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.

Let me say that this U.S. Senator and the West Virginia delegation in the House and in the Senate will do all that we can to prevent that. There is blame to be assessed in the wake of these tragedies and plenty of it to go around.

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

What about the agency that is responsible for making sure that coal operators comply with the spirit and the letter of the law—the Mine Safety and Health Administration. Let me be clear that I have nothing but praise for the brave rescue teams that went into the Sago and Alma mines. Anybody who has been around a mine explosion knows the dangers that still lurk not just hours but days after such an accident. To go into a mine after a disaster, after an explosion, and to risk one's own life in an effort to save other lives, as these rescuers do, takes guts. It takes a love for one's fellow man.

Coal miners are a special breed. I have seen these miners go into a mine after an explosion, risking their own lives, realizing that another explosion might occur and another tragedy would follow in the wake of the first tragedy.

Yes, MSHA is filled with good, well-intentioned, and dedicated professionals, but something is terribly wrong with the leadership at MSHA.

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

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

A short 2 weeks later, similar horrors emerged from a second tragedy at the Aracoma Alma mine and, again, MSHA did not know of the incident for 2½ hours. Something is incredibly wrong. It is obvious something is very, very wrong at MSHA. The rescue procedures for miners are woefully inadequate.

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

Congress recognized a long time ago that mine safety and health depends on financial penalties that ''make it more economical for an operator to comply'' with the law ''than it is to pay the penalties assessed and continue to operate while not in compliance.'' Clearly, the 276 penalties assessed—whatever the amount of the fine—weren't enough to convince this company to take a hard look at safety for its employees.

The Sago mine was a habitual violator—a habitual violator. It was being assessed only the minimum penalties allowed by the law. The maximum penalty could be $220,000 or $1 million, but it makes no difference unless MSHA is willing to impose and collect that maximum amount. Habitual violators must be brought to a state of fearing the consequences of a heavy fine to be paid when assessed. We have to get tough about enforcing the law.

At MSHA, complacent attitudes and arrogance rule at the top. At the Senate Appropriations Labor-HHS Subcommittee hearing on Monday, Acting MSHA Secretary David Dye was asked directly about the issue of communications technology: Why are the miners trapped underground not able to communicate with the rescue teams, and can rescue teams better locate trapped miners? Dye was asked directly if technology exists to correct these problems, and he stated for the record that such technology did not exist.

Now get that. Let me say that again. At this hearing, conducted by one of the finest Senators on either side of the aisle here, Republican Senator SPECTER of Pennsylvania, at that record hearing, Acting MSHA Secretary David Dye was asked directly about the issue of communications technology: Why are the miners trapped underground not able to communicate with the rescue teams, and can rescue teams better locate trapped miners? Dye was asked directly if technology exists to correct these problems, and he stated for the record that such technology did not exist.

How about that. That statement proved to be utterly, utterly, utterly false. Minutes later, after Dye was asked if such technology existed, the subcommittee heard from a former MSHA Secretary, Davitt McAteer, who verified that such communications technology certainly does exist, and Mr. McAteer put tracking and communications devices on the table—on the table—right in front of the subcommittee.

What does that say about the people leading this agency when they don't even know about the existence of lifesaving technology that ought to be in the mines? What does that say? Shame, shame on them. I am talking about the people leading the agency when they testified that they don't even know about the existence of lifesaving technology that ought to be in the mines. Why is the Acting Administrator of MSHA, charged with protecting the health and safety of coal miners, so abysmally ignorant of these technologies? The families of these miners and the Members of this Congress are owed an explanation.

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

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

In 1995, labor and industry jointly proposed a number of initiatives on mine emergency preparedness to improve mine rescue technology and communications. Perhaps one of the most important was to address the dwindling number of mine rescue teams. MSHA has ignored the report and its recommendations. In 2003, the General Accountability Office made a list of recommendations to the Secretary of Labor to help MSHA protect the safety and health of the miners. What happened? MSHA ignored the recommendation. Shame, shame.

Our Nation's coal miners are vital to our national economy. During World War I, coal miners put in long, brutal

hours to make sure that the Nation had coal to heat our homes, power our factories, and fuel our battleships. In World War II, American coal miners again provided the energy to replace the oil that was lost with the outbreak of that global conflict. During the oil boycott-induced energy crisis of the 1970s, our Nation once again called upon—yes, our Nation once again turned, yes, to the coal miners to bail the Nation out of trouble, and the coal miners did.

Coal produces over half of the electricity we use every day in these United States. Here is an example of it all around the ceiling here, the lights that are burning making it bright as day right here in this Chamber. That is coal. That is energy that comes from coal, burning coal—coal that is produced by hard, backbreaking labor in the dangerous mines. Coal is dug out, scratched out by the coal miner.

So today America's coal miners provide the electricity—the electricity right here—the electricity that lights the streets of Washington, New York City, Sacramento, and all over this country, and it heats our homes in winter, lights our homes in summer.

Those coal miners could provide the key to our Nation's future energy security. You can bet on those coal miners—and they are of a different breed, a special breed. If we made better use of this abundant natural resource, coal, we could reduce our country's dangerous dependency on foreign oil.

We could make ourselves less dependent on the rule of despots, and less of a target for the fanatics and the terrorists of the Middle East.

God blessed our country. Yes, the Almighty who was there at the beginning blessed our Nation, especially West Virginia with an abundance of coal, and God provided us with the good, the brave, the hard-working coal miners to dig that coal and bring it from the Earth, the bowels, the dark, the black, the darkness. The coal miners have never failed our Nation.

I know. I grew up in a coal miner's home. I married a coal miner's daughter. Her brother-in-law died from black lung. His father was killed under a slate fall.

We have lived—my family has lived—with coal miners. We have coal miners in our families. We have lost loved ones.

The test of a great country such as ours is how serious we are about protecting those among us who are most at risk, whether it be innocent children who need guarding from hunger and disease or our elderly and sick who cannot afford medication. Those men and women who bravely labor in such dangerous occupations as coal mining to provide our country with critical energy should be protected from exploitation by private companies with callous attitudes about health and safety. That is why MSHA exists. That is why we created MSHA. That is why I was here when that agency was created. But MSHA is just a paper tiger without aggressive leadership. If we are truly a moral nation, and I believe that we should be, moral values must be reflected in government agencies that are charged with protecting the lives of our citizens. The last thing that we need is ho hum, arrogant attitudes from this administration and its officials. Such calumny abuses the public trust and results in the kind of loss of life that so grieves families today in Upshur and Logan Counties and all across my home State of West Virginia.

Madam President, in memory of the Sago and Alma Miners, and all those who labor and have labored in our nation's coal mines, I ask unanimous consent that the eulogy of Homer Hickam, from the Sago Memorial Service on January 15, 2006, be printed in the CONGRESSIONAL RECORD.

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

Families of the Sago miners, Governor Manchin, Mrs. Manchin, Senator BYRD, Senator ROCKEFELLER, West Virginians, friends, neighbors, all who have come here today to remember those brave men who have gone on before us, who ventured into the darkness but instead showed us the light, a light that shines on all West Virginians and the nation today:

It is a great honor to be here. I am accompanied by three men I grew up with, the rocket boys of Coalwood: Roy Lee Cooke, Jimmie O'Dell Carroll, and Billy Rose. My wife Linda, an Alabama girl, is here with me as well.

As this tragedy unfolded, the national media kept asking me: Who are these men? And why are they coal miners? And what kind of men would still mine the deep coal?

One answer came early after the miners were recovered. It was revealed that, as his life dwindled, Martin Toler had written this: It wasn't bad. I just went to sleep. Tell all I'll see them on the other side. I love you.

In all the books I have written, I have never captured in so few words a message so powerful or eloquent: It wasn't bad. I just went to sleep. Tell all I'll see them on the other side. I love you.

I believe Mr. Toler was writing for all of the men who were with him that day. These were obviously not ordinary men.

But what made these men so extraordinary? And how did they become the men they were? Men of honor. Men you could trust. Men who practiced a dangerous profession. Men who dug coal from beneath a jealous mountain.

Part of the answer is where they lived. Look around you. This is a place where many lessons are learned, of true things that shape people as surely as rivers carve valleys, or rain melts mountains, or currents push apart the sea. Here, miners still walk with a trudging grace to and from vast, deep mines. And in the schools, the children still learn and the teachers teach, and, in snowy white churches built on hillside cuts, the preachers still preach, and God, who we have no doubt is also a West Virginian, still does his work, too. The people endure here as they always have for they understand that God has determined that there is no joy greater than hard work, and that there is no water holier than the sweat off a man's brow.

In such a place as this, a dozen men may die, but death can never destroy how they lived their lives, or why.

As I watched the events of this tragedy unfold, I kept being reminded of Coalwood, the mining town where I grew up. Back then, I thought life in that little town was pretty ordinary, even though nearly all the men who lived there worked in the mine and, all too often, some of them died or was hurt. My grandfather lost both his legs in the Coalwood mine and lived in pain until the day he died. My father lost the sight in an eye while trying to rescue trapped miners. After that he worked in the mine for fifteen more years. He died of black lung.

When I began to write my books about growing up in West Virginia, I was surprised to discover, upon reflection, that maybe it wasn't such an ordinary place at all. I realized that in a place where maybe everybody should be afraid after all, every day the men went off to work in a deep, dark, and dangerous coal mine instead they had adopted a philosophy of life that consisted of these basic attitudes:

We are proud of who we are. We stand up for what we believe. We keep our families together. We trust in God but rely on ourselves.

By adhering to these simple approaches to life, they became a people who were not afraid to do what had to be done, to mine the deep coal, and to do it with integrity and honor.

The first time my dad ever took me in the mine was when I was in high school. He wanted to show me where he worked, what he did for a living. I have to confess I was pretty impressed. But what I recall most of all was what he said to me while we were down there. He put his spot of light in my face and explained to me what mining meant to him. He said, ''Every day, I ride the mantrip down the main line, get out and walk back into the gob and feel the air pressure on my face. I know the mine like I know a man, can sense things about it that aren't right even when everything on paper says it is. Every day there's something that needs to be done, because men will be hurt if it isn't done, or the coal the company's promised to load won't get loaded. Coal is the life blood of this country. If we fail, the country fails.''

And then he said, ''There's no men in the world like miners, Sonny. They're good men, strong men. The best there is. I think no matter what you do with your life, no matter where you go or who you know, you will never know such good and strong men.''

Over time, though I would meet many famous people from astronauts to actors to Presidents, I came to realize my father was right. There are no better men than coal miners. And he was right about something else, too:

If coal fails, our country fails.

The American economy rests on the back of the coal miner. We could not prosper without him. God in His wisdom provided this country with an abundance of coal, and he also gave us the American coal miner who glories in his work. A television interviewer asked me to describe work in a coal mine and I called it ''beautiful.'' He was astonished that I would say such a thing so I went on to explain that, yes, it's hard work but, when it all comes together, it's like watching and listening to a great symphony: the continuous mining machines, the shuttle cars, the roof bolters, the ventilation brattices, the conveyor belts, all in concert, all accomplishing their great task. Yes, it is a beautiful thing to see.

There is a beauty in anything well done, and that goes for a life well lived.

How and why these men died will be studied now and in the future. Many lessons will be learned. And many other miners will live because of what is learned. This is right and proper.

But how and why these men lived, that is perhaps the more important thing to be studied. We know this much for certain: They were men who loved their families. They were men who worked hard. They were men of integrity, and honor. And they were also men who laughed and knew how to tell a good story. Of course they could. They were West Virginians!

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

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

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

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

We are proud of who we are.
We stand up for what we believe.
We keep our families together.
We trust in God.
We do what needs to be done.
We are not afraid.

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

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

The legislative clerk proceeded to call the roll.

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

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

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

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

Mr. KERRY. I thank the Chair.

The PRESIDING OFFICER. The Senator from Kentucky.

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

Judge Alito is supremely qualified.

He has a record of fairness and judicial restraint. He will do a fine job on the Supreme Court.

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

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

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

I take this responsibility very seriously.

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

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

I don't find myself agreeing with the Washington Post or the Louisville Courier-Journal newspapers very often.

But even those papers agree that Judge Alito should be confirmed.

I first met Judge Alito this past fall.

I did not know much about him when his nomination was announced by President Bush.

I reserved judgment about his nomination until I had a chance to meet with him.

From that meeting it became clear that I could support his nomination.

And his performance at his confirmation hearing further solidified my support for his nomination.

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

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

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

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

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

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

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

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

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

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

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

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

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

Clarity is something we certainly need on the Supreme Court.

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

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

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

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

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

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

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

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

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

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

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

We—who make policy decisions—are accountable to the voters.

The Justices of the Supreme Court are not.

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

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

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

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

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

That disturbs some who belong to this body.

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

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

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

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

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

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

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

Our judges are insulated from public pressure.

It is this way so that they can make impartial and fair judgments on cases—no matter how popular or unpopular the result.

They are also insulated from the political process to prevent undue influence from Congress or the President.

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

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

But that is not good enough for some who oppose Judge Alito.

They want judges who will make broad policy decrees from the bench.

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

They want activist judges. And Judge Alito is not an activist judge.

Judge Alito will stand up to the activists on the Supreme Court and help make sure the Court follows its proper and vital role.

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

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

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

I press upon my colleagues to support this nomination.

I will vote for Judge Alito and whatever measures and procedures necessary to ensure he gets a final vote up or down.

I am proud to support him.

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

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

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

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

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

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

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

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

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

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

He said on his second day of hearings:

> . . . it is not our job to try to produce particular results. We are not policymakers and we shouldn't be implementing any sort of policy agenda or policy preferences that we have.

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

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

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

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

> I would overlook many technical violations of the Federal Rules of Appellate Procedure and our local rules, but I do not think it is too much to insist that Pirolli's brief at least state the ground on which reversal is sought.

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

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

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

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

The PRESIDING OFFICER. The Senator from Arizona is recognized.

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

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

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

The hearings have occurred, and I believe Judge Alito has performed admirably. There were 18 hours and 700 questions, and there probably would have been a lot more questions if there

had not been the length of the questions, sometimes lasting as long as a half hour.

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

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

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

And they go on to say in their letter:

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

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

Finally, they go on to say:

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

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

I will make one other comment. We are dragging out this process for no good reason. We all know what the outcome of the vote is going to be. We have other pressing business, including lobbying reform, which needs to be taken up by this body. We have pending the issue of the PATRIOT Act. There are many issues we should be addressing and at least beginning to work on, rather than dragging out this process. I wish my colleagues on the other side of the aisle would see fit to bring this process to a close and let us vote on Judge Alito and move on to other pressing issues.

The fact that there will probably be a large number of votes on that side of the aisle against Judge Alito doesn't upset me as much as it saddens me. I didn't agree with the judicial philosophy of Justice Breyer or Justice Ginsburg. I knew that Justice Ginsburg worked for the ACLU and held liberal views. But I also believe that elections have consequences. The President of the United States—at that time, President Clinton—nominated them as his selection. There were very few—a handful of votes against either Justice Breyer or Justice Ginsburg.

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

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

I thank my colleagues, and I yield the floor.

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

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

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

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

It is clear to me that President Bush picked two very well qualified people to serve on the Supreme Court when it came his time to choose a Supreme Court nominee. You don't have to take my word for it. Seven judges testified before the committee who served on the Third Circuit with Judge Alito. They were nominated by Lyndon Johnson, Richard Nixon, Ronald Reagan, George H.W. Bush, and Bill Clinton, really a hodgepodge of nominees in terms of their source. These judges had a universal belief regarding Judge Alito, and that belief was that he is a great colleague, a good man, a judge's judge. They came before our committee to his defense.

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

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

LOG JUDGES TESTIMONY TALKERS

Five sitting and two former judges from the U.S. Court of Appeals for the 3rd Circuit testified on behalf of Judge Samuel Alito's nomination to the Supreme Court.

The judges included nominees of Presidents Lyndon Johnson, Richard Nixon, Ronald Reagan, George H.W. Bush, and Bill Clinton. Collectively they have served with Judge Alito for more than 75 years, watching him work and evaluating his intellect, character, independence, and judgment.

Judge Becker on working with Judge Alito up close: ''There is an aspect of appellate judging that no one gets to see—no one but the judges themselves: how they behave in conference after oral argument, at which point the case is decided, and which, I submit, is the most critically important phase of the appellate judicial process. In hundreds of conferences, I had never once heard Sam raise his voice, express anger or sarcasm, or even try to proselytize. Rather, he expresses his views in measured and temperate tones.''

Judge Becker on Judge Alito's intellect and open-mindedness: ''Judge Alito's intellect is of a very high order. He's brilliant, he's highly analytical and meticulous and careful in his comments and his written work. He's a wonderful partner in dialogue. He will think of things that his colleagues have missed. He's not doctrinaire, but rather is open to differing views and will often change his mind in light of the views of a colleague.''

Judge Becker on whether Judge Alito is an ideologue: ''The Sam Alito that I have sat with for 15 years is not an ideologue. He's not a movement person, He's a real judge deciding each case on the facts and the law, not on his personal views, whatever they may be. He scrupulously adheres to precedent. I have never seen him exhibit a bias against any class of litigation or litigants. . . . His credo has always been fairness.''

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

Chief Judge Scirica on Judge Alito's open-mindedness: ''Like a good judge, he considers

and deliberates before drawing a conclusion. I have never seen signs of a predetermined outcome or view, nor have I seen him express impatience with litigants or with colleagues with whom he may ultimately disagree. He is attentive and respectful of all views and is keenly aware that judicial decisions are not academic exercises but have far-reaching consequences on people's lives.''

Judge Barry on Judge Alito's service as U.S. Attorney: ''The tone of a United States Attorney's Office comes from the top. The standard of excellence is set at the top. Samuel Alito set a standard of excellence that was contagious—his commitment to doing the right thing, never playing fast and loose with the record, never taking a shortcut, his emphasis on first-rate work, his fundamental decency.''

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

Judge Aldisert on working with Judge Alito for 15 years: We who have heard his probing questions during oral argument, we who have been privy to his wise and insightful comments in our private decisional conferences, we who have observed at first hand his impartial approach to decision-making and his thoughtful judicial temperament and know his carefully crafted opinions, we who are his colleagues are convinced that he will also be a great Justice.

Judge Garth on Judge Alito's lack of an agenda: ''I can tell you with confidence that at no time during the 15 years that Judge Alito has served with me and with our colleagues on the court and the countless number of times that we have sat together in private conference after hearing oral argument, has he ever expressed anything that could be described as an agenda. Nor has he ever expressed any personal predilections about a case or an issue or a principle that would affect his decisions.''

Judge Garth on Judge Alito's personality: ''Sam is and always has been reserved, soft spoken and thoughtful. He is also modest, and I would even say self-effacing. And these are the characteristics I think of when I think of Sam's personality. It is rare to find humility such as his in someone of such extraordinary ability.''

Judge Gibbons on Judge Alito's independence from the executive: ''The committee members should not think for a moment that I support Judge Alito' s nomination because I'm a dedicated defender of [the Bush] administration. On the contrary, I and my firm have been litigating with that administration for a number of years over its treatment of detainees held at Guantanamo Bay, Cuba, and elsewhere. And we are certainly chagrined at the position that is being taken by the administration with respect to those detainees.

''It seems not unlikely that one or more of the detainee cases that we are handling will be before the Supreme Court again. I do not know the views of Judge Alito respecting the issues that may be presented in those cases. I would not ask him. And if I did, he would not tell me. I'm confident, however, that, as an able legal scholar and a fair-minded Justice, he 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.''

Judge Lewis on his own liberal politics: ''I am openly and unapologetically pro-choice and always have been. I am openly—and it's very well known—a committed human rights and civil rights activist and am actively engaged in that process as my time permits. . . . I am very, very much involved in a number of endeavors that one who is familiar with Judge Alito's background and experience may wonder—'Well, why are you here today saying positive things about his prospects as a Justice on the Supreme Court?' And the reason is that having worked with him, I 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.''

Judge Lewis on Judge Alito's honesty and integrity: ''As Judge Becker and others have alluded to, it is in conference, after we have heard oral argument and are not propped up by law clerks—we are alone as judges, discussing the cases—that one really gets to know, gets a sense of the thinking of our colleagues. And I cannot recall one instance during conference or during any other experience that I had with Judge Alito, but in particular during conference, when he exhibited anything remotely resembling an ideological bent.''

Judge Lewis on Judge Alito and civil rights: ''If I believed that Sam Alito might be hostile to civil rights as a member of the United States Supreme Court, I guarantee you that I would not be sitting here today. . . . My sense of civil rights matters and how courts should approach them jurisprudentially might be a little different. I believe in being a little more aggressive in these areas. But I cannot argue with a more restrained approach. As long as my argument is going to be heard and respected, I know that I have a chance. And I believe that Sam Alito will be the type of Justice who will listen with an open mind and will not have any agenda-driven or result-oriented approach.''

Judge Lewis on why he endorses Judge Alito: ''I am here as a matter of principle and as a matter of my own commitment to justice, to fairness, and my sense that Sam Alito is uniformly qualified in all important respects to serve as a Justice on the United States Supreme Court.''

Mr. GRAHAM. Mr. President, I have limited time, so I am not going to read them all. But I ask each Member of the body to look, if they can, at these short quotes, or if they want to listen to the whole testimony, they can certainly retrieve it and ask the question of themselves: Why would these judges from a variety of different philosophies be coming before our committee and testifying on behalf of Judge Alito if he truly was an ideologue or out of the mainstream, if he held positions on abortion or any other line of cases that were extreme in nature or outside the judicial mainstream of what a judge should do?

Why would the American Bar Association, after looking at hundreds of opinions and thousands of cases in which Judge Alito participated, come to the conclusion that he is a judge's judge, that he has the temperament, the disposition, and that there is no bias when you look at all the cases where he favors one class of Americans over another? Why would so many law clerks, as Senator MCCAIN mentioned, come to the judge's aid if he was a person who exhibited a hard heart, for lack of a better way of saying it, a person who took the law and applied it to individuals in this country coming before him in a statistical manner, not a human manner?

I would argue that of all the records that have ever been amassed for a nominee Judge Alito's record is on par with Ginsburg, Breyer, and anyone else who has ever been nominated, in terms of being highly qualified—15 years on the bench and a good person.

Those who know him best, those who work with him when the cameras are not on and when nobody else is around all have the same view of Judge Alito: He is a good person who takes his job seriously. He follows the law, and he is conservative, but he is mainstream in terms of what we expect a judge to be.

Who is in the mainstream in America when it comes to judging? And who is to determine what the mainstream is? If you would ask me to judge a Democratic nominee as to whether they were in the mainstream of legal thought I would try to give you an honest answer. But if you wanted to ask someone other than me—I am a Republican—I would probably understand why you want to ask somebody other than me.

How do we determine if a person is in the mainstream of being a judge? Rather than asking a politician, maybe we should go to a source outside the political moment, outside a political body, who believes that this is a hugely important decision not only for the country but has political consequences.

The reason this is an important political decision is because special interest groups are watching our every move. Millions of dollars have been spent on advertising for and against Judge Alito. There are groups out there that have made it their reason for existing to deny this man a vote or to defeat him. There are groups out there that are bent on supporting him.

What do nonpolitical people say? What do people who have no political ax to grind say? What do the people who have sat with him a decade plus say, his fellow judges, African-American judges? They say he is not an ideologue, that he is a good judge.

What does the American Bar Association say? That he has a temperament—over 2,000 people were interviewed, I think it was; some amazing amount of interviews conducted—a temperament beyond question; that he approaches each case without a bias, but he tries to find the best he can, looking through his philosophy of judging, to get the right answer. Those who worked with him as a prosecutor, who have been his clerks, all have nothing but admiration for this man.

So why will he get, at best, five or six Democratic votes? Why did Justice Ginsburg get 96 votes? I would argue she deserved 96 votes, but she was no better qualified than Judge Alito. The same things that were said about Justice Ginsburg, in terms of her temperament and her legal abilities, are being said about Judge Alito.

Politics has changed. Some members of our committee openly said things are different now than they were then. This is replacing Justice O'Connor. The

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

If that is the only reason you were voting for Justice Ginsburg, you knew with a high degree of certainty the balance of power on the Court would change when it came to that one issue.

Somehow back then people of a pro-life persuasion set that aside and looked at her qualifications. She was never attacked, that I can find in the RECORD, for being the general counsel for the American Civil Liberties Union, a left of center organization, from a conservative's point of view, that embraces many causes with which I personally disagree. But people understood there was a difference between lawyering and judging.

I would argue forcefully that the unpopular cause needs the best lawyer. Instead of holding it against her for representing politically unpopular causes, causes with which I completely disagree, I would give her credit as a lawyer because the unpopular cause needs the best lawyers in the country. The more popular it is, the worse lawyer you can have because you are likely to win.

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

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

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

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

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

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

I end with this thought. Elections do matter. President Clinton earned the right from the American people to make two selections. He picked people of known liberal philosophy and inclination to be on the Court. These are legitimate philosophies to embrace and to have. He picked extremely well-qualified people to be on the Court. They are on the Court now with an overwhelming vote.

President Bush and his nominees have been treated differently. I worry more about the future of the judiciary than I worry about President Bush because his time will come and it will go. He may have another pick. But what we are doing on his watch is going to forever change the way the Senate relates to the judicial confirmation process if we don't watch it.

For someone such as Judge Alito to be rejected by 80 percent of the Democratic caucus is not healthy for the country because, quite frankly, he has earned a better showing than that. He has lived his life well.

He has been a good judge. He is a good man. His record, his colleagues, his associates, and everything he has done as a lawyer, judge, and person needs to be considered in its entirety—not for political ends for the moment.

This vote we are about to take in the next few days is going to change the way the Senate works for a long time to come. My belief is it is going to change it for the worse.

I yield the floor.

The PRESIDING OFFICER. The Senator from Maryland is recognized.

Ms. MIKULSKI. Mr. President, on behalf of the Democratic leader, I ask unanimous consent that the hour of Democratic time be controlled as follows: MIKULSKI, CLINTON, and KERRY up to 20 minutes each, and Senator NELSON of Florida up to 5 minutes.

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

Ms. MIKULSKI. Mr. President, I rise to voice my opinion on the nomination of Judge Alito. I view this process with enormous seriousness. It is not like a political campaign because the Supreme Court is a lifetime appointment.

Senators are called upon to make two decisions that are irrevocable and irretrievable. One is the decision to go to war and put our troops in harm's way. A very serious decision. You can't say the next day, Whoops, I made a mistake. The other is the confirmation of a Justice of the Supreme Court. When that person goes on the Court, he or she is there for a lifetime unless they commit an impeachable offense.

This vote will have an immense impact on future generations. Judge Alito is 55 years old. We can presume that he will be blessed with good health and will serve if confirmed for at least another 20 years. He will rule on thousands of cases, which themselves will be around for decades after he has left the court. His decisions will affect the lives of virtually all Americans for generations.

This vote will have an immense impact because of who the judge is replacing, Justice Sandra Day O'Connor, the very first female ever appointed to the Supreme Court. Wow. She has been a terrific Justice of the Supreme Court, a historical figure indeed. She broke the glass ceiling of the highest Court in our land to become the first female justice on the United States Supreme Court. She has been a true pioneer in helping to pave the way for women in the legal profession. Justice O'Connor's impact on women in America reached beyond being a mentor and a role model. Because it is not only what she did for women—it was the outstanding Justice she was. She brought new perspectives to the Court, a great intellectual ability, and she brought a strong sense of independence. That is why I think she was picked by Ronald Reagan. She has been squarely in the mainstream, and often a critical swing vote, which determined which way a key case was decided. She brought the

''i'' word to the Court—not ego but intellectual rigor and integrity and independence. That is why she was such a key vote, and often her vote determined whether fundamental rights were protected or not often depended on Justice O'Connor's vote.

When we pick the nominee to replace Justice Sandra Day O'Connor, I hoped the President would have picked another woman. When he nominated Harriet Miers, I was shocked, stunned, and even repulsed by the vitriolic, vicious attack on Harriet Miers.

After Harriet Miers was withdrawn, who did they give us? Certainly, I think in all of the United States of America there was a qualified woman who could have been nominated to serve on the Court. It would have been nice if we had taken the time to find one, but I don't know if they were really looking because if you seek you shall find.

Who did the President nominate? Judge Alito.

I want to be very clear at the outset: I am going to vote to oppose the confirmation of Judge Alito, and I do so for a variety of reasons.

One, I don't know who the real Judge Alito is. Is he the Judge Alito who, when he applied for a job at the Reagan Justice Department, pandered to every right-wing cliche, message-driven focus group identified cause, attack affirmative action, one person, one vote, and all of that? Is that the Judge Alito we will have serving on the Supreme Court? He says, No, I wrote that because I was applying for a job. Hey, what is he doing here right now in the confirmation process? He is applying for a job.

The process has occurred in the public and transparent arena.

But who is he? Is he a so-called new, moderate, mainstream, ''Gee, I have always been in the middle'' kind of guy or is he the person who applied to work at Reagan Justice Department whose writings validate his pattern of thinking?

Judge Alito failed to answer too many questions during the confirmation hearing. Judge Alito refused to clarify his views and his philosophy. He has written many, many decisions as a Circuit Court Judge which are clearly out of the mainstream. He failed to clarify his positions on the constitutional right to privacy, other fundamental rights and settled law. It is also unclear if he will be able to keep his strong personal views from influencing his decisions on the highest court of the land. In the end, Judge Alito failed to answer too many questions; he appears to be out of the mainstream.

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

First, is the nominee competent? Judge Alito is competent. He has the highest rating of the American Bar Association. I listen to them very carefully because we consider them an important advisory group that weighs in to the Senate. I hope that same standard of looking to the American Bar is applied to other nominees in the future.

Second, does he have the highest personal and professional integrity? Personal integrity: I would say yes. By all accounts, he is an honest man. He pays his bills. His wife is devoted to him. He seems to have wonderful children.

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

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

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

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

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

First, let's take the issue of civil rights. One of the most important civil rights is the right to vote. Yet Alito left me with serious doubts on what his true views are. When applying for a job in the Reagan administration, Alito said he strongly disagreed with the Warren Court on legislative reapportionment which became the bedrock principle of one person, one vote. That Supreme Court decision changed the face of America. It changed the face of how districts were drawn up, and made sure, therefore, that people truly could be represented in legislative bodies.

He later said in the judiciary hearings that the one person, one vote doctrine is settled law. But he couldn't explain why he wrote the other statement on his job application or why his opposition to the Warren Court's decisions inspired him to go to law school.

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

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

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

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

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

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

Then there is the right to privacy. In the area of the constitutionally protected right of privacy, it is unclear what Judge Alito believes the Constitution protects. Again, I go back to the statements he made when he applied to work in the Reagan administration. He was 35 years old, so he wasn't some kid who wasn't sure about himself. He was exploring big theories and big ideas. He was 35 years old. He was applying for a job at the Justice Department. You have to be a pretty experienced professional to even think you are qualified to apply for a job at the Justice Department. He was seasoned, and he was experienced, but he also wrote in that application that he was proud he would have argued that the Constitution does not protect the right to an abortion.

Let me say these are his words, not Senator MIKULSKI's. Not only did he take the position to eliminate the rights in Roe v. Wade, he thought it was important that he emphasized it in his job application.

Now at the hearings he presents a different view. The key question for Judge Alito on the constitutionally protected right to privacy was whether he considered Roe to be settled law.

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

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

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

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

Sure, we have to look out for terrorists, but should every book checked out of a library trigger the government spying on you? Do you want them listening while you talk to your girlfriend? Do you want them monitoring you and what church you go to?

These are big questions we are facing as a nation. We need to have mindful judges who help set the appropriate parameters to protect citizens against the predators in our society, to be sure our Government itself does not become a predator on the ordinary citizen's privacy. These are big issues.

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

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

I have given careful consideration to this nomination. I have carefully watched the Judiciary Committee hearings. I may not be a member of the Judiciary Committee, but I have paid close attention to the hearings and watched them on C–SPAN. I went over his past writings, his decisions as a judge and the testimony of others.

In the end, I have too many doubts about what Judge Alito will mean on the Supreme Court, what he will mean for civil rights, our civil liberties, checks and balances on executive power, caused by what he said—and even more by what he refused to say. I am concerned he is out of the mainstream, that he is willing to say what he needs to say to get a job, that he is an ideologue and that his personal views will influence his decisions. It is not acceptable that Judge Alito has explained that he either forgot why he wrote something or that his early writings were simply for a job application. What he believes is what he is. It will shape the Supreme Court for the next 20 years.

After careful review of the record before the Senate, I have too many doubts, too many unanswered questions. Doubts about his commitment to providing access to courts for Americans, ensuring appropriate checks and balances among the three branches of government and the fundamental right to privacy. The Supreme Court nomination is too important a decision to roll the dice; I am afraid I will come up with snake eyes. Therefore, when my name is called in the United States Senate for his nomination, I will vote no.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mrs. CLINTON. Mr. President, I associate myself with the eloquent remarks of the Senator from Maryland. Once again, she evidences the rare combination of high intellect, quick wit, and a savvy understanding of what is important to the people she represents.

The nomination of Judge Samuel A. Alito, Jr., to the Supreme Court of the United States is a matter of great, even monumental, importance to all—to our children and to future generations of Americans.

I have spent a lot of time in my State over the last 2 weeks. I have traveled from one end of it to the other, from Long Island to Buffalo. I have to say, Judge Alito's name is not on the lips of most of my constituents. They want to talk to me about the complex and confusing Medicare prescription drug benefit. They want to ask about the culture of corruption that seems to have taken over Washington under the Republican leadership. They have questions about their health care which is at risk, even if you are employed, or the pensions which seem to disappear with regularity these days. They are concerned about the day-to-day, bread-and-butter, table-top issues that we all live with.

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

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

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

Each time we have made strides forward, there have been vocal voices of opposition. There have been those who have wanted to go back. At those moments of profound importance to our

country, the Federal courts have been the guardians of our liberties, have stood on the side of greater freedom and opportunity.

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

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

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

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

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

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

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

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

When I ran for the Senate, I told New Yorkers that I would only vote for judges who would affirm constitutional precedents, such as Roe and Brown and other landmark achievements and expanding rights and the reach of equality for all Americans. This is about more than rhetoric. This is very real. The American people are counting on us not to be a rubberstamp but counting on us to make sure the President's nominee will not take us backward.

I also view this nomination through the prism of the Justice that Judge Alito will replace. I have not always agreed with Justice Sandra Day O'Connor. But she has shown, throughout her career of distinguished service to the Court that one Justice makes a big difference. One Justice can protect our constitutional rights. Justice O'Connor is a true conservative, a mainstream jurist. She appreciated the advancements we have made as a society because she lived them. Anyone who has ever read her autobiography about this little cowgirl growing up on a ranch in Arizona, going off to school, eventually going to Stanford Law School, graduating near the top of her class and being unable to find a job simply because she was a woman does not only intellectually understand why our history is about moving forward and removing the obstacles to God-given human potential, she feels it. She understands it.

Time and time again, she showed she appreciated the advancements we have made as a society. She has fought to ensure they continue. Her vote was often the defining vote on which key civil liberties and rights rested. She exercised it with care and independent judgment.

