

Senate Judiciary Committee Vote for the Nomination of Judge Samuel A. Alito, Jr. to be Associate Justice on the U.S. Supreme Court

January 24, 2006

Specter & Leahy - Judiciary Vote on Alito

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U.S. SENATE JUDICIARY COMMITTEE MEETS TO VOTE ON THE NOMINATION OF JUDGE SAMUEL ALITO TO THE U.S. SUPREME COURT

JANUARY 24, 2006

SPECTER: Ladies and gentlemen, the Judiciary Committee will now proceed with the executive committee considering the nomination of Samuel Alito for associate justice of the Supreme Court of the United States.

Before turning to the opening statements, just a couple of comments on Senate Judiciary Committee business.

The majority leader has announced that we will proceed to the floor tomorrow with debate on the nomination and that we will proceed in sequence to hear all senators, looking toward a vote by the end of the week.

The Judiciary Committee will be focusing on the Patriot Act, where there is an expiration date of February the 3rd. And I expect some action on that next week.

What we are faced with on the Patriot Act is the conference report, which has many additional protections beyond what the Patriot Act provides in its present form -- to pass that conference report or to have an extension of the current act, looking toward a four-year period.

Technically, the conference has been dissolved with the filing of the conference report. It's always possible, on agreement of all parties, to revisit any matter, as we know, on legislation. But I can tell you, after talking to Chairman Sensenbrenner, that the House feels that they've gone as far as they can go on compromises on the act. And I think the reality may be that we're looking at either the current act extended or the conference report, which has many additional protections on civil rights.

The conference report doesn't go as far as I'd like to have gone; it doesn't go as far as the Senate bill went, but we have a bicameral system.

But we'll be facing that imminently, right after Alito.

On February 6th, the committee will have a hearing on the electronic surveillance which will take up the issue of the compliance with the Foreign Intelligence Surveillance Act or executive powers under Article II.

We've set that hearing for the 6th because we couldn't find any other day to do it, and that's the day we will open arguments on the -- opening statements on asbestos.

It is anticipated that we'll have at least two, perhaps three, days of hearings on the electronic surveillance. On the 6th we'll be listening to Attorney General Gonzales. And the staffs have already been talking with the expectation of having the attorney general on all day.

And I anticipate it'll have 10-minute rounds and more than one round, because there are very complex issues here and we want to have ample time to explore them with the attorney general to give the president an opportunity to state his case.

When we move to asbestos, we've had very extensive markup in committee, as we all know, and it would be my hope that those who have amendments to offer on the floor -- and I know there will be amendments and people feel very deeply about many of the issues there, and I expect the amendments -- but I would hope that members who have amendments would notify the ranking member and me in advance, give us as much notice as you can. That was a 13-5 vote out of committee, with Senator Leahy and Senator Kohl and Senator Feinstein joining the 10 Republicans on the committee.

Let's see if we can get time agreements and move ahead in an orderly way to consider that bill, because it is complicated and it will take some time.

Before moving to the senators' statements on the Alito confirmation, let me yield now to the distinguished ranking member.

LEAHY: Thank you, Mr. Chairman.

(inaudible) an impressive and aggressive schedule, and I agree with it.

On the question of the Patriot Act, as you know, most of us felt we didn't want to end it, we just wanted to mend it. And that can be done. The bill that was voted out of this committee unanimously -- all Republicans, all Democrats on the Patriot Act -- would have mended it.

As you and I discussed -- when we were at the White House for another matter with President Bush -- there are a number of things I think that could have been handled very quickly with some help from the other body.

Certainly, the concern raised by librarians -- I did raise that with the president; perhaps inspired by the fact that Mrs. Bush was standing right there.

But there's also the gag rules and the presumptions. Those are things that have concerned people across the political spectrum. You find it from gun clubs to civil liberty organizations. These are issues that affect all of us.

I would hope that we might end up fixing those few problems that can be done fairly easily.

