convince you of these things, you can take a look at the speech he gave to the Federalist Society in which, as a sitting judge, he ''preached the gospel'' of the Reagan Justice Department nearly 15 years after he left it; a speech in which he announced his support of the ''unitary executive theory'' on the grounds that it ''best captures the meaning of the Constitution's text and structure.''

As Beth Nolan, former White House counsel to President Clinton, describes it:

> ''Unitary executive'' is a small phrase with almost limitless import: At the very least, it embodies the concept of Presidential control over all Executive functions, including those that have traditionally been exercised by ''independent'' agencies and other actors not subject to the President's direct control. Under this meaning, Congress may not, by statute, insulate the Federal Reserve or the Federal Election Commission . . . from Presidential control.

Judge Alito believes you can.

> The phrase is also used to embrace expansive interpretations of the President's substantive powers, and strong limits on the Legislative and Judicial branches. This is the apparent meaning of the phrase in many of this Administration's signing statements.

Now, most recently, one of those signing statements was used to preserve the President's right to just outright ignore the ban on torture that was passed overwhelmingly by the Congress. We had a long fight on this floor. I believe the vote was somewhere in the 90s, if I recall correctly. Ninety-something said this is the intent of Congress: to ban torture. But the President immediately turned around and did a signing in which he suggested an alternative interpretation. And Judge Alito has indicated his support for that Executive power.

During the hearings, Judge Alito attempted to convince the committee that the unitary executive theory is not about the scope of Presidential power. But that is just flat wrong. Not only does the theory read Executive power very broadly, but, by necessity, it reads congressional power very narrowly. In other words, as the President gains exclusive power over a matter, the Constitution withholds Congress's authority to regulate in that field. That is not, by any originalist interpretation, what the Founding Fathers intended.

Let me give you a real-life example, as described again by Beth Nolan:

> [W]hen the Reagan Administration undertook the covert arms-for-hostages operation that eventually grew into the Iran-Contra scandal, it triggered the requirement of the National Security Act that the Administration provide Congress ''timely notification'' of the covert operation.

Reading the phrase ''timely notification'' against the background of the unitary executive theory, the Justice Department stated, ''The President's authority to act in the field of international relations is plenary, exclusive, and subject to no legal limitations save those derived from the applicable provisions of the Constitution itself.''

> According to Justice, under that interpretation, Congress's role in this matter was limited because its only constitutional powers in the area of foreign affairs were those that directly involved the exercise of legal authority over American citizens. Justice even qualified this statement, saying that by ''American citizens'' it meant ''the private citizenry'' and not the President or other executive officials.

According to Ms. Nolan:

> [I]f such claims are taken seriously, then the President is largely impervious to statutory law in the areas of foreign affairs, national security, and war, and Congress is effectively powerless to act as a constraint against presidential aggrandizement in these areas.

Does that sound familiar? It ought to sound familiar. The Bush administration's legal opinion on torture, the administration's response to the McCain antitorture amendment, and the justifications given for the NSA's domestic spying program have all been based, in large part, on this exact same theory of the unitary executive.

Given Judge Alito's history in the Reagan Justice Department, given his writings on the Third Circuit, given the year 2000 speech to the Federalist Society, a central question is whether you can trust that he, in fact, is going to protect the rights of the Congress and the legislative branch as well as those personal freedoms of individual Americans from those governmental intrusions?

I believe the record says ''no.''

Now, as I mentioned earlier, I know this is flying against some of the sort of political punditry of Washington. I understand that. But this is a fight worth making because it is a fight for a lifetime appointment on the Supreme Court of the United States, with a series of decisions that suggest a view—however brilliant a legal mind—he has a brilliant legal mind. I met with him. He is a nice fellow—we all understand that—well regarded by some people in the judicial system. He was looked at by the ABA. And they make a judgment based on sort of just legal decisions, not necessarily the ideological impact, the larger implication, all the other conditions that we need to consider as we give advice and consent.

Perhaps Professor Liu of the Berkeley Law School put it best when he wrote this. He said:

Judge Alito's record envisions an America where police may shoot and kill an unarmed boy to stop him from running away with a stolen purse; where federal agents may point guns at ordinary citizens during a raid, even after no sign of resistance; where the FBI may install a camera where you sleep on the promise that they won't turn it on unless an informant is in the room; where a black man may be sentenced to death by an all-white jury for killing a white man, absent a multiple regression analysis showing discrimination; and where police may search what a warrant permits, and then some.

He says:

[T]his is not the America we know. Nor is it the America we aspire to be.

So these are the reasons we need to take a hard look at what we are doing, even if it means swimming upstream. There are consequences to this nomination that I do not believe all the American people got out of the hearings because the hearings did not answer questions. And when you pose some of these choices to Americans, they come down on the side that I have described: being protected, not making those kinds of choices about a young kid, making sure that our privacy is protected.

So for those reasons, and others I will discuss starting on Monday, I oppose Judge Alito's nomination. And I hope that colleagues, others, will join in that effort in the end.

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

The PRESIDING OFFICER. The clerk will please call the roll.

The legislative clerk proceeded to call the roll.

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

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

MORNING BUSINESS

Mr. COCHRAN. Mr. President, I ask unanimous consent that there be a period of morning business with Senators permitted to speak for up to 10 minutes each.