Any fair reading, in my view, of Judge Alito's record does not demonstrate that same independence of judgment, nor does it illustrate a grasp, either intellectual or emotional, of the day-to-day struggles that tens of millions of Americans face. On the contrary, Judge Alito proudly announced his personal opposition to a woman's right to choose early in his career in the now infamous 1985 job application for a position in the Reagan administration. Although he has tried to distance himself from the comments he made in that document, his time on the bench shows an unapologetic effort to undermine the right to privacy and a woman's right to choose.

I believe, and I have said so for many years, abortion should be safe, it should be rare, but it should be legal. I understand it is a difficult and even tragic choice for many women. It is a decision of conscience. Therefore, it should be a constitutionally protected decision made not by the Government, not by the majority—whoever the majority might be—but between a woman, her doctor, and her faith in God.

Judge Alito does not share this view. And I think we can be certain that, freed from the constraints of Supreme Court precedent, he will intensify his campaign to roll back these important privacy rights.

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

Judge Alito's constrained views have not been limited to issues of privacy. While on the Third Circuit, he has rarely sided with individuals seeking relief from discrimination on the basis of race, age, gender, or disability. In fact, in the vast majority of civil rights cases, Judge Alito has sided with those who would infringe on the civil rights of Americans. For example, in several dissents, he has called for curtailing what is called title VII of the Civil Rights Act of 1964, the landmark statute prohibiting discrimination against women and minorities in the workplace.

These individual views, as manifested by his writings, his work in the Government, and his opinions on the bench, are even more troubling because he seems to favor Executive power so much over the other branches of Government. So I also fear he will not respect the system of checks and balances that our Founders so carefully set out in the Constitution. No one who has read the Federalist Papers or the debate that our Founders had when constructing the Constitution or who understands the historical context in which our Declaration of Independence and our Revolution occurred could underestimate the importance they placed on having three truly independent and equal branches of Government.

The Founders understood human nature. They got it. They knew that unchecked power would lead to abuses. And we have seen some of that right here in Washington over the last 5 years. They realized that we had to check and balance against power centers in order to bring out the better ''angels'' of our nature, but also to keep a watch on each other.

I do not believe, after reviewing Judge Alito's record, he understands or respects this central principle to the way America is set up. He has sought to expand the power and purview of the executive branch at nearly every turn, while simultaneously stripping Congress of its authority and curtailing the rights enjoyed by private citizens. For example, while working for the

Reagan administration, he made the argument that Cabinet officials who are charged with authorizing illegal wiretaps of Americans in this country should be entitled to absolute immunity. At a time when this President and his political party stand accused of political overreaching and abuse of power, we must demand from our judiciary a respect for the proper role of each of our three branches of Government. But Judge Alito's excessive deference to Presidential authority, coupled with his restrictive view of congressional authority, tells me he does not have the proper reverence for separation of powers.

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

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

Since his appointment to the Third Circuit, Judge Alito has aggressively sought to promote this theory of limited congressional power. In 1996, he voted to invalidate parts of our Federal gun laws, arguing there was no evidence in the record to determine that Congress had the power under the Constitution's commerce clause to enact legislation that regulated the sale of machine guns. In another case, Judge Alito wrote an opinion striking down Congress's right to make a State agency comply with the Family and Medical Leave Act. And just 3 years later, the Supreme Court, with a similar set of facts, reached precisely the opposite conclusion.

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

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

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

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

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

Judge Alito, if confirmed, may hold a seat on the Supreme Court for a generation—long after this President has left office. Perhaps through 8 to 10 Presidential elections, decades of progress would fall prey to his radical ideology, jeopardizing not only civil rights, civil liberties, health and safety and environmental protections, but also fundamental rights such as the right to privacy. Our Federal Government could be transformed into one where Congress is largely irrelevant and the President is permitted to make up the rules as he goes. I do not believe Judge Alito's vision of that America is what our Founders intended for us. He would take us backward, when it has never been more important to move forward together.

I sincerely hope my concerns about Judge Alito are unfounded, but I suspect they are not, and our children and grandchildren will pay the price. He has not demonstrated a proper respect for the rule of law, our Constitution, and the principles, freedoms, rights, and privileges that Americans hold most dear. I, therefore, cannot give my consent to his confirmation.

Mr. President, I ask unanimous consent that letters written to Senators SPECTER and LEAHY opposing this nomination be printed in the RECORD.

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

NATIONAL ORGANIZATION FOR WOMEN,
Washington, DC, December 13, 2005.

DEAR SENATOR, NOW is strongly opposed to the elevation of Judge Samuel Alito to the Supreme Court of the United States, and with every passing day more information appears that reconfirms our opposition. We urge you to review his record, writings and judicial philosophy and join us in opposing his nomination.

Not only is NOW disappointed that President Bush has proposed to replace Justice Sandra Day O'Connor with yet another white male ultra-conservative, but we are deeply disturbed by the twenty-year track record that places Judge Alito on the far right of the judicial spectrum, especially when it comes to women's and civil rights. If Samuel Alito is confirmed by the U.S. Senate, many of our fundamental rights will be at great risk and could well be lost entirely.

A bedrock principle for NOW is full Constitutional rights for women and at the heart of that equality is self determination for women when they deal with their reproductive health care and childbearing decisions. When applying for a position in the Reagan administration in 1985, Alito stated he was ''particularly proud'' of his work on cases arguing ''that the Constitution does not protect a right to an abortion.'' A memo released later shows that Alito told his boss that two pending cases provided an ''opportunity to advance the goals of overruling Roe v. Wade and, in the meantime, of mitigating its effects.'' These are not the actions of someone simply trying to please his boss, but proud convictions that we have no reason to believe have altered in the past two decades.

Also troubling is his proud touting of his membership in a conservative Princeton alumni group that complained about the admission of women and the number of minority students on the elite college campus. How will Judge Alito deal with educational opportunity and Title IX? How will Judge Alito deal with pay equity and workplace policies as well as affirmative action and job benefit issues that disproportionately affect women? How will Judge Alito deal with challenges to federal legislation guaranteeing disability rights, lesbian and gay rights, and freedom from domestic and sexual violence? We believe he will rule on the side of narrowing our freedoms and barring our redress in court.

Please consider all of these issues as you review Samuel Alito's fitness to serve on our highest court in the land. Based on his record, he will not come down on the side of fairness and equality for all. We ask that you vote against his nomination.

Sincerely,

KIM GANDY,
President.

LEGAL MOMENTUM;
Washington, DC, January 10, 2006.

Senator ARLEN SPECTER,
Chairman, Committee on the Judiciary, U.S. Senate
Senator PATRICK LEAHY,
Ranking Member, Committee on the Judiciary, U.S. Senate

CHAIRMAN SPECTER AND SENATOR LEAHY: Legal Momentum, the nation's oldest women's legal rights organization, opposes the confirmation of Judge Samuel Alito as Associate Justice to the Supreme Court of the United States. Throughout his career he has pursued legal approaches that raise questions about his ability to respect the balance of power between the three branches of government. Judge Alito defers to agency decisions in many settings, while showing skepticism toward individual litigants' claims, appears to support a narrow view of civil rights, prisoners' rights, and workers' rights, appears willing to uphold legislative restrictions on the right to privacy and is willing to limit congressional power while showing excessive deference to the executive branch. This agenda poses a danger to an inclusive society, and a representative democracy with constitutionally required checks and balances that serves the needs of the whole electorate. The legacy of conservative centrist, Justice Sandra Day O'Connor, deserves a replacement that does not rule based on political considerations, but can fairly and justly interpret the laws and Constitution of the United States.

Judge Alito's available record reveals a judicial philosophy that would undermine critical civil and privacy rights and protections. In his public statements, he speaks about the restrained role of judges. Put into practice, however, these views translate into higher burdens for plaintiffs seeking to vindicate their rights, deference to states or institutional defendants and employers, and limits on the ability of Congress to require certain conduct from states. For example, Judge

Alito often favors a restrictive reading of the law, which results in the narrowest interpretation of civil rights. Thus, individuals may be unable to enjoy the full reach of these protections at crucial times. Stressing the need for judicial restraint and discouraging judges from legislating from the bench, he has used these themes as a means to limit access to the ability of individuals to have their day in court. And, he frequently argues to constrain the power of the courts and the power of Congress, with regard to binding states. The end result is that individuals, courts, and Congress have less ability to hold states accountable to ensure compliance with the law and remedy legal violations.

Judge Alito has taken a very restrictive approach in employment discrimination cases, resulting in few successes for plaintiffs. In Bray v. Marriott, he would have let stand an employer's decision not to promote an African American female employee even though there was considerable evidence of irregularities in the hiring and interview process. Judge Alito argued in dissent that the employer's failure to follow its own rules was not sufficient to prove discrimination against the plaintiff. For him, the employer's argument that the plaintiff was not the best qualified should have been accepted at face value. In contrast, the majority concluded there were enough questions about the employer's motives and conduct to allow the plaintiff her day in court. Moreover, the majority chided Judge Alito's analysis for effectively eviscerating the antidiscrimination purposes of the law, by accepting the employer's reasoning without adequate review to determine whether racial bias influenced the hiring decision. They stressed that what mattered was not whether the company was seeking the ''best'' candidate, but ''whether a reasonable factfinder could conclude that Bray was not deemed the best because she is Black.'' In his fifteen years on the bench, Judge Alito has almost never ruled for African-American plaintiffs in employment discrimination cases. The Supreme Court deserves a Justice that is willing to consider the full circumstances of the case at hand, not deny plaintiffs their right to be heard.

While Congress has made efforts to protect workers who need time off work to care for a sick family member or to heal from a long-term illness, Judge Alito would make it harder for workers to challenge state employers for violating the Family & Medical Leave Act. In Chittister v. Department of Community and Economic Development, Judge Alito wrote for a Third Circuit panel that the state of Pennsylvania was immune from lawsuits by state workers alleging violations of the FMLA's medical leave provisions. The decision effectively insulated the state from FMLA, claims, and undermined the ability of workers to access medical leave when needed. Meanwhile, Justice O'Connor, who Judge Alito would replace, voted to uphold a key provision of the Family and Medical Leave Act. If the Supreme Court adopted Judge Alito's views, millions of workers could lose their ability to vindicate their rights under the Family & Medical Leave Act.

Judge Alito's record strongly indicates that he would question the constitutional right to privacy and undermine existing Court precedent on the issue. In a 1985 job application, he touted his work on Reagan Administration-era cases which argued that the Constitution does not protect a right to an abortion—a position with which he indicated he personally agreed. In a memorandum discussing the strategy for the government's amicus brief in a pending case involving a Pennsylvania abortion regulation, he stressed the importance of finding a way to give states maximum latitude to adopt abortion restrictions to undermine, if not overrule, Roe v. Wade. After leaving the Administration and becoming a judge on the Third Circuit, he wrote a dissent in Planned Parenthood of Southeastern Pennsylvania v. Casey, arguing to uphold burdensome restrictions and hurdles aimed at women seeking an abortion. The Supreme Court ultimately rejected his position, but he once again underscored a desire to place new limits on a woman's ability to make her own reproductive health decisions.

Judge Samuel Alito's rulings on Americans' privacy rights extend even further his support for increased power for the executive branch. As a lawyer in the Solicitor General's Office in 1984, Alito wrote a memo supporting absolute immunity from civil liability for cabinet officials who authorized illegal wiretaps of Americans due to national security concerns. Later, he co-authored a brief to the Supreme Court in which the government argued for absolute immunity—an argument rejected by the Supreme Court. In contrast, Justice O'Connor, writing for an 8–1 majority in the case of American-born detainee Yaser Esam Hamdi (Hamdi v. Rumsfeld), in which the court ruled that an American citizen seized overseas as an ''enemy combatant'' must be allowed to challenge the factual basis of his or her detention, said the Court has ''made clear that a state of war is not a blank check for the president when it comes to the rights of the nation's citizens.''

After becoming a judge, Alito wrote in several opinions that would have extended the reach of search warrants for the executive branch. In a dissenting opinion in Doe v. Groody, he argued that police officers did not violate the Constitution when they strip-searched a mother and her ten year-old daughter, despite the fact that neither was named in the search warrant. The majority opinion, written by now-Homeland Security Secretary Michael Chertoff, asserted that Judge Alito's position would effectively nullify the Fourth Amendment's warrant requirement and ''transform the judicial officer into little more than the cliché rubber stamp.'' In another dissent, in Baker v. Monroe Twp., Judge Alito voted to keep a jury from hearing whether a police supervisor unlawfully allowed his officers to handcuff, hold at gunpoint and search a woman and her teenage children who happened to stop by to visit the home of a relative in the midst of a search.

Alito's stance on executive branch powers is further revealed in a Feb. 5, 1986 draft memo where he argued that the White House should issue ''interpretive signing statements'' when signing a bill into a law, and that courts might be persuaded to consider this 'executive intent' equally with legislative intent. The balance of power between the three branches is imperiled when White House interpretation is accorded equal weight with congressional support.

In conclusion, Judge Alito has consistently articulated legal opinions that are outside the mainstream, that undermine legal protections against employment discrimination, that distorts the law in favor of extending power to the executive branch, and that resorts to judicial activism, blatantly ignoring the clear intention of the legislature to push his arch-conservative political agenda. Therefore, we urge you to oppose his nomination to the U.S. Supreme Court.

If you have any further questions, please contact Lisalyn Jacobs at Legal Momentum, (202) 326–0040.

Sincerely,

LISALYN R. JACOBS,
Vice President for Government Relations.

ELIMINATING RACISM
EMPOWERING WOMEN,
Washington DC, January 10, 2006.

Hon. ARLEN SPECTER,
Chairman,
Hon. PATRICK J. LEAHY,
Ranking Member, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR CHAIRMAN SPECTER AND RANKING MEMBER LEAHY: On behalf of the YWCA USA, representing over 2 million women and girls with 300 associations nationwide, I am writing to write to express our opposition to the confirmation of Judge Samuel A. Alito, Jr. to the Supreme Court of the United States. His views are not consistent with the value of equality that our country holds dear, nor are they consistent with the YWCA USA mission of eliminating racism and empowering women. Over the past 50 years the Supreme Court's jurisprudence has often served to protect the fundamental constitutional rights of all Americans. After closely examining his record, the YWCA USA has concluded that if Judge Alito were to replace Justice O'Connor on the Court, this protection would likely halt and in fact reverse with regard to individual rights. Judge Alito's record reveals a history of troubling decisions in the areas of civil rights, civil liberties, and fundamental freedoms. The YWCA USA is extremely concerned that the confirmation of Judge Alito to the Supreme Court would be harmful for women and people of color.

If Judge Alito were confirmed, he has the potential to change the direction of the court and devastate the rights of women. For example, in the landmark case Planned Parenthood of Southeastern Pennsylvania v. Casey, Judge Alito concluded that it was not an ''undue burden'' for a married woman seeking an abortion to have to notify her husband, a position that the Supreme Court later struck down. This case raises key questions about whether, if confirmed to a seat on the Supreme Court, Alito would vote to overturn Roe v. Wade. Furthering the YWCA USA's concerns, about whether Judge Alito would seek to strip away women's reproductive freedoms, are his own words. As a lawyer in the Reagan administration, Samuel Alito wrote, that he ''personally believed'' that ''the Constitution does not protect a right to an abortion.'' In addition, during his tenure with the Solicitor General's Office he was one of the chief engineers of a multi-tiered, strategy to reverse Roe V. Wade. Alito wrote that an amicus brief in Thornburgh v. American College of Obstetricians and Gynecologists was an ''opportunity to advance the goals of bringing about the eventual overruling of Roe v. Wade and, in the meantime of mitigating its effects.'' While it is impossible to know for certain how Alito would rule in a particular case before the Supreme Court, these statements along with Judge Alito's past opinions make it difficult to believe that he would effectively uphold the fundamental freedoms of women. The rights, health, and safety of women are too important to the YWCA USA to justify this risk.

The YWCA USA is also concerned with Judge Alito's record on civil rights and affirmative action. It is quite troubling that Samuel Alito touts his work as a lawyer in the Reagan administration opposing certain affirmative action programs as something he Was ''particularly proud'' of. One example of Alito's work against affirmative action during the Reagan administration is the case of Local 28 of the Sheet Metal Workers' International Association v. EEOC. Alito and the Solicitor General's office argued that it was illegal for courts to order remedies including

affirmative action even in cases of intentional, on-going and ''egregious racial discrimination.'' Alito signed a brief arguing the extraordinary theory that relief in Title VII cases could be granted only to ''identifiable victims of discrimination,'' contradicting an earlier view of the Equal Employment Opportunity Council (EEOC) itself. The Supreme Court rejected Alito's argument, stating that affirmative action relief ''may be ordered by a court as a remedy for past discrimination even though the beneficiaries may be non-victims.'' Furthermore, in the 1970s and 1980s Alito was a member of Concerned Alumni of Princeton (CAP), an organization that actively sought to limit the number of women and minorities accepted to the university. In contrast, Justice O'Connor cast the decisive vote in Grutter v. Bollinger, upholding affirmative action in higher education. If Judge Alito's views on affirmative action were to replace Justice O'Connor's on the Supreme Court, institutes throughout the country would be harmed. Eliminating this important tool for promoting diversity would deny universities, workplaces and other organizations the enlightenment provided by a greater variety of backgrounds.

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

In one such gender discrimination case, Sheridan v. E.I. Dupont de Nemours, Alito was the sole dissenter in a 10–1 decision; arguing that he would require victims of discrimination to present much more evidence before they would be entitled to take their case to trial. Were this position adopted more broadly, it would make it much more difficult for victims of discrimination to have their day in court and remedy these actions of prejudice. In another employment discrimination case, this one dealing with race, Alito went even further than upping the level of evidence needed for a trial stating that even if discrimination occurred it may not be against the law. In Bray v. Marriott Hotels, Ms. Bray, an African-American woman, applied for a promotion but a white woman was hired for the job instead. Her employer, Marriott, did not follow its own guidelines for hiring and several of the key employees involved in the process gave conflicting statements about how the decision to hire the white woman was ultimately made. Judge Alito argued in his dissent that it might not be illegal for an employer to overlook a qualified person of color even if the employer's belief that it had selected the 'best' candidate was the result of conscious racial bias.'' The majority opinion responds to this analysis by noting that Title VII would be eviscerated if the analysis were to halt where the dissent suggests. In addition to the troubling interpretation of Title VII, Alito's dissent demonstrates skepticism about the legitimacy of discrimination claims. He closed his dissent with the disturbing pronouncement that a percentage of discrimination cases are manufactured by disgruntled employees, rather than victims of discrimination. This shows a lack of sensitivity about the on-going national problem of discrimination in the workplace. In contrast to Judge Alito, 70% of Americans believe racism is a problem in the workplace today. This again illustrates that Samuel Alito is out of step with mainstream America in the area of discrimination.

Finally, it is important to look at the make-up of the court. Given the role that Justice O'Connor plays on the court, it is necessary to review Judge Alito not only on his merits but also in the context of whom he will be replacing on the bench. Justice O'Connor has added an important, independent and unique voice to the Supreme Court. As the first women to sit on the nation's highest court, she has broken barriers for women not only by blazing a trail but also by providing a voice and a vote on the Court for all women. Indeed, time and again on those issues that affect civil rights, and women's rights, including reproductive freedoms, Justice O'Connor is the deciding fifth vote. Numerous laws have been shaped and upheld by this 5 to 4 margin. Thus it is important to evaluate not only if Judge Alito is qualified to sit on the Supreme Court, but also if he will protect and honor the legal and social legacy of the woman he would be replacing.

The concern that Alito would overturn well-established legal principles and social achievement in the areas of women's rights and civil rights, that the YWCA has worked to protect for almost 150 years, is too great to ignore. That is what his record indicates and furthermore, during his confirmation hearing he stated, ''If I'm confirmed . . . I'll be the same person I was on the Court of Appeals.'' For these reasons, the YWCA USA feels that Judge Alito's confirmation to the Supreme Court would negatively impact the lives of women and people of color and therefore is urging you to reject the nomination of Judge Samuel Alito to the United States Supreme Court. Senators must stand up and protect the rights of the people they represent by voting against Alito's lifetime appointment to the Supreme Court. The nation has come too far in the fight for equality and worked too hard to protect the rights of all individuals.

Sincerely,

PEGGY SANCHEZ MILLS,
YWCA USA CEO.

AMERICAN ASSOCIATION OF UNIVERSITY WOMEN,
Washington, DC, January 9, 2006.

Hon. ARLEN SPECTER,
Chair, Senate Judiciary Committee, Dirksen Senate Office Building, Washington, DC.

Hon. PATRICK LEAHY,
Ranking Member, Senate Judiciary Committee, Dirksen Senate Office Building, Washington, DC.

DEAR SENATORS: On behalf of the more than 100,000 bipartisan members of the American Association of University Women (AAUW), we write to express our opposition to the confirmation of Third Circuit Court of Appeals Judge Samuel A. Alito, Jr. to be associate justice of the United States Supreme Court. As the Senate Judiciary Committee opens its confirmation hearings today, you will be faced with critical questions and, ultimately, a critical decision that will affect the balance of the nation's highest court—which will in turn impact the everyday lives of generations to come.

After a careful review of Judge Alito's record, including 15 years of appellate opinions, AAUW finds him to be a troubling choice with red flags in areas critical to our mission and membership, including workplace discrimination, reproductive choice, and affirmative action. Judge Alito's appellate judgments provide little reassurance that he would apply the law in ways that would uphold fundamental civil and women's rights precedents should he ascend to the highest court in the land. Indeed, taken as a whole, his publicly available record—both from his government service and his tenure on the Third Circuit—illustrate a judicial philosophy at odds with AAUW's Public Policy Program. For all these reasons, AAUW has opposed the confirmation of Judge Alito to the U.S. Supreme Court.

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

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

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

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

No nominee is presumptively entitled to confirmation. After a thoughtful review of his well-established judicial philosophy, AAUW cannot conclude that Judge Samuel A. Alito, Jr. is the appropriate choice for a lifetime position on the U.S. Supreme Court. AAUW urges senators to reject Alito's nomination and let their votes be a true measure of their commitment to equity for women and girls.

Sincerely,

LISA M. MAATZ,
Director, Public Policy and Government Relations.

NATIONAL COUNCIL OF
WOMEN'S ORGANIZATIONS,
Washington, DC, January 11, 2006.

Senator ARLEN SPECTER,
Chairman, Committee on the Judiciary, U.S. Senate.

Senator PATRICK LEAHY,
Ranking Member, Committee on the Judiciary, U.S. Senate.

CHAIRMAN SPECTER AND SENATOR LEAHY: The National Council of Women's Organizations, the oldest and largest coalition of the nation's women's groups, urges the Senate to reject the nomination of Samuel Alito to the United States Supreme Court. Judge Alito's extreme position on a range of issues, including reproductive rights, workplace discrimination and violence against women, make him the wrong choice to replace retiring Justice Sandra Day O'Connor.

In nominating Samuel Alito after Harriet Myers withdrew from consideration, President Bush chose to put political expediency ahead of the rights and well-being of this nation's women and girls. Mr. Bush's right-wing base clamored for rejection of Ms. Myers because, as conservative as she is, they felt she was not 100 percent pure on their issues. Samuel Alito, however, is apparently their man.

Judge Alito has a long record demonstrating hostility to women's reproductive rights. In the 1980's, he repeatedly advocated the overturning of Roe v. Wade. In the 1990's, as an appellate judge, he argued to uphold a Pennsylvania statute requiring women to notify their husbands before having an abortion—a position rejected by Justice O'Connor's 5–4 opinion in Planned Parenthood v. Casey. Nowhere in his writings, however, does he express any concern that the days of back-alley abortions could return if women do not have safe, legal means to terminate unwanted pregnancies. Nor have we been able to find any statement of concern, in any of his writings, for women's fundamental right to be in control of their own reproductive health decisions.

Indeed, Judge Alito has even expressed hostility to contraception. In 1985, as a Justice Department attorney, he wrote that some forms of birth control are ''abortifacients,'' and saw no constitutional problem with a state law restricting women's access to them. Extreme anti-abortion organizations have long argued that the IUD and some birth control pills are ''abortifacients''—subject to the same kinds of restrictions that may be placed on women's access to abortion—because they may prevent a fertilized egg from becoming implanted on the uterine wall. This view runs counter to accepted medical understanding, which is that pregnancy does not begin until after implantation. Yet it is the view embraced by Samuel Alito.

Judge Alito's opinions demonstrate an abiding deference to the powerful at the expense of ordinary people. He has argued, in cases such as Sheridan v. DuPont and Bray v. Marriott Hotels, for erecting higher and higher procedural hurdles that would prevent victims of employment discrimination from being able to present their case to a jury. He argued, in Doe v. Groody, to uphold a police strip search of a woman and her ten-year-old daughter even though they were not named in the search warrant and were simply at home when the house was searched. He ruled, on all but one issue, against a female police officer who was subjected to two years of pervasive sexual harassment in Robinson v. City of Pittsburgh. He has repeatedly criticized affirmative action policies, and struck down a school district's affirmative action plan in Taxman v. Board of Education. He ruled, in Chittister v. Dept. of Community and Economic Development, that state governments did not have to comply with provisions of the Family and Medical Leave Act. Women have fought hard over the last four decades, against resistance, skepticism and backlash, to win fundamental rights. If confirmed, Judge Alito will be in a position to undermine our gains for generations to come. We urge you to stand firm for women's rights and reject this nomination.

Sincerely,

SUSAN SCANLAN,
Chair
TERRY O'NEIL,
Executive Director.

NATIONAL WOMEN'S LAW CENTER
Washington, DC, January 9, 2006.

Hon. ARLEN SPECTER, Chair,
Hon. PATRICK J. LEAHY, Ranking Member,
Senate Committee on the Judiciary, Dirksen Senate Office Building, Washington, DC.

DEAR CHAIRMAN SPECTER AND SENATOR LEAHY: On behalf of the National Women's Law Center, an organization that has worked since 1972 to advance and protect women's legal rights, we write to reiterate the Center's opposition to the nomination of Samuel A. Alito, Jr. to the United States Supreme Court. As a result of its extensive review of Judge Alito's record, the Center has concluded that the confirmation of Judge Alito to the Supreme Court would endanger core legal rights for women, with profound and harmful consequences for women across the country and for decades to come. This letter summarizes the basis for the Center's conclusions, which are set forth more fully in the Center's December 8, 2005 letter and detailed report.

Judge Alito has worked to limit a woman's right to choose. While in the Solicitor General's office, Alito urged the government to file an amicus brief in Thornburgh v. American College of Obstetricians and Gynecologists in order to ''advance the goals of bringing about the eventual overruling of Roe v. Wade and, in the meantime, of mitigating its effects.'' His memo argued in favor of upholding even the most burdensome and dangerous barriers to abortion. Alito then volunteered to work on the government's Thornburgh brief, and researched and wrote key portions. The Court rejected the brief's extreme positions—it struck down dangerous burdens on the right to choose the brief had argued to uphold, and it refused to overturn Roe v. Wade as the brief had urged. In plain reference to his role in the Thornburgh case, Alito later wrote: ''I am particularly proud of my contributions in recent cases in which the government has argued in the Supreme Court . . . that the Constitution does not protect a right to an abortion.'' He wrote this in an application for a promotion a few months after the Thornburgh brief was filed.

Judge Alito's record on the Third Circuit reinforces the concerns about his approach to the right to choose. In Planned Parenthood v. Casey, he not only would have upheld a law requiring married women to notify their husbands before having an abortion, but took an approach to the law that would eviscerate Roe v. Wade by upholding many dangerous barriers to the right to choose. For example, he failed to focus on women who would be hurt by the restrictions (such as victims of domestic abuse), and would have given husbands the same kind of control over their wives' most personal decisions that parents have over their children. A majority of the Supreme Court, in an opinion co-authored by Justice O'Connor, soundly rejected his analysis.

Judge Alito has ruled to limit Congress's authority to protect public safety and welfare. Judge Alito would have struck down a federal law prohibiting the transfer and possession of machine guns, arguing in a dissenting opinion in United States v. Rybar that Congress did not have the authority to enact the statute under the Commerce Clause of the Constitution. Judge Alito's Third Circuit colleagues, and eight other circuit courts to date, have disagreed with him. In another case, Chittister v. Department of Community and Economic Development, Judge Alito wrote an opinion that barred state employees from suing for damages when their employers violate their right to take medical leave under the Family and Medical Leave Act (FMLA). A 6-3 majority of the Supreme Court, including even Justice Rehnquist, subsequently upheld another provision of the FMLA against a similar challenge on the ground that the FMLA was enacted to address sex discrimination in the workplace. Judge Alito gave short shrift to this argument.

Judge Alito has ruled to make it more difficult for plaintiffs to prove discrimination. Judge Alito's opinions in employment discrimination cases raise significant concerns. For example, he dissented from Sheridan v. E.I. DuPont De Nemours and Company, a sex discrimination case in which all 10 of the other members of the Third Circuit joined in reversing the trial court's rejection of a jury verdict for the plaintiff. Judge Alito ignored applicable legal standards to urge overturning the jury verdict, inappropriately credited the employer's explanations for its actions, and, standing in for the jury, downplayed the plaintiff's evidence. Alito also dissented in Bray v. Marriott Hotels, a race discrimination case, and again would have prevented the plaintiff from bringing her case before a jury by giving the employer the benefit of the doubt. The majority said that under his approach to the evidence, ''Title VII [of the Civil Rights Act of 1964] would be eviscerated.''

Judge Alito's publicly available record does not reveal his views on the constitutional protection against sex discrimination under the Equal Protection Clause of the Fourteenth Amendment. But in his 1985 job application he expressed support for at least some of the central legal tenets of the Reagan Administration, and the Justice Department under Attorney General Ed Meese favored the ''originalist'' approach to constitutional interpretation advocated by Robert Bork, which would permit almost any gender-based distinctions in law or government policy. Judge Alito's views in this area must be carefully explored at his confirmation hearing.

Throughout his career, Judge Alito has taken positions and issued rulings detrimental to women in other areas of the law, including through his membership in an organization that was openly hostile to the admission of women and minorities to his alma mater, Princeton; his participation in cases where the Solicitor General argued against affirmative action policies; his vote to uphold a strip search of a woman and her ten-year-old daughter, even though they were not named in a search warrant, in Doe v. Groody, his opinion in Sabree v. Richman strongly suggesting that if he were to join the Supreme Court, he would change the law to limit, and potentially preclude, the ability of individuals to enforce federal rights such as rights to Medicaid, public housing, child support enforcement, and public assistance; and his denial of an asylum claim by an Iranian woman who asserted that if she returned to Iran she would be persecuted for her feminist beliefs.

This is a watershed moment for women's legal rights. In recent years, the Supreme Court has decided cases affecting women's legal rights by narrow margins. Justice Sandra Day 0'Connor, the first woman on the Supreme Court, often has cast the decisive vote

in these cases. With the retirement of Justice O'Connor, the Court will lose not only its first female Justice, but also the Justice whose vote often has been pivotal on issues critical to women. Judge Alito's record demonstrates that if he is confirmed to the Supreme Court, he is likely to eviscerate core rights that American women rely upon, and shift the Court in a dangerous and harmful direction. Based on the information available at this time, as summarized above, we conclude that Judge Alito should not be confirmed to the Supreme Court.

Sincerely,

NANCY DUFF CAMPBELL,
MARCIA D. GREENBERGER,
Co-President.

Mrs. CLINTON. Mr. President, I yield the floor.

The PRESIDING OFFICER (Mr. MARTINEZ). The Senator from Massachusetts.

Mr. KERRY. Mr. President, obviously, today we face one of the most important choices we make as Senators. This is a choice, as colleagues have said, that is going to affect the country for the next several decades.

To replace Justice Sandra Day O'Connor, the President has nominated a man who has consistently deferred to Government action regardless of how egregious that action may be. He has nominated a man whose pattern of decisions erects rather than breaks down barriers in the area of civil rights; a man who, to this day, has never retreated from his declaration that the Constitution does not protect a woman's right to privacy; a man who has demonstrated a persistent insensitivity to the history of racial discrimination in this country and was even, at the Government's request, willing to ignore overwhelming evidence that African Americans were intentionally stricken from an all-White jury in a Black defendant's capital case.

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

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

We are being asked to confirm a nominee whose views will undermine a balance of power that I believe, and many others believe, literally keeps our country strong, a balance of power that helps to bring people together rather than divide them, that helps to apply the Constitution to people in all walks of life, not simply those with power and privilege.

For the reasons of this track record: the of his writings in the Justice Department, the questions unanswered in the hearings, the cases he has decided, where studies have shown a pattern of willingness to ignore our Constitutional rights and deny people access to our court system, for all of these and for other compelling reasons, I oppose this nomination.

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

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

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

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

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

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

I believe, based on his track record, the decisions already made, the writings already expressed, the questions that went un-answered, that the he will have a detrimental effect. President Bush had the opportunity to nominate someone who would have united the country. He could have nominated somebody who would have received 100 votes or 98 votes. He chose not to do this, which is his right. We all understand. We have heard the argument about the consequence of elections. The fact is, he chose not to do that.

The way in which this nomination came to us in the Senate tells us a huge amount what this nomination really means. The President was under fire from his conservative base for nominating Harriet Miers, a woman whose judicial philosophy was unmercifully attacked. President Bush, in the end, broke to those extreme rightwing demands. This was an ideological coup. Miers was removed and Alito was installed. The President didn't consult with the Senate, as required by the Constitution. He gave more thought to what the political needs were than to what the country's needs were. Indeed, he made this nomination about his political base. He made it about an ideological shift in the Court. He made it about unassailable conservative credentials and an unimpeachable conservative judicial philosophy.

If you want proof of that, all you have to do is look at the comments of people such as Ms. Ann Coulter. We all know Ms. Coulter is capable of being as inflammatory and conservative as anyone in the country, often engaging in character assassination. She denounced the nomination of John Roberts. She attacked the nomination of Harriet Miers, calling her completely unqualified and lamenting that President Bush had ''thrown away a Supreme Court seat.'' Yet she celebrated the nomination of Sam Alito, stating that Bush gave the Democrats a ''right hook'' with this ''stunningly qualified'' nominee. This from a woman who said that the Republicans need to nominate a person who ''wake[s] up every morning . . . chortling about how much his latest opinion will tick off the left.''

Failed Supreme Court nominee Robert Bork had a similar reaction. He denounced the Miers nomination as ''taking the heart out of a rising generation'' of conservative constitutional scholars and ''widen[ing] the fissures within the conservative movement.'' Yet he praised Alito's nomination as ''substantially narrowing'' that rift. In fact, he called the nomination something to ''rejoice'' because if Alito were confirmed, it would only take ''one more Justice of the Roberts-Scalia-Thomas-Alito stripe to return the Court to so-called jurisprudential respectability.''