There were certainly improvements made in the House bill. I think we would have reached conclusion had the Republicans not decided, as they often do on committee conferences, that all Democrats had to leave the committee conference.

One of the reasons why I was unwilling to sign that conference report is that, notwithstanding the tremendous help from you and the fact that you and I stayed in contact on this, the Republicans determined at the conference -- the chair of the Republican conference or the chair of the

conference determined that final decisions on the Patriot Act would be made with only Republicans in the room and not Democrats.

We've seen even in today's press that sometimes there's \$20 billion giveaways that result from those kind of conferences. But in this case, I'm more concerned that liberties were given away.

The hearings, I think, are extremely important and I applaud you for doing it.

I'm concerned that when we have these questions of illegal spying, where the law is not being followed, that, in the other body, they've been unwilling -- under pressure from the White House, but unwilling to hold hearings. And, in fact, most committees in the Senate have been unwilling to hold hearings because of the pressure from the White House.

You have taken the position that, whether you have Democrats or Republicans there, we ought to have hearings. This Senate was willing to have hearings during the Clinton administration. And I'm glad to see, finally, we're going to have them during the Bush administration.

I applaud you for doing that. I think there are real questions that should be asked.

On the question of the asbestos legislation, I think that we did put together a bipartisan piece of legislation.

I think it is not going to make everybody satisfied, by any means. But it brings us a lot closer to getting help for people who are suffering grievously from asbestosis. And I think that we would not be this far had you not been willing to stick with it, even during a time of great physical discomfort for you because of the treatment that you underwent for a cancer last year.

SPECTER: Thank you very much, Senator Leahy.

I'm going to set the clock at five minutes, which will be the extent of my comments on Judge Alito. My request to the members is to be brief. We will be on the floor tomorrow with opportunity to make very lengthy speeches.

I do not believe, notwithstanding all of the cameras here today, that there's a great deal of suspense as to what's going to happen in this committee hearing. Everybody, I think has announced, or if not, everybody knows where everybody stands. So that to the extent that we can be brief it would be appreciated.

We all know that that's only the chairman's request, but I'm going to set the example by staying within five minutes. And it would be my hope that we could move along, because there will be a full opportunity for extended speeches tomorrow.

I'll start the clock.

I intend to vote for Judge Alito for Supreme Court of the United States.

I do so because I think he is qualified.

His personal background is exemplary. His professional qualifications are outstanding. His educational achievements are of the highest order.

And I believe that, in presenting himself to this committee, he has answered questions as far as he could go. He did not decline to answer questions based on the fact that cases might come before him, but instead, on the issues, discussed the considerations that would guide him in coming to his decisions.

He did not say what his ultimate decision would be, as he should not, because no nominee ought to be asked to decide in advance how he is going to rule on any specific case.

On the issue of a woman's right to choose, it is my judgment that he went as far as he could go. He emphasized the factor of stare decisis and precedents, and the reliance factor, which was paramount in the Casey decision.

He agreed with Justice Harlan's dissent in *Ullman v. Poe* about the Constitution being a living document. Agreed with Cardozo in *Palko* about representing the values of our society. And agreed with Chief Justice Rehnquist, who changed his views on *Miranda* over three decades, when police practices had become embedded in the culture of a society.

And it is my view that a woman's right to choose has been embedded in the culture of our society. But our function is to vote on nominees; and justices must decide the ultimate question.

I think that his statements about *Roe* as settled law were very, very similar to what Chief Justice Roberts had to say. Chief Justice Roberts said *Roe* was settled in beyond, but he left room for stare decisis and precedents to be changed, and so did Judge Alito, as I think any nominee must in terms of not making an ultimate decision.

We have seen the rule that there is no rule as to how nominees will act once they're on the court. When Justice Souter was up, the National Organization of Women flooded Capitol Hill with a rally: Stop Souter or women will die. And there was a similar pamphlet distributed as to Judge Alito.

