Washington Post expressed this concern, even though they would have chosen a different nominee than Judge Alito:

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

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

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

(See exhibit 1.)

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

EXHIBIT 1

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

CONFIRM SAMUEL ALITO

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

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

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

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

Humility is called for when predicting how a Supreme Court nominee will vote on key issues, or even what those issues will be, given how people and issues evolve. But it's fair to guess that Judge Alito will favor a judiciary that exercises restraint and does not substitute its judgment for that of the political branches in areas of their competence. That's not all bad. The Supreme Court sports a great range of ideological diversity but less disagreement about the scope of proper judicial power. The institutional self-discipline and modesty that both Judge Alito and Chief Justice Roberts profess could do the court good if taken seriously and applied apolitically.

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

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

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

The legislative clerk proceeded to call the roll.

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

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

JUDICIARY COMMMITTEE AGENDA

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

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

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

(See exhibit 1.)

Mr. SPECTER. It outlines the alternatives which we face at the present time. One is to let the act expire on February 3, which I think no one would like. Second would be to extend the current bill for a period of time. We will be discussing a 4-year extension. Or, third, to have cloture imposed on the filibuster which is in effect and then vote to utilize the conference report and pass the act. It is always possible to take another course of action if there is unanimous consent.

The conference is technically discharged at this point, and the House of Representatives has made it emphatically clear that they have gone as far as they think it reasonable to go on the compromises.

There have been very substantial compromises worked out. At one juncture, there were three additional requests which we took to the House and got all of them, the most important of which was the sunset provision changed from 7 years to 4 years. Then additional changes were requested, and they could not be accommodated.

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

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

Mr. SPECTER. Certainly.

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

The distinguished Senator from Pennsylvania and I were at the White House on another matter recently and talked briefly about this with the President. I know the distinguished Senator from New Hampshire, Mr. SUNUNU, has been working very hard with us. I think the changes that still need to be made are relatively minor. I urge parties, especially all of us who helped write the original PATRIOT

Act, to make that one last effort. That would include, of course, the White House and the other body to do it.

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

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

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

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

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

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

(See exhibit 2.)

Mr. SPECTER. A third item of Judiciary Committee scheduling involves the asbestos reform bill. The leader has stated his intention to bring it up on February 6. As we customarily do, we meet in the afternoon. I intend to absent myself from the Judiciary Committee hearing on NSA to come make an opening statement. Then we will proceed on that bill.

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

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

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

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

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

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

I am glad to yield to Senator LEAHY.

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

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

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

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

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

I urge people to come to this with an open mind, vote it up or down, vote the amendments up or down. I have heard some opponents quoted as being prepared to demagog this bipartisan bill. This bill did not just suddenly spring

out of nowhere; it was worked on in such a way that it is a bipartisan bill. And I might say there is pain in it for everybody. Everybody has had to give something in this. The Senator from Pennsylvania did not get everything he wanted. I did not get everything I wanted. The stakeholders who came to the table, virtually all of them openly and honestly, they gave up a lot on it. But the people who are suffering from asbestos poisoning in whatever form are the ones waiting for us to act.

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

EXHIBIT 1

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

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

The Senate is faced with three options:

1. Invoke cloture on the Conference Report and pass the Conference Report as the House of Representatives has already done;

2. Extend the present Act for a period of time. The current discussion with the House is to extend it for four years; or

3. Let the Act expire.

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

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

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

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

Sincerely,

ARLEN SPECTER.

SIDE-BY-SIDE COMPARISON

Conference report (2006)	Current law (PATRIOT Act 2001)
Requests for Business Records ("Library Provision") Section 215	
Application to the FISA Court for an order under Section 215 requires a statement of facts	No requirement of any factual showing.
Records can be obtained only if the FISA Judge finds that the statement of facts shows "reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation".	Records can be obtained if the FBI merely "specif[ies] that . . . they are sought for an authorized investigation."
May not be used for threat assessments	May be used for threat assessments.
Encourages the FBI to demonstrate a connection to terrorism or espionage by providing a presumption of relevance if the records sought pertain to: (a) a foreign power or an agent of a foreign power; (b) the activities of a suspected agent of a foreign power who is the subject of the investigation; or (c) an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of the investigation.	No analogous incentive for the FBI to demonstrate a connection to terrorism or espionage.
Requires the use of minimization procedures that will limit "the retention, and prohibit the dissemination" of information concerning U.S. persons.	No requirement that minimization procedures be used.
Explicit right of recipients of Section 215 requests to consult legal counsel	No explicit right of recipients of Section 215 requests to consult legal counsel.
Explicit right of recipients of Section 215 requests to challenge their legality in court	No explicit right of recipients of Section 215 requests to challenge their legality in court.
Requirement that the FBI Director, Deputy Directer, or Executive Assistant Director personally approve requests for certain sensitive documents, including library records, medical records, educational records, and gun records.	No special requirements for sensitive documents such as library records.
Limits the scope of Section 215 requests to materials that could be obtained via grand jury subpoena or a similar court order for the production of records.	No specified limitation on the scope of Section 215 requests.
Adds the Senate Judiciary Committee as a recipient of the "fully inform[ed]" reports	"Fully inform[ed]" reports given only to House and Senate Intelligence Committees.
Reporting to Congress on the number of orders granted, modified, or denied for the production of certain records from libraries and bookstores, firearms sales records, tax return records, educational records, and certain medical records.	No reporting to Congress on Section 215 requests for sensitive documents.
Public reporting on the total number of applications under Section 215 and the total number of such orders granted, modified, or denied.	No public reporting.
Two comprehensive audits by the Justice Department's Inspector General regarding the use, including any improper or illegal use, of Section 215. The first report will examine the use of Section 215 in 2002–04; the second report will examine the use of Section 215 in 2005–06. The reports will examine "each instance" in which the government submitted an application under Section 215, and the Conference Report provides detailed specifications of what the investigation should cover.	No requirement that the Justice Department's Inspector General audit the use of Section 215.
Four-year sunset.	
Delayed-Notice Searches ("Sneak and Peek" Searches) Section 213	
Notice to the target of the search must be given "within a reasonable period not to exceed 30 days after the date of its execution," or on a later date certain if the facts justify it.	Notice to the target of the search may be given within a "reasonable" time; no limitation on the maximum period of delay.
Extensions on the period of delay only upon "an updated showing of the need for further delay"	Extensions on the period of delay may be granted upon mere "good cause shown".
Extensions are limited to 90 days or less, unless the facts of the case justify a longer period	No maximum period of extension.
Notice may not be delayed if the only reason for doing so is that the court finds reasonable cause to believe that immediate notification may result in unduly delaying a trial.	Notice may be delayed if the court finds reasonable cause to believe that immediate notification may result in unduly delaying a trial.
Public reporting on the number of applications for delayed-notice warrants and extensions; and the number of such warrants and extensions granted or denied; the duration of delays in giving notice.	No reporting to Congress or the public.
Roving Wiretaps Section 206	
Application requires "the identity, if known, or a description of the specific target" of the surveillance	Application requires "the identity, if known, or a description of the target" of the surveillance.
FISA Court's orders must specify "the identity, if known, of the specific target" of the surveillance	FISA Court's orders must specify "the identity; if known, or a description of the target" of the surveillance.
For so-called John Doe roving wiretaps, requires the FISA Court to "find[], based upon specific facts provided in the application, that the actions of the target of the application may have the effect of thwarting the identification of a specified person".	For so-called John Doe roving wiretaps, requires the FISA Court to "find that the actions of the target of the application may have the effect of thwarting the identification of a specified person".
Requires that within ten days of beginning of surveillance at any new facility or place, the FBI notify the FISA Court of "facts and circumstances" justifying FBI's belief that each new phone is being used or is about to be used by the target.	No requirement that FBI notify the FISA Court when surveillance begins at any new facility or place.
Requires "fully inform[ed]" reporting to Senate Judiciary Committee	No requirement to report to Senate Judiciary Committee.
Existing reports expanded to include the total number of applications for orders and extensions of orders approving electronic surveillance where the nature and location of the facility at which the surveillance will be directed is unknown.	Attorney General to inform the Congress twice per year of all roving wiretaps under 206.
Four-year sunset.	
National Security Letters ("NSLs")	
Explicit right of recipients to consult legal counsel	No explicit right of recipients to consult legal counsel.
Explicit right of recipients to challenge NSL in court and have it set aside if the court finds that compliance would be "unreasonable, oppressive, or otherwise unlawful".	No explicit right of recipients to challenge NSL in court.
Detailed mechanism for recipients to challenge the nondisclosure requirement in court; provision for subsequent challenges in the event that initial challenges are unsuccessful.	No explicit right of recipient to challenge the nondisclosure requirement in court.
Two comprehensive audits by the Justice Department's Inspector General regarding the use, including any improper or illegal use, of NSLs. The first report will examine the use of NSLs in 2003–04; the second report will examine the use of NSLs in 2005–06. The Conference Report provides detailed specifications of what the investigation should cover.	No requirement that the Justice Department's Inspector General audit the use of NSLs.
Report to Congress by the Attorney General and the Director of National Intelligence regarding the feasibility of applying minimization procedures in the context of NSLs.	No requirements with respect to the use of minimization procedures in the context of NSLs.
Annual public reporting on the total number of each type of NSL	No public reporting.
Additional Protections	
Reporting to Congress on the total number of emergency employments of electronic surveillance and the total number of subsequent orders approving or denying such electronic surveillance.	No such reporting.