Let's not forget conservative stalwart Pat Buchanan who denounced the Miers nomination as revealing the President's lack of desire ''to engage the Senate in fierce combat to carry out his now suspect commitment to remake the Court in the image of Scalia

and Thomas.'' Apparently, Mr. Buchanan believes that the Alito nomination demonstrates the President's change of heart. He heralded the nomination as one that would unite and rally the base, a nomination for the base, not the country.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In fact, even Stephen Calabresi, one of the fathers of the theory, has stated that ''[t]he practical consequences of the theory are dramatic. It renders unconstitutional independent agencies and councils.'' That means that Congress would lose the power to protect public safety by creating agencies like the Consumer Products Commission, which ensures the safety of products on the marketplace, or the Securities and Exchange Commission which protects Americans from corporations such as Enron. And who would gain the power? The Executive, the President.

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

Judge Alito's endorsement of the unitary executive theory is not the only cause for concern. In 1986, while working at the Justice Department, he endorsed the idea that Presidential signing statements could be used to influence judicial interpretation of legislation. His premise was that the President's understanding of legislation is just as important in determining legislative intent as Congress's, which is absolutely startling when you look at the history of legislative intent and of the legislative branch itself. President Bush has taken the practice of issuing signing statements to an extraordinarily new level. Most recently, he used a signing statement to reserve the right to ignore the ban on torture that Congress overwhelmingly passed. He also used signing statements to attempt to apply the law restricting habeas corpus review of enemy combatants retroactively, despite our understanding in Congress that it would not affect cases pending before the Supreme Court at the time of passage.

The signing statements have been used to specifically negate or make an end run around very specific congressional intent. The implication of President Bush's signing statements are absolutely astounding. His administration is reserving the right to ignore those laws it doesn't like. Only one thing can hold this President accountable, and it is called the Supreme Court. Given Judge Alito's endorsement of the unitary executive and his consistent deference to government power, I don't think Judge Alito is prepared to be the kind of check we need. Reining in excessive government power matters more today to the average American than perhaps at any recent time in our memory, as we work to try to provide a balance between protecting our rights and our safety. As Justice O'Connor said: The war on terror is not a blank slate for government action. We can and must fight that in a manner consistent with our Constitution.

Last but certainly not least, I have grave concerns about Judge Alito's ability and willingness to protect a woman's right to choose. In his 1985 job application, Judge Alito wrote that he was ''particularly proud'' of his work arguing before the Supreme Court that ''the Constitution does not protect a right to abortion.'' Now, all of us know this is an extraordinarily complicated issue. I don't know anybody here who is pro-abortion. But we are in favor of the right of people individually to make that choice for themselves rather than having the Government make that choice for them. And, the fact is that the Constitution protects that right.

Yet, in 1985, Judge Alito wrote a memo outlining a strategy for chipping away at Roe v. Wade, an approach he believed would be more successful than asking for an outright reversal. In his

hearings, Judge Alito stated these statements were accurate reflections of his views in 1985. But what is more disturbing is what he refused to say. He refused to say his views have changed, that he accepted Roe v. Wade as settled law, which even Chief Justice Roberts did during his confirmation hearings. In other words, Judge Alito refused to give any assurances that his concept of the Constitution's protected liberty is consistent with mainstream America's.

I realize Judge Alito has promised he is going to keep an open mind, but I don't think any of us can be reassured by those words. We heard those very same words before. Justice Thomas repeatedly told the Judiciary Committee he would keep an open mind on this issue. But we all know that once safely on the Supreme Court, Justice Thomas voted to overturn Roe v. Wade months later, writing a dissent in Casey that likened abortion to polygamy, sodomy, incest, and suicide. Given Justice Thomas's success, you can almost imagine Karl Rove whispering to Judge Alito: Just say you have an open mind; say whatever it takes.

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

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

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

Mr. President, I ask unanimous consent that letters to Senator LEAHY and Senator SPECTER in opposition to this nomination from the Women's Caucus, Black Caucus, and Hispanic Caucus all be printed in the RECORD at this time.

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

CONGRESS OF THE UNITED STATES,
Washington, DC, January 9, 2006.

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

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

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

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

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

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

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

Sincerely,

Louise M. Slaughter, Tammy Baldwin, Lois Capps, Jane Harman, Barbara Lee, Doris O. Matsui, Juanita Millender-McDonald, Hilda L. Solis, Corrine Brown, Rosa L. DeLauro, Eddie Bernice Johnson, Carolyn B. Maloney, Betty McCollum, Gwen S. Moore, Grace F. Napolitano, Linda T. Sánchez, Ellen O. Tauscher, Diane E. Watson, Jan Schakowsky, Debbie Wasserman Schultz, Nydia Velázquez, Lynn Woolsey.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, DC, January 6, 2006.

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

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

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

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

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

While Judge Alito's background and record on the bench have been largely discussed in the public forum his opportunity to explain his opinions and philosophy will come during the confirmation hearings. Like all Americans, we deserve and expect clear answers on his record both on and off the bench, as many of his opinions and writings give us reason to be concerned. In order to better gauge his current attitudes, we respectfully request that you consider asking Judge Alito the attached questions or questions similar to these during the confirmation hearings in the Senate Judiciary Committee.

While we should not expect any Supreme Court justice to consistently rule in a manner that we agree with, we hope that the successor to Justice Sandra Day O'Connor will share her tradition of being fair, open-minded and unbiased towards any specific group.

Thank you for taking these views into consideration as you proceed with fulfilling your constitutional duty to provide advice and consent on Judge Alito's nomination.

Sincerely,

GRACE F. NAPOLITANO,
Chair, Congressional Hispanic Caucus.
CHARLES A. GONZALEZ,
Chair, CHC Civil Rights Task Force.

CONGRESSIONAL HISPANIC CAUCUS QUESTIONS TO SUPREME COURT JUSTICE NOMINEE JUDGE SAMUEL A. ALITO, JR.

A. RACIAL (ETHNIC) DISCRIMINATION: PEMBERTHY V. BEYER, 19 F.3d 857 (3D CIR. 1994)

Facts: Alito wrote majority opinion allowing ''peremptory challenges'' by the prosecution of bilingual prospective jurors because of concerns that ability to understand Spanish would jeopardize jurors' acceptance of official translations of tape recorded conversations.

Question: This holding would provide a vehicle for striking jurors based on ethnicity (i.e., Latinos more likely to speak Spanish) under the guise of ''language concerns''. Why isn't this unconstitutional as it relates to the prospective juror being struck (deprivation of right to serve on jury, participate in government)? Why isn't this unconstitutional as to the defendant per Batson precedent?

B. VOTING RIGHTS ACT: JENKINS V. MANNING, 116 F.3d 685 (3D CIR. 1997)

Facts: The issue was the ''at-large'' election of school board members. After reversing and remanding the District Court's ruling that no violation of the VRA took place, the District Court considered additional evidence and again found no violation. Judge Alito appears to have joined the majority in affirming the District Court's ruling. Judge Rosen's dissent is insightful and a good example of a judge's exercise of discretion in viewing the same evidence and reaching a decision that gives meaning to the VRA.

Question: The ''Senate Factors'' (after finding Gingles factors present) were additional and necessary considerations and consisted of (1) the extent to which minority group members had been elected to public office in the jurisdiction and (2) the extent to which voting in the elections of the political subdivision is racially polarized. Judge Alito found that the Senate Factors were met when historically only 3 of 10 black candidates over a 10 year period were successful (one in a never-repeated plurality win and one by a black candidate defeating another black candidate). Would Judge Alito please elaborate on his ''judicial philosophy'' when it comes to VRA and ''at-large'' voting districts?

C. IMMIGRANT RIGHTS: 1986 DEPUTY ATTORNEY GENERAL ALITO MEMO TO FBI DIRECTOR WILLIAM WEBSTER

Facts: The memo reflects Judge Alito's legal analysis that ''. . . illegal aliens have no claim to nondiscrimination with respect to non-fundamental rights.''

Question: In light of *Plyler* v. *Doe*, 457 U.S. 67 (1982), how does he reconcile his conclusions that appear to be based on the 1976 case of *Matthews* v. *Diaz*, 426 U.S. 67 (1976), obviously a case decided PRIOR to Plyler? Does he follow precedent only when convenient? If he is not willing to follow existing precedent (is there any other kind?), then it would appear that if he is able to establish ''precedent'' (that's what the Supreme Court does), he will do it readily and easily.

CONGRESSIONAL BLACK CAUCUS,
RAYBURN BUILDING
Washington, DC, January 17, 2006.

Hon. PATRICK LEAHY,
U.S. Senate,
Washington, DC.

DEAR SENATOR LEAHY: On December 8, 2005, the Congressional Black Caucus (CBC) announced its opposition to the confirmation of Judge Samuel Alito to the United States Supreme Court. We announced this decision prior to the Senate Judiciary Committee's confirmation hearings after making an extensive review of his record as a judge and as a high-level government official and after Judge Alito and the Administration failed to respond to our request for a meeting with the nominee. Unfortunately, nothing transpired at the hearings before the Judiciary Committee to change our view that Judge Alito should not be confirmed.

If the Senate values its own work on federal statutes in many areas of American life, it will find unacceptable Judge Alito's record as a frequent dissenter in commerce clause and other cases involving of long established congressional authority to enact laws benefiting Americans of every background. For example, his dissent in United States v. Rybar, in which he unsuccessfully sought to restrict congressional authority to regulate machine guns, is an example of a dangerous retrenchment that could have far-reaching consequences for many kinds of federal legislation that have long been considered well within congressional power.

However, the CBC is most especially concerned that Judge Alito's record on matters of race reflects a consistent pattern of hostility to race discrimination cases and remedies. This pattern places at extreme risk important work of the Supreme Court and the Congress to eliminate discrimination in voting, employment and other critical areas in which Judge Alito's dissents have left little doubt about his views. If he is promoted to the Supreme Court, where stare decisis is less constraining and where his views are no longer subject to reversal, his dissents can be expected to become the law of the land. In that case, we have no doubt that racial progress would be reversed, especially in light of the delicate 5–4 balance that has existed on the Court. We, therefore, believe that a vote for Judge Alito would radically change the Court and lead to an erosion of 50 years of jurisprudence on matters of race and equality. Our country moves in that direction at its peril.

We find extremely troubling the consistency and predictability of Judge Alito's hard-right views in an area that has been so critical to African Americans and where his views could become the decisive vote. The best evidence that Judge Alito is a judge of extreme views is the often strongly critical written opinions of his judicial colleagues. Faced with Supreme Court precedents upholding remedies for discrimination, Judge Alito has sought instead to close the Federal courts to job discrimination claims by using unprecedented technical evidentiary standards long rejected by the Supreme Court. For 40 years in an unbroken record of thousands of job discrimination cases, the Supreme Court and every federal circuit have left no doubt that discrimination claims must not be prematurely destroyed by requiring significant upfront evidence before trial. Consequently, all the Third Circuit judges in an en banc review in Sheridan v. E.I. DuPont de Nemours and Company criticized Judge Alito, the only dissenter, for seeking to elevate the standard necessary for a woman, who alleged her employer failed to promote her, to even get access to the Federal courts to attempt to prove discrimination. Undeterred, the next year in Bray v. Marriott Hotels, Judge Alito was similarly admonished by the Circuit's majority in a racial discrimination case in which a hotel employee was denied a promotion. In sharply criticizing Judge Alito, the majority said that if they followed his lead, ''Title VII [the basic job discrimination statute] would be eviscerated.''

Habitually attempting to use procedural technicalities to get around precedents, Judge Alito has been a virtually automatic vote to deny discrimination claims in 14 of the 18 job discrimination cases he has considered. In one of the cases, he favored white civil rights complainants, Pittsburgh police officers who sued alleging reverse discrimination, and in another he ruled in favor of a mentally disabled employee. Alito's hostility to discrimination cases could not be more systematic, carrying over to claims against the disabled as well, where the Third Circuit criticized his dissent that would allow ''few if any'' Rehabilitation Act plaintiffs access to the courts (Nathanson v. Medical College of Pennsylvania).

Considering the distance the Nation has come on race and the distance still to go, in our view the confirmation of Judge Alito would mark a dangerous step backwards. In our view, no one who reads his opinions can believe that he has the open mind required of a Supreme Court justice. Judge Alito moved from his days in the Reagan Justice Department, where he sought unsuccessfully to get the Supreme Court to restrict discrimination remedies, to the Third Circuit, where he has compiled a striking record as a dissenter, rather than follow employment discrimination precedents.

The evidence is too clear to leave any doubt about where Judge Alito would stand, for example, on fragile 5–4 rulings in which Justice O'Connor has been the deciding vote. Among these cases are the University of Michigan case upholding affirmative action in law school admissions (Grutter v. Bollinger) and other cases where the Court has allowed race to be considered as a factor to rectify discrimination. As we approach reauthorization of the Voting Rights Act in 2007, the Congressional Black Caucus cannot afford to forget that the 5–4 cases also include redistricting cases such as Hunt v. Cromartie.

A critical election year of accountability for the Congress must begin with how members of the Senate vote on this nominee. All that we have fought for in order to secure rights long denied African Americans is put at risk by this nomination. For African Americans, the stakes don't get any higher. Therefore, the members of the CBC are asking you and all of your colleagues to vote against the confirmation of Judge Alito.

Sincerely,

MELVIN L. WATT,
Chair, CBC.
ELEANOR HOLMES NORTON,
CBC Judicial Nominations Chair.

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

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

Mr. SANTORUM. Mr. President, I rise today to give my full support to Judge Alito to be an Associate Justice of the Supreme Court. I am sure that will be no great surprise to those who have followed my career.

I want to lay out in brief why I believe Judge Alito is exactly the kind of Justice this country needs at this time and, candidly, is exactly the kind of Justice this country, for the most part, has had, in keeping with its constitutional traditions over the last 200-plus years.

Judge Alito is not from Pennsylvania, although he claims to be a Phillie fan, which is fine by me. I somewhat prefer the Pirates, being from

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

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

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

Many have tried to claim that somehow or another he is ideological. I don't think there is anything in the RECORD that would indicate Judge Alito applies his own personal viewpoints to the case at hand. He looks at the law, looks at the facts of the case and does his best on the narrowest grounds possible to decide the cases before him. That is what a judge is supposed to do—not say, gee, here is my opportunity to change the law, my opportunity to right a wrong that I think Americans or a particular State or the Government has done that I disagree with; here is my opportunity to change the law by using the force of the Constitution to impose my values. That is not what he does. Again, what he also doesn't do—and it strikes me as a very odd discussion when it comes to analyzing a judge's rulings on who he rules for, does he rule for the little guy or the big guy, as if little guys are always right and big guys are always wrong, or vice versa, for that matter. It is the idea that you don't decide the case before you based on the law and the facts but based on whether you like the plaintiff, or you like the defendant, or what is a sympathetic figure on one side or the other—that is about the worst kind of justice you can possibly acknowledge.

My colleagues who say he rules for the big guys or the big corporations, or whoever it is, are you saying every action that comes before the Court where a little guy is in a case, he automatically should win? Is that what it is? If you are not a judge who rules for the little guy all the time, is it true that somehow you don't have a proper view of the law? This is a remarkable discussion I keep hearing. I heard over and over again in the Judiciary Committee about the result of these cases and who he sides with. Is that somehow a point which is legitimate when it comes to a judge? The question is, is he an appellate jurist who was following the law? Was he properly applying the law to the case? It is not who won or lost the case. I find it very disturbing that we are reducing this confirmation process to whose side he ruled on and whether ideologically he fits a particular Senator's view of a particular issue or particular issues. That is not how we have ever viewed Justices in the Senate. We do not keep scorecards of whether you side with the little guy or big guy or how you came down on cases. We certainly have not had ideological litmus tests in the past on judicial nominations.

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

We are electing someone whose job it is to play it right down the middle, whose job it is to be blind justice, who is going to weigh the facts in the law and do what it dictates, not do what they believe, in their ideological viewpoint, is right.

I am disturbed by the criticism, but I am very encouraged by Judge Alito and the way he has conducted himself and the way he answered the questions and how he has, in fact, laid out a very concise and well-reasoned approach to his making decisions on the Court in the past.

He obviously has impeccable credentials. The Senator from Utah is in the Chamber right now, and I heard him say over and over that no one has the credentials this man has and the experience he brings to the Supreme Court. No one, in my view, has been more personally decent, humble, and modest dealing with a rather rancorous hearing process. He came off, at least from my view, as exactly the kind of temperament we would want of a Supreme Court Justice—of any judge. He is obviously highly intelligent, battling wits with some of the best minds in the Senate. During this process, both privately and publicly, he has been gracious. He is, again, someone I am very proud to support.

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

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

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

One of the reasons that I think is vitally important for putting a Judge Alito on this Court, and hopefully future Judge Alitos as other vacancies occur, is that we will have an opportunity to return a balance of power in this country away from nine unelected people across the street from the Senate to the halls of the people's bodies, to the living rooms of America, for them to be able to make these decisions that are important to the future of our country and not have those decisions taken from them by radical judges on our courts.

So this is an important step. Do I believe that we are going to see, as a result of Judge Alito's confirmation, which appears to be all but certain, a dramatic change in the precedents of the U.S. Supreme Court? I sort of doubt that we will see dramatic change, certainly not any time soon. But I think what we will see is a more

modest approach to dealing with the problems with which the Supreme Court is confronted. We will not see cases where the Court could decide a case on a narrow issue and settle the dispute at hand and instead of doing so take the opportunity, ''while we are at it,'' to overturn a variety of precedents they don't need to overturn and create new legislation, if you will, through their judicial opinions. We see that happen time and again. It threatens the very foundation of our country.

Thomas Jefferson understood that. Jefferson in 1821—this was after he was President, 5 years before he died, obviously a great student of our Constitution, obviously a great student of the powers of the Congress and the judiciary and obviously of the Presidency—he said, in reflecting on this very delicate system and the balance of power among the executive, the judicial, and the legislative branch:

> The germ of destruction of our Nation is in the power of the judiciary, an irresponsible body working like gravity by night and by day, gaining a little today and a little tomorrow and advancing its noiseless step like a thief over the field of jurisdiction until all shall render powerless the checks of one branch over the other and will become as venal and oppressive as the government from which we separated.

He saw the power of an immodest, a brash, a bold judiciary in its ability by using the ultimate law of the land, the Constitution, in grabbing power by day and by night quietly—drip, drip, drip—taking the power away from the people and ceding it to itself so that, to paraphrase Jefferson, they would be like the monarchs we left, ruling from their kings' benches.

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

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

Whether I am in the Senate or somewhere else at that point in time, I hope I will have the integrity and the ability to stand up and criticize that Court such as I am criticizing the courts over the last 30 years for their activities. There is no place for the Court imposing its will and making laws. There is no place for that in our Constitution. That is not their role.

I am very pleased the President understands that and that he has put forth judges who I believe understand that point of view as a member of the judiciary. I am hopeful that we will confirm Judge Alito and that we will continue this process of creating a better balance of powers among the Congress, the executive branch, and the judiciary. This is a very important, in my opinion, second step in that process.

I yield the floor.

The PRESIDING OFFICER. The Senator from Utah.

Mr. HATCH. Mr. President, I enjoyed my colleague's remarks. We are in the final stretch of considering the nomination of Samuel Alito to the Supreme Court of the United States, and by any reasonable objective or traditional standard, Judge Alito deserves overwhelming confirmation, without question.

The first reason Judge Alito should be confirmed is that he is highly qualified to serve on the Supreme Court. It amazes me that some parties to this debate practically ignore his qualifications altogether. They are so intent on manufacturing a case against this nominee that they brush aside this seemingly minor detail of his qualifications as if it were just an annoyance.

After serving in the Department of Justice and as a highly regarded Federal prosecutor, Judge Alito has served on the U.S. Court of Appeals for the Third Circuit since 1990, has participated in nearly 5,000 cases, and has written more than 360 opinions. He has more judicial experience than any Supreme Court nominee in the last three-quarters of a century.

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

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

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

The second reason Judge Alito should be confirmed is that he is a man of character and integrity. Anybody watching those proceedings would have to conclude that. I have been struck, throughout this process, at the level of respect and praise for Judge Alito's character and integrity, how it is directly related to how well people know him, how closely they have worked with him. Without exception, those sounding the most dire warnings, creating the most negative caricatures, and painting the scariest picture of Judge Alito are those who know him the least or who do not know him at all.

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

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

The third reason Judge Alito should be confirmed is that he understands and is committed to the appropriately limited role of the judiciary. America's Founders established a system of limited Government containing three branches, each with its category of power and ability to check the others. The judicial branch is as much a part of this system of Government and must remain as limited as the legislative and executive branches.

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

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

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

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

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

Others leave the political process behind and go to the courts, trying to persuade judges to impose upon the American people policies and priorities the people would not choose for themselves, or they could never get through the elected representatives of the people.

The fight over judicial appointments is whether we should have judges willing to take such political bait.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I might add that at one time in the proceedings one of the Democratic Senators said he never ruled in favor of labor. We immediately showed a number of cases where he did. You can find rulings by Judge Alito across the spectrum with respect to people who should have won those cases.

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

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

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

The first three words of the Constitution are ''we the people.''

The Constitution belongs to the people.

It does not belong to judges.

The Constitution, your Constitution—I am speaking to the people out there—already has a specific process for changing it, and the only branch of government involved in that process is this one, the legislative branch, the one you directly elect.

If America's founders explicitly excluded the judiciary from the process of changing the Constitution, do you think instead that judges should now be able to change the Constitution?

Do you believe that the Constitution, your Constitution, is whatever judges say it is?

It is the Constitution that ultimately protects our rights and liberties.

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

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

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

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

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

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

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

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

Some Democratic Senators used this very illegitimate tactic on Judge Alito, selecting the most salacious or controversial articles which Judge Alito never read. One Senator even tried to

pass a parody of such outrageous views off as the real thing. That is how denigrating this process became.

Our staff spent hours pouring through boxes of documents related to this group and the name Samuel Alito never appeared on a single scrap of paper—not one.

The disinformation was even worse in the media.

The group in question, or at least some of its members, wanted to preserve Princeton's all-male tradition and opposed affirmative action—in other words, affirmative action.

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

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

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

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

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

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

At Judge Alito's hearing, the Senator from New York cited a few cases in which colleagues disagreed with how Judge Alito treated the court's prior decisions. The Senator from New York made no attempt whatever to determine whether Judge Alito's position in those cases was right or wrong. He simply grabbed quotes supporting his preconceived point of view.

With all due respect to the judges who disagreed with Judge Alito in those cases, they could very well be the ones who misread or misapplied the Third Circuit's prior decisions.

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

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

My colleagues will remember that seven of Judge Alito's current and former judicial colleagues appeared before the Judiciary Committee. Who better to give the Senate real insight of Judge Alito's approach to cases, his attitude toward litigants, and his perspective on the law? Better yet, what a unique opportunity to hear from those fellow judges about how Judge Alito handled precedent.

I might add that earlier in the hearing, for example, the Senator from New York quoted a passage critical of Judge Alito from the majority opinion in Dia v. Ashcroft. Chief Judge Anthony Scirica joined that opinion. Chief Judge Scirica was sitting right there in front of the committee.

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

I asked him about it. I referred to the claims by the Senator from New York and asked the judges whether Judge Alito disregards precedent, whether he has an agenda to disrupt the court's prior decisions. Judge Edward Becker, former Chief Judge of the Third Circuit Court of Appeals, participated with Judge Alito in more than 1,000 cases. Judge Becker said he never saw Judge Alito disregard or ignore precedent. Judge Alito followed precedent unless he believed the precedent was distinguishable or was what judges called dicta—in other words, not binding language in a particular case.

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

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

As I mentioned earlier, some of my Democrat colleagues are particularly fond of scorecards and tallies, thinking that tells anything useful about a judge's approach to the law. Perhaps they can create something like a confirmation rate card listing the percentage of cases in different categories that one side or the other is supposed to win. Plaintiffs should win this percentage of employment discrimination, the prosecution is allowed to win this percentage of criminal cases, and so on. Perhaps it can be a list titled ''Whose Side Are You Supposed To Be On'' as a judge. That is about the way it comes off. Before anyone dismisses this as ridiculous or farfetched, this is exactly what some of my Democrat colleagues and many of their leftwing interest group friends have done to Judge Alito.

In his opening statement on January 9, the Senator from Massachusetts, Mr. KENNEDY, cited a so-called study by University of Chicago law professor Cass Sunstein claiming that Judge Alito voted against the individual in 84 percent of his dissents. The Senator from Massachusetts did not quote from Professor Sunstein's letter that such statistics must be taken with ''many grains of salt and with appropriate qualifications,'' or Professor Sunstein's own admission that his analysis was done under what he called considerable time pressure, rendering his conclusions only tentative and preliminary. And, of course, the Senator from Massachusetts did not examine any of the dissents on the merits. He let the calculator do the talking. Remember, these are appeals. Most of the appeals are upheld on appeal.

Actually, the Senator from Massachusetts went much further than that. On the basis of this one tentative and preliminary statistic from this one study, he claimed that ''average Americans have had a hard time getting a

fair shake in [Judge Alito's] courtroom.'' That is an outrageous claim, one that would not be at all justified even if the supposed evidence behind it were more legitimate.

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

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

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

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

He said:

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

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

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

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

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

And the reason is that having worked with him, I 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.

He went on to say:

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

He endorsed Judge Alito in no uncertain terms.

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

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

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

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

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

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

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

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

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

I wish my Democratic colleagues would follow Governor Rendell's lead.

Finally, Mr. President, I am encouraged that Judge Alito will indeed be confirmed.

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

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

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

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Mr. President, we have Senators who wish to speak.

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

Mr. HATCH. Will the Senator yield?

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

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

The PRESIDING OFFICER. The Senator from Florida.

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

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

I believe in an America where courts address injustice and correct it. I believe in an America where our judges serve the people by interpreting the Constitution, without agenda. I may have no greater responsibility in the Senate than to be charged by our Constitution with advising the President

on his picks for the U.S. Supreme Court. And in assuming this awesome responsibility, I rise to oppose Judge Alito's confirmation to the Supreme Court.

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

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

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

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

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

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

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

In Chittister v. Department of Community and Economic Development, he ruled that State employees could not sue for damages to enforce their rights under the Federal Family and Medical Leave Act. The Supreme Court later reversed this ruling by a vote of 6 to 3. I might say that both of those acts under consideration by the Court I had the privilege of voting for when I was a Member of the House of Representatives.

And then in Riley v. Taylor, he ruled there was no basis for appeal in a death penalty case in which prosecutors had used their preemptory challenges to exclude Black jurors from the jury pool. The full Third Circuit later heard the case and overturned Judge Alito's ruling.

These cases highlight the broader concerns I have with Judge Alito's record.

During my years in the Senate, I have voted for almost all of President Bush's judicial nominees. All told, I have voted for 216 of the President's 226 judicial picks, including Chief Justice John Roberts. That is 96 percent.

I greeted Judge Alito's nomination with an open mind. But his many legal writings, his judicial opinions and evasive answers, both at his hearing and in my private meeting with him, convinced me that he would tilt the scales of justice ever so slightly against the average Joe. I do not want that outcome.

And because he is not the voice I believe this Nation needs to replace the retiring Justice Sandra Day O'Connor, who fiercely defended the rights and liberties of all Americans—because of this—I am going to vote no on his confirmation.

I yield the floor.

The PRESIDING OFFICER. The Senator from Rhode Island.

Mr. REED. Mr. President, before I comment on the nomination, I would like to recognize and thank several people who have been very helpful in preparing my comments: Kara Stein, Justin Florence, and Sharon Rapport.

Mr. President, I also ask unanimous consent to have printed in the RECORD a series of letters from national organizations with respect to issues of church and state separation and the nomination of Judge Alito.

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

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE,
Washington, DC, January 10, 2006.

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

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

DEAR CHAIRMAN SPECTER AND RANKING MEMBER LEAHY: Americans United for Separation of Church and State urges you to oppose the confirmation of Judge Samuel A. Alito, Jr. to be Associate Justice of the Supreme Court of the United States. Americans United for Separation of Church and State represents more than 75,000 individual members and 9,500 clergy nationwide, as well as cooperating houses of worship and other religious bodies committed to the preservation of religious liberty. We oppose the confirmation of Judge Alito to the Supreme Court because his record demonstrates that he would fundamentally alter First Amendment law and immediately put at risk many of the crucial protections for religious minorities that the Supreme Court has recognized and consistently enforced over the past sixty years.

Legal scholars have understood the First Amendment's religion clauses as striking a balance between the religious and political rights of individuals and groups within our society. There is a necessary tension between the Free Exercise Clause and the Establishment Clause, which serves to balance the sometimes competing interests of individuals' freedom of conscience against the requirement that the state be neutral with respect to religious viewpoints. Justice O'Connor has been successful in ensuring that public expression did not turn into government favoritism or state coercion of religious beliefs.

During his fifteen year tenure on the United States Court of Appeals for the Third Circuit, however, Judge Alito has shown himself to have a view of the First Amendment, particularly of the Establishment Clause, that differs dramatically from both Justice O'Connor's judicial philosophy and the settled understanding of fundamental Establishment Clause principles that has guided the Supreme Court's decisions for at least six decades. Indeed, early on, Judge Alito acknowledged his disagreement with the Supreme Court on its Establishment Clause jurisprudence. When applying for a position in the Reagan Administration Department of Justice, Judge Alito declared that his ''deep interest in constitutional law [was] motivated in large part by disagreement with the Warren Court decisions, particularly in areas [such as] the Establishment Clause. . . .'' As evidenced by his longstanding appeals court record, we remain concerned that such a motivation taints his view today.

There is much at stake for the future of religious liberty as a result of Justice O'Connor's retirement and Judge Alito's nomination to take her place on the Supreme Court. As Justice O'Connor has recognized, it is vital that our longstanding Establishment Clause protections remain in place:

''At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. . . Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?'' (McCreary County, Kentucky v. ACLU of Kentucky, 125 S. Ct. 2722, 2746 (O'Connor, J., concurring)).

In the Establishment Clause area, replacing Justice O'Connor with Judge Alito likely would have a profound effect on the religious freedoms that our dual constitutional commitments to free exercise and separation of church and state have long ensured. Both the straightforward holdings and the underlying tenor of Judge Alito's decisions in Establishment Clause cases contrast sharply with Justice O'Connor's views. Throughout her career on the Court, Justice O'Connor has been keenly attuned to the plight of religious minorities in society as a whole, and most especially in the public schools. But Judge Alito's focus has been elsewhere: on religious majorities' ability to express their views through governmental instrumentalities, at government owned facilities, and in government-organized enterprises like the public schools. Judge Alito has given broad license to religious majorities to use the public schools and other official settings to broadcast their religious messages without regard for the competing rights and interests of religious minorities.

Because Judge Alito has not extended the same protections to all Americans that he has granted to politically powerful religious majorities, the Senate should decline to confirm his appointment as an associate justice of the U.S. Supreme Court.

If you have any questions on Americans United's position on this nomination, please contact Aaron D. Schuham, Legislative Director.

Sincerely,

REVEREND BARRY W. LYNN,
Executive Director.

B'NAI B'RITH INTERNATIONAL,
Washington, DC, January 6, 2006.

Hon. PATRICK LEAHY,
U.S. Senate,
Washington, DC.

DEAR SENATOR LEAHY: On behalf of B'nai B'rith International and our more than 110,000 members and supporters, we write to ask that the confirmation hearings of Judge Samuel Alito deeply probe the nominee's judicial philosophy with regard to issues of great concern to our organization. Founded in 1843, B'nai B'rith is America's pioneer Jewish agency, with a wide range of domestic and international public policy priorities. Included in our agenda are several issues that we would like to ask the Judiciary Committee to raise with Judge Alito:

(1) Church-State Relations. We hope the Committee will ask Judge Alito which judicial test should be applied to determine whether a particular government action violates the First Amendment's Establishment Clause. It might be helpful to ask if the nominee feels it is permissible for public school officials to lead students in prayer or scriptural readings, or whether he believes that public funds and public property may be used for religious displays. We also would be interested to learn whether Judge Alito believes that a statute or ordinance requiring schools to give ''equal time'' to instruction in creationism or intelligent design would violate constitutional principles.

(2) Asylum. B'nai B'rith hopes the Committee will ask the nominee what standard should be applied to asylum claims by individuals facing persecution in their homelands. We would be interested to know what threshold of harm, or risk of harm, a person fleeing a repressive society must demonstrate before receiving asylum in the United States.

(3) Workplace Discrimination. B'nai B'rith would like to hear Judge Alito's views on the standard that should be applied to cases of age, disability, or sexual discrimination in the workplace. It would be useful to know the nominee's position on the burden of proof an older worker must meet to demonstrate that he or she has been passed over for promotion, denied accommodation, or unfairly rejected as a job applicant because of his or her age or disability.

Thank you for your attention and consideration. B'nai B'rith looks forward to remaining in communication with you about this and other matters of mutual interest in the months to come.

Respectfully,

JOEL S. KAPLAN,
President.
DANIEL S. MARIASCHIN,
Executive Vice President.

UNITARIAN UNIVERSALIST ASSOCIATION OF CONGREGATIONS,
Washington, DC, December 15, 2005.

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

DEAR SENATOR: On behalf of the over 1,000 congregations that make up the Unitarian Universalist Association, I urge you to oppose the confirmation of Judge Samuel Alito Jr., to the United States Supreme Court. After a careful review of his decisions, and in particular dissents, we have concluded that Judge Alito does not show sufficient respect for civil liberties. His deciding vote on the court could undermine fundamental rights for decades.

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

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

Police Power: In the case of Doe v. Groody, Judge Alito dissented from a Third Circuit ruling that police officers had violated clearly established constitutional rights. Police had strip-searched a mother and her ten-year-old daughter while executing a search warrant authorizing only the search of her husband and their home. Then-Third Circuit Judge Michael Chertoff, now Secretary of Homeland Security, held that the unauthorized search violated ''clearly established'' rights. Alito disagreed, arguing that even if the warrant did not authorize the search, an officer still could have read the warrant as allowing it.

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

In ACLU of New Jersey v. BlackHorse Pike Regional Board of Education, Judge Alito joined a dissent from the Third Circuit's ruling which struck down a public school board policy allowing high school seniors to vote on whether to include student-led prayer at their school-sponsored graduation ceremonies. In a subsequent case (Santa Fe Independent School District v. Doe), the Supreme Court, with Justice O'Connor in the majority, struck down a public school board policy allowing students to vote on whether to include student-led prayer at high school football games.

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

Judge Alito has strongly disagreed with Third Circuit rulings protecting the civil rights of African Americans. In Bray v. Marriot Hotels, Alito disputed a ruling by Theodore McKee—the Circuit's only African American judge—allowing a race discrimination case to go to trial. McKee said that Alito's position would ''immunize an employer from the reach of Title VII if the employer's belief that it had selected the 'best' candidate, was the result of conscious racial bias.''

Judge Alito has narrowly construed statutes in gender discrimination cases. In Sheridan v. E.I. DuPont de Nemours and Co., Alito was the only judge to dissent from a ruling clarifying the nature of evidence permitting a jury to find an employer engaged in discrimination. Alito's position would have denied the plaintiff the opportunity to go to trial despite significant evidence of discrimination.