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

HONORING OUR ARMED FORCES

SERGEANT NATHAN R. FIELD

Mr. GRASSLEY. Mr. President, Today, I wish to honor an heroric Iowan who has given the ultimate sacrifice for his country in Operation Iraqi Freedom. SGT Nathan R. Field died January 7, 2006, in Umm Qasr, Iraq due to injuries sustained when his Humvee was hit by a civilian vehicle. Sgt. Field was assigned to the 4249th Port Security Company, U.S. Army Reserve out of Pocahontas, IA, but was temporarily assigned with the 414th Military Police of Joplin, MO. I want to extend my condolences to his parents Bill and Mary, his brother Eli, his fiancée Connie, and his many family members and friends.

Sergeant Field graduated from South East Webster High School in 2000 where he was a member of the student council, senior class president, captain of the wrestling team, and was a three year member of the football team and manager of the football team his senior year. SGT Field enlisted in the Army Reserve while still in high school and after the terrorist attacks of September 11, 2001. His unit was called to active duty where he accompanied ships to Belgium, France and Germany. In September of 2005, he volunteered for duty in Iraq, something that he felt compelled to do for the freedom of our country.

Nathan Field will be remembered for his loyalty to friends and for his love of life. As his father said, ''If Nathan liked you, there wasn't anything he wouldn't do for you.'' I call on my colleagues in the Senate and every American to pay tribute to this brave American and to give thanks to this courageous soldier who gave the ultimate sacrifice in defending our freedom.

ADDITIONAL STATEMENTS

IN MEMORY OF MAJOR GENERAL JOHN W. KIELY

● Mr. CHAFEE. Mr. President, I rise today to honor the life of MG John W. Kiely. Major General Kiely was a man of exemplary service to our State and country. A veteran of three wars, he ascended to the rank of colonel, Regular Army as well as serving as brigadier general, National Guard of Rhode Island, adjutant general of Rhode Island, and also was promoted to the grade of major general and commanding general. General Kiely was a model soldier, receiving a Purple Heart, 2 Bronze Stars, Valor, and 3 Legions of Merit, along with 22 other Federal Government awards and decorations, as well as the Rhode Island Cross and the Rhode Island Star. His military knowledge and service to our Nation will be dearly missed, and my deepest condolences go to Mrs. Marilyn L. Kiely and the Kiely family in their time of mourning.●

REMEMBERING JOSEPH O'DONNELL

● Mr. CHAFEE. Mr. President, it is with great sadness that today I reflect upon the life of Joseph O'Donnell. Mr. O'Donnell dedicated his life to his family and to public service. He served alongside my father as Lieutenant Governor in the 1960s, and is, in fact, the last Republican elected to the position. He remained active in politics until his passing. In addition to his tenure as Lieutenant Governor, Joe O'Donnell has served his community and the State of Rhode Island for over 55 years, including as State Director of Administration, as Chairman of the North Smithfield Water Authority, and in a number of other capacities. In addition, Mr. O'Donnell served the business community as a founding partner and chairman of the board of Keough Kirby Associates, Inc., as a trustee of Landmark Health Systems, and in other board positions for numerous business and civic organizations. As a panelist on the 'Coffee-An' radio program in his later years, Joe O'Donnell contributed his knowledge of politics, his great sense of humor, and his penchant for gourmet cooking to a larger audience. His name is on the Wall of Honor at the Marine Maritime Academy for outstanding lifetime achievement, and he was a recipient of the Admiral Joel R.P. Pringle Society Award from the Naval War College Foundation in Newport. It is with heavy hearts that Stephanie and I send our deepest sympathies to Mrs. Yolande O'Donnell and their six children. Of all his accomplishments, I know he is most proud of the closeness of his family.●

MESSAGES FROM THE PRESIDENT

Messages from the President of the United States were communicated to the Senate by Mr. Williams, one of his secretaries.

EXECUTIVE MESSAGES REFERRED

As in executive session the Presiding Officer laid before the Senate messages from the President of the United States submitting sundry nominations which were referred to the appropriate committees.

(The nominations received today are printed at the end of the Senate proceedings.)

MEASURES REFERRED

The following bills were read the first and the second times by unanimous consent, and referred as indicated:

H.R. 2099. An act to establish the Arabia Mountain National Heritage Area, and for other purposes; to the Committee on Energy and Natural Resources.

H.R. 2329. An act to permit eligibility in certain circumstances for an officer or employee of a foreign government to receive a reward under the Department of State Rewards Program; to the Committee on Foreign Relations.

H.R. 3351. An act to make technical corrections to laws relating to Native Americans, and for other purposes; to the Committee on Indian Affairs.

H.R. 3508. An act to authorize improvements in the operation of the government of the District of Columbia, and for other purposes; to the Committee on Homeland Security and Governmental Affairs.

H.R. 3827. An act to preserve certain immigration benefits for victims of Hurricane Katrina, and for other purposes; to the Committee on the Judiciary.

H.R. 4000. An act to authorize the Secretary of the Interior to revise certain repayment contracts with the Bostwick Irrigation District in Nebraska, the Kansas Bostwick Irrigation District No. 2, the Frenchman-Cambridge Irrigation District, and the Webster Irrigation District No. 4, all a part of the Pick-Sloan Missouri Basin Program, and for other purposes; to the Committee on Energy and Natural Resources.