Conference report (2006)	Current law (PATRIOT Act 2001)
Adds the Senate Judiciary Committee as a recipient of these reports	Reporting to the House and Senate Intelligence Committees of all physical searches conducted pursuant to FISA.
Reporting to Congress on the total number of emergency physical searches authorized by the Attorney General and the total number of subsequent orders approving or denying such physical searches.	No such reporting.
Reporting to Congress on the total number of emergency pen registers and trap and trace devices authorized by the Attorney General and the total number of subsequent orders approving or denying the installation and use of the same.	No such reporting.
Disclosure of the rules of the FISA Court to the Senate and House Committees on Intelligence and the Judiciary	No provision requiring disclosure of the rules of the FISA Court to Congress.
Reporting to the House and Senate Judiciary Committees on good-faith emergency disclosures under Section 212 of the PATRIOT Act.	No such reporting.
Report to Congress on the Justice Department's use of data mining	No specific provisions concerning data mining.

EXHIBIT 2

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, January 24, 2006.

Hon. ALBERTO R. GONZALES,
Attorney General, U.S. Department of Justice, Washington, DC.

DEAR ATTORNEY GENERAL GONZALES: I write to let you know some of the subjects which I would like you to address in your opening statement on the Judiciary Committee hearing scheduled for February 6, 2006, on ''Wartime Executive Power and the NSA's Surveillance Authority.''

(1) In interpreting whether Congress intended to amend the Foreign Intelligence Surveillance Act (FISA) by the September 14, 2001 Resolution (Resolution), would it be relevant on the issue of Congressional intent that the Administration did not specifically ask for an expansion for Executive powers under FISA? Was it because you thought you couldn't get such an expansion as when you said: ''That was not something that we could likely get?''

(2) If Congress had intended to amend FISA by the Resolution, wouldn't Congress have specifically acted to as Congress did in passing the Patriot Act giving the Executive expanded powers and greater flexibility in using ''roving'' wiretaps?

(3) In interpreting statutory construction on whether Congress intended to amend FISA by the Resolution, what is the impact of the rule of statutory construction that repeals or changes by implication are disfavored?

(4) In interpreting statutory construction on whether Congress intended to amend FISA by the Resolution, what would be the impact of the rule of statutory construction that specific statutory language, like that in FISA, trumps or takes precedence over more general pronouncements like those of the Resolution?

(5) Why did the Executive not ask for the authority to conduct electronic surveillance when Congress passed the Patriot Act and was predisposed, to the maximum extent likely, to grant the Executive additional powers which the Executive thought necessary?

(6) Wasn't President Carter's signature on FISA in 1978, together with his signing statement, an explicit renunciation of any claim to inherent Executive authority under Article II of the Constitution to conduct warrantless domestic surveillance when the Act provided the exclusive procedures for such surveillance?

(7) Why didn't the President seek a warrant from the Foreign Intelligence Surveillance Court authorizing in advance the electronic surveillance in issue? (The FISA Court has the experience and authority to issue such a warrant. The FISA Court has a record establishing its reliability for nondisclosure or leaking contrasted with concerns that disclosures to many members of Congress involved a high risk of disclosure or leaking. The FISA Court is a least as reliable, if not more so, that the Executive Branch on avoiding disclosure or leaks.)

(8) Why did the Executive Branch not seek after-the-fact authorization from the FISA Court within the 72 hours as provided by the Act? At a minimum, shouldn't the Executive have sought authorization from the FISA Court for law enforcement individuals to listen to a reduced number of conversations which were selected out from a large number of conversations from the mechanical surveillance?

(9) Was consideration given to the dichotomy between conversations by mechanical surveillance from conservations listened to by law enforcement personnel with the contention that the former was non-invasive and only the latter was invasive? Would this distinction have made it practical to obtain Court approval before the conservations were subject to human surveillance or after-the-fact approval within 72 hours.

(10) Would you consider seeking approval from the FISA Court at this time for the ongoing surveillance program at issue?

(11) How can the Executive justify disclosure to only the so-called ''Gang of Eight'' instead of the full intelligence committees when Title V of the National Security Act of 1947 provides:

Sec. 501. [50 U.S.C. 413] (a)(1) The President shall ensure that the congressional intelligence *committees* are kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity as required by this title. (Emphasis added)

(2)(e) Nothing in this Act shall be construed as authority to withhold information from the congressional intelligence *committees* on the grounds that providing the information to the congressional intelligence committees would constitute the unauthorized disclosure of classified information or information relating to intelligence sources and methods. (Emphasis added)

(12) To the extent that it can be disclosed in a public hearing (or to be provided in a closed executive session), what are the facts upon which the Executive relies to assert Article II wartime authority over Congress' Article I authority to establish public policy on these issues especially where legislation is approved by the President as contrasted to being enacted over a Presidential veto as was the case with the War Powers Act?

(13) What case law does the Executive rely upon in asserting Article II powers to conduct the electronic surveillance at issue?

(14) What academic or export opinions does the Executive rely upon in asserting Article II powers to conduct the electronic surveillance at issue?

(15) When foreign calls (whether between the caller and the recipient both being on foreign soil or one of the callers or recipients being on foreign soil and the other in the U.S.) were routed through switches which were physically located on U.S. soil, would that constitute a violation of law or regulation restricting NSA from conducting surveillance inside the United States, absent a claim of unconstitutionality on encroaching on Executive powers under Article II?

This letter will further confirm our staffs' discussions that the Committee will require, at a minimum, the full day on February 6th for your testimony.

Sincerely,

ARLEN SPECTER.

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

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

The amount of work that the Senator from Vermont has specified has been gigantic. It has been 3 years in process. Senator HATCH took the lead with the trust fund concept where the manufacturers and the insurers have agreed to put up some $140 billion into the trust fund with no government payments and not coming out of the pockets of the taxpayers.