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

Reproductive Freedom: Dissenting in Planned Parenthood v. Casey, Judge Alito wrote that the right to reproductive freedom does not prevent states from requiring women to notify their spouses, except in limited circumstances, before getting an abortion. Justice O'Connor cast the deciding vote rejecting Judge Alito's position. Joined by Justices Kennedy and Souter, O'Connor held that the provision Alito supported harkened back to the days when ''a woman had no legal existence separate from her husband'' and created an undue burden on a woman's ability to obtain an abortion.

WE ARE NOT ALONE

When the Unitarian Universalist Association makes a decision to adopt a particular stance, we generally find ourselves in the company of other religious organizations with similar views. This holds true for our opposition to the confirmation of Judge Alito.

In late November, the biennial convention of the Union for Reform Judaism—the largest branch of Judaism in North America—voted overwhelmingly to oppose Judge Alito's confirmation, saying that it ''would threaten protection of the most fundamental rights'' that the Reform Movement supports. ''On choice, women's rights, civil rights and the scope of federal power,'' Alito would ''shift the ideological balance of the Supreme Court on matters of core concern to the Reform Movement,'' according to the resolution adopted by the more than 2,000 voting delegates from more than 500 congregations in all 50 states.

Both our denominations reviewed Judge Alito's rulings and found that his record did not support our stated values. The Unitarian Universalist Association of Congregations criteria and supporting materials are available at http://www.uua.org/. Materials from the Union for Reform Judaism can be found at http://urj.org.

Liberty is at the core of our Unitarian Universalist faith. Civil liberties are at the heart of our American experiment in democracy. Those civil liberties guaranteed by the Bill of Rights are as fundamental to our practice of democracy as freedom of conscience is to our religion. We believe that Judge Alito's philosophy does not sufficiently respect these fundamental rights, and we urge you to oppose his confirmation.

In Faith,

ROBERT C. KEITHAN,
Director.

WOMEN OF REFORM JUDAISM,
New York, NY, January 9, 2006.

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

DEAR SENATOR LEAHY: Recognizing the profound significance of the Judiciary Committee hearings on the nomination of Judge Samuel Alito, Jr. to the United States Supreme Court for the future of jurisprudence in the United States, Women of Reform Judaism, comprised of 75,000 members in 550 affiliates in North America urges you to oppose his confirmation.

Women of Reform Judaism rarely opposes judicial nominations. Its resolution ''Judicial and Executive Branch Nominations'' adopted in 2004, however, emphasizes the need for balance of legal and social perspectives on the federal bench. This resolution also enables Women of Reform Judaism to oppose judicial candidates whose record demonstrates opposition to the core values, rights and principles supported by our organization.

In his years in the Reagan Administration and on the Third Circuit Court of Appeals, Judge Alito has been a strong and consistent voice for restricting women's rights, extending police powers and destroying the wall separating church and state in schools and in community religious displays. Judge Alito has also taken anti-affirmative action positions and has supported stringent barriers in discrimination cases. Judge Alito's vote could be a crucial one on the court in all these areas and more, replacing the balance provided by Justice Sandra Day O'Connor with a marked shift that would endanger the civil liberties and civil rights of the people of the United States.

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

Respectfully,

SHELLEY LINDAUER,
ROSANNE M. SOLFON.

RELIGIOUS ACTION CENTER
OF REFORM JUDAISM,
Washington, DC, January 11, 2006.

Hon. ARLEN SPECTER,
U.S. Senate, Hart Senate Office Building, Washington, DC.

Hon. PATRICK J. LEAHY,
U.S. Senate, Russell Senate Office Building, Washington, DC.

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

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

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

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

On choice, women's rights, civil rights, and the scope of federal power (particularly as it relates to civil rights and environmental protection), Judge Alito's nomination has sparked a national debate on one or more issues of core concern to the Reform Movement so that the outcome of the nomination is likely to be perceived as a referendum on that issue and will have significant implications beyond the individual nomination;

Many of his rulings have been contrary to our core values and differed from the views of Justice Sandra Day O'Connor (who was so often the moderate ''swing vote'' on a closely divided Supreme Court), and, consequently, Judge Alito's elevation would shift the ideological balance of the Supreme Court on matters of paramount concern to the Reform Movement; and

Judge Alito's elevation to the Supreme Court would likely contribute significantly to reshaping American jurisprudence in a direction that would jeopardize our core values.

Judge Alito's government service, and especially his fifteen-year record on the 3rd Circuit Court of Appeals, provide clear insight into his judicial philosophy and understanding of the Constitution. His rulings from the bench in many areas of great import to the Reform Movement, and the views he expressed while working at the Department of Justice, demonstrate to us that he should not be confirmed.

As a religious minority, our community has historically been committed to maintaining a strong wall of separation between church and state. We see nothing in Judge Alito's background to suggest he shares our commitment. In fact, in his 1985 job application to the Reagan Justice Department, Judge Alito wrote that one of the very reasons he became interested in constitutional law was his ''disagreement'' with the Warren Court's decisions regarding the Establishment Clause. His opinions as a sitting judge have been consistent with this claim. In ACLU–NJ v. Schundler, Judge Alito said it was constitutional to have a holiday display consisting of a crèche (a representation of the infant Jesus in the manger), a menorah, a Christmas tree, and other ''secular holiday'' displays in front of the entrance to the main city government building. Again evidencing his lack of commitment to Establishment Clause values, in ACLU of New Jersey v. Black Horse Pike Regional Board of Education, Judge Alito's dissenting opinion argued that it was constitutional for a public school district to allow prayer at graduation ceremonies. Later, in a similar case involving school prayer the Supreme Court disagreed. The statements in Judge Alito's 1985 job application and the aforementioned cases illustrate his indifference (at best) to the constitutional protections separating church and state; safeguards that have been the linchpin protesting religious liberty for all Americans.

A longtime advocate for women's rights and reproductive choice, the Reform Movement is also deeply concerned by Judge Alito's views on reproductive rights. During his time as an attorney in the Solicitor General's office, Judge Alito helped author the Reagan Administration's amicus brief in Thornburgh v. American College of Obstetricians and Gynecologists which argued for overturning the Roe v. Wade decision. Judge Alito also authored a 17-page memo to the Solicitor General on how to ''advance the goals of bringing about the eventual overturning of Roe v. Wade . . .'' Further, in his 1985 job application to the Reagan Justice Department he wrote of his work in the Solicitor General's office saying, ''it has been a source of personal satisfaction to me . . . to help advance legal positions in which I personally believe very strongly. I am particularly proud of my contributions to recent cases in which the government has argued in the Supreme Court that . . . the Constitution does not protect a right to an abortion.'' This dedication to the ''advancement'' of reversing Roe is also clearly illustrated by his dissenting opinion in Casey v. Planned Parenthood (1991). Judge Alito would have upheld a provision of Pennsylvania's restrictive anti-abortion law requiring a woman to notify her husband before obtaining an abortion. His colleagues on the Third Circuit disagreed and the Supreme Court overturned the Pennsylvania provision (with Justice O'Connor casting the deciding vote). The Court's majority opinion found that the provision Judge Alito would have upheld reverted back to the days when ''a woman had no legal existence separate from her husband.''

So often our nation's courts ensure civil rights and civil liberties that are otherwise unprotected by flawed systems and discriminatory actions. In order to continue administering justice and equality for all, individuals with grievances must have access to the courtroom. Here, too, the record suggests that Judge Alito does not share our commitment to this fundamental principle. In split decisions on the merits of claims alleging violations of the civil rights of racial minorities, women, seniors, and people with disabilities, Judge Alito has consistently ruled with the defendants. In 16 of 24 such cases, Judge Alito has voted to deny litigants the right to even bring their suit before the court. For example, in Bray v. Marriott Hotels, involving claims of race discrimination, the Court majority sharply criticized Judge Alito's dissent, stating that his ''position would immunize an employer from the reach of Title VII'' in certain circumstances. In Public Interest Research Group v. Magnesium Elektron, another case involving access to the courtroom, Judge Alito again voted to make it harder for citizens to establish standing to sue, this time concerning toxic emissions that violate the Clean Water Act.

Judges, especially those selected to serve on the highest court in our land, must be committed to upholding our foundational principles of liberty and equality. Judge Alito's record leaves us with serious doubts as to his ability to safeguard these rights that we as a Movement, and a nation, hold so dear. Here, with the stakes so high—a lifetime appointment to the nation's highest court, replacing a pivotal Justice who was often the ''swing vote'' in key areas—we cannot afford such doubts.

We, therefore, urge you to oppose the nomination of Judge Samuel Alito Jr. to the Supreme Court of the United States, and we

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

Respectfully,

RABBI DAVID SAPERSTEIN,
Director, Religious Action Center of Reform Judaism.
JANE WISHNER,
Chair, Commission on Social Action of Reform Judaism.
NATIONAL COUNCIL OF JEWISH WOMEN,
November 29, 2005.

Hon. ARLEN SPECTER,
Chairman, Senate Judiciary Committee, Hart Senate Office Building, Washington, DC.

DEAR CHAIRMAN SPECTER: I am writing to you on behalf of 90,000 members and supporters of the National Council of Jewish Women (NCJW) to express our strong opposition to the nomination of Judge Samuel A. Alito, Jr. to fill the seat of Justice Sandra Day O'Connor on the U.S. Supreme Court. We have decided to oppose Judge Alito for many reasons, most notably because of his record concerning the right to privacy, his views on civil rights and women's equality, and his support for weakening the wall of separation between religion and state. In light of this record, NCJW believes that Judge Alito should not be confirmed for a lifetime position on the Supreme Court.

When Justice Sandra Day O'Connor announced her intention to retire from the Supreme Court, NCJW called upon President Bush to seek a mainstream consensus nominee that would unite and not divide the nation. Instead, he has selected a nominee who is deeply ideological with a demonstrated commitment to pulling the court to the far right.

Judge Alito is clearly not a nominee in the tradition of Justice O'Connor, who sought to balance competing interests and adopted a pragmatic approach to the law. Rather, over the course of his career, Judge Alito has ruled to severely restrict a woman's constitutional right to abortion and against civil rights protections for both women and minorities. He has shown a cramped view of the power of Congress to legislate, ruling, for example, that Congress lacked authority to ban fully automatic machine guns and that Congress overstepped its bounds in passing the Family and Medical Leave Act.

With the withdrawal of the nomination of Harriet Miers to the Supreme Court, it became clear that the extreme right wing was determined to see a justice confirmed who would implement their agenda from the bench. Judging from his record, Samuel Alito appears to be just such a nominee. We are extremely disappointed that the President chose this path and gave in to those forces demanding a nominee dedicated to rolling back fundamental constitutional rights, rather than protecting them. We urge the Senate to reject Judge Alito's nomination.

We applaud your intention to hold hearings that will thoroughly explore Judge Alito's views and judicial philosophy. While we hope that he will be candid in his answers, the hearing is only part of the record that senators must take into consideration as they determine whether or not a nominee is fit to be confirmed to be an Associate Justice of the Supreme Court. With the stakes so high, it is all the more critical that the Senate take into account Alito's entire record—not just his brief appearance before the Judiciary Committee. President Bush must immediately turn over all of the records requested by the senators. And Judge Alito must now be forthcoming regarding his judicial philosophy and views on settled legal questions.

NCJW believes that the most basic qualification for a lifetime seat on the federal bench is a commitment to fundamental rights and freedoms. What we know of Judge Alito's record raises sufficient doubt that he meets that essential qualification and therefore we urge the Committee to reject his confirmation.

Sincerely,

PHYLLIS SNYDER,
NCJW President.

Mr. REED. Mr. President, nearly two centuries ago, Alexis de Tocqueville observed that ''there is hardly a political question in the United States which does not sooner or later turn into a judicial one.''

As was the nomination of John Roberts to replace Chief Justice Rehnquist, the nomination of Samuel Alito to replace Associate Justice Sandra Day O'Connor, upon her retirement, is an extremely important moment for our Nation.

The Constitution makes the Senate an active partner, along with the President, in the confirmation of a Supreme Court nominee. Article II, section 2, clause 2 of the Constitution states that nominees to the Supreme Court shall only be confirmed ''by and with the Advice and Consent of the Senate.'' The Senate's role in the confirmation process places an important democratic check on America's judiciary.

As a result, this body's consent is both a constitutional requirement and a democratic obligation. It is in upholding our constitutional duty as Senators to give the President advice and consent on his nominations to Federal courts that I believe we have our greatest opportunity and responsibility to support and defend the Constitution of the United States.

In our consideration of the nomination of Chief Justice Roberts last fall, I stated my test for a nominee to the Supreme Court. It is a simple test, one drawn from the text, the history, and the principles of the Constitution. As I said then, a nominee's intellectual gifts, experience, judgment, maturity, and temperament are all important. But these alone are not enough.

In addition, a nominee to the Supreme Court must live up to the spirit of the Constitution. A nominee must not only commit to enforcing the laws, but to doing justice. A nominee must give life and meaning to the great principles of the Constitution: equality before the law, due process, freedom of conscience, individual responsibility, and the expansion of opportunity.

It is these principles that ensure full and equal participation in the civic and social life of America for all Americans. A nominee to the Supreme Court must make these constitutional principles resonate in a rapidly changing world.

In my view, Judge Alito has not met this test. In his personal writings from his time in the Reagan Department of Justice, he has outlined a view of the Constitution that is narrow, restrictive, and backward-looking on issue after issue. He has pursued this vision through both the clients he has chosen to represent and the causes he has chosen to advocate.

In addition, his opinions on the Third Circuit Court of Appeals have shown the impact of his personal philosophy on his role as a judge. Too many times he has read constitutional clauses and statutes in a narrow and cramped way to protect the Government or big corporations instead of ordinary Americans. In case after case, and in his testimony before the Judiciary Committee, Judge Alito has failed to show a commitment to protecting the spirit of the Constitution.

Indeed, during his hearings, he had a chance to answer questions about his prior writings and rulings in a clear manner. Instead, Judge Alito opted to speak in broad platitudes and failed to answer key questions in a manner that would qualify or put in adequate context his prior writings and rulings.

Part of the genius of the Constitution that our Founding Fathers drafted is that it fulfills two functions at once. It is a blueprint for our Nation to govern itself through a system of checks and balances. It is also a charter of the rights and liberties of the American people. I am deeply concerned about Judge Alito's views in both of these areas. Judge Alito's record on the Third Circuit shows he has joined or agrees with a movement to undermine the ability of Congress to protect the American people through restrictive interpretations of the Commerce Clause and the 14th amendment. The Supreme Court, in recent years, has struck down more acts of Congress than ever before. By narrow 5-to-4 margins, in cases such as United States v. Lopez and United States v. Morrison, the Court has drifted from longstanding Supreme Court precedents to invalidate portions of the Gun-Free School Zones and the Violence Against Women Acts.

Judge Alito would go even further. In his dissent in the case of United States v. Rybar, he advocated striking down Congress's ban on the transfer and possession of machineguns. Alito's opinion diverged not just from the majority in his own Third Circuit but also from five other courts of appeals that had already found the law to be a constitutional expression of Congress's authority.

Yet Judge Alito argued that he was not convinced by Congress's findings on the impact of machineguns on interstate commerce. He substituted his own policy preferences in a way that the Third Circuit majority found was, in their words, ''counter to the deference that the judiciary owes to its two coordinate branches of government.'' Every other circuit has since disagreed with Judge Alito's views on this case, and the Supreme Court has concurred in these circuit court decisions.

Judge Alito's divergence from mainstream constitutional views on this issue is particularly disturbing because it echoes personal views on congressional authority he has expressed in other contexts. For example, while

working in the Reagan administration, he argued in a memo that the Truth in Mileage Act of 1986 ''violates the principles of freedom'' and should be vetoed by the President. This Federal law requires a seller to disclose the vehicle's mileage on the title when ownership is transferred. Congress enacted this law to prohibit odometer tampering and to protect consumers from mileage fraud. Samuel Alito argued that it was the States, and ''not the federal government,'' that should protect American citizens.

Not only does Judge Alito have an unusually narrow view of the Commerce Clause, it also appears that he would restrict Congress's ability to pass laws under section 5 of the 14th amendment. This clause states that ''Congress shall have power to enforce, by appropriate legislation, the provisions of this article.'' Those provisions include some of our most fundamental constitutional principles, including due process and the equal protection of the law.

Congress has acted under the authority of this clause to protect the rights of women and minorities, to ensure religious freedom, and to guarantee civil rights for the elderly and the disabled. But based upon his writings and rulings, Judge Alito would severely limit the meaning of this clause. In Chissiter v. Department of Community and Economic Development, he found the sick leave provisions of the Family and Medical Leave Act to be unconstitutional because he believed that 12 weeks of leave was ''out of proportion'' to the gender discrimination that Congress wished to remedy. Here again, Judge Alito relied on his own policy preferences to strike down the measured judgment of Congress.

In the case of Nevada Department of Human Resources v. Hibbs, the Supreme Court explicitly upheld the family leave provisions of the act by a 6-to-3 vote. Where Alito had questioned the judgments of Congress, the Hibbs majority, including Justices Rehnquist and O'Connor, found that, in their words:

> The [Family Medical Leave Act] is narrowly targeted at the fault line between work and family—precisely where sex-based overgeneralization has been and remains strongest.

The possible consequences of this tendency by Judge Alito to second-guess the policy judgments of Congress and to replace them with his own policy preferences are profound. They go beyond any single act of Congress or any single area of policy. As just one example, this year the Supreme Court will consider a pair of cases on the constitutionality of the Clean Water Act. These cases challenge whether Congress can protect wetlands and tributaries through its commerce clause power. If the Supreme Court, with a recently confirmed Judge Alito, adopts a more restrictive view of the commerce clause and the 14th amendment, it could limit our ability to protect our country's wetlands, let alone our national interests in area after area.

At the same time that Judge Alito has advocated for a narrower vision of Congress's constitutional authority, he has argued that the powers of the executive branch should be nearly unlimited. In a 2001 speech to the Federalist Society, Judge Alito stated that since the 1980s, he had believed in the ''theory of the unitary executive.'' In the Judiciary Committee hearings, Judge Alito denied any connection between the unitary executive theory and the scope of Executive power. But scholars and judges have drawn from this theory to advance expansive views of the executive.

For example, in Hamdi v. Rumsfeld, the Supreme Court reviewed the President's claim that he could indefinitely detain an American citizen without bringing charges or giving him a day in court to challenge the detention. Eight of the nine Supreme Court Justices rejected the President's claim, and Justice O'Connor wrote in her plurality opinion that ''a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.''

In a lone dissenting opinion, Justice Thomas deployed the unitary executive theory to support broad Presidential powers. He wrote that congressional or judicial interference in foreign affairs or national security ''destroys the purpose of vesting the primary responsibility in a unitary Executive.''

In view of the long scope of American constitutional history, the unitary executive theory is a relatively recent invention. It was a creation of the Reagan Justice Department in the 1980s. And according to his speeches, Judge Alito has subscribed to it since working there. While he worked in the Reagan administration, Judge Alito proposed a particular idea to, in his words, ''increase the power of the Executive to shape the law.''

In a 1986 memorandum, Alito argued that the President should issue statements when signing a bill because the President's ''understanding of the bill should be just as important as that of Congress.'' The administration has followed Judge Alito's 1986 advice. For example, just recently, the President issued a signing statement regarding the McCain amendment which prohibits torture. In that statement, the President wrote that he would construe the McCain amendment ''in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch.''

The practice Judge Alito first advocated in the mid-1980s arguably helps the executive to thwart the will of Congress when it passes a law. While the current Supreme Court has not given weight to these signing statements interpreting the meanings of acts of Congress, I worry how a possible Justice Alito would view these Presidential statements should they come before him on the Supreme Court.

I think Judge Alito's view of the unitary executive is wrong and violates the text and the spirit of the Constitution. In Federalist Paper No. 47, James Madison explained how the Constitution deliberately divided power among the branches of Government. Rather than create a unitary executive, the Framers created a careful and thoughtful system of checks and balances between all three branches of Government. They were very weary of concentrating too much power in any one branch of Government. As the McCain amendment demonstrates, Congress plays a vital role in placing limitations on Executive power, but so do and must the courts.

In the near future, the Supreme Court will hear further cases in this area. Perhaps the President's claimed authority to conduct warrantless surveillance of Americans in violation of congressional statutes will come before the Court. In this time of crisis in particular, we need to have Supreme Court Justices committed to the balance and separation of powers between the three branches of Government. Despite Judge Alito's statements that no one is above or beneath the law, Judge Alito's record and views on the unitary executive give me pause. If Judge Alito believes that under the Constitution the President can determine what laws apply to him and how they apply, then he is essentially giving away the power of the Supreme Court as well as the power of Congress.

Ever since Marbury v. Madison, it has been ''emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.'' That settled doctrine, Marbury v. Madison, clashes with this notion of a unitary executive who can declare the law for himself and thus make himself exempt from the law.

Judge Alito's support for a powerful and unitary executive is exacerbated by his 15-year circuit court record of repeatedly deferring to government officials when American's civil rights and liberties lie in the balance. As I mentioned earlier, this is the other function the Founding Fathers created for the Constitution. The Framers included the fourth amendment in the Bill of Rights to protect Americans against unreasonable government searches and seizures. It was a response to the abuses of the British in the years leading up to the American Revolution. Yet time and again, Judge Alito has deferred to police, prosecutors, and other governmental agents instead of ordinary Americans.

Judge Alito wrote in his now famous 1985 job application essay that he disagreed with the Warren Court's criminal procedures decisions. These include famous cases in the development of American liberties—for example, Miranda v. Arizona, which sets forth

rights for the accused; or Katz v. the United States, which prohibited warrantless electronic surveillance; or Gideon v. Wainwright, which guaranteed every American the right to a lawyer. There is little doubt that Judge Alito's personal views in this area have carried over to his time on the bench.

As Professor Goodwin Liu testified before the Judiciary Committee, in fourth amendment cases, Judge Alito has not one time taken a position more protective of individual rights than his colleagues on the Third Circuit. These include cases where there were defective warrants, where agents conducted warrantless electronic surveillance, or where police used excessive force against unarmed individuals. Indeed, the Washington Post found that Judge Alito had sided with the government in these cases over 90 percent of the time, whereas other appeals court justices nationwide only sided with the government 54 percent of the time. In the face of government officials, the dignity, autonomy, and rights of individual Americans have carried less weight for Judge Alito.

As just one example, his dissent in the 2004 case of Doe v. Groody would have upheld the strip search of a mother and her 10-year-old daughter even though they were not named in the search warrant for the house. Judge Michael Chertoff, who wrote the majority opinion in the case and who is now the Secretary of Homeland Security, said that Judge Alito's opinion of the case, if adopted, could ''transform the judicial officer into little more than the cliche 'rubber stamp.'''

Judge Chertoff's quote is an apt summation of my concern over the nomination of Judge Alito. American courts cannot become a rubberstamp blotting out the constitutional rights of our citizens. But from women's rights to workers' rights and reproductive freedom to religious freedom, Judge Alito's writings and rulings reveal insensitivity to the judiciary's role in protecting the charter of freedoms enshrined in our Constitution.

The first amendment protects Americans' religious liberties through two clauses that work in tandem: the free exercise clause and the establishment clause. I worry that if confirmed, Judge Alito would upset the careful balance the Founders sought in constructing the first amendment. In fact, Judge Alito seems to interpret the establishment clause as a rarely applicable part of the first amendment. He applies the free exercise clause on a much broader basis, often interpreting establishment clause cases as free exercise cases. He seems to see a plaintiff's complaint of establishment clause violations as attempts to block the free exercise of religion.

Judge Alito's views appear to have been developed well over 20 years ago on these issues. In his 1985 job application essay, Judge Alito wrote that he disagreed with the Warren Court's establishment clause decisions. These rulings prohibited government-sponsored prayer in public schools, protected students who are members of minority religious faiths, and prevented State interference with and entanglement in America's religious liberty.

Judge Alito's record on the bench supports a troubling view of the establishment clause. For example, he joined a dissenting opinion in the case of ACLU of New Jersey v. Black Horse Pike Regional Board of Education, supporting student-led prayer at official, school-sponsored high school graduation ceremonies. The Supreme Court, in an opinion joined by Justice O'Connor, has since explicitly rejected this approach in Santa Fe Independent School District v. Doe and as recently as last year has sought a careful balance in establishment clause cases such as ACLU v. McCreary County.

In summary, in ACLU of New Jersey v. Black Horse Pike Regional Board of Education, the Third Circuit majority determined that a student-led prayer at a graduation ceremony violated the establishment clause.

Judge Alito joined the dissent in arguing that the establishment clause does not prohibit a high school graduation prayer. The school board involved had decided to allow graduating students to vote whether they wished to have a prayer, a moment of silence, or neither at their graduation ceremony. The students voted for prayer. Citing Wallace v. Jaffree and Board of Education v. Barnette, the Third Circuit majority said:

> An impermissible practice cannot be transformed into a constitutionally acceptable one by putting a democratic process to an improper use.

Judge Alito joined the dissenting opinion written by Judge Mansmann, stating that ''the establishment clause should not be read to prohibit activity which the free exercise clause protects.'' The dissent argued that the Supreme Court in Lee had not decided any broad constitutional precedents against prayer at graduation ceremonies, stating the facts in the case were wholly different, as the graduates, not the principal, maintained control over the ceremony, thereby avoiding the appearance of a state actor. The dissenters wrote:

> The establishment clause should not be used for imposing content-based restrictions on religious speech in a public forum under the appropriate scrutiny analysis.

The dissent further criticized the Lemon test established in Lemon v. Kurtzman, pointing to a ''division'' existing on the Supreme Court ''as to whether the establishment clause precludes the government from conveying a message that endorses or encourages religion in a generic sense, or especially acknowledges or accommodates the broad Judeo-Christian heritage of our civil and social order.'' It also concluded:

> [A]n absolute prohibition on ceremonial prayer at graduation would . . . violate the Free Exercise Clause by unduly inhibiting the practice of religion, and would also implicate the free speech guarantees of the First Amendment.

In another case, Child Evangelism Fellowship of New Jersey v. Stafford Township School District, Judge Alito wrote an opinion requiring a school to distribute a proselytizing religious group's literature to elementary school students under the Equal Access Act. Judge Alito dismissed the school district's concerns that students would perceive distribution of the religious fliers as endorsement of religion. Again, Judge Alito's view in this area of the law differed from that of the Supreme Court. Justice O'Connor's opinion in Board of Education v. Mergens, for example, carefully distinguished between requiring access to school facilities—which was acceptable under the Equal Access Act—and requiring the active involvement of school officials and teachers, which could have an inappropriately coercive effect.

Although I could discuss more cases, the basic point I want to make here is that I believe Judge Alito would upset the careful balance between the Free Exercise and Establishment Clauses of the First Amendment, allowing majority religious views to prevail over minority views, and leading to an inappropriate Government coercive effect on religious practice.

As Justice O'Connor states in McCreary:

> At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for the constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish . . . Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?

I believe Judge Alito would make that trade.

Consider another area. The Federal Courts play an important role in enforcing American workers' access to fair and safe working conditions, while protecting their right to organize, and providing a forum for remedying wrongful discrimination. Yet, as a judge, Alito has consistently tried to limit the reach of Congress' workplace statutes, and to make it more difficult for plaintiffs to bring legal claims. For example, in RNS Services v. Secretary of Labor, the Third Circuit majority found that the Mine Safety and Health Review Commission had jurisdiction over the work and safety conditions of employees at coal processing sites. But Judge Alito disagreed, siding with the employer by interpreting the statute and case law restrictively. One academic study has found that Judge Alito has sided with the employee or union in only 5 out of 35 labor opinions he has written. These are decisions that have real world effects on working people, as the recent mining accidents in West Virginia demonstrate all too clearly.

As far as a woman's right-to-choose is concerned, in his 1985 job application, Samuel Alito wrote that he was proud of his work in the Reagan administration advancing a ''legal position'' that he ''personally believe[d] very strongly.'' Namely, that ''the Constitution does not protect the right to an abortion.'' Let me make clear, he did not say that he thought abortion was wrong; he wrote that the Constitution did not protect a woman's right to choose. This is a view that he advanced as a lawyer and then a circuit judge, and that he did nothing to dispel in his Judiciary Committee hearings.

In his work for the Reagan Justice Department, Alito wrote a memo with a strategy for ''bringing about the eventual overruling of Roe v. Wade'' by chipping away gradually at privacy and reproductive rights. In the case of Planned Parenthood of Southeastern Pennsylvania v. Casey, Judge Alito used his dissent to argue for a constitutional interpretation that would do just that, chip away at the protections for the freedom to choose. The Supreme Court explicitly rejected Alito's opinion, with Justice O'Connor writing that the State ''may not give to a man the kind of dominion over his wife'' that Judge Alito would have accepted. Judge Alito's record in this area is long and clear, and I am disappointed that rather than openly answer the questions of Senators on the Judiciary Committee, he responded with obfuscating statements about the judicial process.

The Supreme Court has been a leader in safeguarding all kinds of civil rights, through momentous cases like *Brown* v. *Board of Education*, and through its application of historic laws of Congress like the Civil Rights Act of 1964. Victims of racial, gender, age, or disability discrimination can find remedies in the Federal Courts. But from my reading of his record, Judge Alito has repeatedly used procedural and evidentiary requirements to make it more difficult for plaintiffs to vindicate their civil rights claims. One study of discrimination cases heard by Judge Alito in which the panel was divided concluded that he sided against civil rights protections 85 percent of the time, more than any other judge on the Third Circuit.

For example, in the case of Bray v. Marriott Hotels, the Third Circuit said that an African-American woman denied a promotion in favor of a white woman, when the company had not followed its policy, should have a chance to present her case before a jury. Judge Alito disagreed, saying that this would ''allow disgruntled employees to impose the costs of trials on employers.'' As the majority in the case noted, under Judge Alito's view Title VII ''would be eviscerated.''

I know Judge Alito spoke in the hearings about his own family's history as immigrants to the United States. America's courts have played a crucial role in reviewing the immigration, deportation, and asylum decisions of the Federal Government and the Board of Immigration Appeals (BIA). As the noted conservative Judge Posner recently wrote, his appellate court reversed the Board of Immigration Appeals 40 percent of the time last year, mitigating the at-times harsh, unequal, and unfair application of our immigration laws. In the hearings, Judge Alito said he agreed that the way BIA cases are handled ''leaves an enormous amount to be desired.'' Yet immigrants who have appealed these decisions have found no place of refuge in Judge Alito's courtroom. According to one academic study, Judge Alito sided with the BIA in 7 out of 9 opinions he has written on asylum, and in 7 out of 8 other immigration opinions he has authored. I believe that the spirit of our laws and the history of our country require that immigrants to our shores are assured fair and full hearings.

In his application to the Reagan Justice Department in 1985, Samuel Alito wrote that his interest in constitutional law had been ''motivated in large part by disagreement with Warren Court decisions'' about voting rights. These landmark decisions, in cases like Baker v. Carr and Reynolds v. Sims, have enshrined the bedrock principle of ''one person, one vote'' into our Constitution. They have protected the right of all Americans to have an equal share in our democracy, regardless of the color of their skin or the location of their home.

While Judge Alito backed away from these strong statements in his confirmation hearings, his opinion in a voting rights case he heard on the Third Circuit calls that statement into question. In the case of Jenkins v. Manning, Judge Alito joined an opinion rejecting the African-American plaintiffs' challenge to the voting system for the local school board. The dissenting judge in the case wrote that Judge Alito's side had ''overlooked the broad sweep of the Voting Rights Act of 1965 and its 1982 amendments'' which that judge noted ''is widely considered to be the most successful piece of civil rights legislation ever enacted by Congress.'' The Supreme Court continues to regularly hear cases about the ability of Americans to participate fairly and equally in our democracy, and I believe a nominee to the Supreme Court should clearly and emphatically treasure and respect the Court's role in safeguarding voting rights, rather than minimizing it.

At the hearings before the Judiciary Committee, Judge Alito attempted to distance himself from his record and the constitutional views he has advocated throughout his career. An attorney must vigorously serve the interests of his client, but in the case of Judge Alito, he chose his clients—political offices in Republican Justice Departments—precisely because of the constitutional agenda it allowed him to advance. So, I do not accept Judge Alito's plea that we should not evaluate him based on the constitutional values he advanced through political positions.

I also have not been convinced by Judge Alito's vague rhetoric during the hearings about following the judicial process, or his begrudging acknowledgment that important Supreme Court cases were indeed ''precedents of the Court.'' While judges on the Federal circuit courts are circumscribed by Supreme Court precedent, there is no higher court to bind the Justices of the United States Supreme Court. Decisions of the Supreme Court are binding on all lower courts, so even if a circuit judge disagrees with well-established precedent about the rule of law, he or she must follow that law. But this is not true of the Supreme Court.

As Justice Frankfurter once wrote:

> It is because the Supreme Court wields the power that it wields that appointment to the Court is a matter of general public concern and not merely a question for the profession. In truth, the Supreme Court is the Constitution.

It goes without saying that the constitutional views of the Justices determine the rulings of the Supreme Court. In response to questioning during the hearings, Judge Alito pledged to put aside his personal views. But in his writings and speeches, including his 1985 job application, Judge Alito didn't just record his personal political views; he wrote down his views about what the Constitution means—about what rights it contains, and what limits it places on Government. To be clear, this is exactly what it means to serve on the Supreme Court and interpret the Constitution.

America's courtrooms are staffed with judges, not machines, because justice requires human judgments. This is particularly so on the Supreme Court. Of all the hundreds of thousands of cases filed in American Federal Courts each year, only about 80 reach the Supreme Court. These are the hardest of cases, cases that have divided the country's lower courts. These are cases where one constitutional clause may be in conflict with another; where one statute may influence the interpretation of another; and where one core national value may interfere with another. These cases often divide the Justices of the Court by close margins. Surely the Justices on both sides of a 5 to 4 case can claim to be following the judicial process and respecting the precedents of the Court. What divides their opinions is the set of constitutional values that they bring to the case. Judge Alito's testimony before the Judiciary Committee suggests a failure either to understand or to acknowledge the impact of his own constitutional views on the outcome. of cases that he hears.

Given his lengthy record and his extensive statements about what the Constitution means, the burden was on Judge Alito to convince the Senate that he would be a judicious and balanced member of the Supreme Court.

The questions he was asked by members of the Judiciary Committee gave him numerous opportunities to do so. Judge Alito did not meet this burden. He failed to inform this body of his views on important constitutional issues, he evaded fair and important questions instead of offering honest and insightful answers, and he in no way demonstrated that he would uphold not just the letter of the law, but also its spirit.

As a result, I cannot support his lifetime nomination to the highest court in America.

I yield the floor.

The PRESIDING OFFICER. The Senator from Washington is recognized.

Mrs. MURRAY. Mr. President, I rise this evening to discuss my vote on the confirmation of Judge Samuel Alito, Jr., to the U.S. Supreme Court. After meeting with Judge Alito and studying his record and comparing his answers to my criteria for judicial nominees, I have decided to vote against confirming Judge Samuel Alito, Jr., as an Associate Justice of the U.S. Supreme Court.