Justice Kennedy and Justice O'Connor spoke in very, very strong terms against abortion rights before they came to the court, and we know that Souter and Kennedy and O'Connor wrote the joint opinion in *Casey v. Planned Parenthood*, and have been staunchly in favor of a woman's right to choose.

I thought that Judge Alito went about as far as he could go on discussing executive power and congressional power. I was pleased to see that he did not adhere to the Supreme Court opinion that justices have a superior method of reasoning to senators.

And I thought that the judges who testified on his behalf got to the core of the concerns of many members that he is not an ideologue and that he does have an open mind. And those are men and women who go with him into conferences where they talk about the cases and know the most about the judges.

Former Circuit Judge Tim Lewis, African-American, was very explicit in talking about his being pro-choice and in favor of civil liberties, and supported Judge Alito wholeheartedly.

I am personally sorry to see a party-line vote out of this committee, and perhaps very close to a party-line vote out of the full Senate. But we all have our points of view.

I would hope that Judge Alito would consider him confirmed for all the people, if he is, in fact, confirmed, and that he has pro-choice supporters. And there are six Republicans or more who are pro-choice.

I conclude on zero.

Senator Leahy?

LEAHY: Mr. Chairman, I may take more than five minutes.

But first off, on the question of party-line votes, considering the fact that the U.S. Supreme Court is there for nearly 300 million Americans, I wish we could have somebody who would have the support of all Americans.

As you know in discussions that you and I had with the president on this, the president spoke of his campaign promises. I reminded him several times of his biggest campaign promise, to be a uniter and not a divider, and urged him to be a uniter and not a divider when it came to a Supreme Court nomination.

There are many, many, many people in this country who would have had from 90 to 100 votes in the Senate. Democrats and Republicans would have joined eagerly to support them.

We have nine members on the Supreme Court today. Seven of those nine members were nominated by Republican presidents; two by a Democrat.

I voted for eight of those nine members. I try very hard not to have partisan votes on Supreme Court nominees.

Think how much better it would have been if, in this case, President Bush had sought any one of dozens upon dozens of highly qualified people -- highly qualified people, men and women, various ethnic backgrounds, all of whom would have gotten an overwhelmingly -- overwhelmingly, if not unanimous, vote from the Senate. And think of the signal that would have sent to the country and think how that would have allowed the president to fulfill his campaign promise of being a uniter and not a divider.

But this nomination raises the fundamental question of whether the Senate will serve its constitutional role as a check on the president by preserving the Supreme Court as a constitutional check on the expansion of presidential power.

I'd urge senators, and particularly Republican senators, to approach this discussion with open ears and open minds.

This is a nomination that I fear threatens the fundamental rights and liberties of all Americans now and in generations to come.

The president is in the midst of a radical realignment of the powers of the government and its intrusiveness into the private lives of Americans.

And I believe this nomination is part of that plan. I am concerned that if we confirm this nominee we will further erode the checks and balances that have protected our constitutional rights for more than 200 years.

It's a critical nomination. It's one that can tip the balance in the Supreme Court radically away from the constitutional checks and balances and the protection of Americans' fundamental rights.

This past week, I introduced a resolution to clarify what we all know: that congressional authorization for the use of military force against Osama bin Laden did not authorize warrantless spying on Americans, as the Bush administration is now claiming.

As Justice O'Connor underscored recently, even war, quote, is not a blank check for the president when it comes to the rights of the nation's citizens, close quote. Who could disagree with that?

But now that the illegal spying on Americans has become public and the president has acknowledged the four-year-old program, the Bush administration's lawyers are now contending the Congress authorized it.

The September 2001 authorization to use military force did no such thing. Democratic and Republican senators know it. A few Republicans have said so publicly. We all know it.

The liberties and rights that define us as Americans, and the system of checks and balances that serve to preserve them, should not be sacrificed to threats of terrorism or the expanding power of the government.

Our authorization was to go after Osama bin Laden. How much I wished the administration had continued to go after Osama bin Laden instead of pulling our best forces out of Afghanistan when we had a chance to catch him.