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

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

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

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

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

He has a background from a father who was an immigrant from Italy, not

born with a silver spoon in his mouth, came up the hard way, had the extraordinary academic record at Princeton and the Yale Law School, worked as an Assistant U.S. Attorney, then was U.S. Attorney and worked in the Department of Justice, and for 15 years has been on the Court of Appeals for the Third Circuit.

I think he answered questions put to him more extensively than any other nominee in recent times.

I ask unanimous consent that the full text of the prepared statement be printed in the RECORD at the conclusion of my remarks, which specifies the details of the questions asked and provides analysis of many of his cases.

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

(See exhibit 1).

Mr. SPECTER. Mr. President, Judge Alito came under very extensive questioning on the issue of a woman's right to choose because of his work on a brief on the Thornburgh case where he advocated not reversal of Roe v. Wade but cut back on some of the provisions, and because of a statement which he had made in 1985 when applying for a position with the Federal Government where he expressed the view that the Constitution did not protect the right to an abortion. Judge Alito testified at length that he has an open mind on this subject.

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

He was questioned extensively on this issue. I led off with it for 20 minutes on my first round of questioning. And Judge Alito expressed his regard for stare decisis, the Latin expression for let the decision stand.

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

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

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

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

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

When it came to the issue as to whether he reviewed it and regarded it as settled law, his testimony was virtually identical to the testimony of Chief Justice Roberts, who testified that it was settled. As Chief Justice Roberts put it in his confirmation hearings, it is settled beyond that. Chief Justice Roberts left open the unquestionable right and duty of the Court to review all cases on the merits when they are presented and to afford appropriate weight to stare decisis and to precedents, but not to take the position that precedents can never be overturned.

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

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

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

Back to the point. What superior wisdom and what superior method of reasoning comes when a person crosses the green to the Supreme Court of the United States? Our method of reasoning may not be too good, but it is our method of reasoning. To have the Court say that they declare acts unconstitutional because they do not like our method of reasoning is, candidly stated, highly insulting. Judge Alito said the obvious: Our method of reasoning was as good as the Court's.

Then in the decision on the Americans with Disabilities Act, where the Supreme Court has imposed a test of what is proportionate, taking it out of thin air in a 1997 decision, what is ''congruent and proportionate'' is a test which cannot be applied with any consistency. It lends itself to legislation from the bench. Justice Scalia characterized it accurately, calling it ''a flabby test,'' where the Court was functioning as the taskmaster of Congress to see that we had done our homework. Judge Alito's answers showed an appropriate respect for separation of powers and congressional authority.

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

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

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

Many issues were discussed. Judge Alito approached them with an open mind. One subject of particular concern to this Senator is the issue of televising the Court, which I think ought to be done. The Supreme Court of the United States today makes the final decisions on so many of the cutting-edge questions of our time. The American people ought to know what is going on. A number of the Justices appear on television programs. There is

no reason why the Court proceedings should not be televised. Senator BIDEN and I made that specific request on the case of Bush vs. Gore and got a response from Chief Justice Rehnquist denying it; however, they released an oral transcript of the proceedings at the end of the day and the Court is doing more of that, which is a step forward.

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

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

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

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

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

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

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

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

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

But we need to move away from the kind of partisanship, which has ripped this body in recent times. I think it is important the American people have confidence in what the Senate does on the merits and that we avoid projecting the appearance of rank politics.

I believe it is important for Judge Alito to have supporters who favor a woman's right to choose so he does not feel in any way beholden to or confirmed by people who have one or another idea on some of these questions. Without naming names and identifying people, we have more than six Republicans who are pro-choice, who support a woman's right to choose. So the balance of power will be, if confirmed, not only on one side of that issue or another.

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

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

I think, when we examine temperament and background, including jurisprudence, those are the appropriate tests. No one knows with certainty how Judge Alito is going to vote. The cases are full of surprises. Justice Sandra Day O'Connor was very much opposed to abortion rights before she came to the Court. And she has been one of the foremost proponents of a woman's right to choose, subject to some limitations. Justice Anthony Kennedy spoke very disparagingly about abortion rights before coming to the Court, and he has supported Roe v. Wade. Justice David Souter, as attorney general for New Hampshire, opposed repealing New Hampshire's law banning abortions, even after it had been declared unconstitutional by the Supreme Court of the United States. The National Organization for Women had a rally on Capitol Hill when David Souter was up for confirmation in 1991—I remember it well; I was there—with big placards ''Stop Souter or Women Will Die.'' Justice Souter, too, has supported Roe v. Wade.

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

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

EXHIBIT 1

ALITO FLOOR STATEMENT

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

It has been 86 days, nearly three months, since President Bush announced his choice of Judge Samuel Alito to fill the seat being vacated by Justice Sandra Day O'Connor. During this time, my staff and I have undertaken an extensive review of Judge Alito's record, including an examination of his 238 major decisions while serving on the Third Circuit Court of Appeals, a review of 49 of the cases Judge Alito handled during his tenure as a United States Attorney, analyses of 43 speeches and articles Judge Alito authored, and evaluations of the 38 formal opinions, petitions, and Supreme Court briefs which Judge Alito wrote while serving in the Department of Justice. Additionally, the Judiciary Committee held 30 hours and 20 minutes of hearings, which included 17 hours and 45 minutes of questioning of Judge Alito and testimony from 33 outside witnesses.

Based on my thorough review of his record, I intend to vote to confirm Judge Alito as the 110th Justice of the United States Supreme Court. I did not reach this decision lightly. As I have said before, except for a declaration of war or its virtual equivalent, a resolution for the use of force, no Senate vote is as important as the confirmation of a Supreme Court justice. And this vote is one that requires Senators to free themselves from the straight-jacket of party loyalty and exercise independent judgment. Under separation of powers, Senators are separate from

the executive branch and have a full, independent role in staffing the Third Branch of government. I have long adhered to this view, which led me to vote against Judge Bork's confirmation, even though he was nominated by a President of my own party. If I thought Judge Alito should not be confirmed, I would vote no again.

Judge Alito has sterling academic credentials, having excelled at Princeton University and the Yale Law School. Judge Alito began his lifetime commitment to public service with a prestigious clerkship for Judge Leon I. Garth of the United States Court of Appeals of the Third Circuit. For the next thirteen years, Judge Alito served his country as an Assistant to the U.S. Solicitor General, a Deputy Assistant Attorney General in the Office of Legal Counsel, and as both the United States Attorney for New Jersey and an assistant United States Attorney in that same office. When Judge Alito was appointed to his current position on the Third Circuit Court of Appeals, the ABA unanimously voted to award Judge Alito its highest possible rating, and Judge Alito enjoyed broad bipartisan support, as reflected by the fact that he was confirmed by unanimous consent.

Judge Alito's achievements are all the more impressive when one realizes that Judge Alito was not born with a silver spoon in his mouth. Judge Alito's father was brought to this country from Italy as an infant and grew up in poverty. Although his father graduated at the top of his high school class, he had no money for college, and he was set to work in a factory. It was only because at the last minute, a kind person arranged for him to receive a $50 scholarship, that he was able to attend college. Despite the discrimination he faced as an Italian immigrant in 1935, Judge Alito's father eventually became a teacher, served in the Pacific during World War II, and held a nonpartisan position for the New Jersey Legislature. Judge Alito put it best when he said:

''my parents taught me through the stories of their lives . . . and it is the story, as far as I can see it, about the opportunities that our country offers and also about the need for fairness and about hard work and perseverance and the power of a small good deed.''