The next Justice will have the power to change the Court, change the country, and change our rights for generations. Judge Alito has a very troubling record. In his hearing and in our private meeting he did not show that he will be an independent judge who will uphold the rights and liberties of all Americans. With our rights and freedoms on the line, I will not take a chance on Judge Alito because I have serious questions about his independence and his commitment to protecting our rights and our liberties.

As with past nominees, I have evaluated this nominee based on my longstanding criteria, which ask: Is the nominee qualified, ethical, and honest? Will the nominee be fair, evenhanded, and independent? And will the nominee uphold the rights and liberties of all Americans?

Personally, I got involved in politics because of another Supreme Court nomination, that of Clarence Thomas. At the time, I was frustrated that average Americans didn't have a voice in the process that affects them so much. I have worked to be the voice of working families in my State, and I have asked the questions they would ask. I am voting to protect their interests.

I recognize the significance of a seat on the U.S. Supreme Court. The Constitution directs Senators to provide advice and consent on all judicial nominees, and the people of my home State of Washington have trusted me to be their advocate to safeguard their rights as I vote on judicial nominees.

I take that responsibility very seriously. That is why I have reviewed Judge Alito's past writings, studied his answers to the Senate Judiciary Committee, and asked to meet with him in my office.

A lifetime appointment to the Supreme Court is a tremendous grant of unchecked power. If the Supreme Court rules incorrectly, there is no option for appeal. There is no backstop. Any seat on the Supreme Court can affect our rights for generations. But there are three factors involved in this particular nomination that make it even more significant. Those factors are the times, the seat, and the process.

First, I am well aware that we are living in historic times. Each day, it seems that the rights of the individuals and the power of government are being tested. We are at war overseas, we face threats from terrorism here at home, and the current administration is pushing the bounds of governmental power in remarkable ways.

The Bush administration has arrested U.S. citizens and held them without access to the courts. It has run secret prisons around the world. It has expressed views on torture that put our own troops at risk. As we recently learned, the administration has been spying on American citizens without prior approval from a court. These are grave issues which will likely come before the Supreme Court. How that Court rules will affect the rights of our citizens, the balance of power between the branches of our Government, and the balance of power between our citizens and Government.

So as I make my decision on this nominee, I am very mindful of the historic times we are living in and the serious questions this Supreme Court will address in the coming years.

Secondly, I am very mindful of the seat that is open on the Supreme Court and its significance. Justice Sandra Day O'Connor was a pioneer in the field of law, and her decisions will shape the lives of the American people for generations to come.

As I said when she announced her resignation, we live in a better America due to her 24 years of service on the Court. Justice O'Connor was often a swing vote on those critical decisions. Her successor could easily change the balance of power on the Court, which could dramatically shift the Court's ruling on so many issues. Because this is a swing seat that could tip the Court's balance of power, we need to make sure that the person we confirm is someone who will protect our rights and liberties.

Some have suggested that I should just go along and support the President's nominee. That is not the way I make decisions. I have criteria that I use to evaluate all judicial nominees, and Judge Alito is no different.

Third, I am also well aware of how Judge Alito came to be the President's nominee. The President, as we all remember, had nominated his counsel, Harriet Miers, to the High Court, but Ms. Miers was not acceptable to the rightwing of the President's party. I found it very interesting that before her nomination, Republicans were demanding an up-or-down vote on the Senate floor for anyone the President nominated. But when President Bush nominated Ms. Miers, suddenly we stopped hearing that urgent call for an up-or-down vote. In fact, Ms. Miers' nomination was killed by the President's own party, apparently because she did not meet the ideological test of the extreme right.

I recount this history tonight not to diminish Judge Alito but to point out that his nomination comes before the Senate in the context of an ideological battle that has been created by the rightwing. When the President nominated Judge Alito, the rightwing cheered, confident that he would vote their way. That reaction gives me pause as to whether this nominee can keep an open mind on the issues that come before him. If the rightwing is so confident that he is going to vote their way, how can all of us be confident that he will put our country's needs first? That alone does not suggest that Judge Alito cannot be fair, but it did lead me to explore those questions diligently.

Given the importance of the Supreme Court and the background of the times and the seat and the process, I began to evaluate how Judge Alito measured up to my standards for judicial nominees. Judge Alito's record contains some disturbing statements, rulings, and pronouncements that require detailed explanations. Does he still hold some of those views? In many cases, we don't know. I wish Judge Alito had been more forthcoming during his hearing. At the same time, many of the things he said and refused to say spoke volumes.

As I noted earlier, my standards are simple: Is the nominee qualified, ethical, and honest? Will the nominee be fair and evenhanded and independent? And will the nominee uphold the rights and liberties of all Americans?

I am very comfortable that Judge Alito is qualified, he is honest, and he is ethical. But whether he will be fair and evenhanded is another question. And, as was discussed at his hearing, he does have a troubling record for fighting for the government and corporations and against individuals. He seems to favor the entrenched power over the little guy. His record does not give me the confidence that everyone who comes before the Court will be treated fairly.

I am also deeply concerned about Judge Alito's independence. We rely on our courts as a critical check and balance against government abuse. That independent check helps to protect our rights. This is especially important today because of the growing questions of the expansion of Executive power.

The Supreme Court will need to evaluate whether recent Executive actions are constitutional. Here Judge Alito's unbalanced minority view of the scope of Executive power tells me he does not have the independence to be an adequate check on the Government's abuse of our rights.

Finally, I have serious doubts that Judge Alito will uphold our rights and liberties. One example is his hostility

to the right of privacy. In the hearings, he refused to say that Roe v. Wade is settled law, and he did not adequately explain his 1985 statement that the Constitution does not protect a right to an abortion.

Last year, when I voted to confirm, yes, Chief Justice John Roberts, I said I was choosing hope instead of fear and that Judge Roberts, through his answers, inspired such hope. Judge Alito, through his writings, his rulings, and his nonanswers, does not inspire confidence in me that he will protect all our rights. Because so much is on the line, because I do not believe he will be sufficiently independent or will uphold our rights and liberties, I will respectfully vote against his confirmation to the U.S. Supreme Court.

Mr. President, I ask unanimous consent to print in the RECORD a letter from teachers around the country who have opposed this nomination.

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

SOCIETY OF AMERICAN LAW TEACHERS,
January 9, 2006.

Re The Society of American Law Teachers' Opposition to the Nomination of Judge Samuel Alito to the United States Supreme Court.

Hon. ARLEN SPECTER,
Chair, Committee on the Judiciary, U.S. Senate, Washington, DC.
Hon. PATRICK LEAHY,
Ranking Minority Member, Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR SENATORS SPECTER AND LEAHY: The Society of American Law Teachers (SALT) opposes—and urges all members of the Senate Judiciary Committee to vote against—the nomination of Judge Samuel Alito to the United States Supreme Court. SALT is the largest organization of law professors in the United States, representing more than 900 professors at more than 160 law schools. SALT has taken a position opposing only a very few judicial nominations. It did not oppose the nomination of Justice Roberts or Harriet Meirs. However, it is deeply committed to civil rights, individual rights and liberties, and an interpretation of federalism that retains a robust role for Congress in protecting these rights. Judge Alito's work in the United States Department of Justice and fifteen year record on the United States Court of Appeals for the Third Circuit evidence his disregard for all three. Replacing Justice Sandra Day O'Connor with Judge Alito will result in the Court shifting profoundly to the right.

A Knight-Ridder comprehensive review of published opinions written by Judge Alito concluded that Alito has worked quietly but resolutely to weave a conservative legal agenda into the fabric of the nation's laws . . . [His] record reveals decisions so consistent that it appears results do matter to him . . . [He] rarely supports individual rights claims. . . [and] often goes out of his way to narrow the scope of individual rights.

While Judge Alito's opinions are devoid of explosive language and appear to reflect a dispassionate application of law to facts, he has used legal craftsmanship and existing precedent in the service of predetermined results. As Professor Lawrence Tribe has stated, ''I simply make a plea to quit pretending that law, life and an individual's assumptions about both can be entirely separated. . . .'' A judge's values, beliefs and experiences do matter. Judge Alito has undermined the protections of civil rights laws, devalued individual rights, overturned or weakened federal statutes, and narrowly reinterpreted precedent in the name of dispassionate application of the law.

UNDERMINING CIVIL RIGHTS PROTECTIONS

EMPLOYMENT DISCRIMINATION

Judge Alito has engaged in an effort to eviscerate the laws that seek to remedy violations of federal civil rights. This effort can be seen in particular in an evaluation of his opinions in the area of employment discrimination. Judge Alito has written opinions in eighteen employment discrimination cases and has sided with the plaintiff only four times, which includes one case in which he sided with white police officers challenging an affirmative action policy. He has evinced deep skepticism about the legitimacy of most discrimination claims and an unwarranted belief that discrimination is rare in our society.

In three cases in which Judge Alito would have dismissed claims of harassment, he displayed a lack of understanding of the dynamics of harassment and hostile environment discrimination and their impact on a victim's workplace environment and psychological well-being. In one case, writing for the court, he upheld the exclusion of a report showing the harasser had previously harassed another woman because ''the report in no way put the City on notice that Dickerson was harassing Robinson.''

In another case, Pirolli v. World Flavors, Inc., there was an undisputed evidence that an employee with mental disabilities had suffered sexually motivated, physically abusive workplace harassment. The trial court dismissed Pirolli's claim, calling the quite horrifying harassment mere macho horseplay. In a 2–1 decision, the Third Circuit reversed and sent the case back for trial. Judge Alito dissented, not because Pirolli had failed to meet the legal standard for sexual harassment, but because his brief never explicitly asserted that he suffered from a work environment that a reasonable person without mental retardation would find hostile or abusive, even though all the necessary facts had been alleged. In other words, Judge Alito would have dismissed the case for sloppy brief writing. Additionally, he would have held Pirolli to a higher standard of reasonableness than the law requires. Judge Alito would have compared Pirolli to a reasonable person without mental retardation. The Supreme Court had previously emphasized in Oncale v. Sundowner Offshore Services, Inc., Justice Scalia writing for the majority, that the severity of the harassment is to be judged from the perspective of a reasonable person in the plaintiff's position—in this case, a reasonable person with a mental disability.

Lastly, in a dissenting opinion, Judge Alito would have excluded evidence crucial to the victim's discrimination case in Glass v. Philadelphia Electric Co. Mr. Glass had worked for Philadelphia Electric for twenty-three years and received only one job evaluation less than satisfactory. He applied for and was denied many promotions. The employer explanation was based part in on the one sub-par evaluation Glass had received. Glass tried to present evidence that during that time period he was assigned to a position where he was subject to racial harassment and a hostile work environment. Amazingly, Judge Alito's dissent argued that allowing Glass to tell his side of the story might cause ''substantial unfair prejudice'' and, failing to do so was, in any case, harmless error.

In several cases, Judge Alito would have granted summary judgment depriving plaintiffs of their right to trial by setting the evidentiary bar so high that it would be almost impossible for a plaintiff to survive summary judgment. In Sheridan v. E.I. de Nemours and Co., a hotel employee brought suit for sex discrimination in the failure to promote her. The District Court granted the employer summary judgment, and the case was appealed to the Third Circuit. The issue was how much evidence a victim of discrimination must present to get her case to trial. In an en banc 10–1 decision in which Judge Alito was the only dissenter, the majority overturned the grant of summary judgment and sent the case back for trial. The majority held that a plaintiff would survive summary judgment if she made her prima facie case and presented evidence of pretext to rebut the employer's evidence. Judge Alito would have disregarded the evidence in plaintiff's prima facie case if the employer presented evidence of a non-discriminatory reason for its action and would have required additional evidence of discrimination. Judge Alito's approach misinterpreted a Supreme Court case, St. Mary's Honor Society v. Hicks, regarding litigants' shifting evidentiary burdens in Title VII cases. The majority's interpretation of Hicks was reaffirmed by the Supreme Court in Reeves v. Sanderson Plumbing Products, Inc. Although the dispute in Sheridan appears to be highly technical, it is central to whether victims of discrimination will have their day in court.

In another discrimination case in which Judge Alito dissented from the reversal of a grant of summary judgment, the majority said, ''Title VII would be eviscerated if our analysis were to halt where the dissent suggests.'' An African American woman was denied promotion and alleged race discrimination. The issue was whether the employer's evaluation that a white woman was the best candidate was the result of discrimination. In spite of conflicting evidence, Judge Alito would have simply accepted the employer's judgment of who was the best candidate. The majority accused Judge Alito of overstepping his judicial role and acting as a fact finder in resolving the conflicting evidence in favor of the employer. Judge Alito's hostility toward some employment discrimination cases was reflected in his dissent:

''I have no doubt that in the future we are going to get many more cases where an employer is choosing between competing candidates of roughly equal qualifications and the candidate who is not hired or promoted claims discrimination. I also have little doubt that most plaintiffs will be able to use the discovery process to find minor inconsistencies in terms of the employer's having failed to follow its internal procedures to the letter. We are allowing disgruntled employees to impose the costs of trial on employers who, although they have not acted with the intent to discriminate, may have treated their employees unfairly.''

Taken together, these cases reflect a palpable hostility toward plaintiffs in employment discrimination cases.

DISCRIMINATION IN JURY SELECTION

Judge Alito has written troubling opinions in two death penalty cases where the defendants challenged jury selection as reflecting discrimination. The cases are troubling for three reasons. First, they reflect a general hostility toward civil rights. Second, they suggest that Judge Alito is among the most conservative judges when it comes to the death penalty (whereas Justice O'Connor was frequently the swing vote in capital cases). Third, one of the cases reflects Judge Alito's hostility to the use of statistics to prove discrimination. This hostility is most troubling because statistics have been an important element of proof in creating an inference of discrimination or a discriminatory impact.

While picking a grand jury in Ramseur v. Beyer, the judge announced that he was not randomly selecting jurors because he was trying to pick a cross section of the community, instead asking some prospective jurors, including at least two African Americans, to sit separately in the body of the courtroom. An en banc divided Third Circuit ruled against Ramseur's claim of an equal protection violation. Judge Alito wrote a separate concurrence, making the astounding assertion that defendants have no constitutional basis to challenge a grand jury when certain racial groups were treated differently in order to get a cross section jury. Equally dismayingly, he suggested that defendants may not be able to assert rights of jurors who are the victims of discrimination with respect to grand jury jurors (although the right is clearly established for challenges to regular jurors). Judge Alito reached well beyond what was necessary to decide the case in order to present radical ideas in dicta.

In Riley v. Taylor, the defendant was convicted of felony murder and sentenced to death. Eventually he filed a motion in federal court challenging his conviction on numerous grounds, including that peremptory challenges were used impermissibly to strike jurors based on race. The full Court reversed his conviction, in part based on a violation of his constitutional rights with respect to peremptory challenges. Judge Alito filed a dissenting opinion. Ramsey presented evidence that all three of the potential Black jurors were struck in his trial and that prosecutors struck every potential Black juror in all four murder trials held the same year in Delaware County. Judge Alito completely discounted the statistical evidence, writing that inferring discrimination was no more reasonable than attempting to explain why a disproportionate number of recent presidents were left handed. As the majority noted, the analogy ignored the underlying constitutional right and ''minimize[d] the history of discrimination against prospective black jurors and black defendants.'' Because of this history of discrimination, courts have consistently held that, barring another explanation by the defendant, statistics can aid in proving discrimination. Judge Alito's approach would completely discount reliance on statistics to help prove discrimination and would fly in the face of years of judicial decisions in discrimination cases.

ENDANGERING CORE LEGAL RIGHTS FOR WOMEN

In cases raising issues of gender discrimination, Judge Alito has written troubling decisions in which he appears to accept traditional notions of the subservient role of women in society and to deny the separate rights of women to control their own destiny.

Judge Alito's record, both prior to and subsequent to joining the bench, reflects clearly that he does not support the constitutional right to choose and that his elevation to the Supreme Court would endanger this fundamental right. In 1985, while in the Solicitor General's office, he wrote a memo offering his own strategy for using the government's brief in Thornburgh v. American College of Obstetricians and Gynecologists to (1) advance the goal of bringing about an eventual overruling of Roe v. Wade, and (2) in the meantime to mitigate its effects by upholding even the most burdensome barriers to abortion. In the same year, Judge Alito submitted an application for a Justice Department promotion, wherein he wrote that he was particularly proud of his contributions in cases in which the government has argued to the Supreme Court that the Constitution does not protect the right to an abortion.

Judge Alito's record in the Third Circuit demonstrates that he has sought to implement his earlier views. In a concurring opinion rejected by the majority and subsequently rejected by the Supreme Court in Planned Parenthood v. Casey, Judge Alito would have upheld a requirement that a woman notify her husband before having an abortion. He discounted the liberty and bodily integrity of the woman while showing great concern for the husband's rights. Judge Alito's view that the spousal notification provision in the law caused no undue burden to women suggests that he believes a woman loses her autonomy rights when she marries. Even in two cases concerning abortion rights protections which had previously been struck down by the Supreme Court and in which Judge Alito was compelled to follow precedent, he wrote narrow concurring opinions to insure that there was no language that might support the upholding of Roe or inhibit the ability to further narrow the right to choose.

Just as Judge Alito has denied the liberty rights of women to control their bodies, his decision striking down the Family and Medical Leave Act demonstrates that he has no understanding of the distinctive burdens women face in juggling work and family. Likewise, his opinions have demonstrated a lack of understanding of the dynamics of sexual harassment and its detrimental impact on victims of harassment. Even in cases involving fathers of unborn children, Judge Alito's solicitude seems to apply only to married couples. He has shown a lack of sympathy for protection of people and couples who are unmarried. In an immigration case, Judge Alito held that it was justifiable to permit a husband, but not a fiance to contest a woman's deportation to China where she fears coerced abortion of the couple's unborn child. In another asylum case, Judge Alito denied asylum to an Iranian woman who asserted she would be persecuted for refusal to wear the traditional veil and for her feminist beliefs if she returned to Iran. While acknowledging that an asylum claim can be based on gender-based persecution, Judge Alito was not convinced that she would be willing to actually defy the authorities and therefore suffer the severe consequences alleged. In other words, a woman must show her willingness to become a martyr in order to prevail in the typical gender-based asylum case.

AN EXPANSIVE VIEW OF THE POLICE POWER AT THE EXPENSE OF INDIVIDUAL RIGHTS

Judge Alito has advanced an expansive view of the police power. His 1985 application to the Justice Department expressed his disagreement with Warren Court decisions concerning criminal procedure. Since ascending to the Third Circuit, he has in criminal cases consistently deferred to state courts, police, and prosecutors. In particular, he has written a series of decisions narrowing the Fourth Amendment protection against unreasonable search and seizure. Judge Alito has sat on at least twelve panels in which judges agreed regarding a citizen's Fourth Amendment rights. In each case, Judge Alito adopted the view most supportive of the government's position.

One of the most troubling examples of Judge Alito's expansive view of law enforcement authority is his dissent in Doe v. Groody, where he voted to approve the strip search of a mother and her ten-year-old daughter, even though the search warrant obtained by the police did not name or refer to either of them. As then Judge Michael Chertoff wrote, Judge Alito's position threatened to turn the Constitution's search warrant requirement into little more than a ''rubber stamp.''

Other dissenting decisions of Judge Alito suggest that he views individual and other constitutional rights as stopping at the prison door. He would have upheld a Pennsylvania law prohibiting certain inmates from having newspapers, magazines, and photos of their family and friends. In a death penalty case, Judge Alito wrote an opinion for the court rejecting a claim of denial of the right to effective counsel. In the sentencing phase of the trial, the attorney had failed to look at materials he knew would be relied on by the prosecutor, materials that would have revealed a range of mitigation leads. The Supreme Court overturned Alito in a 5–4 decision with Justice O'Connor in the majority.

EXTREME VIEW OF FEDERALISM AND SEPARATION OF POWERS THAT WOULD LIMIT THE ROLE OF CONGRESS IN PROTECTING THE HEALTH, SAFETY AND WELFARE OF ITS CITIZENS AND GIVE UNWARRANTED POWER TO THE EXECUTIVE BRANCH

LIMITING THE ROLE OF CONGRESS

Judge Alito has written two opinions that reflect an extreme view of the limits of congressional power to pass legislation. He voted to invalidate the federal prohibition on machine gun possession and part of the federal Family and Medical Leave Act. His decisions are consistent with his 1985 application to be Deputy Assistant Attorney General, in which he wrote that he ''believe[s] very strongly in . . . federalism.

In United States v. Rybar, Judge Alito argued in dissent that the federal ban on machine gun possession, which had been on the books in some form since 1934 is unconstitutional Commerce Clause legislation. The Commerce Clause undergirds many of the most important civil rights, consumer protection, worker protection and environmental protection laws. Judge Alito argued that the majority's theory would lead to the conclusion that Congress may ban purely intrastate possession of just about anything. He rationalized his decision in part by claiming that there were no congressional findings or statutory bases for the law, thus imposing a new stringent fact-finding requirement for Congressional justification of its laws. He ignored common sense—the facts involved a licensed gun dealer selling machine guns at a gun show—transactions which involved interstate commerce. Additionally, he ignored references in conference reports and on the floor of Congress concerning the effect of the ban on interstate commerce. Judge Alito's colleagues accused him of institutional disrespect by requiring the ''coordinate branches of government'' to ''play'' show and tell with the federal courts at the peril of invalidating congressional statutes. All of the other appellate courts which had considered the law in the wake of United States v. Lopez agreed with Judge Alito's colleagues, and all but one court to have looked at the law since then has done the same. The Supreme Court rejected Judge Alito's restrictive view of Congress' lawmaking authority in Gonzales v. Raich.

In another case concerning Congress' lawmaking authority, Judge Alito again advocated an extremely narrow view of congressional power. Chittister v. Department of Community and Economic Development involved a state employee who sued for damages under the Family Medical Leave Act (FMLA) when his sick leave was revoked and he was terminated. Congress claimed the authority to pass the FMLA under section 5 of the Fourteenth Amendment on the grounds that the Act attempted to remedy sex discrimination by allowing women to take leave without sacrificing their jobs. Judge Alito held that Congress does not have the authority to give state employees the right to sue their employers for damages for violating the FMLA. He rejected the justification that the FMLA remedied sex discrimination and claimed that Congress had failed

to make any findings that state statutes had discriminated against women. The preamble to the statute explicitly states that the purpose of the Act is to remedy sex discrimination. There is of course, a long history of litigation striking down state statutes disadvantaging women in the workplace. Nevertheless, Judge Alito would require Congress to engage in fact finding specifically directed at the FMLA. In a similar challenge, Nevada Department of Human Resources v. Hibbs the Supreme Court later held that state employees can enforce their right to damages pursuant to a violation of another provision of the FMLA.

ADVOCATING AN EXPANSIVE SCOPE OF EXECUTIVE POWER

Since the Nixon Administration, the country has witnessed a legal battle concerning the scope of presidential authority under our Constitution. The present administration advances an extreme, expansionist theory of the scope of presidential power, both foreign and domestic. The theoretical underpinnings for the concept of the ''imperial presidency'' have been developed by writings of the Federalist Society. Judge Alito's 1985 application to serve as Deputy Assistant Attorney General in the Office of Legal Counsel (OLC) boasts of his regular participation in the Federalist Society, an involvement which continues to this day. OLC, during his tenure, was the source of extreme thinking about expansive presidential power. For example, OLC opined that the executive branch could ignore congressionally authorized procedures for federal procurement and determined that the President had constitutionally unfettered authority to determine when to tell Congress of his covert initiative with regard to Iranian arms sales—even though the power to regulate foreign trade is an express congressional authority.

In other memoranda which Judge Alito wrote during his time at the Justice Department, he argued in favor of expanded government authority to intercept computer messages and broader authority for government agents to set up shell companies to help with undercover operations. He also told the FBI that it was not bound by two district court decisions restricting the Bureau's power to investigate employees whose jobs were not critical to national security.

During his years on the bench, Judge Alito has been extremely deferential to assertions of executive authority, particularly in the area of criminal law, and has gone out of his way to place limitations on Congress's legislative powers. It is this line of thinking that has spawned (1) unprecedented claims of executive privilege, (2) claims of authority to engage in torture, (3) claims to hold U.S. citizens indefinitely as enemy combatants and foreign nationals as enemy combatants in Guantanamo Bay without any right of review of that designation, and now (4) an apparent pattern of flagrant violations of the Foreign Intelligence Surveillance Act by sanctioning domestic wiretapping without obtaining a warrant.

CONCLUSION

With the retirement of Justice O'Connor, the direction of the Court stands in the balance. Judge Alito's record demonstrates that he would shift the court radically rightward. His vision of federalism and separation of powers would dangerously expand the power of the executive and the states; shrink the power of Congress to protect the health, safety and welfare of this nation's citizens; and diminish the role of the courts in guarding against discrimination and undue government intrusion into individual rights. Justice Alito's opinions show an alarming detachment from real life and real people. His opinions are a historical and reflect a lack of empathy for or appreciation of the human condition and the role of courts in protection the rights of minorities.

We urge you to reject the nomination of Judge Alito to the Supreme Court.

Sincerely,

EILEEN KAUFMAN,
Co-President.
TAYYAB MAHMUD,
Co-President.

Mrs. MURRAY. Mr. President, I yield the floor.

Mr. HATCH. Mr. President, today on this floor the distinguished Senator from Vermont, Mr. LEAHY, accused me of misrepresenting him when I earlier characterized comments he has made about the nomination of Samuel Alito to the Supreme Court. He would not yield to me at that time, and I want to set the record straight.

This is how I characterized the Senator from Vermont's previous comments: ''The Senator from Vermont, Senator LEAHY, has repeatedly said that, all by himself, Judge Alito is a threat to the rights and liberties of all Americans literally for generations to come.''

The Senator from Vermont reacted by saying that I was not even ''within the ballpark of accuracy.''

This reaction was particularly perplexing because the latest example of the Senator from Vermont making such a statement had occurred just hours before.

This time, I will be careful to quote, rather than characterize, what he said. In his opening remarks today on the Alito nomination, the Senator from Vermont said: ''This is a nomination that I fear threatens the fundamental rights and liberties of all Americans, now and for generations to come.'' That language is simply cut and pasted from the statement as it appears on the Senator from Vermont's Web site.

The Senator from Vermont made the exact statement yesterday, during the Judiciary Committee's business meeting at which we considered the Alito nomination. He said: ''This is a nomination that I fear threatens the fundamental rights and liberties of all Americans now and in generations to come.''

I was not only in the ball park, I was standing on homeplate.

The PRESIDING OFFICER. The Senator from Colorado is recognized.

Mr. ALLARD. Mr. President, my time to speak is not until 6:15. Since there is nobody else in the Chamber, I will proceed to speak on the nomination of Judge Samuel Alito to the U.S. Supreme Court.

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

Mr. ALLARD. Mr. President, I rise today in support of Judge Samuel Alito, President Bush's nominee as Associate Justice to the U.S. Supreme Court.

Judge Alito has the experience, intellect, temperament, and integrity required of a Supreme Court Justice.

He has more judicial experience than any Supreme Court nominee in 70 years. In his 15 years on the U.S. Court of Appeals for the Third Circuit, Judge Alito participated in over 1,500 cases and authored more than 350 opinions.

Prior to becoming a Federal appellate judge, Judge Alito established a record as a tough Federal prosecutor while serving as the U.S. attorney for the District of New Jersey.

As the State's top Federal law enforcement official, Judge Alito oversaw the prosecutions of drug traffickers, terrorists, and organized crime figures. He also cracked down on perpetrators of environmental crimes, creating a new position of Environmental Crimes Coordinator.

Prior to being unanimously confirmed twice by the U.S. Senate, Judge Alito proved himself to be an effective advocate on behalf of the United States while serving in the Office of the Solicitor General. There, Judge Alito participated in more than 250 cases, arguing 12 before the Supreme Court.

In sum, Judge Alito has served as a judge on one of the Nation's highest courts, as the top Federal prosecutor in one of the Nation's largest Federal districts, and as an advocate for the United States in the Office of the Solicitor General. His 30 years of public service spans the full breadth of the law.

Judge Alito is unarguably a highly qualified nominee. However, I told the citizens of Colorado that I would also evaluate judicial nominees on their judicial philosophy and commitment to the rule of law.

Specifically, I pledged to support judges who rule on the law and facts before them—not judges who attempt to legislate from the bench. Judge Alito's judicial philosophy corresponds with that promise.

Judge Alito recognizes the limited role of the Federal judiciary, having observed that ''although the judiciary has a very important role to play, it's a limited role. . . . It should always be asking itself whether it is straying over the bounds, whether it's invading the authority of the legislature, for example, whether it is making policy judgments rather than interpreting the law.''

Like his view of the limited role of the judicial branch, Judge Alito also recognizes the limits on the powers of the executive branch. Speaking on his understanding of the ''unitary Executive,'' Judge Alito explained, ''the idea of the unitary Executive is that the President should be able to control the executive branch. . . . [I]t goes just to the question of control. It doesn't go to the question of scope.''

Further, Judge Alito recognizes that ''[n]o person in this country, no matter how high or powerful, is above the law, and no person in this country is beneath the law.'' This statement reflects his commitment to a principle so fundamental to justice in this country that it is carved in stone over the entrance to the Supreme Court: ''Equal justice under law.''

Consistent with the principle of equal justice under law, Judge Alito does not

allow his personal opinion to decide the outcome of a case. He says ''[a] judge can't have any agenda. . . . The judge's only obligation—and it's a solemn obligation—is to the rule of law, and what that means is that in every single case, the judge has to do what the law requires.''

I believe that each of my colleagues would agree that judges should be held to this standard. Yet, at the same time, some criticize Judge Alito's record for living up to it.

For example, in Doe v. Groody Judge Alito argued in dissent that a search warrant authorized law enforcement officials to search everyone inside a drug dealer's house, including the wife and daughter. Even though he personally ''share[d] the majority's visceral dislike of the intrusive search,'' Judge Alito's unwavering commitment to the rule of law led him to do what he believed the law required, despite his personal beliefs on the outcome.

In sum, Judge Alito will serve as an effective steward of the law and Constitution. His record evidences a deep respect for the separation of powers and other fundamental principles envisioned by our Founding Fathers. I have no reason to believe Judge Alito will be deferential to anyone or anything other than the law and the facts before him.

As a representative of Colorado, I also appreciate the uniqueness of the issues important to our State and the West. The departure of Justice O'Connor and Chief Justice Rehnquist marks the loss of a Western presence on the Supreme Court.

Earlier this year, I asked President Bush to nominate a judge who could capably decide issues important to Colorado and the West, such as water and resource law.

When I asked Judge Alito about his understanding of Western resource and water law, I was pleased to learn that he grew to appreciate the importance and complexity of these issues while working in the U.S. Solicitor General's Office. He assured me that he understands the uniqueness to the West of such issues as water rights, the environment, and public lands.

In conversing with Judge Alito, I couldn't help but be reminded of my meeting with now Chief Justice Roberts. Judge Alito is a man of great restraint, delivering thoughtful, careful, and thorough responses to my many questions—a further reflection of his view of the limited role of a judge.

Although America was already aware of Judge Alito's distinguished record, the Judiciary Committee hearings were helpful in shedding additional light on his character, temperament, and integrity, particularly in trying circumstances.

During the nearly 18 hours of questioning, Judge Alito was both open and candid. He answered 97 percent of the nearly 700 questions that were asked of him, declining to answer only 3 percent. By comparison, Justice Ginsburg declined to answer 20 percent of questions. Justice Ginsburg received 96 votes in favor of her confirmation.

Throughout the course of the demanding process, Judge Alito demonstrated great patience, humility, and respect—all attributes of a temperament desirable for a Supreme Court justice.

The hearings were also an opportunity for Judge Alito to set the record straight on scurrilous attempts to impugn his integrity. Laid to rest is the claim that he acted improperly by participating in a case involving Vanguard, his mutual fund company. Shares in Vanguard mutual funds are not an ownership interest in the Vanguard company, and Judge Alito had no legal or ethical obligation to recuse himself. His ultimate decision to do so—beyond what the law requires—should be praised, not attacked.

These and other attacks are nothing but thinly veiled attempts to distract from the impeccable record of a highly qualified nominee.

Judge Alito's jurisprudence and integrity have been praised by major newspapers, legal scholars, former law clerks, and colleagues from both sides of the aisle.

The American Bar Association unanimously awarded Judge Alito its highest rating of ''well qualified.'' The ABA's stated criteria for evaluating nominees are ''integrity, professional competence and judicial temperament.''

The judges with whom he has served on the Third Circuit offer their praise. Judge Tim Lewis, a former Clinton appointee, commended Judge Alito for his role in discrimination cases. Judge Lewis, testifying in support of Judge Alito, said that ''if I believed that Sam Alito might be hostile to civil rights as a member of the United States Supreme Court, I guarantee you that I would not be sitting here today.''

Major newspapers across the State of Colorado, including both the Rocky Mountain News and the Denver Post, offer their praise for Judge Alito.'''

The Rocky Mountain News says that Judge Alito ''personifies judicial restraint'' and ''deserves confirmation. . . . He has refused to elevate his ideology above the rule of law while showing deference to the crucial but limited role the Founders envisioned for federal judges.''

Commenting on the temptation for Democratic Senators to cave to the demands of ''left-wing interest groups [who] portray Alito as someone who should be under house arrest, rather than an accomplished nominee with a distinguished resume,'' the Rocky Mountain News points out that ''Senate Democrats have an opportunity to rise above the muck'' concluding that ''Samuel Alito should be confirmed.''

I ask unanimous consent to have the January 9, 2006 Rocky Mountain News editorial printed in the RECORD.

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

[From the Rocky Mountain News, Jan. 9, 2006]

ALITO PERSONIFIES JUDICIAL RESTRAINT

No one seriously questions the qualifications of federal appeals court Judge Samuel Alito to sit on the Supreme Court: U.S. attorney, assistant to the solicitor general and the attorney general, and a 15-year tenure on the 3rd U.S. Circuit Court of Appeals.

Former colleagues, including Democrats, who worked with Alito the prosecutor laud his insistence on defending the law rather than pursuing a political agenda. Keep that in mind as confirmation hearings open in Washington today. Liberal interest groups and some partisan Democrats are up in arms because Alito has served as a model of restraint.

And that's why the Senate should confirm Judge Alito to succeed Sandra Day O'Connor. He has refused to elevate his ideology above the rule of law while showing deference to the crucial but limited rule the Founders envisioned for federal judges.

On principle, the Senate should give the president substantial leeway to appoint federal officials who share his views. And while candidates for life-tenured positions on the Supreme Court deserve thorough scrutiny, we are confident that the hearings will let Alito earn the nation's trust.

On the bench, Alito has championed a government with limited, defined powers. He has defended the First Amendment's guarantee of religious liberty, ruling against governments that denied Muslims and Indians their ability to freely express their faiths.

In United States v. Rybar, he seconded the view articulated by the Supreme Court in United States v. Lopez that the Constitution's Commerce Clause does not give Congress unlimited power to regulate private actions. And though in Planned Parenthood v. Casey Alito wrote in favor of a spousal-notification requirement for abortions that the Supreme Court later rejected, his law clerk at the time, self-described Democrat Jim Goneia, told the Las Vegas Sun that he ''never had any clue what (Alito's) personal opinion might be.''