How much safer we would be if they had continued what we asked them to do.

In the days immediately following those attacks of September 11th, I said, and I continue to believe, that the terrorists win if they frighten us into sacrificing our freedoms and what defines us as Americans.

The Bush administration's after-the-fact claims about the breath of the authorization to use military force are the latest in a long line of manipulations, is another affront to the rule of law, of American values and traditions.

We've also seen the same type of overreaching and that same Justice Department's twisted interpretation of the torture statute, with the detention of suspects without charges and denial of access to counsel, and with the misapplication of the material witness statute as a, sort of, general preventative detention law.

Throughout the Alito hearing, from my opening statement on Monday afternoon to my first questions on Tuesday morning to my last written question, which received a response last Friday, I asked Judge Alito about these matters, and I am not reassured by his answers.

A central question during the hearings on this nomination was whether Judge Alito would serve as an effective constitutional check on the presidency.

We have a president who is prone to unilateralism and assertions of executive power that extend all the way to illegal spying on Americans. Preventing government intrusion into the privacy and freedoms of Americans is one of the hallmarks of the Supreme Court.

There is no assurance that Judge Alito will serve as an effective check and balance on government intrusion into the lives of Americans. Indeed, his record suggests otherwise.

We know that Samuel Alito sought to justify absolute immunity for President Nixon's attorney general, John Mitchell, from lawsuits for wiretapping Americans, among other violations of our privacy.

We know that as a judge Samuel Alito was willing to go further than even Michael Chertoff, the current secretary of the Department of Homeland Security, in excusing government agents for searches not authorized by judicial warrants.

We know Judge Alito would have excused the strip search of a 10- year-old girl that was not authorized -- in fact, expressly not authorized by a search warrant.

We know he was part of an effort within the Meese Justice Department to expand the use of presidential signing statements to increase the president's role in construing what a law passed by Congress means. That is a practice that the Bush administration is taking to new heights.

This president has made some of the most expansive claims of power since American patriots fought the War of Independence to rid themselves of the oppressive rule of King George III.

This president is claiming power to illegally spy on Americans, to allow actions that violate our values and laws protecting human rights, and to detain U.S. citizens and others on his say so -- on his say so, without judicial review, without any due process.

This is something I have not seen in my lifetime.

This is a time in our history when the protection of Americans' liberties are at risk, as are the very checks and balances that have served to constrain abuses of power for more than two centuries.

I've said before and I'll say again the Supreme Court is the ultimate check and balance in our system.

The independence of the court and its members is crucial to our democracy and our way of life.

The United States Senate should never be allowed to become a rubber stamp. We should be the conscience of the nation. But neither should the Supreme Court be allowed to be a rubber stamp for any president, Democratic or Republican.

I asked Judge Alito to demonstrate his independence from the interests of the president. He failed that test.

And I suspect that the answer to the question Judge Alito posed at the hearing regarding how he got the nomination can be answered in large measure with regard to his demonstrated deference to government power, his adherence to the unitary executive, his rulings in favor of government intrusions, and whatever he said in his job interviews at the White House that convinced those advising this president that he'll be a reliable vote against challenges to presidential power.

No president should be allowed to pack the courts, especially the Supreme Court. An overwhelmingly Democratic-controlled Senate stood up to the most popular Democrat ever elected president, Franklin Roosevelt, and we Democrats protected the independence of the Supreme Court by saying that even someone as popular as Franklin Roosevelt could not pack the Supreme Court.

Well, even today, with a Republican Senate, I would say that no president should be allowed to pack the courts, and especially the Supreme Court when nominees are selected to enshrine presidential claims of government powers.

Our system was designed to ensure balance and to protect against overreaching by any branch. The Senate should not be a rubber stamp to this president's effort to move the law dramatically to the right and to give him unfettered leeway.

So I will not lend my support to an effort by this president to move the Supreme Court and the law radically to the right and to remove the final check within our democracy.