I have participated in the confirmation hearings for the past eleven nominees to the Supreme Court. Although judgments may differ, I think that Judge Alito went farther in answering questions than most Justices in the past. Indeed, Senator BIDEN commented, ''you have been very gracious. I appreciate you being responsive.'' By one reckoning, Judge Alito was asked 677 questions and answered some 659—97%. That is far more than Justice Ginsburg, who answered only 307 out of 384 questions, or 80%, or Justice Breyer, who answered only 291 out of 355 questions, or 82%. Judge Alito did not refuse to respond because a similar case might come before the Court. He ultimately stopped short of making commitments as to how he would vote, as he should. But for each topic that was raised, Judge Alito discussed the relevant constitutional considerations and his judicial philosophy.

For example, on the topic of a woman's right to choose, Judge Alito agreed that the Constitution creates a right to privacy. I asked Judge Alito whether he agreed with the Supreme Court's holding in Eisenstadt, which established that unmarried women have a constitutional right to contraception and was an underpinning of the Supreme Court's decision in Roe v. Wade. Judge Alito replied directly, ''I do agree with the result in Eisenstadt.'' When Senator FEINSTEIN asked Judge Alito whether the Constitution guarantees a right to privacy, Judge Alito responded: ''The 14th Amendment protects liberty. The Fifth Amendment protects liberty. And I think it is well accepted that this has a substantive component, and that that component includes aspects of privacy that have constitutional protection.''

Judge Alito also discussed whether Roe v. Wade is so well established that it should not be overturned. Judge Alito stated: ''I agree that in every case in which there is a prior precedent, the first issue is the issue of stare decisis, and the presumption is that the Court will follow its prior precedents. There needs to be a special justification for overruling a prior precedent.''

Some Members of the Judiciary Committee have argued that Judge Alito was less forthcoming on this issue than Chief Justice Roberts was during his Supreme Court confirmation hearing, when he called Roe v. Wade ''settled law.'' Comparing the testimony of the two nominees, I cannot see a dime's worth of difference between their responses. I asked Chief Justice Roberts what he meant when, as a nominee for the circuit court, he said Roe was settled law. Specifically, I asked him if he meant it was settled for him as a circuit court judge, or if it was settled beyond that, even as a Supreme Court Justice. He answered: ''beyond that, it's settled as a precedent of the Court, entitled to respect under principles of stare decisis.''

Similarly, Judge Alito testified that ''Roe v. Wade is an important precedent of the Supreme Court'' and that the Court's reaffirmation of that case ''strengthens its value as stare decisis.'' Moreover, both Chief Justice Roberts and Judge Samuel Alito testified that they agreed with the result in Eisenstadt, that unmarried people may not be denied contraception, and with the foundational case of Griswold v. Connecticut, which guaranteed that same right to married couples. Both Chief Justice Roberts and Judge Samuel Alito agreed that with the view that the Constitution's Due Process Clause includes a substantive protection of privacy—the legal view underpinning Roe v. Wade. And both Chief Justice Roberts and Judge Samuel Alito refused to make commitments on how they would vote in abortion cases, including how they would rule if Roe came before the Court again. This is as it should be: no nominee for the Supreme Court or any other Court should be required to commit to how they would rule on a potential case before them.

I was pleased to hear Judge Alito confirm that he does view the Constitution as a living document. Judge Alito stated, ''I think the Constitution is a living thing in the sense that matters, and that is . . . it sets up a framework of Government and a protection of fundamental rights that we have lived under very successfully for 200 years, and the genius of it is that it is not terribly specific on certain things. It sets out some things are very specific, but it sets out some general principles, and then leaves it for each generation to apply those to the particular factual situations that come up. . . . As times change, new factual situations come up, and the principles have to be applied to those situations. The principles don't change. The Constitution itself doesn't change, but the factual situations change, and as new situations come up, the principles and the rights have to be applied to them.''

Judge Alito's record confirms that he is not an ideologue on a crusade to curtail Roe v. Wade. He has upheld a woman's right to choose even when he had the discretion to limit abortion rights. For example, in the 1995 case of Elizabeth Blackwell Medical Center for Women v. Knoll, Judge Alito struck down two abortion restrictions by the State of Pennsylvania. The first provided that a woman who became pregnant due to rape or incest could not obtain Medicaid funding for her abortion unless she reported the crime to the police. The second provided that if a woman needed an abortion to save her life, she had to obtain a second opinion from a doctor who had no financial interest in the abortion. The question was whether these laws conflicted with a federal regulation issued by the Secretary of Health and Human Services. The case did not involve a question of constitutional law. There was no binding Supreme Court precedent on point. Judge Alito easily could have upheld the abortion restrictions if he wished to. Indeed, another Third Circuit judge appointed by President Reagan voted to do just that. But Judge Alito voted to strike down both laws in favor of a woman's right to choose. This is not the behavior of someone bent on chipping away at Roe v. Wade. This is the behavior of a moderate jurist who understands the importance of precedent.

The fact is that, notwithstanding Senators' concerted efforts, it is not possible to predict how Judge Alito will rule on the issue of abortion. If there is a rule on expectations, it is probably one of surprise. Two or three decades ago, no one would have predicted that Justices O'Connor, Kennedy, or Souter would have voted to uphold a woman's right to choose. At her confirmation hearing, Justice O'Connor testified that she personally viewed abortion with ''abhorrence'' and stated, ''my own view in the area of abortion is that I am opposed to it as a matter of birth control or otherwise.'' Yet, roughly 10 years later, she voted to uphold Roe v. Wade and has done so ever since. Justice Kennedy explained that he ''was brought up to think of abortion as a great evil. He once denounced the Roe decision as the Dred Scott of our time, a reference to the infamous 1857 ruling that sanctioned slavery and helped spark the Civil War.'' Yet, in 1992, Justice Kennedy cast the deciding vote in Casey v. Planned Parenthood to uphold Roe v. Wade. When he was New Hampshire Attorney General, Justice Souter filed a brief arguing that tax payer dollars should not be used to fund ''the killing of unborn children'' and defended abortion laws that had already been undermined by Roe v. Wade. During his confirmation hearing, the National Organization for Women organized a rally against his confirmation entitled ''Do or Die Day'' and distributed flyers proclaiming ''Stop Souter or women will die.'' Yet, on the Supreme Court, Justice Souter has consistently voted to uphold a woman's right to choose.

Similarly, there have been dire predictions about Judge Samuel Alito. The National Organization for Women has released another flyer—this one declaring ''Save Women's Lives. Vote No on Alito.'' The rule is that there is no rule.

Judge Alito was also questioned extensively on Executive power and whether the resolution for the authorization of use of force gave the President authority to engage in electronic surveillance. When I asked Judge Alito whether he agreed with Justice O'Connor's statement in Hamdi that ''We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens,'' Judge Alito responded, ''Absolutely. That's a very important principle. Our Constitution applies in times of peace and in times of war, and it protects the rights of Americans under all circumstances.'' Judge Alito went somewhat beyond the usual practice of answering just as many questions as he needed to in order to be confirmed. While he would not commit to giving answers to hypothetical situations which may come before the Court, he fully explained his methods of reasoning. For example, when questioned by me and other

Senators about how he would decide questions dealing with the limits of executive power, he responded that he would apply Justice Jackson's framework from the Youngstown Steel case:

''[A]s I said, the President has to follow the Constitution and the laws and, in fact, one of the most solemn responsibilities of the President—and it is set out expressly in the Constitution—is that the President is to take care that the laws are faithfully executed, and that means the Constitution, it means statutes, it means treaties, it means all of the laws of the United States.