His measured approach has not slowed the partisan spinmeisters from lobbing scurrilous allegations—charging everything from misogyny to racism. The left-wing interest groups portray Alito as someone who should be under house arrest, rather than an accomplished nominee with a distinguished réumś.

But Senate Democrats have an opportunity to rise above the muck. We applaud their plan to focus on Alito's views of the proper balance of power between the president and Congress. Concerns about executive authority deserve special attention, particularly as the Bush administration prosecutes the war on terror.

Barring any stunning surprises, Samuel Alito should be confirmed. While we will surely disagree with some of his decisions, we're confident that they will be soundly reasoned and reflect respect for both the Constitution and the law.

Mr. ALLARD. Mr. President, Colorado's other major newspaper, the Denver Post, proclaims that there is ''no reason to block [the] Senate's Alito vote . . .'' On the threat of a Democrat filibuster, the Denver Post says ''we don't believe the arguments against Alito merit a filibuster. . . . Alito has served capably on the 3rd U.S. Circuit Court of Appeals for 15 years, and his confirmation should rise or fall on a majority vote.''

I ask unanimous consent that the January 17, 2006, Denver Post editorial be printed in the RECORD.

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

[From the Denver Post, Jan. 17, 2006]

NO REASON TO BLOCK SENATE'S ALITO VOTE

Judge Samuel Alito managed to navigate his way through last week's Senate Judiciary Committee hearings without upsetting supporters' high hopes or relieving opponents' high anxiety.

Though his testimony to the committee was never too revealing, Alito demonstrated his qualifications for the high court, and he's likely to be confirmed. We wish we could be enthusiastic, but Alito's record is troubling in such areas as reproductive rights, privacy and executive power. If he rises to the Supreme Court, we hope Alito will follow the letter of the law and not the call of ideology or the urging of special interests. Associates who have worked with Alito over the years offer welcome assurances that he can be an impartial figure and not a clone of Clarence Thomas on the far right side of the bench.

We tend to agree with Sen. Dianne Feinstein, D–Calif., who said on Sunday, ''This is a man I might disagree with. That doesn't mean he shouldn't be on the court.'' Like Feinstein, we don't believe the arguments against Alito merit a filibuster.

Alito needs a simple majority to win confirmation unless opponents try to extend debate indefinitely; then 60 senators must agree to a vote. Republicans have 55 senators, and many are willing to ban judiciary filibusters if that's what it takes.

In the end, Republicans will probably support Alito en masse and most Democratic senators will vote no, reflecting both parties' expectation of his future role. Much attention is being paid to the ''Gang of 14,'' the coalition (including Colorado Sen. Ken Salazar) that vowed to avoid filibusters except under extraordinary circumstances. This isn't one of them; Alito has served capably on the 3rd U.S. Circuit Court of Appeals for 15 years, and his confirmation should rise or fall on a majority vote.

We hope Alito will moderate his views if voted to the court of last resort. His statements about Roe vs. Wade suggest he opposes abortion-rights, which we favor, while his support for the ''unitary executive'' theory, which exaggerates the powers of the president, is chilling given the current debate on domestic surveillance and the balance of powers among the branches of government. Some of Alito's dissents on the 3rd Circuit inspire disbelief, such as his defense of a police officer who strip-searched a 10-year-old girl whose father was wanted on drug charges.

We urged President Bush to choose a centrist to succeed retiring Justice Sandra Day O'Connor, but once his first choice, Harriet Miers, was blocked, it was inevitable that he would seek out a nominee with proven conservative credentials. That's Alito, to be sure. Wherever he serves, we hope Alito exercises his approach to the law in a way that affords Americans all the protections due under law and the Constitution.

Mr. ALLARD. Mr. President, I am pleased to see that these Colorado publications join me in recognizing that Judge Alito is the type of judge that Coloradans—and all Americans—deserve.

In conclusion, Judge Alito is one of the most qualified judicial nominees ever. He is deeply committed to the rule of law, he recognizes the limited role of the judiciary, and he has the judicial temperament fitting of a Supreme Court justice.

The Senate debate should reflect that the job of a judge is to review cases impartially, not to advocate issues. Judges should be evaluated on their qualifications, judicial philosophy, and respect for the rule of law.

It would be unfortunate and irresponsible for any of my Senate colleagues to continue to politicize the judicial confirmation process. Judge Alito is eminently qualified, and he deserves a swift up-or-down vote.

I intend to vote in favor of Judge Samuel Alito's confirmation as the 110th Justice to the United States Supreme Court and I strongly urge my colleagues to do the same.

I believe that Judge Alito will not be an activist judge and supports limits on the judiciary.

I ask unanimous consent to have printed in the RECORD a letter from attorney William Banta in which he discusses judicial independence, judicial activism, and judicial usurpation, now referred to by many of us as just judicial activism.

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

Englewood, CO, September 6, 2005.

Re: A Lawyer's Duty—Judicial Independence, Judicial Activism, and Judicial Usurpation.

Hon. WAYNE ALLARD,
U.S. Senate, Dirksen Senate Building, Washington, DC.

DEAR SENATOR ALLARD: Recently there has been an outcry from the established bar in defense of judicial independence. However, very little has been said against judicial activism, which used to be referred to as ''judicial usurpation''. Because of the present tension between them, it behooves us as lawyers to understand the relationship between judicial activism and judicial independence. Marbury v. Madison is a good place to begin.

While Marbury is typically used to justify a court's prerogative to say what the law is, there is a discipline to the case that is either overlooked or not discussed in polite legal company. Chief Justice Marshall bases the Marbury decision upon the American people's original right to establish a constitution, the principles of which are ''fundamental'' and which are to be ''permanent''. The case itself involved three issues: (1) whether Mr. Marbury had a right to his commission as justice of the peace; (2) if so, whether there was a remedy available to him to secure his commission; and (3) whether the remedy was a writ of mandamus from the Supreme Court of the United States. Marshall said ''yes'' to the first two issues and ''no'' to the third issue.

The Chief Justice held that the Supreme Court lacked the power to issue a writ of mandamus for Mr. Marbury's commission because the Constitution did not provide for the exercise of such original jurisdiction even though an Act of Congress (the Judiciary Act of 1789) did. In ruling against the Supreme Court's having jurisdiction, John Marshall declared the obedience of courts to the Constitution, the Constitution being ''a rule for the government of courts, as well as of the legislature.''

To paraphrase Chief Justice Marshall, judges are subject to the Constitution; the Constitution is not subject to judges. The force behind the Marbury decision is the restraint and responsibility required of the judicial branch.

Now I have a couple of questions regarding what some see as attacks upon judicial independence. Does anyone think that the public is criticizing courts because the judges on those courts are thought to be following the Constitution? Or, are courts being criticized because some judges are seen as expounding politics instead of a constitution? It would certainly be independent of any court to contradict the Constitution, but it would also be unscrupulous and, to use John Marshall's word, ''immoral'' of them.

Roger J. Miner wrote an admonition to us lawyers that I ran across about seventeen (17) years ago: ''Should Lawyers Be More Critical of Courts?'' Judge Miner's reproof was more recently reprinted in The Colorado Lawyer: ''Judges'' Corner—Criticizing the Courts: a Lawyer's Duty.'' To his dismay, what Judge Miner had noticed was lawyers' ''reluctance to criticize judge-made law, specific judicial decisions, or the qualifications of individual judges''. He quoted Justice Robert H. Jackson to the effect that the public rightfully looks to lawyers (as the only group that knows how well judicial work is being done) ''to be the first to condemn practices or tendencies that they see departing from the best judicial traditions''. Does anyone think, as Judge Miner would, that the public has reason to be disappointed in us lawyers for not being properly critical of judges who deviate from their oaths to support the Constitution that governs them?

As lawyers, we need to understand what is going on here. To its credit, the established bar does not directly dispute the right of Americans to criticize their judiciary. However, only a very few lawyers have spoken out in defense of Chief Justice Marshall's insistence on judicial scruples—the established bar is more apt to rationalize, excuse, or even defend in the name of ''judicial independence'' the conduct of judges who act contrary to the language of the Constitution. It is almost as if Supreme Court decisions were infallible so that it would be irreverent of lawyers to challenge them very much.

Not only Chief Justice Marshall but Chief Justice Harlan F. Stone would not have it. Chief Justice Stone said, ''I have no patience with the complaint that criticism of judicial action involves any lack of respect for the courts. When the courts deal, as ours do, with the great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action and fearless comment upon it.

The point is this: when a court takes it upon itself to engage in politics, social experimentation, or baseless lawmaking contrary to the Constitution, the American people, if not the established bar, tend to hold that court accountable. In holding judicial feet to constitutional fire, critics are not threatening judicial independence; they are reprehending those judges, those public servants, who overstep their roles and thereby become ''activist''.

The purpose of the Constitution's Article III lifetime tenure and undiminished compensation for Federal judges and the purpose of Colorado's constitutional and statutory provisions for judicial nominations, appointments, and retentions are to insulate judges from political pressures as much as practical . . . providing them with a measure of independence to decide cases with restraint and impartiality. Yet, if a judge commandeers the law, usurps the jurisdiction of the other governmental branches, or overpowers the rights of the people, is he not frustrating the purpose of judicial independence?

That brings me to my last question: isn't the real threat to judicial independence judicial activism itself? We needn't have come to this pass had we, as lawyers and judges, insisted on judges remaining faithful to ''the

best judicial traditions''. Too often we justified baseless decisions on the unsteady promise of political results or indulged the sentiment that the Constitution is whatever a court says it is. Incidentally, to that utterance of Charles Evans Hughes, Theodore Roosevelt rejoined that the Constitution belonged to the American people and not to the judges.

By not remarking the wrong of judicial activism all along, the established bar must now be careful not to excuse judicial activism in an ambiguous effort to preserve judicial independence. The risk of confusing judicial activism with judicial independence could compound our problem so that the public comes to see the whole thing as a mess of our own making. If that happened, the American people could demand direct political control over those who had Wayne Allard lost the self-control upon which Chief Justice Marshall insisted, those who became unaccountable to the law they had taken an oath to support.

To avoid such a misfortune, it might be a good idea to revisit the instruction manual. Perhaps we could think about whether the Constitution is our bedrock foundation or more like a nomad's tent pitched on shifting sands. We might ask ourselves whether we ought to dismiss the Constitution as an outdated 18th century document or recognize that it was designed in light of human experience and human nature to endure for all time. And we can mull over whether our Constitution should really be an adventure in judicial dead reckoning or whether, instead, the written Constitution provides a reliable compass, trusty sextant, and inspired chart for the American people.

My impression is that commentators and many in the public are way ahead of us lawyers and judges on these concerns. Nonetheless, I hope that we are able to help out here so that, as Judge Miner would prefer, ''the judiciary is strengthened, the rule of law is reinforced, and the public duty of the bar is performed.''

Very truly yours,

WILLIAM M. BANTA,
Attorney at Law.

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

The PRESIDING OFFICER. The Senator from Arizona is recognized.

Mr. KYL. Mr. President, I ask unanimous consent to have an item printed in the RECORD.

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

SENATE REPUBLICAN POLICY COMMITTEE: FELLOW JUDGES TESTIFY IN SUPPORT OF ALITO NOMINATION

On January 12, 2006, five sitting and two former judges from the U.S. Court of Appeals for the 3rd Circuit testified on behalf of Judge Samuel Alito's nomination to the Supreme Court. The judges included nominees of Presidents Lyndon Johnson, Richard Nixon, Ronald Reagan, George H.W. Bush, and Bill Clinton. Collectively they have served with Judge Alito for more than 75 years, watching him work and evaluating his intellect, character, independence, and judgment. Their collective endorsement should be taken seriously by Senators considering this nomination.

The judges included the following individuals. Judge Edward Becker, appointed by President Ronald Reagan in 1981, is a Senior Judge on the 3rd Circuit and formerly its Chief Judge. (Note: a Senior Judge continues to serve on the court and hear cases on a limited basis; he is not retired.) Judge Anthony Scirica, appointed by President Ronald Reagan in 1984, is the Chief Judge of the 3rd Circuit. Judge Maryanne Trump Barry has served on the 3rd Circuit since President Bill Clinton appointed her in 1999. Judge Barry also worked in the U.S. Attorney's office with Judge Alito in the late 1970s. Judge Ruggero Aldisert, appointed by President Lyndon Johnson in 1967, is a Senior Judge on the 3rd Circuit and formerly its Chief Judge. Former Judge John Gibbons, appointed by President Richard Nixon in 1970, served on the 3rd Circuit until 1990 when he retired to become a professor of law at Seton Hall. As a federal prosecutor, Judge Alito had argued cases before Judge Gibbons, and Judge Gibbons has stated that he has followed Judge Alito's work since 1990. Judge Leonard Garth, appointed by President Richard Nixon in 1973, is a Senior Judge on the 3rd Circuit. Judge Alito served as his law clerk in 1976–1977. Former Judge Tim Lewis, appointed by President George H.W. Bush in 1992, served on the 3rd Circuit for seven years before retiring to enter private practice, where he does significant work in civil rights and human rights law. Excerpts from their testimony follow.

Judge Becker on working with Judge Alito up close . . . ''There is an aspect of appellate judging that no one gets to see—no one but the judges themselves: how they behave in conference after oral argument, at which point the case is decided, and which, I submit, is the most critically important phase of the appellate judicial process. In hundreds of conferences, I had never once heard Sam raise his voice, express anger or sarcasm, or even try to proselytize. Rather, he expresses his views in measured and temperate tones.''

Judge Becker on Judge Alito's intellect and open-mindedness . . . ''Judge Alito's intellect is of a very high order. He's brilliant, he's highly analytical and meticulous and careful in his comments and his written work. He's a wonderful partner in dialogue. He will think of things that his colleagues have missed. He's not doctrinaire, but rather is open to differing views and will often change his mind in light of the views of a colleague.''

Judge Becker on whether Judge Alito is an ideologue . . . ''The Sam Alito that I have sat with for 15 years is not an ideologue. He's not a movement person. He's a real judge deciding each case on the facts and the law, not on his personal views, whatever they may be. He scrupulously adheres to precedent. I have never seen him exhibit a bias against any class of litigation or litigants. . . . His credo has always been fairness.''

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

Chief Judge Scirica on Judge Alito's open-mindedness . . . ''Like a good judge, he considers and deliberates before drawing a conclusion. I have never seen signs of a predetermined outcome or view, nor have I seen him express impatience with litigants or with colleagues with whom he may ultimately disagree. He is attentive and respectful of all views and is keenly aware that judicial decisions are not academic exercises but have far-reaching consequences on people's lives.''

Judge Barry on Judge Alito's service as U.S. Attorney . . . ''The tone of a United States Attorney's Office comes from the top. The standard of excellence is set at the top. Samuel Alito set a standard of excellence that was contagious—his commitment to doing the right thing, never playing fast and loose with the record, never taking a shortcut, his emphasis on first-rate work, his fundamental decency.''

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

Judge Aldisert on working with Judge Alito for 15 years . . . ''We who have heard his probing questions during oral argument, we who have been privy to his wise and insightful comments in our private decisional conferences, we who have observed at first hand his impartial approach to decision-making and his thoughtful judicial temperament and know his carefully crafted opinions, we who are his colleagues are convinced that he will also be a great justice.''

Judge Garth on Judge Alito's lack of an agenda . . . ''I can tell you with confidence that at no time during the 15 years that Judge Alito has served with me and with our colleagues on the court and the countless number of times that we have sat together in private conference after hearing oral argument, has he ever expressed anything that could be described as an agenda. Nor has he ever expressed any personal predilections about a case or an issue or a principle that would affect his decisions.''

Judge Garth on Judge Alito's personality . . . ''Sam is and always has been reserved, soft spoken and thoughtful. He is also modest, and I would even say self-effacing. And these are the characteristics I think of when I think of Sam's personality. It is rare to find humility such as his in someone of such extraordinary ability.''

Judge Gibbons on Judge Alito's independence from the executive . . . ''The committee members should not think for a moment that I support Judge Alito's nomination because I'm a dedicated defender of [the Bush] administration. On the contrary, I and my firm have been litigating with that administration for a number of years over its treatment of detainees held at Guantanamo Bay, Cuba, and elsewhere. And we are certainly chagrined at the position that is being taken by the administration with respect to those detainees.

''It seems not unlikely that one or more of the detainee cases that we are handling will be before the Supreme Court again. I do not know the views of Judge Alito respecting the issues that may be presented in those cases. I would not ask him. And if I did, he would not tell me. I'm confident, however, that, as an able legal scholar and a fair-minded justice, he 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.''

Judge Lewis on his own liberal politics . . . ''I am openly and unapologetically prochoice and always have been. I am openly—and it's very well known—a committed human rights and civil rights activist and am actively engaged in that process as my time permits. . . .

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

''And the reason is that having worked with him, I 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.''

Judge Lewis on Judge Alito's honesty and integrity . . . ''As Judge Becker and others have alluded to, it is in conference, after we have heard oral argument and are not propped up by law clerks—we are alone as judges, discussing the cases—that one really gets to know, gets a sense of the thinking of our colleagues. And I cannot recall one instance during conference or during any other experience that I had with Judge Alito, but in particular during conference, when he exhibited anything remotely resembling an ideological bent.''

Judge Lewis on Judge Alito and civil rights . . . ''If I believed that Sam Alito might be hostile to civil rights as a member of the United States Supreme Court, I guarantee you that I would not be sitting here today. . . . My sense of civil rights matters and how courts should approach them jurisprudentially might be a little different. I believe in being a little more aggressive in these areas. But I cannot argue with a more restrained approach. As long as my argument is going to be heard and respected, I know that I have a chance. And I believe that Sam Alito will be the type of justice who will listen with an open mind and will not have any agenda-driven or result-oriented approach.''

Judge Lewis on why he endorses Judge Alito . . . ''I am here as a matter of principle and as a matter of my own commitment to justice, to fairness, and my sense that Sam Alito is uniformly qualified in all important respects to serve as a justice on the United States Supreme Court.''

Mr. KYL. Mr. President, I ask unanimous consent that the attached editorial by the Arizona Republic, dated January 24, be printed in the RECORD of this debate on the confirmation of Judge Samuel Alito to the U.S. Supreme Court. The editors' support for Judge Alito is welcome, and their statement that ''Judge Alito is a superior candidate for the high court regardless of his political leanings'' is absolutely true.

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

[From the Arizona Republic, Jan. 24, 2006]

ALITO: WISE IN THE WAYS OF ''WHYS''

If America is not on pins and needles over today's Senate Judiciary Committee vote on Samuel Alito for the U.S. Supreme Court, perhaps this Web site headline on Monday helps provide an explanation:

''Feingold unsure of Alito''—WSAW–TV, Wausau, Wis.

If one of the Senate's most solidly liberal members, Sen. Russ Feingold, D–Wis., remains uncertain about President Bush's nominee one day prior to his scheduled Judiciary vote, prospects for derailing the nomination in the full Senate would seem dim.

We'll see how the votes pan out. Still, it is worth wondering: Where did the drama go?

The most obvious answer among many is that Alito is a superior candidate for the high court regardless of his political leanings. After 15 years on the bench, Alito has established a lengthy track record as a fair jurist who has struck a proper balance between his own constitutional interpretations and those of other courts.

Even his obvious discomfort at the beginning of his Judiciary hearings worked to Alito's favor. The candidate is bookish and uncomfortable in the limelight? All the better for a position on the nation's most deliberative, most cerebral panel.

Many commentators have noted that the even-keeled Alito presents himself far differently from Robert Bork, the famously rejected conservative nominee of 1987.

Well, yes. Alito was not combative in the face of relentless grilling, as Bork was. And he wears no wicked-looking beard.

But it would seem that Alito's imminent success is less a matter of televised theatrics, facial adornment or even judicial philosophy than it is a reflection of the public's expectations of a jurist.

Unquestionably, the public wants jurists to be fair, and it seems to believe that Alito will live up to that standard. The public wants a jurist who respects the judgment of other courts, but it also wants one who understands that Job 1 is to interpret the Constitution.

Sometimes, Supreme Court judges have found those two directives in conflict. The public, and most of the senators who represent it, seems to believe Alito will find his way through those conflicts fairly and intelligently.

But most of all, Alito appears to have won over converts because he has demonstrated the trait that increasingly seems to distinguish great jurists from mediocre-to-good ones: He can explain why.

We all wish to know why. With all due respect to President Bush's previous nominee, Harriet Miers, it was not enough that—wink, wink—her vote on the ''right'' issues was ensured. Indeed, that constituted the most damning argument against her.

Alito, by contrast, has won support because senators believe that his decisions will be grounded and argued in the facts of the law, not in some predisposed political prejudice that is unsupported by the case before him.

And that is a powerful argument for Alito all by itself.

Mr. KYL. Mr. President, I rise in support of Judge Alito's nomination to the Supreme Court and urge my colleagues to quickly confirm him.

I begin by observing that the party-line vote in the Judiciary Committee yesterday raises a troubling question for the full Senate, and it is basic to our deliberations. What is the proper test for determining whether to confirm a nominee to the Supreme Court? Until very recently, the Senate has evaluated whether the nominee was qualified—that is, whether he or she possessed the requisite experience, integrity, and temperament to serve. But a new test has been proposed by Judiciary Committee Democrats: will the nominee provide assurances that he or she will rule a particular way on cases sure to come before the Court?

Before I discuss the ramifications of that troubling question, though, I would like to apply the traditional test—the proper test—to the nominee before us.

A Supreme Court Justice should be an experienced judge. Samuel Alito has more Federal judicial experience than all but one nominee in U.S. history, Horace Lurton, who was nominated by President Taft. In 15 years of service, Judge Alito has authored more than 360 opinions and participated in more than 4,800 decisions. It is an extensive record.

A Supreme Court Justice should be deeply familiar with American constitutional law. Judge Alito has spent his entire professional life grappling with constitutional jurisprudence—serving as a Federal prosecutor at both the trial and appellate level, as the government's lawyer before the Supreme Court, and as a constitutional lawyer in the Justice Department before becoming a judge. Nobody who watched Judge Alito's testimony would deny that he is a brilliant legal thinker with a deep and textured understanding of our Nation's jurisprudence.

A Supreme Court Justice should have unassailable integrity. Here, I look to those who know him best.

First, the American Bar Association, in finding him unanimously ''well-qualified'' to serve, conducted more than 300 interviews with people who know Judge Alito on a professional and personal basis. They have reported that the high praise for Judge Alito's integrity was ''consistent and virtually unanimous.'' I repeat, it was ''unanimous.''

Second, let's look at what the judges of the U.S. Court of Appeals for the Third Circuit had to say. Seven current and former judges testified on Judge Alito's behalf—judges who were nominated by Presidents Johnson, Nixon, Reagan, the first President Bush, and Clinton. Collectively, they have served with Judge Alito for more than 75 years. They praised his fairness, his integrity, his open-mindedness, his temperament, his intellect, and his devotion to the rule of law.

Finally, a Supreme Court Justice must know the difference between the judicial role and the legislative or executive function. This qualification is sometimes difficult to decipher, but there are several clues that can guide us.

First, a long judicial record helps, and Judge Alito gives us that. There is not a trace of judicial activism in his record.

Second, a judge cannot have a policy agenda. He or she must defer to the political branches on policy questions. Judge Alito agreed, testifying, ''We [judges] are not policymakers and we shouldn't be implementing any sort of policy agenda or policy preferences that we have.'' Judge Alito's colleagues on the Third Circuit appeals court confirmed this. For example, Judge Aldisert testified that ''at no time during the 15 years that Judge Alito has served with me and with our colleagues on the court, and the countless number of times that we have sat together in private conference after hearing oral argument, has he ever expressed anything that could be described as an agenda.''

Third, a judge must not twist statutes or constitutional provisions to reach a result he favors. As Judge Alito testified, ''Judges don't have the authority to change the Constitution. The whole theory of judicial review . . . is contrary to that notion.'' In

other words, a judge must accept that the Constitution will sometimes require him to make rulings that he might disagree with. Politicians are free to vote their convictions; judges must put their personal views aside. I will have more to say about this issue in a few moments.

Fourth, the judge must have the right understanding of the ''living Constitution.'' Our Constitution must always remain alive to new situations that the Founders did not contemplate. But the judge must apply the constitutional provisions in the way that most closely approximates the meaning of the text and the underlying principles as understood when drafted. The Constitution is not infinitely malleable. It is not a blank slate for the judicial branch to draw upon. It has no ''trajectory'' or ''evolutionary theme.'' It is a text—words with meanings. If the Constitution can be twisted to mean anything, then it ultimately means nothing, and then we live under the rule of judges, not the rule of law.

Judge Alito respects the proper divisions within American constitutional government. As he explained in his testimony, the judiciary ''should always be asking itself whether it is straying over the bounds, whether it's invading the authority of the legislature [or] making policy judgments other than interpreting the law.'' He emphasized that judges have a duty to police themselves through what he called the ''constant process of re-examination on the part of the judges.'' If all judges engaged in this process of re-examination, the quality of justice in this Nation would improve dramatically.

Judge Samuel Alito is not going to legislate from the bench or bend the Constitution to suit any political preferences that he might have. He is not going to rely on foreign law, but will look to our American traditions. He is not going to apply the Constitution as he wishes it might be, but as it is written. In exercising this judicial restraint, Judge Alito will protect the people's ability to govern themselves—and that is ultimately what is at stake.

That is why I support Judge Alito. Here is a man who is the son of an immigrant, comes from a modest background, and has a keen sense of patriotic duty. He is highly intelligent, undeniably experienced, and imbued with character and personal integrity. He has a low-key, patient, and respectful personality—the model of what we have come to call the ''judicial temperament.'' He believes in judicial restraint and has proven it for the past 15 years. He deserves my vote and I will proudly give it to him.

This is the analysis we have applied in the past, and its application has resulted in confirmation for most nominees. It was certainly the analysis used to evaluate President Clinton's nominees to the Supreme Court. So it is in this context that I want to discuss what is evolving as a new test—a ''results-oriented'' test.

The minority members of the Judiciary Committee did not question Judge Alito's qualifications. Rather, they tried to get him to commit to certain results in cases that are sure to come before the courts. They want to see certain policy goals enacted into law. Now, we all want our policy goals to become law, but our aim should be enacting constitutional legislation, not relying on the courts to enact our policy preferences.

In my September statement supporting Judge Roberts, I explained that this same dynamic had played itself out during his hearings. It is apparent that there is now a fundamental difference between the majority and the minority parties on this matter. We believe the courts should not try to impose policy results in their decisions; they should just decide the questions of statutory interpretation and constitutional meaning.

For the Supreme Court, the results are—or should be—simply a function of the proper application of the Constitution and law to the facts of each case.

To the minority, however, that's not enough. As many minority Senators have expressed, they are not going to vote for a nominee who will not assure them that he will vote the way they want in future cases. I submit that that is wrong. As Judge Alito testified, ''Results-oriented jurisprudence is never justified because it is not our job to produce particular results.''

Yesterday's meeting of the Judiciary Committee illustrates that many Senators have adopted this results-oriented approach to the confirmation process. The wrong questions are being asked, and the wrong answers are being demanded. The right question is how the nominee will do his job, not what the nominee will decide. This fundamental point is getting more and more lost with each passing confirmation battle.

Let me give a few examples. Yesterday a Senator said that it was necessary to vote against Judge Alito because that Senator believes in a right to abortion and there is no guarantee that Judge Alito will agree with that position in a future case dealing with abortion regulations.

That Senator took the same approach when discussing the just-decided case of Gonzales v. Oregon, which dealt with the Attorney General's promulgation of regulations in response to a state physician-assisted suicide statute. The Attorney General had said that, despite the Oregon statute, physicians could not use Federally regulated drugs to kill patients.

The case, therefore, did not turn on the Court's views on physician-assisted suicide, but, rather, on the interpretation of the underlying statute. The majority made this clear in the first paragraph. Justice Kennedy explained:

> The dispute before us is in part a product of this political and moral debate, but its resolution requires an inquiry familiar to the courts: interpreting a federal statute to determine whether Executive action is authorized by, or otherwise consistent with, the enactment.

The Supreme Court had not ruled on the wisdom or appropriateness or constitutionality of physician-assisted suicide, but the Senator was critical of Chief Justice Roberts because he had not voted to uphold assisted suicide, and the Senator didn't think Sam Alito would either. One could fervently agree with the Senator on the policy issue, yet interpret the statute in a way that requires a different result. But, it appears, results are all that matter.

As another example from yesterday's committee meeting, a Senator said that protecting wetlands was very important, and wanted to make sure that Judge Alito would allow the Federal Government to protect them under the Clean Water Act. The Senator acknowledged that the underlying constitutional question was the extent of Congress's power to regulate non-navigable waterways which, arguably, are not in interstate commerce. That is a thorny constitutional question. But, rather than acknowledging that Congress might have gone too far in exercising its power to regulate interstate commerce, the Senator was troubled that Judge Alito's future votes on protecting wetlands could not be predicted.

Now, I don't mean to single out any one Senator, because the same thing happened throughout the committee meeting. Senator after Senator would bring up the results of decisions by Judge Alito without any regard as to why he reached a certain result, such as their procedural disposition, the proper standard of review, the governing case law of the Supreme Court or the Third Circuit, or the legal reasoning that Judge Alito used. It was all about results.

As a final example, another Senator wanted Judge Alito to tell him that it was unconstitutional for the President to take major military action against Iran or Syria absent prior congressional authorization. He was exasperated that Judge Alito wouldn't just prejudge the question, which the Senator called ''basic,'' and say that the President could not do so. But Judge Alito gave the judge's answer. It was anything but ''basic.'' Judge Alito explained that he needed to consider the political question doctrine first, then to analyze the scope of the President's Article II War Powers, the history of the use of force absent congressional authorization—it's a very complicated history—and then apply it to the facts before him. The Senator wanted a politician's answer, a policymaker's answer. In other words, he wanted to know how that case would turn out, before it was briefed and argued. But all we should be asking, is how he would approach the question. What principles would Sam Alito apply, not what kind of results Sam Alito will deliver.

Abortion, executive power in a time of war, congressional power, State sovereign immunity, the 4th amendment,

wetlands regulation, the death penalty—many Senators have constructed a confirmation standard that revolves completely around predictions about how cases related to issues such as these will come out. We cannot allow our public policy aspirations to cloud our view of the judicial function.

If our process evolves into results-oriented voting, votes will inevitably become partisan. Indeed, it appears that it has already become partisan. The confirmations of Ruth Bader Ginsburg and Stephen Breyer speak volumes about how this results-oriented approach is, in fact, a problem centered within the democratic caucus. Both of these nominees had a long history of liberalism. Both were Democrats with ties to the political left. Ginsburg was the former general counsel to the ACLU who had advocated taxpayer funding of abortion, and Breyer had been Senator KENNEDY's chief counsel and an academic promoter of an expansive regulatory state. Yet both received unanimous support from the Judiciary Committee. Justice Ginsburg received 96 votes on the floor, and Justice Breyer received 87 votes. They have served for more than a decade on the left side of the Supreme Court, exactly as Republicans suspected that they would when they voted to confirm them. But Republicans evaluated their judicial qualifications favorably, trusted their commitments to approach cases with an open mind, and gave deference to the President's choice. After all, he had won the election.

We haven fallen a long way since Justice Breyer was confirmed in 1994. The Republicans who put aside their policy goals and supported liberal Democratic nominees have been rewarded with unprecedented filibusters of qualified nominees to the lower courts and the adoption of a results-oriented confirmation standard for the Supreme Court.

I say to my Democrat colleagues—is this really the path you want to put us on? You have already dramatically increased the chance of future filibusters. Do we really want Senators to vote against any nominee who will not prejudge cases and guarantee results? I know that the most ideological activists on both sides of the spectrum would prefer that path, but do you? Does the Senate? Does the Nation?

As I said, for now this is a Democrat problem. But it is naive to think that, someday, Republicans won't decide that what is good for the goose is good for the gander. And while your ''no'' votes on Judge Alito will not keep him from the Supreme Court, I say to my Democratic friends—what if President Bush had lost the 2004 election but there were 55 Republicans in the Senate? If Republicans today were applying your results-oriented, litmus-test-based standard to a Democrat President's nominees, would it be possible to confirm anybody even vaguely as liberal as Ginsburg or Breyer. If we followed your path, the answer would clearly be ''no.'' This is a terribly dangerous road to travel.

We all know that the Supreme Court confirmation process has taken on political campaign-like elements, with television advertisements and grass roots activism. That development, plus this results-oriented approach to confirmation, represents the subtle rejection of the very idea of a non-political, independent judiciary. What else can we conclude when Senators won't vote for a nominee who even they say is qualified and has high integrity, just because they want to guarantee certain results out of the Court? That's not law. That's politics. It is the antithesis of the rule of law and constitutional government. Do we really just want policy makers in robes? I remember when President Clinton's former White House Counsel, Lloyd Cutler, testified before the Judiciary Committee. His answer was a resounding ''No.''

In conclusion, I remind the Senate of something Justice O'Connor said last September: the rule of law is ''hard to create and easier than most people imagine to destroy.'' That warning speaks directly to what we face today. If a partisan block of Senators continue down this path of politicization, it cannot be expected to apply to only one party. The ultimate loser will not be Republicans or Democrats, but the rule of law itself.

''Hard to create, and easier than most people imagine to destroy.'' My friends, please—take a step back. The man is qualified. He has high integrity. He is fair. He deserves your vote.

The PRESIDING OFFICER. The Senator from Nevada is recognized.

Mr. ENSIGN. Mr. President, I rise today in support of the nomination of Judge Samuel Alito, Jr., to the U.S. Supreme Court.

One of the greatest honors and responsibilities of a Senator is a vote we cast to confirm judges. Our role is not one that I take lightly. It is with deep respect for the laws of this Nation and for the highest Court in our land that I stand before the Senate today.

As Senators, we are tasked with the specific duty in the checks and balances system of our Government. It is with our advice and consent that a President's nominee is confirmed or rejected. This is how it has worked since the Constitution was adopted. Our forefathers, with great brilliance and foresight, wanted to ensure that no one person wielded excessive power. However, at the same time, it is the President who selects a nominee. He earns that power as the elected leader of the United States. President Bush nominated Judge Alito. We are here to consider that nomination.

I had the opportunity to meet Judge Alito and I find he is extremely qualified to join the highest Court in this land. His experience, his temperament, his understanding of the role of the Court and his respect for the law make him an admirable candidate who I believe will serve this Nation well.

The single most important factor that went into my decision of whether to support Judge Alito has to do with the Justices' role on the Court. The job of the judiciary is to apply and interpret the Constitution and the laws of the land. Unfortunately, not everyone sees it that way. That is why judicial activism has become so rampant in this country. In no way is it the judiciary's purview to make laws. That is clearly the job of legislators. Legislators are to make the laws and judges apply them. Judge Alito understands this principle and has demonstrated so throughout his esteemed career.

In his testimony before the Senate Judiciary Committee he spoke about the limited role of the judiciary. Judge Alito stated it should always be asking itself whether it has strayed over the bounds, whether it is invading the authority of the legislature, for example, whether it is making policy judgments rather than interpreting the law. That has to be a constant process of reexamination of the judges.