As I said, I voted for eight of the nine members of the Supreme Court. I voted for President Reagan's nomination of Sandra Day O'Connor, for President Reagan's nomination of Justice Anthony Kennedy, for President Bush's nomination of Justice Souter and for this president's recent nomination of Chief Justice Roberts.

But this is a bridge too far. I cannot vote for this nomination.

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

Thank you, Mr. Chairman.

SPECTER: Thank you, Senator Leahy.

Senator Hatch?

Hatch & Kennedy - Judiciary Vote on Alito

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SPECTER: Thank you, Senator Leahy.

Senator Hatch?

HATCH: Well, thank you, Mr. Chairman.

I strongly support this outstanding nominee. Under a reasonable, objective or traditional standard, the Senate would overwhelmingly confirm this exceptional nominee.

Only about a dozen years or so ago, the Senate applied such a standard and overwhelmingly confirmed two nominees of President Clinton. They were at least as liberal as Judge Alito is said to be conservative.

One of them, Judge Ruth Bader Ginsburg, and, of course, Judge Stephen Breyer -- we all knew that they were both social liberals. We knew that and yet we voted for them because they were qualified and they were put forward by a constitutionally elected president of the United States who had the right to do so.

Yet the Senate confirmed Justice Ginsburg by a vote of 96-3 and Justice Breyer by a vote of 87-9. These two Clinton nominees received only a dozen negative votes between them.

Observer of what the judicial confirmation process has become in the last several years might have a hard time remembering that particular fair process.

Where were the filibusters? Where were the litmus paper and the score cards? Did the people tally up Justice Ginsburg's past appeals court rulings and on that basis warn that she would not give certain groups a fair shake in the future?

No, the Senate overwhelmingly confirmed Justices Ginsburg and Breyer because we acknowledged their obvious qualifications and judicial temperament. And we gave the president, the then-president, the deference required by the separation of powers.

By that traditional standard, Judge Alito should receive at least as much support as they did.

Judge Alito is exceptionally well qualified, with over 15 years on the U.S. Court of Appeals, during which time he has participated in nearly 5,000 cases, written more than 360 opinions.

After interviewing hundreds of people and reviewing hundreds of opinions and other writings, and examining charges raised by critics, the American Bar Association unanimously, once again, gave Judge Alito its highest, well-qualified rating.

The ABA's criteria include a nominee's compassion, open-mindedness, freedom from bias, and commitment to equal justice under the law.

Liberal legal scholars and even liberal editorial pages have said that while they do not agree with everything Judge Alito has written or concluded, his opinions are thoughtful, well reasoned, careful and respectful of precedent.

Judge Alito's colleagues came before this committee to give the kind of insight and perspective that no one but those working most closely with the judge can give. Seven current and former members of the U.S. Court of Appeals for the 3rd Circuit gave remarkable testimony about Judge Alito's intellect, open-mindedness, character and judicial independence.

Judge Leonard Garth, for whom Judge Alito clerked and with whom he now serves, said that Judge Alito has ever expressed anything that can be described as an agenda.

Judge Timothy Lewis, describing himself as openly and unapologetically pro-choice and a civil rights activist, said that Judge Alito, whether in the courtroom or behind closed doors, never exhibited anything resembling an ideological bent.

All of the evidence -- every bit of it points to a judge who honors his oaths to be impartial and to render justice without respect to persons.

Under the standards that we used not that long ago, this would have been more than enough to confirm Judge Alito in short order.

That was then. As the vote we will soon take will show, times have changed.

I believe, Mr. Chairman, that the key to this nominee's opposition is, indeed, to be found in his testimony before this committee.

Judge Alito, after all, testified that the judiciary has an important but limited role. His opponents must believe that the judiciary should have an all-important and unlimited role.

It seems that some on the left cannot abide a judge who thinks that the Constitution, the supreme law of the land, governs not only the legislative and executive branch, but also the judicial branch as well.