''But what I am saying is that sometimes issues of Executive power arise and they have to be analyzed under the framework that Justice Jackson set out. And you do get cases that are in this twilight zone and it is—they have to be decided when they come up based on the specifics of the situation.''

When Judge Alito was similarly questioned about the President's power to control the executive branch, he responded by explaining in full:

''[A]s to the agencies that are headed by commissions, the members of which are appointed for terms, and there are limitations placed on removal, the precedents—the leading precedent is Humphrey's Executor and that is reinforced, and I would say very dramatically reinforced, by the decision in Morrison, which did not involve such an agency. It involved an officer who was carrying out what I think everyone would agree is a core function of the executive branch, which is the enforcement of the law, taking care that the laws are faithfully executed. . . .

''[W]hat I have tried to say is that I regard this as a line of precedent that is very well developed and I have no quarrel with it and it culminates in Morrison, in which the Supreme Court said that even as to an inferior officer who is carrying out the core executive function of taking care that the laws are faithfully executed, it is permissible for Congress to place restrictions on the ability of the President to remove such an officer, provided that in doing so, there is no interference with the President's authority, and they found no interference with that authority there. That is an expression of the Supreme Court's view on an issue where the claim for—where the claim that there should be no removal restrictions imposed is far stronger than it is with respect to an independent agency like the one involved in Humphrey's Executor.''

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

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

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

Judge Edward Becker, the former Chief Judge of the Third Circuit is one of the most acclaimed jurists of our time. He recently won the coveted Devitt Award as the Outstanding Federal Jurist of the year. I know Judge Becker very well since our college and law school days, so, I take his views seriously.

Judge Becker has sat on over a thousand cases with Judge Alito and, as he testified, they only disagreed 27 times. In each of those cases, Judge Becker testified, Judge Alito's ''position was closely reasoned and supportable either by the record or by his interpretation of the law, or both.'' Judge Becker testified that he knows Judge Alito approaches judging with no agenda and was not an ideologue. He said, ''The Sam Alito that I have sat with for 15 years is not an ideologue. He is not a movement person. He is a real judge deciding each case on the facts and the law, not on his personal views, whatever they may be. He scrupulously adheres to precedent. I have never seen him exhibit a bias against any class of litigation or litigants.''

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

I thought that the testimony of Judge Timothy Lewis was particularly influential, given his background. He is an African American who described himself at the hearing as ''unapologetically pro-choice'' and as ''a committed human rights and civil rights activist.'' He joked that it was no coincidence that he happened to be sitting at the ''far left'' end of the panel of judges.

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

He testified that ''I cannot recall one instance during conference or during any other experience that I had with Judge Alito, but in particular during conference, when he exhibited anything remotely resembling an ideological bent. That does not mean that I agreed with him, but he did not come to conference or come to any decision that he made during the time that I worked with him based on what I perceived to be an ideological bent or a result-oriented demeanor or approach. He was intellectually honest, and I would say rigorously so, even with respect to those areas that he and I did not agree.''

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

Again, Judge Lewis's testimony is instructive. He told the Committee that ''[I]f I believed that Sam Alito might be hostile to civil rights as a member of the United States Supreme Court, I can guarantee you that I would not be sitting here today.'' Coming from some one with an unquestioned commitment to civil rights who has worked closely with Judge Alito, that testimony is entitled to considerable weight.

Judge Lewis' testimony supported my view of Judge Alito from examining his cases. Indeed, I have found many cases where he has defended civil rights and the interests of African Americans. For example:

In U.S. v. Kithcart, Judge Alito held that the Fourth Amendment does not allow police to target drivers because of the color of their skin. After a police officer received a report that two black men in a black sports car had committed three robberies, she pulled over the first black man in a black sports car she saw. Judge Alito ruled that this violated the Constitution.

In Brinson v. Vaughn, Judge Alito ruled that the Constitution does not allow prosecutors to exclude African Americans from juries. In that case, the prosecutor had used 13 of his 14 ''strikes'' to exclude African-Americans from the jury, but argued that this was not a problem, because he allowed 3 African-Americans onto the jury. Judge Alito explained that the prosecutor could not get around the Constitution by allowing a handful of African-Americans onto the jury.

In Zubi v. AT&T Corp., Judge Alito authored a lone dissent, opposing the establishment of a stringent limitations period in which civil-rights plaintiffs would have to file a claim. The Supreme Court unanimously vindicated Judge Alito's position four years later.

In Reynolds v. USX Corporation, Judge Alito ruled in favor of Deborah Reynolds, an African-American woman who was subjected to racial and sexual harassment at work. Her employer claimed that the company shouldn't be liable because the harassment came from her coworkers, rather than supervisors. Alito concluded that her supervisors were aware of the harassment and the company had a duty to end it.

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

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

In that case, Judge Alito ruled in favor of a woman with disabilities who sought social security benefits. The Social Security Administration concluded that the plaintiff was not entitled to benefits because she could still perform her former job as an elevator operator—even though such jobs no longer exist. Judge Alito thought that such a rigid application of the law ''sets up an artificial roadblock'' to people seeking disability benefits. He saw ''no plausible reason why Congress might have wanted to deny benefits to an otherwise qualified person simply because that person, although unable to perform any job that actually exists in the national economy, could perform a previous job that no longer exists.''

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

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

Fiscus v. Wal-Mart Stores, Inc., where Judge Alito ruled in favor of a victim of disability discrimination who suffered from end-stage renal disease and sought permission from her employer to self-administer dialysis every four to six hours during the workday. Judge Alito voted to reverse the lower courts ruling that kidney failure was not covered by the Americans with Disabilities Act.

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

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

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

Judge Alito has authored a number of other important, progressive, opinions, vindicating the rights of the so-called ''little guy''. For example, in Fatin v. INS, Judge Alito held that an Iranian woman could establish a basis for asylum if she showed that compliance with Iran's gender specific laws would be deeply abhorrent to her or that the Iranian government would persecute her because of her gender. This is a landmark case that established gender-based discrimination as possible grounds for asylum.

In Alexander v. University of Pittsburgh Medical Center System, Judge Alito dissented from the court's ruling in favor of a hospital in a medical malpractice case. A young woman had been hospitalized for a rare illness of the liver. Based on advice from several doctors, her parents waited for one and one-half months before ordering a liver transplant. The young girl died, and the parents sued. The jury ruled for the parents and awarded substantial damages. The majority of the Third Circuit reversed the jury's verdict against the doctors, explaining that the trial court judge should have instructed the jurors to consider whether the parents were partly responsible for the young girl's death. Judge Alito dissented, concluding that the fault for any poor decision rested with the defendant doctors, not the parents. Judge Alito wrote: ''Except perhaps in truly extreme cases, it is not negligent for a patient such as Alyssa or her parents to follow the advice of primary care physicians.''

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

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

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

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

I thank the Chair and I now yield the floor.

The PRESIDING OFFICER. The Senator from Alabama.

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

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

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

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

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

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

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

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

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

This is an extreme interpretation of the separation of church and state. It is not consistent with our classical understanding of law in America. We had the Supreme Court, in this past year,

redefining the takings clause. The takings clause says you can take private property for public use.

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

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

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

These are important issues. The American people are concerned about it. President Bush was concerned about it. He promised he would appoint judges who show restraint, judges of great ability and integrity but who would show restraint and be more modest in the way they handle these cases. That is a fair standard. It is a legitimate issue for the American people to decide. He talked about it in almost every speech he made. That is what he promised to do, and that is what he has done.