During Judge Alito's confirmation hearing, Democrats tried to make the case that judicial precedent is more important than the Constitution itself. Most Americans believe the words of the Constitution should have real meaning. A strict constructionist approach to interpreting the Constitution is necessary for the consistent application of our laws. How can we as the legislative branch do our jobs effectively when the judicial branch is free to provide an expansive reading of the Constitution at any moment? I don't believe we can.

For this reason, we need judges who value the Constitution first. Precedent is a necessary tool to ensure consistent application of the laws, but precedent should not be held so high that we prohibit judges from revisiting bad precedent. The history of the Supreme Court supports this idea. If bad precedent could not be overturned, Plessy v. Ferguson would still stand and racial segregation would still be legal in this country. That thought is truly reprehensible. The Supreme Court, in fact, has overturned its own precedent at least 225 times. That is nearly once per year.

I support Judge Alito's nomination because his testimony demonstrates his understanding of the principle that the Constitution, and not precedent, is preeminent.

In addition to his clear and committed approach to interpreting laws and not being a judicial activist, I think the testimony and support of his colleagues speaks volumes about what we can expect from Justice Alito.

Judge Maryanne Trump Barry has served on the Third Circuit with Judge Alito since President Bill Clinton appointed her in 1999. She also worked in the U.S. Attorney's Office with Judge Alito in the late 1970s. About his service as U.S. attorney, she stated:

Samuel Alito set a standard of excellence that was contagious—his commitment to

doing the right thing, never playing fast and loose with the record, never taking a shortcut, his emphasis on first-rate work, his fundamental decency.

Judge Aldisert of the Third Circuit, appointed by President Johnson, has worked with Judge Alito for 15 years. He testified about the experience of those who have served with Judge Alito. Because of Judge Alito's work on the bench, he stated:

. . . we who are his colleagues are convinced that he will also be a great justice.

The character, the qualifications, and the commitment of Judge Alito are not in question by anybody in this room. His long history of public service has proven that. He has served our judicial system and our Nation with the utmost honor, and we can expect him to continue that legacy from our Supreme Court.

I urge all of my colleagues in the Senate to consider their vote and to avoid partisanship. Consider Judge Alito's qualifications. Consider his respect for the Constitution. Senator KYL from Arizona preceded me on the floor. He talked about the dangerous precedent that would be set if this body were to depart from the standard of judging nominees based on their experience in favor of a partisan approach. Republicans, back in the 1990s, voted for two people they knew would be liberal. The basis on which Judge Alito's confirmation is based will likely determine the basis by which all future nominees will be judged.

What I think is important to consider is not how someone will rule but rather on their judicial approach with respect to the words of the Constitution, at the writing of the Founders, at the principles on which America was founded. That is the judicial approach I want somebody to have on the Highest Court in the land. And that is the judicial approach I believe—no one knows for sure, but I believe—Samuel Alito has and how he will make judgments as an Associate Justice of the U.S. Supreme Court.

So I urge all my colleagues to support his nomination. Mr. President, I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. COLEMAN. Mr. President, I have come to the Senate floor to discuss the nomination of Judge Samuel Alito. My purpose is to share with my colleagues and the people of Minnesota my decision to vote to confirm Judge Alito and the reasons for it.

This is one of the most solemn and important events in the life of the Senate. From Minnesota, I watched and listened to the hearings closely. Judge Alito's intellect and character are nothing short of remarkable.

On day four of the hearings, January 12, 2006, four sitting and two former judges of the U.S. Court of Appeals for the Third Circuit testified on behalf of Judge Sam Alito's nomination to the Supreme Court. They spoke about his independence, judgment, intellect, and character.

I remember listening to Judge Timothy Lewis tell us that Judge Alito will be the type of Justice who will listen with an open mind and will not have any agenda-driven or result-oriented approach. I think that is what we want in a judge.

What is interesting is that Judge Lewis is a Clinton appointee. He stated:

I am openly and unapologetically prochoice and always have been.

Judge Lewis went on to state:

I am openly—and it's very well known—a committed human rights and civil rights activist and am actively engaged in that process as my time permits. . . .

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

And the reason is that having worked with him, I 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.

It has been said that the most important decision in Government is ''who decides?'' With magnificent simplicity, article II, section 2 of the Constitution lays out the process for placing members on our Highest Court. It says:

. . . he [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint [justices] of the Supreme Court. . . .

For us, elected officials, the process of determining who will lead is long, drawn out, expensive, and sometimes very noisy. But for the selection of Justices, the Founders wanted the process to reflect the dignity of the office.

Unfortunately, we have witnessed a deterioration of the dignity and solemnity of that process in the last few years. Despite Chairman SPECTER's best efforts, the hearing before the Judiciary Committee seemed, at times, to me, at least in some ways, an exercise in futility.

I would like to know the breakdown between the amount of time Senators on the committee spent making speeches for the witness to hear and how much time they spent listening to him. The ''advice and consent'' process became ''lobby and confront.''

The Senate should examine the nominee, not dissect him or her.

I have read he was asked more than 700 questions. The Presiding Officer should know; he was there. He sat through part of that process. I believe he brought, and others try to bring, a sense of asking the nominee about the process that he would employ in making decisions. It was clear that what Judge Alito brought to the table was not one that says here is what I believe and as a result this is what I will do but, rather, what you would want a judge to do: What do the facts say, what does the law say, what does the Constitution say.

In being asked 700 questions, I think that is something like 500 more than Justice Ginsburg was asked. Senators on the committee who had previously counseled nominees not to answer specific questions on issues that will come before them on the Court on this occasion abused the nominee for not doing so. The American people know what this process is supposed to be about. The President nominates and the Senate confirms. The President, who was elected by all the people, did his job. Now it is time for us to do ours.

When we approach issues of greatest magnitude, the Senate should be at its very best. I like Stephen Covey's advice to leaders when he wrote:

The Main Thing is to keep the Main Thing the Main Thing.

Despite all the distractions and attempted detours, there is a main thing to be focused on. This main thing is not a particular issue or political agenda. This main thing should not vary based on whether your party is in the White House. I hope that in my time in the Senate, if there is a President of a different party, I will bring the same approach that I have tried to bring to the judges that President Bush has nominated. My consistent standard throughout my time in the Senate will be this: Is the nominee qualified by relevant experience, proper judicial temperament, and ethical standards which are beyond reproach? Does he bring a perspective that says a judge is to be a judge or referee, not to bring his or her personal opinions to the table to create law as he or she sees it but, rather, does what Judge Alito does, looks at the facts, looks at the law, the Constitution.

I would submit that a quick search for the votes and record of judicial nominations over the last 200 years would indicate this is the historical standard almost all Senators have taken. The current circumstance of microscopic examination, politicizing, and threats of filibusters is a major historical aberration. For the sake of the judiciary and the whole constitutional system, I hope we find our way back to the way things have been for over the last 200 years plus, rather than the last 5 years.

In my view, Judge Samuel Alito is extremely well qualified to serve on the Supreme Court. He has an extraordinary legal mind. There is no doubt about it. He has demonstrated in his years on the bench and in hundreds of cases that he views the judicial role as following the Constitution and interpreting the law, not making the law.

Judge Alito told us in his own words that ''no person in this country, no matter how high or powerful, is above the law, and no person in this country

is beneath the law.'' He also told us that ''our Constitution applies in times of peace and in times of war, and it protects the rights of Americans under all circumstances.''

On results-oriented jurisprudence, Judge Alito stated:

> Results-oriented jurisprudence is never justified because it is not our job to try to produce particular results. We are not policymakers. We shouldn't be implementing any sort of policy agenda or policy preferences we have.

In effect, this was the same standard that Judge Roberts applied. I recall he was asked a question whether he was ruling on behalf of the little guy. And the comment was, if the Constitution says the little guy deserves to win, he will. And if it says that he doesn't deserve to win, then he won't. That is what judges should do. That is the way they should operate.

Advice and consent was never intended as a rehash of the previous Presidential election. It was never intended as a means for the Senate to impose its policy agenda on a future court. I worry that we are walking down a dangerous path when Senators start looking at judges and in effect requiring them to say, yes, I will rule a certain way or otherwise you will not get my vote.

Advice and consent was never intended as a means to grandstand or placate interest groups. I will proudly vote to support Judge Alito's nomination. His career, his writings, and his class during this less-than-ideal confirmation process are proof that he will be an outstanding member of the highest Court. The President has done his job admirably. He has nominated an outstanding judge. The Senate has examined his qualifications. Now it is time for us to do our job and confirm Samuel Alito as an Associate Justice of the U.S. Supreme Court.

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

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. DURBIN. Mr. President, pending before the U.S. Senate is the nomination of Judge Sam Alito from the Third Circuit to the U.S. Supreme Court. As I mentioned earlier in the day, it is a historic moment seldom seen on the floor of the Senate when we discuss the possible elevation of an individual to a lifetime appointment to the highest Court in the land.

The Supreme Court is the last refuge for America's rights and freedoms. It is an important institution for our values and our future. That is why during the course of the day many Members of the Senate have come to the floor to express their feelings about Judge Alito. It is largely broken down on partisan lines. Those on the other side of the aisle—the Republican side—are virtually all in support of Judge Alito. Most on the Democratic side oppose him.

I have listened to what many of the Republican Senators who have come to the floor have said. Almost every Republican Senator who has come to the floor today has made the argument that we should all vote for Judge Alito because in 1993, some 13 years ago, Justice Ruth Bader Ginsburg, a Supreme Court nominee of President Clinton, was confirmed overwhelmingly by the Senate. That appears to be talking point No. 1 that the White House generated not only in conversation today on the floor, but also at the hearing concluded recently in the Senate Judiciary Committee. There are some fundamental flaws in their reasoning and I will point out three:

First, as I mentioned this morning, Justice Sandra Day O'Connor, whose vacancy is being filled, has been the fifth and decisive vote on many issues central to our democracy. The Justice who takes her place is truly in the position to tip the scales of justice in America. In the last 10 years, 193 cases have been decided in the Supreme Court by the closest of votes, 5 to 4; and of the 193 cases, Justice Sandra Day O'Connor has been the deciding vote in 148; 77 percent of these closely divided decisions were decided by Justice Sandra Day O'Connor. Now, the Justice whom Ruth Bader Ginsburg replaced in 1993, Byron White, didn't play the same pivotal role Justice O'Connor has played as the decisive vote on so many important issues.

Second, President Clinton selected Justice Ginsburg after a real, authentic consultation with Republicans in the Senate. This morning, I saw Senator HATCH early in the day and I said his book sales must be up because everybody is quoting him. It is a book he wrote entitled ''Square Peg: Confessions of a Citizen Senator.'' In that book, Senator Orrin Hatch of Utah described how in 1993, as the top Republican on the Judiciary Committee, he received a telephone call from President Clinton to discuss possible Supreme Court nominees. Senator HATCH recounted in his book—and still stands by it—that he warned President Clinton away from a nominee whose confirmation Senator HATCH believed ''would not be easy,'' in his words. He wrote in his book that he suggested the names of Ruth Bader Ginsburg, whom President Clinton had never heard of, according to Senator HATCH, and Stephen Breyer. Senator HATCH wrote that he assured President Clinton that Ginsburg and Breyer ''would be confirmed easily.''

What a contrast to the situation we face today. President Bush sends the names of nominees to the Senate without previous consultation. In fact, I may be mistaken on this particular nominee, Judge Alito, but I do recall Senator SPECTER saying he learned of Harriet Miers' nomination when the news media announced it—or only shortly before. I think he said he was called within an hour or so before the news announcement. That is much different than the consultation that took place with Senator HATCH and President Clinton, where President Clinton went to the ranking Republican—not even the Chair at that moment—and asked him for advice and consultation on the next Supreme Court nomination.

Judge Alito was nominated not as a product of bipartisan consultation with the Senate but, rather, as a payoff—or at least a satisfaction to the radical right who had turned their back on Harriet Miers' nomination.

There is another crucial difference between Judge Alito and Judge Ginsburg. Despite some Republican Senators' efforts to rewrite history, Judge Ginsburg was viewed at the time of her nomination as a moderate and centrist judge based on her dozen years of service on the Federal bench. In a National Public Radio news story dated June 18, 1993, a reporter named Nina Totenberg said as follows:

> Why did the Republicans feel so comfortable with Judge Ginsburg? The answer is that her judicial record shows her to be the most conservative Carter-appointed judge on the U.S. Court of Appeals here in the District of Columbia.

She's considered a centrist, a swing vote. And in fact, a statistical analysis done in 1987 of that Court's voting pattern shows Judge Ginsburg voting substantially more often with the court's conservative Republican bloc of judges, led by then-Judge Robert Bork, than with the liberal Democrat judges.

Judge Alito, by contrast, has never been called a centrist judge. At least those who looked at his record have not called him that. He is not a judge who votes more often with his Democratic colleagues than his Republican colleagues. Far from it. Judge Alito is a staunch conservative and the most frequent dissenter on his court. When he dissents, it is almost always in a rightward and more conservative direction.

I spoke earlier about Judge Alito's track record on civil rights. I talked about some of the cases in which he showed a particular insensitivity to those who came before his court without the trappings of power. In fact, Judge Alito, in many of those cases, was the sole dissenting judge. Because Justice O'Connor was the fifth and deciding vote on so many cases involving civil rights and racial justice, Judge Alito will tip the scales of justice on those issues if he is confirmed.

At this point, I ask unanimous consent to have printed in the RECORD a letter of January 6, 2006, from the Leadership Conference on Civil Rights that has been submitted in opposition to the nomination of Judge Alito, signed by Dr. Dorothy Height, chairperson, and Wade Henderson, executive director.

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

LEADERSHIP CONFERENCE ON CIVIL RIGHTS,
Washington, DC, January 6, 2006.

Hon. ARLEN SPECTER, Chairman,
Hon. PATRICK J. LEAHY, Ranking Member,
Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR CHAIRMAN SPECTER AND RANKING MEMBER LEAHY: On behalf of the Leadership Conference on Civil Rights (LCCR), the nation's oldest, largest, and most diverse civil and human rights coalition, we write to express our opposition to the confirmation of Judge Samuel A. Alito, Jr. as Associate Justice of the Supreme Court of the United States. The Supreme Court's jurisprudence over the past 50 years has often served to protect the fundamental constitutional rights of all Americans. Judge Alito's decisions, however, often stand in direct contrast to that jurisprudence and embrace a much more limited and narrow view of constitutional rights and civil rights guarantees. A careful examination of Judge Alito's record reveals a history of troubling decisions in the areas of civil rights, civil liberties, and fundamental freedoms, decisions that undermine the power of the Constitution and of Congress to, protect the civil and human rights of all Americans. LCCR believes that Judge Alito's record does not demonstrate an adequate commitment to protecting fundamental rights and, therefore, urges the Senate to reject his nomination.

The Supreme Court is the final arbiter of our laws, and its rulings can drastically impact the lives, liberties, and rights of all Americans. As such, LCCR believes that no individual should be confirmed to the Supreme Court unless he or she has clearly shown a strong commitment to the protection of civil rights and liberties, human rights, privacy, and religious freedom. The evidence reviewed to date shows that Judge Alito's record in these areas is highly troubling. His overall record reveals a jurist whose views are clearly to the right of where most Americans stand on a number of issues, including the reach of civil rights laws, the constitutional safeguards afforded those within our criminal justice system, and the power of Congress to protect Americans in the workplace and elsewhere.

In addition, LCCR is very troubled by the statements Judge Alito made in his 1985 application to be the Reagan administration's Deputy Assistant Attorney General in the Office of Legal Counsel. In particular, Judge Alito cited his disagreement with key rulings by the Supreme Court on legislative reapportionment, criminal justice and religious liberties, and added that he was ''particularly proud'' of his work to restrict affirmative action and limit remedies in racial discrimination cases. Although he now claims that these were just mere words on an application, his record as a jurist reveals something different. The ideological views taken in the application and during his time in the Reagan administration are exemplified throughout his judicial decision making, where he routinely favors a reading of statutory and constitutional law that limits the rights of individuals and the power of Congress to protect those individuals. The following is a summary of the reasons for LCCR's opposition:

JUDGE ALITO'S ''DISAGREEMENT'' WITH SUPREME COURT RULINGS ON REAPPORTIONMENT

In an essay attached to a 1985 application for a position within the Department of Justice, Judge Alito wrote that he had been motivated by his opposition to, among other things, the Warren Court's rulings on legislative reapportionment. Because those rulings first articulated the fundamental civil rights principle of ''one person, one vote,'' and paved the way for major strides in the effort to secure equal voting rights for all Americans, his stated opposition to them is extremely troubling. It is vital to understand the context in which these cases were decided.

Prior to the 1960s, as urban areas throughout the country experienced rapid population growth, many state and federal legislative districts were not redrawn, often leaving rural voters with far more representation per capita—and thus far more political power—than urban residents. In Florida, for example, just 12 percent of the population could elect a majority of the state senate. While unequal districts affected all voters, their impact was especially harsh in the South, where, along with discriminatory requirements like poll taxes and literacy tests, malapportionment virtually guaranteed the exclusion of racial minorities from the democratic process. Until 1962, the federal courts generally refused to intervene, dismissing such matters as ''political questions.''

The Supreme Court's ruling in Baker v. Carr broke new ground when the Court declared, for the first time, that the federal courts had a role to play in making sure that all Americans have a constitutional right to equal representation. In Wesberry v. Sanders, the Court examined Congressional districts in the State of Georgia, which had drawn its legislative map so that 823,680 people in the Atlanta are were all represented by one Congressman, while a rural Congressman represented only 272,154 people. The Court held that these disparities violated the Equal Protection Clause of the 14th Amendment, and ordered that the districts be redrawn more evenly. In Reynolds v. Sims, the Court applied the principle of ''one person, one vote'' to state legislatures, which, in many cases, had even more drastic malapportionment than Congressional districts. For example, the Reynolds case itself challenged Alabama's legislative districts, in which one county with more than 600,000 people had only one senator, while another county with only 15,417 people also had its own senator.

In articulating the concept of ''one person, one vote,'' the so-called ''Reapportionment Revolution'' cases equalized political power between urban and rural voters, and ensured that every citizen would have an equal voice in the legislative process. Along with the passage of the Voting Rights Act of 1965 and its subsequent amendments, the decisions also paved the way to far greater representation of racial and ethnic minorities, at both the state and federal levels of government. They also helped open the door for legal challenges to the ''at-large'' and ''multimember'' districts that many Southern states established in an effort to circumvent the Baker rulings and continue excluding African-American voters from the political process.

The Warren Court decisions that established the constitutional principle of ''one person, one vote'' were a catalyst for tremendous progress in our nation's efforts to secure equal voting rights for all Americans, and quickly became so accepted as a matter of constitutional law that they could fairly be described as ''superprecedent.'' Yet two decades later, long after most of the nation had come to embrace this progress, Judge Alito still boasted of his opposition to it. The fact that he would use his opposition as a ''selling tactic'' for a job in 1985 is disconcerting, and raises suspicions about his overall legal philosophy that deserve extensive scrutiny.

JUDGE ALITO'S NARROW READING OF ANTI-DISCRIMINATION AND OTHER WORKER PROTECTION LAWS

Judge Alito's record also raises concerns about whether he would be a strong enforcer of our nation's civil rights and labor laws. His decisions thus far in such cases show a pattern of narrow interpretations of the laws, placing greater burdens on civil rights plaintiffs to prove discrimination and making it harder for the government to protect workers.

In a number of cases involving race, gender, disability, and age discrimination, Judge Alito was clearly to the right of his colleagues on the Third Circuit. In Bray v. Mariott Hotels, for example, the Third Circuit ruled that an African-American plaintiff who had been denied a promotion had shown that racial discrimination might have been a factor, and that she was therefore entitled to take her case to trial. But Judge Alito dissented, writing an opinion that prompted the majority to charge that ''Title VII would be eviscerated if our analysis were to halt where the dissent suggests.'' In Sheridan v. E.I DuPont de Nemours and Co., a gender discrimination plaintiff sued after being denied a promotion. A jury ruled in her favor, but the trial judge threw out the verdict. The Third Circuit found that she had presented enough evidence to persuade the jury that discrimination was a factor, but Judge Alito was the lone dissenter in the en banc decision. Judge Alito acknowledged that additional evidence of discrimination, beyond proof that an employer's explanation for an adverse decision was pretextual, should not usually be required for a plaintiff to get to a jury, but he maintained that summary judgment might still be appropriate in some cases. The result Judge Alito would have reached in the Sheridan case, however—reversing a jury finding of sex discrimination that every other judge on the Third Circuit would have upheld—undermines the neutral standard he articulated. To reach this result, Judge Alito not only gave the employer the benefit of the doubt but failed to consider some of the most important evidence brought by Sheridan. Finally, in Nathanson v. Medical College of Pennsylvania, a prospective medical student filed suit under the Rehabilitation Act of 1973, claiming that the school failed to provide accommodations for a back injury. The trial court granted summary judgment in favor of the school, but a Third Circuit panel reversed on the Rehabilitation Act claim because there were different factual assertions that necessitated a jury trial. Judge Alito dissented, prompting his colleagues to write that under his standards, ''few if any Rehabilitation Act cases would survive summary judgment.

Judge Alito's record on anti-discrimination cases becomes more troubling when considered in light of his record prior to serving on the Third Circuit. As Assistant to the Solicitor General during the Reagan administration, Judge Alito co-authored several *amicus curiae* briefs that sought to eliminate affirmative action policies that were put in place to remedy past discrimination, discrimination which, in one case, persisted in contravention of at least three court orders over an eight-year period. In his 1985 application for a promotion within the Justice Department, Judge Alito later mischaracterized these cases as involving nothing more than challenges to ''racial and ethnic quotas.'' Judge Alito's involvement in the Reagan Justice Department's zealous campaign to undermine affirmative action remedies suggests that he adheres to an ideology that goes beyond mere conservatism on civil rights matters.

In cases involving other worker protections that deal with such matters as salary,

pensions and job safety, Judge Alito has also demonstrated a clear and unmistakable tendency to rule narrowly and against working people. Given a choice between reading a statute broadly, consistent with Congress' intent to provide workers with basic protections, or reading a statute in the narrowest way possible, he again shows a disturbing tendency to come down against workers. In Reich v. Gateway Press, for example, Judge Alito dissented from a ruling in which the Third Circuit found that employees of a group of related community newspapers were protected by the overtime rules of the Fair Labor Standards Act. The majority reasoned that while the law may not have covered each individual newspaper, which were small in size and circulation, the papers and all employment decisions were managed by one company and thus amounted to an ''enterprise'' that was subject to the overtime law. Judge Alito dissented, however, and would have denied this coverage, claiming that neither the statute nor the legislative history could support the majority's conclusion. In Belcufine v. Aloe, on the other hand, Judge Alito took a more expansive reading of the law, but in this case it was in order to benefit corporate officers at the expense of workers. Belcufine involved a state law that held corporate officers personally liable for unpaid wages and benefits. Judge Alito ruled, in a split decision, that the law could no longer be applicable, as a matter of policy, once a corporation has filed a bankruptcy petition. The dissenting opinion pointed out that nothing in the statute in question ''even remotely can be read to excuse the agents and officers'' from liability once a company files for bankruptcy.

JUDGE ALITO'S WILLINGNESS TO UNDERCUT FUNDAMENTAL PRIVACY AND DUE PROCESS RIGHTS

In cases involving criminal justice matters such as the Fourth Amendment, habeas corpus, and the right to effective assistance of counsel, Judge Alito has shown an excessive tendency to defer to police and prosecutors. This deference frequently comes at the expense of the constitutional rights and civil liberties of individual Americans, and it raises concerns about whether Judge Alito would help enable governmental abuses of power.

In Doe v. Groody, Judge Alito argued in dissent that police officers who conducted strip searches without a warrant could still be entitled to qualified immunity. The majority concluded, in a decision authored by Judge Chertoff, that strip searches of the suspect's wife and ten-year-old daughter went well beyond the police's warrant to search the home of a suspected drug dealer, and that the officers were therefore not entitled to claim qualified immunity as a defense to a subsequent lawsuit. As Judge Chertoff noted, holding otherwise would ''transform the judicial officer into little more than the cliche 'rubber stamp.' '' Judge Alito, in criticizing the majority for what he called a ''technical and legalistic'' ruling in favor of the plaintiffs, would have granted authority to the police to decide who could be searched and therefore, would have given the officers immunity for invading the privacy rights of the wife and daughter. In United States v. Lee, Judge Alito upheld the warrantless video surveillance by the FBI of a suspect's hotel suite. He justified his ruling on the ground that the FBI only turned on the surveillance equipment when an informant was present in the suite and could ''consent'' to the surveillance, but this ruling disregarded the fact that the equipment was capable of being used at any time and thus enabled the FBI to invade the suspect's privacy at any time. And in Baker v. Monroe Township, a woman and her children were searched as they were entering premises that were the subject of a search wacrant. The search warrant specified a location but there were no names included on the warrant, which led the majority to conclude that the warrant was deficient under the requirements of the Fourth Amendment. Judge Alito dissented, however, arguing that the lack of particularity in the warrant allowed the officers more leeway to search anyone on the premises.

Judge Alito's overly deferential attitude toward law enforcement at the expense of privacy rights was also evident before his appointment to the Third Circuit. In a 1984 memorandum, Judge Alito—then an attorney with the Justice Department—opined that the Attorney General and other government officials should have absolute immunity from civil liability for wiretapping the phones of Americans without a warrant. He urged the administration not to pursue such an argument in a pending Supreme Court case, but only on purely strategic grounds. The Supreme Court, in Mitchell v. Forsyth, went on to rule that absolute immunity did not apply in such situations, rejecting the broad, troubling view expressed in Judge Alito's memorandum.

Judge Alito's record is equally troubling in other areas of criminal justice, and shows the same excessive deference to law enforcement that can open the door to abuses. In another 1984 memorandum, Judge Alito argued in defense of a state law that had authorized Tennessee police to use deadly force against any fleeing felon suspect whom police have probable cause to believe had committed a violent crime or was armed or dangerous. In the case of Tennessee v. Garner, that law was invoked after police shot and killed an unarmed, 15-year-old, 5′4″ burglary suspect while he was climbing a fence. While Judge Alito did not recommend filing an amicus curiae brief in support of the police in the case, he still found the shooting to be constitutionally defensible. When given a choice between killing a possibly nonviolent suspect and allowing a possibly violent suspect to escape, Judge Alito argued that ''[r]easonable people might choose differently in this situation.'' The Supreme Court disagreed wiih Alito's farfetched analysis, finding ihe statute unconstitutional by a 6–3 margin.

Judge Alito's record also reveals a distressing tendency to deny habeas corpus claims of those in the criminal justice system. In Rompilla v. Horn, Judge Alito held that in ihe sentencing phase of a capital murder case, the failure of a defense attorney to investigate and present mitigating evidence, including ihe defendant's traumatic childhood, alcoholism, mental retardation, cognitive impairment and organic brain damage, did not amount to ineffective assistance of counsel in violation of the Sixth Amendment. His ruling was decried as ''inexplicable'' by the dissent and was overturned by the Supreme Court, which noted that some of the mitigating evidence was publicly available in the very courthouse in which the defendant was tried. Justice O'Connor concurred in reversing Judge Alito's ruling, describing the defense attorney's performance as ''unreasonable.'' In another case, Smith v. Horn, Judge Alito's dissent would have denied ihe habeas claims of a death row inmate. Judge Alito concluded that a jury instruction regarding the defendant's guilt, which the majority found the jury could have reasonable misunderstood, did not amount to a constitutional violation.

Finally, the case of Riley v. Taylor shows Judge Alito's reluctance to question prosecutors even where racism is alleged in the jury selection process. In that case, Judge Alito did not find a constitutional violation in the prosecution's apparent use of peremptory challenges to exclude black jurors from a death penalty case involving an African-American defendant. His dissent in the case illustrated a disregard for ihe impact of racially motivated peremptory jury strikes on African-American defendants. The majority had relied, in part, on statistical data to conclude that black jurors had been excluded, but Judge Alito took issue with the use of statistics, questioning the exclusion of black jurors as a statistical oddity and comparing it to the fact that five of the last six U.S. Presidents had been left-handed. His comments drew a sharp rebuke from the majority, who said that ''[t]o suggest any comparability to the striking of jurors based on their race is to minimize the history of discrimination against prospective black jurors and black defendants.

JUDGE ALITO'S TROUBLING RECORD ON IMMIGRATION LAW

Judge Alito's record in appeals of asylum and deportation orders reveals an abnormally strong tendency to let adverse Board of Immigration Appeals (BIA) and lower court rulings stand. For example, an analysis by The Washington Post found that Judge Alito has sided with immigrants in only one out of every eight cases he has handled, which, according to the Post, sets him apart even from most Republican-appointed judges. Judge Alito's record is more problematic in light of the recently growing criticism, by many other federal judges from both parties, of asylum rulings by the BIA and administrative immigration judges.

In asylum cases, Judge Alito has a strong tendency to rule against individuals who are seeking protection in the United States, even where evidence shows that they have been or would have been persecuted in their own countries. In Chang v. INS, Judge Alito dissented from the court's grant of asylum for a Chinese engineer who claimed he would face persecution if returned to his own country. Judge Alito found no reason to reverse the INS denial of asylum despite the fact that Chang had presented evidence that his wife and son already faced persecution and he was threatened with jail if he returned to China. Similarly, in Dia v. Ashcroft, Judge Alito dissented from a majority opinion granting asylum to an immigrant from the Republic of Guinea whose house had been burnt down and whose wife had been raped in retaliation for his opposition to the government. The majority noted that the immigration judge seemed to be searching for ways to deny asylum and find fault with the credibility of Dia. Judge Alito's dissent pushed for a higher standard. The majority criticized Judge Alito's dissent, noting that his proposed standard would ''gut the statutory standard'' and ''ignore our precedent.''

Judge Alito's excessive tendency to defer to the BIA is also evident from his record in deportation cases. In Lee v. Ashcroft, Judge Alita dissented when the court ruled that a false tax return is not an ''aggravated felony,'' an immigration law term that triggers mandatory deportation and bars most forms of humanitarian waivers. The court reasoned that Congress only intended for tax evasion to trigger mandatory deportation, but Judge Alito disagreed and pushed for a more expansive reading of the law. The majority noted that ambiguity in the law should be resolved in favor of the immigrant and that Judge Alita's interpretation was grounded in ''speculation.'' In Sandoval v. Reno, Judge Alito's dissent would have construed the Antiterrorism and Effective Death Penalty Act of 1996 to strip the federal courts of their ability to hear habeas corpus claims from aliens in custody challenging deportation orders. The Supreme Court ultimately rejected

Judge Alita's reading of the law, in INS v. St. Cyr, because such an interpretation would raise serious constitutional questions.

Also troubling is a 1986 letter Judge Alito wrote, in his capacity as Deputy Assistant Attorney General, to former FBI Director William Webster in which he suggested, inter alia, that ''illegal aliens have no claim to nondiscrimination with respect to nonfundamental rights,'' and that the Constitution ''grants only fundamental rights to illegal aliens within the United States.'' Judge Alito uses a strained reading of the 1976 Supreme Court ruling in Mathews v. Diaz to support this assertion, but oddly, he makes no mention of the 1982 ruling in Plyler v. Doe, which squarely ruled that a state could not discriminate against undocumented children in public education, even though education is not considered a fundamental constitutional right. As such, Judge Alito's letter raises questions about whether he would be willing to adequately protect undocumented immigrants from unconstitutional forms of discrimination.

JUDGE ALITO'S RESTRICTIVE VIEW OF THE ESTABLISHMENT CLAUSE

Judge Alito's record shows that he takes an overly narrow view of the First Amendment's Establishment Clause, a view that sets him apart from Justice O'Connor and the majority of her colleagues to serve on the Supreme Court. His record—along with his acknowledged disagreement with the Supreme Court's most noteworthy rulings in this area—raises concerns that he would not do enough to protect the religious liberties of an increasingly diverse America.

For example, in ACLU of New Jersey v. Black Horse Pike Regional Board of Education, Judge Alito voted—against an en banc majority of his colleagues on the Third Circuit—to uphold a public school policy that allowed high school seniors to vote on whether to include prayer during a graduation ceremony. By allowing a popular majority of public school students to waive the rights of a minority, Judge Alito's view—had it not also been subsequently rejected by the Supreme Court in a later case—would have essentially defeated the purpose of the Establishment Clause.

Judge Alito's ruling in ACLU of New Jersey v. Schundler (Schundler II) is equally troubling. In Schundler, the municipality of Jersey City, New Jersey had placed a crèche and menorah outside of City Hall. After a district court ruled that the display violated the Establishment Clause, the city added additional figures to the following year's display, including those of Santa Claus, Frosty the Snowman, a red sled, and Kwanzaa symbols. The district court eventually found that this modified display was also unconstitutional. Judge Alito reversed this decision, however, and upheld the modified display. In doing so, he minimized the fact that the display had only been modified in response to litigation and that the city had been attempting to promote religion through its holiday displays for decades—even though the Supreme Court considers such history to be highly relevant when determining whether a practice or policy violates the Establishment Clause.

JUDGE ALITO'S EFFORTS TO LIMIT CONGRESSIONAL AUTHORITY IN FAVOR OF ''STATES' RIGHTS''

Judge Alito's record demonstrates a troubling tendency to favor ''states' rights'' over the rights of ordinary Americans. During his tenure on the Third Circuit, he has engaged in an excessively narrow reading of the Commerce Clause and an excessively broad reading of state sovereign immunity under the 11th Amendment. In fact, his decisions show that he would go even further than the current Supreme Court in undercutting Congress' ability to protect Americans.

In United States v. Rybar, the Third Circuit upheld the conviction of a firearms dealer for the sale of outlawed machine guns, joining six other circuits in finding the federal law banning the transfer or possession of machine guns to be a valid exercise of Congressional authority under its power to regulate interstate commerce. But Judge Alito dissented, arguing that the Supreme Court's recent decision in United States v. Lopez, which invalidated Congress' gun-free school zone ban, made clear that Congress did not have such power. The majority distinguished Lopez because it dealt with a small geographic area—school zones—whereas the law at issue in Rybar applied nationwide. Judge Alito would have taken Lopez a step beyond to place further restrictions on Congress' power to use its Commerce Clause authority to protect Americans from machine gun violence. Judge Alito's extraordinarily narrow perspective of Congressional power expressed in his Rybar dissent raises serious concerns about whether he will uphold major and historically effective pieces of civil rights infrastructure such as the ban on discrimination in places of employment or public accommodation in the Civil Rights Act of 1964, and whether he will hold a restrictive view of Congress' power to move the country forward with additional civil rights laws such as hate crimes and non-discrimination legislation.

In Chittister v. Department of Community and Economic Development, Judge Alito's majority opinion would have denied a state employee the benefits of the Family and Medical Leave Act of 1993 (''FMLA''). In this case, a state employee had sued after being fired for taking medical leave that had been approved pursuant to FMLA. A jury ruled in Chittister's favor, but the trial court reversed the verdict on the ground that the state was immune from suit under the 11th Amendment. On appeal, Judge Alito affirmed the ruling, claiming that Congress had not abrogated state sovereign immunity. The Supreme Court later reached an opposite conclusion from Judge Alito's holding in its 2003 decision in Nevada Department of Human Resources v. Hibbs. The Court held that state employees could in fact sue their employers under the FMLA, a decision that has subsequently been read by some courts to validate the constitutionality of the entire law.