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

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

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

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

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

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

He has had his record exposed to the world. What does it look like? Without question, it is a record of fairness and decency. Some of us on the conservative side have questioned the bar association. They are pro-abortion in their positions. They take liberal positions on a lot of issues, and some people have criticized them for that. They declare their ratings of judges are not based on that. But sometimes they have been accused of allowing their personal views to infect that rating process.

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

They go out and talk to these people. They will share with the American Bar Association privately what they might not say publicly. So they interviewed 300 people, and contacted over 2,000. They concluded that Judge Alito has established a record of both proper judicial conduct and evenhanded application in seeking to do what is fundamentally fair.

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

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

This is what he said at the hearing:

The PRESIDING OFFICER (Mr. GRAHAM). The majority's time has expired.

Mr. SESSIONS. Mr. President, I ask unanimous consent for 30 seconds to wrap up.

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

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

Mr. SESSIONS. This is what he said:

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

That is what we need on the bench today. I think it would restore the public confidence. I am proud to support this nomination.

Mr. President, I respect Senator LEAHY. He is an excellent advocate for the Democratic side. I was pleased he supported Judge Roberts, and I am not as thrilled he is not supporting Judge Alito. It was a process that was a bit rough at times, but fundamentally I think the judge was able to have his day in court.

I yield the floor.

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

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

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

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

What the distinguished senior Senator from Nevada, the Democratic leader, has said over and over again is that this is a vote of conscience. Every Senator has to search his or her own conscience. In fact, I was also concerned when the distinguished Republican leader opened the debate on this nomination by complaining that those opposing Judge Alito are smearing a decent and honorable man. Mr. President, again, out of almost 300 million Americans, only 100 of us get a chance to say whether this man will go on the Supreme Court, where he can sit there for years, decades even, and where he is supposed to be the ultimate check and balance and guardian of our rights. To say that by opposing him is smearing him, that is not so.

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

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

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

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

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

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

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

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

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

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

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

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

We are constantly reminded of what Benjamin Franklin said: People who give up their liberties for security deserve neither. The terrorists win if they frighten us into sacrificing our

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

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

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

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

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

When they talk about thousands of al-Qaida conversations they have to monitor going to Americans—thousands? Interesting. So how many people have been arrested because of those thousands? Two thousand people? Fifteen hundred people? One thousand? Five hundred? Four hundred? Three hundred? Thirteen? Seven? Five, three, four, two, one? Or none?

A central question, therefore, during the hearings of this nomination was whether Judge Alito would serve as an effective constitutional check on the Presidency. Preventing Government intrusions into the personal privacy and freedoms of Americans is one of the hallmarks of the Supreme Court. They are not supposed to be in the pocket of any administration. After all, this Senate, when it was overwhelmingly Democrat, under Democratic control—one of the most popular Democrats in my lifetime was President Franklin Roosevelt. When he wanted to pack the Supreme Court, when he wanted to manipulate the Court, it was the Democrats who stood up and said no because they felt the Court should be a check and balance. Here there is no assurance that Judge Alito will serve as an effective check and balance on Government intrusions into the lives of Americans. In fact, his record suggests otherwise.

We know that Samuel Alito sought to justify absolute immunity for President Nixon's Attorney General John Mitchell from lawsuits for wiretapping Americans, among other violations of their privacy. He was asking for immunity even if the Attorney General acted willfully to violate people's rights. This is the man who is going to be a check and balance on our rights?

We know that as a judge, Samuel Alito was willing to go further than even Michael Chertoff, the former head of the Ashcroft Justice Department's Criminal Division and the current Secretary of the Department of Homeland Security, in excusing Government agents for searches not authorized by judicial warrants. This is the man who is going to be a check and balance?

We know Judge Alito would have excused a strip search of a 10-year-old girl, even though the search warrant did not authorize this. This is a man who is going to be a check and balance?

In both Doe v. Groody and Baker v. Monroe Township, Judge Alito dissented and would have allowed invasive searches beyond the scope of warrants. This is a man who is going to be there as a check and balance?

I was a prosecutor for eight years, and I am keenly aware of the difficulties faced by police officers in the course of their duties. I support vigorous law enforcement tools. But I am also mindful of the careful balance that must be struck in order to preserve our individual liberties. One of the most important Fourth Amendment protections we have for our privacy is the requirement that a judicial officer ensure that the Government's intrusion on citizens' privacy is based on probable cause and that it is reasonable. It is the judge who determines whether to authorize the search and the extent of the search to be permitted. The officer's affidavit and the warrant are not mirror images of each other. The magistrate is not a rubber stamp. The role of the magistrate in issuing warrants, a role Judge Alito has too easily cast aside on the bench, is a crucial check in maintaining the right balance so that all Americans can have both security and liberty.

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

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

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

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

The illegal strip search was not ''technical'' for the 10-year-old girl. Then-Judge Chertoff understood that this issue is far from technical, but, rather, embedded in the core protections of our individual privacy and dignity from governmental intrusion. In the court's opinion, rejecting the rationale of Judge Alito's dissent, Judge Chertoff wrote: ''This is not an arcane or legalistic distinction, but a difference that goes to the heart of the constitutional requirement that judges, and not police, authorize warrants.''

Judge Alito tried to find ''technical'' ways to excuse the illegality. Judge Alito's dissent relied on the affidavit accompanying the warrant. To the extent the affidavit had requested a search of ''all occupants'' of the home, it did so based on a concern about concealment of drugs by ''frequent visitors that purchase [drugs]'' or by ''persons who do not actually reside or own/rent the premises''—not by a 10-year-old girl living in the home. Judge Alito ignored this language in the affidavit, in order to misconstrue the affidavit more broadly and to then substitute it for the magistrate's warrant.

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

Similarly, in Baker v. Monroe Township, Judge Alito saw the facts in the light most favorable to the Government, rather than to the mother and her children. That is directly contrary to the standard that should be used when reviewing an order granting summary judgment against a party. In his dissent, Judge Alito found that although the warrant in question did not describe any persons to be searched, it nevertheless was appropriate for officers to search and handcuff a mother and her three teen-aged children as they approached a relative's home. Judge Alito stated in his dissent that even though the mother and her three children were not named in the warrant and there was no reason to suspect them of any wrongdoing, ''to [his] mind'' the warrant had been intended to authorize a search of ''any persons found on the premises.'' Judge Alito went so far as to excuse the officers' failure to request or obtain a warrant permitting the search of persons on the premises as sloppiness.

The Third Circuit disagreed with Judge Alito, holding that because the search warrant did not authorize the search, it was unlawful and in violation of the Fourth Amendment. The other judges hearing the case found fault with Judge Alito's willingness to look beyond the warrant to excuse the unauthorized and unlawful searches. In Baker, Judge Alito inserted himself into the case in an active attempt to excuse misconduct when the warrant did not authorize the Government intrusion.

Unfortunately, Doe and Baker are not outliers in Judge Alito's record. As troubling as his dissents are in those two cases, they are only part of a broader pattern of deference to the Government that shows far too little concern for individual liberties and rights, which find their ultimate protection in the Supreme Court.

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

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

And so we owe it to the American people of today, and the Americans of generations to come, to ask and answer several essential questions: Can this President, or any President, order illegal spying on Americans? Can this President, or any President, 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 era, and these are among the most vital questions that confront the Senate in considering this nomination to our highest court. Judge Alito's record, and his responses—and his failure to adequately answer questions about these issues—are deeply troubling.

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

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

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

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

I see the distinguished senior Senator from Massachusetts in the Chamber. I am prepared at this point to yield to the distinguished Senator and former chairman of the Judiciary Committee and one whose protection of the civil liberties of all of us is unparalleled in the history of this body.

The PRESIDING OFFICER. The Senator from Massachusetts.

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

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

Those words are meant to guarantee our courts will be an independent check on abuses of power by the other two branches of Government. They are a commitment that our courts will always be a place where the poor and the powerless can stand on equal footing with the wealthy and the privileged.

Each of us in the Senate has a constitutional duty to ensure that anyone confirmed to the Court will uphold that clear ideal.

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

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

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

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

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

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

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

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

The record demonstrates we cannot count on Judge Alito to blow the whistle when the President is out of bounds. He is a longstanding advocate of expanding Executive power even at the expense of core individual liberties.

One thing is clear: Judge Alito's view of the balance of powers is inconsistent with the Supreme Court's historic role of enforcing constitutional limits on Presidential power.

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

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

Judge Alito refused to discuss his current view of the constitutional limits on Presidential power. But in a speech Judge Alito gave in 2004 to the Federalist Society, he stated that he believed ''the theory of the unitary executive best captures the meaning of the Constitution's text and structure.'' Under this radical view, all current independent agencies would be subject to the President's control. This would destroy the independence of agencies such as the Federal Election Commission, the Securities and Exchange Commission, the Consumer Product Safety Commission, and the Federal Reserve Board.

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

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

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

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

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

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

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

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

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

In cases involving claims of privacy and freedom from unjustified searches

and seizures under the Bill of Rights, Judge Alito has consistently deferred to the Government at the expense of core individual rights. In the Doe v. Groody case, Judge Alito issued a dissent defending the strip search of a 10-year-old girl without authorization from a warrant. In his majority opinion, Michael Chertoff, former head of the criminal division in the Department of Justice, who is now President Bush's Secretary for Homeland Security, sharply criticized Judge Alito's view as threatening to turn the requirement of a search warrant into little more than a rubberstamp. This is not Democrats saying this; this is President Bush's Secretary of Homeland Security saying this. He was a judge on that circuit, criticizing this kind of action, extension of a search warrant, because of the inclusion of some kind of other document into the search warrant. We understand what Michael Chertoff was saying, and Judge Alito issued the dissent.

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

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

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

There it is—issues on race, issues on disability, individual rights and liberties, those individuals, farmers, and others in a home involving a civil action, who committed no crime, where marshals used gestapo-like tactics. They were denied an opportunity for a court to give a hearing. Judge Alito said no. That is why many Members wonder what kind of an opportunity the average American is going to have.

Does Judge Alito tip more to the powerful and the entrenched interests and the Executive authority? Does he give those individuals—women, minorities, disabled workers—a fair shake?

Judge Alito said, let's look at the record. We have looked at the record. We looked at primarily the dissents, as pointed out in the previous discussions.

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

In another case, a jury ruled a woman had provided enough evidence to show that she had wrongly lost her job because of sex discrimination. Ten members of the Third Circuit who heard the case on appeal agreed. Only Judge Alito argued that she had not provided adequate proof of discrimination. Who is out of step? Who is out of step? Who is out of the mainstream?

In the Riley v. Taylor case, Judge Alito dissented from a ruling prohibiting the removal of African-American jurors because of their race. It is unbelievable in today's America, in a case involving a minority defendant, that he was willing to ignore the overwhelming evidence that the Government insisted on an all-White jury for a Black defendant. He found no problem with that and with their inclusion for the death penalty. Eventually, that case was overturned, as it should have been. What was going on in the mind? We talk of equal justice under law. We see what has happened to individuals. We see what has happened in this extremely important judicial proceeding.

Many of Judge Alito's other decisions demonstrate a similar tendency against the individual. In Rouse v. Plantier, a group of diabetic inmates sued prison officials for being deliberately insensitive to medical needs. The trial court held there was enough evidence for the jury to decide whether the inmates' constitutional rights had been violated. Judge Alito refused to allow the jury to decide whether the Government was responsible for a broad systematic failure to provide the necessary medical group. These inmates had diabetes. We know the dangers of diabetes. One out of four of our Medicare dollars is spent on diabetes. One out of 10 of all health dollars is spent on diabetes. It can be devastating, leading to blindness, or the losing of a limb, more often the leg. They need attention and treatment.

This is a serious problem that is increasing in our society. There was a systematic failure in terms of providing for that. They thought it should go to the jury. Was it or was it not a factual issue? The lower court said they ought to be able to go, but not Judge Alito. He reached a different conclusion.

In case after case, Judge Alito's decisions demonstrate a systematic tilt toward powerful institutions and against individuals attempting to vindicate their rights. He cites instances where he has decided for the little guy, but they are few and far between. We have an independent duty to evaluate Supreme Court nominees to determine whether their confirmation is in the best interests of our Nation. That is the test. It is a test with which Judge Alito himself seems to agree. He said we should look at his record and decide whether he should be confirmed. I have done so. I have compared the challenges the Court will face in the future with Judge Alito's record and I cannot support his nomination.

In this new century, the Court will undoubtedly consider sweeping new claims to expand Executive power at the expense of core individual rights, including detention of Americans on American soil without access to counsel or the court, and eavesdropping on Americans in violation of Federal law.

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

Justice Alito's record shows he should not be entrusted with these vital decisions facing our Nation's Court, and I urge my colleagues to join me in opposing Judge Alito's nomination.

The PRESIDING OFFICER. The Senator from Illinois.

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

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

I take this very seriously. As Senator KENNEDY said yesterday in another meeting: Next to a vote on war, there is nothing more serious than this decision. The man or woman whom we choose to serve on the Supreme Court

is there for the rest of their natural life. For 10, 20, or 30 years, that person will be making critical decisions on the highest Court in the land, the Court which is the refuge for our freedoms and our liberties.

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

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

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

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

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

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

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

The same thing happened to Sandra Day O'Connor. Starting as a conservative, over the years she moved toward a more libertarian position, a position which, in many instances, was critical for protecting our basic rights.

It has been said she was the most important woman in America. And it is easy to see why. Time and again, Sandra Day O'Connor was the crucial fifth vote on civil rights, human rights, women's rights, and workers' rights. That is why we have looked so closely and so carefully at Judge Sam Alito.

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

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

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

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

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

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

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

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

His listing of the Concerned Alumni of Princeton, of which he was a graduate, was troubling because that organization was once dedicated to establishing a quota at Princeton that each year they would accept no fewer than 800 men, and the Concerned Alumni of Princeton wanted to stop what they considered to be the infiltration of the Princeton student body by women and minorities. Some of the things they wrote and said were outrageous. In fairness, Judge Alito at the hearing

said he would not associate himself with their remarks, but it is interesting that he would identify this organization as one of his memberships that would qualify him to serve in the Justice Department.

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

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

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

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

I am—to some degree.

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

I have a familiarity with the crushing hand of fate.

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

An African American, charged with murder, facing the possibility of the death penalty, argues on appeal that his verdict was unfair because the prosecutor went out of his way to exclude every African American from the jury so that it was an all-White jury judging a Black man. He presented his evidence that in three other murder trials, one involving an African American, the other two White defendants, the prosecutor had done the same thing—kept the Blacks off the jury systematically. The Third Circuit Court on which Judge Alito served said that defendant was right; that is not something we accept in America; we are going to send this case back to be retried by a jury of this defendant's peers. They saw the importance of a justice system that is blind to race.

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

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

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

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

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

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

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

I yield the floor.

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

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

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

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

came in and said this is exactly the kind of judge we would want and we think the American people would have a right to expect, and urged us to favorably vote on his confirmation.