JUDGE ALITO'S MEMBERSHIP IN ''CONCERNED ALUMNI OF PRINCETON''

In the same job application essay described above, Judge Alito also stated that he was ''a member of the Concerned Alumni of Princeton University. a conservative alumni group'' (''CAP''). Throughout its existence, CAP was notorious for its outspoken, inflammatory rhetoric opposing Princeton's decision to enroll female students. Indeed, CAP reportedly advocated limiting the percentage of women admitted to the school. CAP also derided Princeton's efforts to increase the number of minority students; the group argued that children of alumni were more deserving of admission. In the group's magazine, Prospect, one of the organization's founders fondly recalled that Princeton had once been ''a body of men, relatively homogenous in interests and backgrounds,'' but that he now worried about the future of the University ''with an undergraduate student body of approximately 40% women and minorities, such as the Administration has proposed.'' In 1975. an alumni panel reviewed admission issues and condemned CAP's characterization of Princeton's policies. The panel, which included current Senate Majority leader Bill Frist, determined that CAP ''presented a distorted, narrow and hostile view of the university that cannot help but have misinformed and even alarmed many alumni.'' It is unclear when Judge Alito joined the group or what role he played in its activities. But his membership in the organization is troubling, given the group's outspoken hostility towards the inclusion of women and minorities at Princeton University, and it raises serious questions about the level of his commitment to gender and racial equality.

Also troubling is Judge Alito's current effort, following his nomination to the Supreme Court, to now deny he ever had any affiliation with the group. In a questionnaire he recently submitted to the Senate Committee on the Judiciary, Judge Alito stated that ''[a] document I recently reviewed reflects that I was a member of the group [Concerned Alumni of Princeton] in the 1980s. Apart from that document, I have no recollection of being a member, of attending meetings, or otherwise participating in the activities of the group.'' This supposed lack of any recollection of being a member of CAP seems difficult, at best, to reconcile with the statement he made in his 1985 job application essay—a statement in which he not only cited his membership in CAP, but deliberately used this claim of membership in an effort to bolster his conservative credentials.

CONCLUSION

The stakes could not be higher. The Supreme Court is closely divided on cases involving many of our most basic rights and freedoms. Judge Alito has been nominated to fill the seat of retiring Justice Sandra Day O'Connor, who was the crucial deciding vote in so many of those cases. The American people want and deserve to know that any new Supreme Court justice will be committed to protecting individual rights, and will put our freedoms ahead of any political agenda. Unfortunately, Judge Alito's record not only fails to show such a commitment, but also raises serious doubts.

In addition, we also have doubts about whether Judge Alito will, at his confirmation hearings, address the above concerns in a fully open and candid manner. For instance, Judge Alito has given numerous shifting and conflicting reasons for why he did not, as he promised to Senators before being confirmed to the Third Circuit, recuse himself from cases involving the Vanguard companies, in which he had financial holdings. Furthermore, Judge Alito has also recently tried to dismiss a number of troubling statements in his 1985 job application, such as his disagreement with the Warren Court's reapportionment cases, by suggesting that his statements should not be taken seriously because he was simply applying for a job. Finally, as discussed above, Judge Alito has also attempted to deny any affiliation with the radical group Concerned Alumni of Princeton, even though he himself proudly claimed to be a member in 1985. These incidents raise doubts about whether Judge Alito's responses to tough questions about his record and his legal philosophy can be completely believed when his confirmation hearings begin next week.

For the above reasons, we must oppose his confirmation as Associate Justice. We appreciate your consideration of our views. If you have any questions, please feel free to contact LCCR Deputy Director Nancy Zirkin at (202) 263–2880 or LCCR Counsel Rob Randhava at (202) 466–6058. We look forward to working wilh you.

Sincerely,

DR. DOROTHY I. HEIGHT,
Chairperson.
WADE HENDERSON,
Executive Director.

Mr. DURBIN. Mr. President, there is another aspect of Judge Alito's record that is equally troubling, and that is his failure to show that he will protect the average American from the overreaching hand of government.

I question whether he is dedicated to protecting the privacy rights of individuals from government officials in many critical areas of our lives. For example, I share the concern of many of my colleagues about Judge Alito's decision to allow a police officer to conduct a strip search of an innocent 10-year-old girl. The police officer, who did not have a valid search warrant in the opinion of a majority of the judges on Judge Alito's court, took the 10-year-old girl and her mother into a bathroom, ordered them to empty their pockets, and then ordered the young girl and the mother to lift their shirts and drop their pants—a 10-year-old girl. A majority of the judges on Judge Alito's court said that went too far; the search warrant did not authorize it. Judge Alito saw it differently. He was the only judge on the court to say that the Constitution permitted this search.

The majority opinion in this case, incidentally, was written by Michael Chertoff. If the name is familiar, it is because then-Judge Chertoff, a conservative Republican, today is in the President's Cabinet as the head of our Department of Homeland Security. Judge Chertoff, writing the majority opinion, said that what was done was wrong, and Judge Alito's decision was wrong.

In the context of reproductive freedom, I am troubled about whether Judge Alito accepts some of the basic rights of personal privacy. One of the cases which we should not forget was decided some 41 years ago by the Supreme Court. The case was Griswold v. Connecticut.

As hard as it may be to believe, there was a law in the State of Connecticut and in many other States, including my home State of Illinois, at that time which made it a crime for a married couple to buy birth control devices or for a doctor to prescribe them or for a pharmacist to fill the prescription. It was a crime for married couples to engage in family planning by buying any type of birth control device. It is hard to believe. That was America in the 1960s.

The Supreme Court took a look at this case and said that is wrong. There is built into our rights as a citizen the right of privacy, and that privacy goes to those intimate, personal decisions made by individuals—in this case, husbands and wives—in the State of Connecticut. They struck down the Connecticut statute.

I asked Judge Alito what he thought about this Griswold decision and this right of privacy. He was willing to say that Griswold is settled law. But, of course, Griswold v. Connecticut and the right of privacy was the basis of a decision made a few years later in Roe v. Wade. In that particular case, the Supreme Court built on this concept of a right of privacy and said that for a woman making the most important and personal decision of her life, in terms of the continuing of a pregnancy, she had a protected status in certain stages of the pregnancy. That was a decision which was handed down over 30 years ago—33, as a matter of fact.

So we asked Judge Alito if he accepted that Griswold v. Connecticut, which established the right to privacy, was settled law in America, and did he also accept that Roe v. Wade, which followed, was settled law? He repeatedly refused to provide us with that assurance about this landmark decision.

What a contrast to John Roberts, who, just a few months before when he was nominated for the Chief Justice position on the Supreme Court and was asked the same question, said that he believed Roe v. Wade was settled precedent in America. That is a defining difference between these two nominees and an important one.

If Judge Alito is confirmed, there are very serious questions about what will happen with the right of privacy in America, not just for the women who could be affected by these decisions but for everyone.

It wasn't that long ago, a little over a year ago, that the Congress was embroiled in a controversy over something that many families face every day in America. You will remember the Terri Schiavo case, a sad situation where some chemical imbalance led to Terri Schiavo going into a coma. Her life was sustained by extraordinary means for 15 years while her husband argued that she never wanted it that way. She had made it clear not to take extraordinary measures to keep her alive.

There was a battle within the family. Her parents saw it differently, and they went to court regularly to fight this out. Time and again, the Florida courts reached the decision that what Terri Schiavo's husband said would be controlling and that her wishes would be honored and that extraordinary measures to keep her alive would be discontinued, and then the case would be appealed.

Finally, the day came when all appeals had been resolved, and it was apparent a decision would finally be made to remove the life support she was receiving. It was at that moment when a group—a political group—inspired some Members of Congress to get involved. They started arguing it was the time, at that moment, for the Federal courts to step into the hospital room and for the Federal judges to make decisions overriding the State courts, overriding the stated wishes of Terri Schiavo, overriding the wishes of her husband.

There is hardly a person in the Senate who hasn't faced a similar family decision when someone you love is near the end of their life and the doctor comes in and says there are several things we can do. I know in my family, my mother made it very clear to me she didn't want any of that life support, extraordinary effort made. I was determined to honor her wishes. She passed away very quickly with a heart attack, and we never had to face that decision, but we knew what she wanted. Her sons said they would stand by her wishes. Most people feel the same way. Do you know why, Mr. President? Because it is an extremely private, personal, and family issue. But in the case of Terri Schiavo, there were those in the U.S. Congress, particularly in the House of Representatives, who wanted the Federal Government to step in at that moment.

So when we talk about diminishing the right of privacy in America, it goes far beyond the contentious issue of abortion. It goes to issues involving the last wishes of a person who is dying. It goes to issues involving protecting our privacy and our records, our computers, our medical records, our financial records, and our credit history. The right of privacy has become a large part of American life, and I am concerned when Judge Alito has drawn distinctions in saying there are some elements of this right of privacy that he still is not certain are settled law in America.

Another fear I have about Judge Alito is that he will not be respectful of the time-honored system of checks and balances in this country when it comes to Presidential power. If confirmed, Judge Alito will have to decide what limits, if any, the Constitution places on the President's authority over all of us.

Based on his record, I am concerned that Judge Alito will not be willing to stand up to a President who is determined to seize too much power over our personal lives. In speeches to the ultraconservative Federalist Society which Judge Alito bragged about belonging to in the 1980s, Judge Alito has said he is a ''strong proponent'' of the so-called ''unitary Executive theory,'' another phrase you won't find in the Constitution. He even criticized the Supreme Court, specifically Chief Justice Rehnquist, for failing to defer to this theory. During his hearings, Judge Alito said he still supports key elements of the theory today and indicated he will follow it, to some degree, in making his decisions.

The same unitary executive theory has been the basis for many claims by the Bush administration that they had the Executive power to make some of the most controversial decisions of their Presidency, including the war on terrorism, the use of torture, and the power to eavesdrop on our phone conversations without court approval, as required by law.

Based on the unitary executive theory, the Bush administration has claimed the right to seize American citizens and imprison them indefinitely without charge. In the Hamdi case, the Supreme Court, in an opinion written by Justice Sandra Day O'Connor, rejected this policy. Only one Justice

voted to uphold the administration's decision. That Justice, Clarence Thomas, based his dissent on the unitary executive theory, the same general theory to which Judge Alito says he subscribes.

It appears that if Judge Alito is approved for the Court, he will join Justice Thomas and Justice Scalia as only the third Supreme Court Justice who has announced public support for this fringe theory called the unitary executive theory which gives more and more power to the President and less restraint of law on his activities.

The Supreme Court is supposed to be a check on the power of the President. The Court's role is to interpret the Constitution, not to advance some marginal theory of the Federalist Society or any other special interest group. During his hearings, Judge Alito did attempt to distinguish his position on the unitary executive theory from the Bush administration's, but he refused to say whether he disagreed with Justice Thomas' dissent in Hamdi, and he repeatedly refused to say whether this President or any President has the right to disregard a law passed by Congress.

Several Senators asked Judge Alito about this directly, and several times he gave the same carefully worded response—and I quote it:

> The President must take care that the statutes of the United States that are consistent with the Constitution are complied with.

Here is what we don't know about that statement: If the President claims that a law is not consistent with the Constitution, can he ignore the law with impunity? And if Judge Alito is on the Supreme Court, is that how he would rule? That certainly is the way he answered the question.

Presidents often issue formal statements when they sign a law. When Judge Alito was an attorney in President Reagan's Justice Department, he advocated the use of Presidential signing statements to, in his own words, ''increase the power of the Executive to shape the law.'' In this way, Sam Alito argued ''the President will get in the last word on questions of interpretation.''

The Framers of our Constitution didn't see it the same as Judge Alito. They said Congress was to have the last word.

The Bush administration has adopted Judge Alito's proposal. In more than 100 Presidential signing statements, the Bush administration has cited unitary executive theory and pledged to uphold the law if it doesn't conflict with this theory.

Just 3 weeks ago, we saw a good illustration. The White House issued a Presidential signing statement claiming that the President could set aside the McCain torture amendment which Congress passed overwhelmingly in December. Under what rationale could a President ignore a law that passed in this Chamber 90 to 9? The White House claimed the President has the power under the ''unitary Executive theory.'' So hold on to your seats, America. If Judge Alito goes onto the Court pushing this theory that was inspired by the Federalist Society saying this President has extraordinary powers no President has ever had, it will consolidate more power in the executive branch than our Founding Fathers ever imagined.

Does any President have the power to ignore the McCain torture amendment or FISA, the law that requires court approval to wiretap American citizens? Based on his record, I am fearful that Judge Alito, facing these questions, is more likely to defer to the President's power than defend our fundamental constitutional rights.

I will speak more to this issue about wiretaps in a moment.

I also fear that Judge Alito, if confirmed, would blur the traditional line between church and state. In his 1985 job application essay, he indicated his disapproval of the Warren Court decisions on the establishment clause of the Constitution.

What is the establishment clause? In the first amendment, the Constitution makes clear that we have the freedom of religious belief. Of course, that means each of us has the right under the law, under our Constitution, to believe any religious belief or to hold to no religious belief. That is our basic freedom. It says:

> Congress shall make no law respecting an establishment of religion. . . .

This was an understandable part of our Constitution because many of our Founding Fathers hailed from England, which had an official national church. They wanted to make it clear that there would be a separation, a clear wall of separation between church and state, as Thomas Jefferson said in the early 1800s.

The Warren Court, led by Earl Warren, as Chief Justice, struck down government-sponsored prayer and government-sponsored devotional Bible reading in public schools, arguing that it violated the establishment clause. The decisions by the Warren Court were nearly unanimous. They stood for the proposition, as the Constitution said, that our government must be neutral toward religion in order to maintain this healthy separation of church and state. This concept of government neutrality is the bedrock of today's mainstream establishment clause thinking, and it is led by none other than Justice Sandra Day O'Connor. Yet from a review of Judge Alito's 15 years on the Federal bench, it is clear that Judge Alito has serious reservations about whether government should be neutral toward religion, as our Constitution requires.

I think we ought to reflect on this long and hard. We live in a country of diverse religious belief. We try to show respect for each person's religious belief, and we make it clear that our government won't pick favorites among religions. We can only look overseas to other countries that are torn with strife over religious divisions to understand the wisdom of our Founding Fathers, a wisdom that should be honored by our Supreme Court.

The rulings of Judge Sam Alito on the Third Circuit raise questions as to whether he will continue to protect the separation of church and state that has served America so well.

Let me speak for a moment about a timely issue which is not only in the headlines but really relates directly to this confirmation consideration of Judge Alito. Like many Americans, I am deeply concerned about recent revelations that sometime in 2001, President Bush authorized the National Security Agency to begin spying on Americans in the United States without court approval. This is an apparent violation of law.

Let me say at the outset, this is not about whether we should wiretap terrorists. Of course, we should. We should use every legal tool available to put an end to Osama bin Laden's deadly franchise.

Under a law called the Foreign Intelligence Surveillance Act, or FISA, the President has broad authority to wiretap suspected terrorists. The FISA Court has been virtually a rubberstamp for Presidents asking for wiretap orders. In fact, over 19,000 requests have been made of this court to wiretap suspected terrorists, and the administration has been denied only 4 times. 19,000 requests, 4 denials.

Within the FISA law there is an emergency exception so if there is a suspicion that a conversation about to take place needs to be wiretapped to protect America, the Government can move quickly, without court approval, so long as they go through the regular process within 72 hours. So the Government can act if they suspect that a conversation would lead to terrorism and endanger Americans.

So the President has authority, under this Foreign Intelligence Surveillance Act, to engage in the activities he has described to the American people: time-sensitive electronic surveillance on suspected terrorists.

What this debate really is about is the President's constitutional obligation to follow the laws of the land. Legal scholars, former Government officials from both political parties, and the nonpartisan Congressional Research Service have all concluded that the NSA program appears to violate the law.

Even President Bush has recognized it is improper to wiretap Americans in the United States without court approval. Listen to what President Bush said in a speech to the American people on April 20, 2004. I quote it verbatim:

> Now, by the way, any time you hear the U.S. Government talking about wiretapping, it requires—a wiretap requires a court order. Nothing has changed, by the way. When we are talking about chasing down terrorists we are talking about getting a court order before we do so.

That is the end of the quote, April 20, 2004, after the President had initiated this NSA wiretapping that is not approved by law and does not use a court order.

When President Bush concluded over 4 years ago that he wanted to eavesdrop on Americans without the court approval required by law, he had an obligation to come to Congress and ask us to change the law.

Congress has always been a willing partner when the President has requested additional authority to fight terrorism. I can recall the President, within days of 9/11, asking for an authorization for the use of force by this Congress to go after Osama bin Laden and al-Qaida, which I readily voted for. There was unanimous support for a bipartisan resolution which passed the Senate.

Shortly thereafter, the President came to Congress and asked us to pass the PATRIOT Act. It was an act that gave the Government more authority, more tools, more legal ways to go after terrorism in the United States. It was overwhelmingly approved with only one dissenting vote in the Senate. Within the PATRIOT Act, the President asked for some changes in this FISA law to make it easier to wiretap terrorists.

So the administration at this point seems to concede the point that they were bound by this law and were looking for changes so they could use it, in their words, more effectively. We tried to accommodate them as much as we possibly could. When the White House asked Congress to pass this bill, we cooperated with them. Members of Congress from both sides of the aisle were happy to work with the President to keep America safe.

That is not what the President has done here. Instead, we have learned that the President has not followed even the law that he asked us to change. He claims the power to eavesdrop on the phone conversations of Americans and e-mails without any court approval, without any legal authority.

That raises fundamental questions. Is this President or any President above the law? Does the President have the authority to disregard laws passed by Congress, whether it is the question of torture or eavesdropping? Can Congress place any limits on the President's power over our lives?

Today I joined the distinguished minority leader, Senator HARRY REID, and my colleagues, Senators KENNEDY and FEINGOLD, and sent a letter to President Bush. We have urgently requested that the President notify us immediately of the changes in the law that he believes are necessary to permit effective surveillance of suspected terrorists and why the changes are needed.

I ask unanimous consent that this letter be printed in the RECORD.

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

U.S. SENATE.

Washington, DC, January 25, 2006.

President GEORGE W. BUSH,
The White House,
Washington, DC.

DEAR PRESIDENT BUSH: We strongly support efforts to do everything possible, within the limits of the law, to combat terrorism. We are therefore gravely concerned that sometime in 2001, in apparent violation of federal law, you authorized the National Security Agency (NSA) to eavesdrop on Americans in the United States without court approval.

When you concluded over four years ago that existing law did not provide you sufficient authority to conduct this program, you had an obligation to propose changes in the law to Congress. Rather than doing so, you have apparently chosen to ignore the law. We urgently request that you notify us immediately what changes in the law you believe are necessary to permit effective surveillance of suspected terrorists, and why these changes are needed.

The Foreign Intelligence Surveillance Act (FISA) gives the government broad authority to wiretap suspected terrorists. Federal law provides that FISA and the criminal wiretap statute ''shall be the exclusive means by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted.'' 18 U.S.C. §2511(2)(f). FISA makes it a crime, punishable by up to five years in prison, to conduct electronic surveillance except as permitted by statute. 50 U.S.C. §1809.

In fact, you have recognized that it is improper to subject Americans in the United States to warrantless wiretapping. In a speech on April 20, 2004, you said: ''Now, by the way, any time you hear the United States government talking about wiretap, it requires—a wiretap requires a court order. Nothing has changed, by the way. When we're talking about chasing down terrorists, we're talking about getting a court order before we do so.''

You and officials in your administration have repeatedly asserted that FISA does not provide adequate authority to monitor suspected terrorists. However, FISA authorizes monitoring suspected terrorists, who are the purported targets of NSA's warrantless wiretaps. Moreover, FISA includes an emergency exception for situations where there is insufficient time to obtain judicial approval before beginning a wiretap. This exception allows the government to commence electronic surveillance immediately, as long as it seeks a court order within 72 hours. 50 U.S.C. §1805(f). During the course of its existence, the FISA court has approved over 19,000 wiretap applications from the government while disapproving only four.

It therefore appears that your administration has sufficient authority under FISA to engage in the activities you have described—time-sensitive electronic surveillance of suspected terrorists.

Officials in your administration have asserted that the government's internal process for preparing and authorizing a FISA application is too burdensome and slow to monitor suspected terrorists effectively. To be clear, your administration's bureaucratic and paperwork delays are not an excuse for violating the law. As the nonpartisan Congressional Research Service (CRS) concluded: ''To the extent that a lack of speed and agility is a function of internal Department of Justice procedures and practices under FISA, it may be argued that the President and the Attorney General could review these procedures and practices in order to introduce more streamlined procedures to address such needs.'' CRS Memorandum, Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information, by Elizabeth A. Bazan & Jennifer K. Elsea.

If you or officials in your administration believe that FISA, or any law, does not give you enough authority to combat terrorism, you should propose changes in the law to Congress. You may not simply disregard the law.

In your December 19, 2005 press conference, you called FISA ''a very important tool.'' FISA is more than a tool; it is a law, and we are a nation of laws. Under Article 1 of the Constitution, Congress has the power to make laws. Under Article 2 of the Constitution, you must take care that the laws are faithfully executed.

In order to win the war on terrorism, we must maintain the high ground by respecting the rule of law as embodied in our Constitution. To do otherwise makes us weaker as a nation and harms our national security. The Supreme Court long ago rejected the notion that there is a wartime exception to the Constitution's separation of powers. As the Court concluded in the historic Youngstown Steel case: ''The Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. . . . The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times.'' 343 U.S. 579, 587–89 (1952).

In light of the very serious nature of this matter, we request that you respond to this letter as soon as possible, and, in any case, no later than February 1, 2006.

Sincerely,

HARRY REID,
U.S. Senator.
EDWARD M. KENNEDY,
U.S. Senator.
RICHARD J. DURBIN,
U.S. Senator.
RUSSELL D. FEINGOLD,
U.S. Senator.

Mr. DURBIN. The President cannot continue to simply disregard the law.

At a press conference on December 19, 2005, President Bush called FISA ''a very important tool.'' I would say to the President, FISA is more than a tool. It is a law, and we are a nation of laws.

Our Constitution separates powers between different branches of Government. Under article I of the Constitution, Congress has the power to make laws. Under article 2 of the Constitution, the President must take care that the laws are faithfully executed.

The Supreme Court has faced questions like this in the past, questions regarding the powers of the President in the midst of a war. During the Korean war, President Harry Truman violated the law by seizing America's steel mills to aid the war effort. In the historic Youngstown Steel case, the Court rejected President Truman's actions and concluded:

> The Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. . . . The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times.

In order to win the war on terrorism, we must maintain the high ground by respecting our Constitution and respecting the laws of the land. To do otherwise makes us weaker as a nation and harms our national security.

And that is what is at stake with this Supreme Court nomination. Judge Sam Alito, from his early days in the Reagan administration, through the rulings in his court and his testimony before the Judiciary Committee, time and again seems to defer to the Executive's assertions of power. At this moment in history, like none other in recent times, that is a critical and timely issue. We have to ask the question, would this judge on the Court protect our basic privacy and personal freedom or would he give to this President power to ignore the law?

Last week Attorney General Gonzales issued a long memo supporting the administration's position on the NSA spying program. That memo went so far as to suggest that this administration is not even bound by the PATRIOT Act. It suggests that the President can use the powers authorized by the PATRIOT Act without even the limited checks and balances contained in the PATRIOT Act, regardless of what Congress says.

So what has happened is the administration has gone from the question of torture to this whole question of eavesdropping, and now has suggested that this President has the authority to do whatever he cares to do in the name of his power as Commander in Chief.

The Supreme Court in the past has not agreed with Presidents who have tried to seize that much power. President Truman learned that the hard way. I am hopeful this Supreme Court will respect the Constitution and respect the laws of the land and restrain this President or any President who tries to move that far and that fast.

So it comes down to this with the Alito nomination. I am afraid as we look carefully at his record it is clear that he would allow the Government to go too far, to intrude on our personal privacy and our freedoms. I am afraid that he would take the country in the wrong direction when it comes to women's rights and civil rights. I am afraid that his record, as I mentioned earlier on the floor today, is evidence that when he is given a choice between ruling in court for an established institution—whether it is a business or a government—or standing with a consumer or an individual, he consistently rules for the established institution. I am afraid that the 1985 memo, which became a large part of his recent hearing, still guides Judge Alito in many respects in his heart of hearts.

I think the fact that Harriet Miers was rejected by so many conservative groups and the President had to withdraw her nomination has to be taken into consideration here. Judge Sam Alito came as her successor, as the nominee. The same groups that had rejected her accepted Sam Alito. They know or believe they know what I have spoken of this evening, that his is a philosophy that is outside the mainstream, that is not consistent with the values of this country and not consistent with the fine record written by Justice Sandra Day O'Connor.

Mrs. BOXER. Mr. President, yesterday in Burbank, CA, I gave a major address before my constituents announcing my opposition to the nomination of Samuel Alito to the Supreme Court of the United States.

Today I am announcing my opposition to the nomination of Samuel Alito to the Supreme Court of the United States.

According to article II of the Constitution, Justices of the Supreme Court may not be appointed by the President without the advice and consent of the Senate. So it is our solemn duty to consider each nomination carefully, keeping in mind the interests of the American people.

This nomination is particularly crucial because the stakes have rarely been so high.

First, consider the context in which this nomination comes before us. The seat that Judge Alito has been nominated for is now held by Justice Sandra Day O'Connor, who came to the Court in 1981.

For years, Justice O'Connor has provided the tie-breaking vote and a commonsense voice of reason in some of the most important cases to come before the Court, including a woman's right to choose, civil rights, and freedom of religion.

Second, consider the tumultuous political climate in our Nation. President Bush understood that in 2000 when he promised to govern from the center, and be ''a uniter, not a divider.'' Sadly, this nomination shows that he has forgotten that promise because it is not from the center and it is not uniting the Nation.

The right thing to do would have been to give us a justice in the mold of Justice O'Connor, and that is what the President should have done.

Let me be clear: I do not deny Judge Alito's judicial qualifications. He has been a government lawyer and judge for more than 20 years and the American Bar Association rated him well qualified. He is an intelligent and capable person. His family should be proud of him and all Americans should be proud that the American dream was there for the Alito family.

But after reviewing the hearing record and the record of his statements, writings and rulings over the past 24 years, I am convinced that Judge Alito is the wrong person for this job.

I am deeply concerned about how Justice Alito will impact the ability of other families to live the American dream to be assured of privacy in their homes and their personal lives, to be secure in their neighborhoods, to have fair treatment in the workplace, and to have confidence that the power of the executive branch will be checked.

As I reviewed Judge Alito's record, I asked whether he will vote to preserve fundamental American liberties and values.

Will Justice Alito vote to uphold Congress's constitutional power to pass laws to protect Americans' health, safety, and welfare? Judge Alito's record says no.

In the 1996 Rybar case, Judge Alito voted to strike down the Federal ban on the transfer or possession of machine guns because he believed it exceeded Congress's power under the Commerce Clause. His Third Circuit colleagues sharply criticized his dissent and said that it ran counter to ''a basic tenet of the constitutional separation of powers.'' And Judge Alito's extremist view has been rejected by six other circuit courts and the Supreme Court. Judge Alito stood alone and failed to protect our families.

In a case concerning worker protection, Judge Alito was again in the minority when he said that Federal mine health and safety standards did not apply to a coal processing site. He tried to explain it as just a ''technical issue of interpretation.'' I fear for the safety of our workers if Judge Alito's narrow, technical reading of the law should ever prevail.

Will Justice Alito vote to protect the right to privacy, especially a woman's reproductive freedom? Judge Alito's record says no.

We have all heard about Judge Alito's 1985 job application, in which he wrote that the Constitution does not protect the right of a woman to choose. He was given the chance to disavow that position during the hearings and he refused to do so. He had the chance to say, as Judge Roberts did, that Roe v. Wade is settled law, and he refused.

He had the chance to explain his dissent in the Casey decision, in which he argued that the Pennsylvania spousal notification requirement was not an undue burden on a woman seeking an abortion because it would affect only a small number of women, but he refused to back away from his position. The Supreme Court, by a 5 to 4 vote, found the provision to be unconstitutional, and Justice O'Connor, co-writing for the Court, criticized the faulty analysis supported by Judge Alito, saying that ''the analysis does not end with the one percent of women'' affected . . . ''it begins there.''

To my mind, Judge Alito's ominous statements and narrow-minded reasoning clearly signal a hostility to women's rights, and portend a move back toward the dark days when abortion was illegal in many states, and many women died as a result. In the 21st century, it is astounding that a Supreme Court nominee would not view Roe v. Wade as settled law when its fundamental principle a woman's right to choose—has been reaffirmed many times since it was decided.

Will Justice Alito vote to protect Americans from unconstitutional searches? Judge Alito's record says no.

In Doe v. Groody in 2004, he said a police strip search of a 10-year-old girl was lawful, even though their search warrant didn't name her. Judge Alito said that even if the warrant did not actually authorize the search of the

girl, ''a reasonable police officer could certainly have read the warrant as doing so . . .'' This casual attitude toward one of our most basic constitutional guarantees—the fourth amendment right against unreasonable searches—is almost shocking. As Judge Alito's own Third Circuit Court said regarding warrants, ''a particular description is the touchstone of the Fourth Amendment.'' We certainly do not need Supreme Court Justices who do not understand this fundamental constitutional protection.

Will Justice Alito vote to let citizens stop companies from polluting their communities? Judge Alito's record says no.

In the Magnesium Elektron case, Judge Alito voted to make it harder for citizens to sue for toxic emissions that violate the Clean Water Act. Fortunately, in another case several years later, the Supreme Court rejected the Third Circuit and Alito's narrow reading of the law. Judge Alito doesn't seem to care about a landmark environmental law.

Will Justice Alito vote to let working women and men have their day in court against employers who discriminate against them? Judge Alito's record says no.

In 1997, in the Bray case, Judge Alito was the only judge on the Third Circuit to say that a hotel employee claiming racial discrimination could not take her case to a jury.

In the Sheridan case, a female employee sued for discrimination, alleging that after she complained about incidents of sexual harassment, she was demoted and marginalized to the point that she was forced to quit. By a vote of 10 to 1, the Third Circuit found for the plaintiff.

Guess who was the one? Only Judge Alito thought the employee should have to show that discrimination was the ''determinative cause'' of the employer's action. Using his standard would make it almost impossible for a woman claiming discrimination in the workplace to get to trial.

Finally, will Justice Alito be independent from the executive branch that appointed him, and be a vote against power grabs by the president? Judge Alito's record says no.

As a lawyer in the Reagan Justice Department, he authored a memo suggesting a new way for the President to encroach on Congress's lawmaking powers. He said that when the President signs a law, he should make a statement about the law, giving it his own interpretation, whether it was consistent with what Congress had written or not. He wrote that this would ''get in the last word on questions of interpretation'' of the law. In the hearings, Judge Alito refused to back away from this memo.

When asked whether he believed the President could invade another country, in the absence of an imminent threat, without first getting the approval of the American people, of Congress, Judge Alito refused to rule it out.

When asked if the President had the power to authorize someone to engage in torture, Alito refused to answer.

The administration is now asserting vast powers, including spying on American citizens without seeking warrants—in clear violation of the Foreign Intelligence Surveillance Act—violating international treaties, and ignoring laws that ban torture. We need Justices who will put a check on such overreaching by the executive, not rubberstamp it. Judge Alito's record and his answers at the hearings raise very serious doubts about his commitment to being a strong check on an 'imperial President.'

In addition to these substantive matters, I remain concerned about Judge Alito's answers regarding his membership in the Concerned Alumni of Princeton and his failure to recuse himself from the Vanguard case, which he had promised to do.

During the hearings, we all felt great compassion for Mrs. Alito when she became emotional in reaction to the tough questions her husband faced in the Judiciary Committee. Everyone in politics knows how hard it is for families when a loved one is asked tough questions. It is part of a difficult process, and whoever said politics is not for the faint of heart was right.

Emotions have run high during this process. That is understandable. But I wish the press had focused more on the tears of those who will be affected if Judge Alito becomes Justice Alito and his out-of-the-mainstream views prevail.

I worry about the tears of a worker who, having failed to get a promotion because of discrimination, is denied the opportunity to pursue her claim in court.

I worry about the tears of a mentally ill woman who is forced by law to tell her husband that she wants to terminate her pregnancy and is afraid that he will leave her or stop supporting her.

I worry about the tears of a young girl who is strip searched in her own home by police who have no valid warrant.

I worry about the tears of a mentally retarded man, who has been brutally assaulted in his workplace, when his claim of workplace harassment is dismissed by the court simply because his lawyer failed to file a well-written brief on his behalf.

These are real cases in which Judge Alito has spoken. Fortunately, he did not prevail in these cases. But if he goes to the Supreme Court, he will have a much more powerful voice—a radical voice that will replace a voice of moderation and balance.

Perhaps the most important statement Judge Alito made during the entire hearing process was when he told the Judiciary Committee that he expects to be the same kind of Justice on the Supreme Court as he has been a judge on the Circuit Court.

That is precisely the problem. As a judge, Samuel Alito seemed to approach his cases with an analytical coldness that reflected no concern for the human consequences of his reasoning.

Listen to what he said about a case involving an African-American man convicted of murder by an all-White jury in a courtroom where the prosecutors had eliminated all African-American jurors in many previous murder trials as well.

Judge Alito dismissed this evidence of racial bias and said that the jury makeup was no more relevant than the fact that left-handers have won five of the last six Presidential elections. When asked about this analogy during the hearings, he said it ''went to the issue of statistics . . . (which) is a branch of mathematics, and there are ways to analyze statistics so that you draw sound conclusions from them. . . .''

That response would have been appropriate for a college math professor, but it is deeply troubling from a potential Supreme Court Justice.

As the great jurist and Supreme Court Justice Oliver Wendell Holmes, Jr. wrote in 1881, ''The life of the law has not been logic; it has been experience . . . The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.''

What Holmes meant is that the law is a living thing, that those who interpret it must do so with wisdom and humanity, and with an understanding of the consequences of their judgments for the lives of the people they affect.

It is with deep regret that I conclude that Judge Alito's judicial philosophy lacks this wisdom, humanity and moderation. He is simply too far out of the mainstream in his thinking. His opinions demonstrate neither the independence of mind nor the depth of heart that I believe we need in our Supreme Court Justices, particularly at this crucial time in our Nation's history.

That is why I will oppose this nomination.

MORNING BUSINESS

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

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

GSRI HEALTHY LIVING STUDY—THE NEW NORMAL? WHAT GIRLS SAY ABOUT HEALTHY LIVING

Mr. FRIST. Mr. President, America is confronting a childhood obesity crisis, and over the past 25 years, the percentage of overweight girls has more than doubled—to 16 percent of girls ages 6 to 19, up from 6 percent in 1974.

To support the search for a solution, the Girl Scout Research Institute