It is clear to me, though, during the course of the confirmation process, that the reason I support Judge Alito his philosophy of judicial restraint is exactly the reason his detractors oppose his nomination. The sad fact is that there are some in this country who don't want judges who respect the legislative choices made by the American people. Rather, they want judges who will substitute their own personal ideological or political agenda for those choices made in the Halls of Congress by the elected representatives of the American people.

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

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

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

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

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

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

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

He said:

> I am confident that as an able legal scholar and a fair-minded justice, Judge Alito will give the arguments, legal and factual, that may be presented on behalf of our clients careful and thoughtful consideration, without any predisposition in favor of the position of the executive branch.

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

Another favorite pretext of the opponents of this nomination is that as a replacement for Justice O'Connor, this nominee, Judge Alito, will shift the Supreme Court radically to the right. But in order to believe this or support this supposed theory, they have to radically rewrite history. It requires them to paint Justice O'Connor as some sort of liberal.

But the truth is far different. For example, according to the Harvard Law Review, over the last decade, the Justice on the Court with whom Justice O'Connor agreed most frequently—over 80 percent of the time—was former Chief Justice William Rehnquist.

I think we will all acknowledge that Chief Justice Rehnquist was no liberal. Yet Sandra Day O'Connor and Chief Justice William Rehnquist agreed with each other more than 80 percent of the time.

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

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

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

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

The first flaw is a selective reading of Judge Alito's record. Judge Alito has been a judge for 15 years. He has decided plenty of cases in favor of consumers, medical malpractice victims, employment discrimination victims, and other plaintiffs. In other words, he has decided plenty of cases for the little guy. But his opponents ignore all of these cases and focus only on the cases where he has decided against a sympathetic plaintiff. Anyone who has looked at his entire record has found the claim of bias to be completely without merit, indeed, including the Washington Post. The Washington Post did an analysis of

Judge Alito's entire record and found he is no more likely than the average appeals court judge to rule for businesses, for example, over individuals. And, yes, I said the Washington Post and not the Wall Street Journal.

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

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

> Sam Alito is my favorite judge to sit with on this court. He is a wonderful judge and a terrific human being. Sam Alito is my kind of conservative. He is intellectually honest. He doesn't have an agenda. He is not an ideologue.

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

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

One would not know by listening to some of Judge Alito's opponents that he is a fairminded judge. In the America of his opponents, no plaintiff ever loses a case; no entrepreneur ever wins no matter how frivolous the claim of employment discrimination; police departments never win a case no matter how desperate the claim of a criminal defendant; Government agencies, including the Environmental Protection Agency and the Social Security Administration, could never win a case no matter how outlandish the request for Government benefits. In their utopia, the economy is wrecked by frivolous litigation, criminals run free on technicalities, and the public Treasury is plundered.

This admittedly, and thankfully, is not Judge Alito's America. He believes that no one is above the law—not the President, not the Congress, not even the little guy. That is why Lady Justice has always been blindfolded.

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

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

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

I yield the floor.

The PRESIDING OFFICER. The Senator from Virginia.

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

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

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

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

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

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

I don't think it is too much to ask Senators to come here when the nomination is called forth to get off these cushy seats, stand up straight, and vote yes or vote no. That is a matter of fairness. It is also our constitutional responsibility in advise and consent.

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

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

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

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

In Judge Alito's case, no matter the issue, whether or not they are politically charged issues in the realm of electoral politics, he seems, from my reading and review, to have followed a

consistent, thoughtful, deliberative process to decide cases.

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

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

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

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

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

He said:

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

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

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

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

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

Of course, Judge Alito said he didn't agree with any of that. He was concerned about fair access for our military recruiters on campus.

The closing lines in the Wall Street Journal editorial stated:

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

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

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

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

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

As constitutional jurisprudence moves forward, Judge Alito, with his understanding that stare decisis is not an ''inexorable command,'' makes a great deal of sense. We have seen that throughout the history of our country.

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

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

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

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

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

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

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

A continuing debate has to do with parental notification. People in Virginia, when I was Governor, and other

States thought, if an unwed minor daughter is going through the surgery, the trauma of an abortion, and is 17 years old or younger, a parent ought to be involved. After all, if a child is going to get a tattoo or their ears pierced, they need parental consent. So the laws are passed by various States, there is one in contention dealing with New Hampshire. Federal judges, ignoring the will of the people in various States, strike down and allow those laws to be overturned.

Last year, in the summer, the Supreme Court got involved in a case that created a great deal of concern because the city of New London, CT, the city council, acting akin to commissars, decided they were going to take people's homes, the American dream, and condemn those homes, take them not for a school, not for a road or any such public purpose, but rather they wanted to derive more tax revenue off of that property. This is part of the Bill of Rights, the fifth amendment. The Supreme Court, in a very narrow decision, allowed New London, CT, in the Kelo case, to take away people's homes. This is an example of Supreme Court Justices, Federal judges, selected and serving for life, amending our Bill of Rights, the Constitution—the Bill of Rights is the most important part of all the Constitution—by judicial decree. That is wrong. This is why it is important we have men and women serving on the Federal bench that understand their role is to apply the law and not take away our God-given rights enshrined in the Bill of Rights and in our Constitution.

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

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

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

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

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

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

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

Justice O'Connor is a person for whom I have a great deal of respect. She served with great distinction on the Court for many years and has a compelling, interesting life story. The fact that President Reagan appointed her as the first woman on the Supreme Court of the United States as a pioneer in so many ways has been an inspiration to many young people, regardless of gender. Particularly many young women who think, There is a future for me in the law. We have seen a great increase in the number of young women interested in studying in our law schools.

They will say that we have to have someone who has the exact same philosophy as whoever was being replaced. We ought to remember the Founders, in drafting article III of the Constitution that creates the Supreme Court, provides no requirement there must be an ideological balance on the Court. For over 200 years, the Senate has respected the prerogative of the President and performed their advice-and-consent function and ultimately voted for qualified judges, despite their political orientation.

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

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

The PRESIDING OFFICER. The Senator from Florida.

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

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

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

As Alexander Hamilton noted in Federalist No. 78, if the courts are to be truly independent, judges cannot substitute their own preferences to the ''constitutional intentions of the [legislative branch].''

Judge Alito clearly expressed during his confirmation hearings, and his judicial career attests to the fact, that he would not impose his personal views over the demands of the law and precedent. I find that refreshing, I find that encouraging, and I find that a strong reason for supporting the nomination of Judge Alito.

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

Bar Association's committee that reviews judicial candidates is interested and committed to a quality judiciary.

Judge Alito not only received their unanimous approval, but he received their most qualified rating. That means each and every one of the members of that committee gave Judge Alito their highest, most qualified rating. This should weigh heavily in favor of the confirmation of Judge Alito.

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

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

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

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

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

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

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

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

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

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

I see an evolving new standard before us. I heard from the members of the Judiciary Committee who did not support this nominee the setting of a brand new standard, and it is no longer qualifications, but it is now whether they philosophically will judge this person to be the kind of person they would want based on their political philosophy. That, I would suggest, is wrong. It has never been the standard applied or utilized by our Nation as we have sought to confirm Justices to our Court for over 200 years. I would say it is absolutely wrong to begin that new standard and leave it unchallenged as we seek the confirmation of one more Justice to the Supreme Court.

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

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

COAL MINING TRAGEDIES IN WEST VIRGINIA

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

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

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

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

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

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

First, the disaster. Then the weeping. Then the outrage. And we are all too familiar with what comes next. After a few weeks, when the cameras are gone, when the ink on the editorials has dried, everything returns to business as usual. The health and the safety of America's coal miners, the men and women upon whom the Nation depends so much, is once again forgotten until the next disaster. But not this time.