Judge Alito said that judges do not have authority to change the Constitution. While constitutional principles must be applied to new factual situations, he said, quote, the principles don't change, unquote.

That alone, in the eyes of the critics, must be the confirmation kiss of death. How, after all, will they achieve a political agenda that the people reject if the Constitution is not whatever the judges say it is?

In deciding cases, Judge Alito said he begins and often ends with the text of the statute, that statutes are presumptively constitutional and that there is a presumption that precedents will be followed. There he goes again, outlining an important but limited role for judges.

And I can see why some of his critics are so worked up. A judge like this is bound to make us legislators act like, well, legislators.

Judge Alito's testimony before this committee was absolutely consistent with the system of limited government and separated powers established by America's founders.

His testimony was just as inconsistent with the system of judicial activism that some political interests favor so that they can achieve their agenda through the courts rather than through the elected representatives.

That is what this debate is about. The reason why so many senators and the political interests to which they cater will not support Judge Alito is that they cannot support the kind of limited judiciary that he represents.

A limited judiciary will not get them where they want to go. A limited judiciary leaves too many issues, too many questions, too many decisions to the people and to the people's elected representatives.

The debate over judicial appointments in general and over this nomination in particular is about whether the American people and those they elect still have the power to make the law and define the culture, or whether judges, unelected judges, should do it for us instead.

Like America's founders, Judge Alito clearly believes in self-government, that the people not judges, should make the law, and that judges have an important role, but must know and stay in their proper place.

That is why his critics oppose him, and that is why he must be confirmed.

Thank you, Mr. Chairman.

SPECTER: Thank you, Senator Hatch.

Senator Kennedy?

KENNEDY: Thank you very much, Mr. Chairman.

And many of us who will express our reservations about supporting Judge Alito have voted overwhelmingly in favor of this president's nominations to the district court and the circuit court. I believe I voted for about 96 percent of those nominees, and over the history I have been in the Senate, voted for more Republican nominees for the Supreme Court than I have for the Democrats.

I listened to my friend talk about Ruth Bader Ginsburg and also Judge Breyer.

Of course, the process and the procedures that worked toward their elevation to the Supreme Court was something that, I think, all of us admired. And that is where we had real consultation between the president and the leadership, both in the committee and in the Senate. And that resulted in the elevation of these two outstanding judges.

I'm also mindful of something that I mentioned during the course of the hearing, and that is, it isn't so much the majority opinions that are held by judges. The real insight into nominees is their dissents, and who they dissent with, and how they dissent, and what they write in the dissent.

I was struck by the fact Ruth Bader Ginsburg and Judge Bork voted together when they were on the district court 91 percent of the times, and yet these were two entirely different judicial philosophies. And it was only in examining the dissents and what they wrote during those that we really gained an insight.

And as Judge Alito had mentioned at the outset of these hearings, Look at my record and then make a judgment, and that's what many of us have done. And that was the basis upon which I draw my conclusions.

Mr. Chairman, the Supreme Court is the guardian of our most cherished rights and freedoms. They are symbolized in the four eloquent words that are inscribed on the Supreme Court of the United States, Equal justice under law.

And those words are meant to guarantee that all our courts will be an independent check on abuses of power by the other two branches of government. They are a commitment that our courts will always be a place where the poor and the powerless can stand on equal footing with the wealthy and the privileged. And each of us on this committee has a constitutional duty to ensure that anyone confirmed to the court will uphold that clear ideal.

The nomination of Judge Alito is particularly significant because it comes at a time of new challenges for the nation and for the court. Suddenly in this new century, we face unprecedented claims by the White House for sweeping expansions of presidential power that are grave threats to the rule of law.

And despite progress in recent decades, we continue to face serious inequalities and injustices in our society, as demonstrated so clearly by the immense tragedy a few months ago in Hurricane Katrina.

And we face new controversies over government's intrusion into people's private lives, from the interference with private medical decisions into new attempts to limit or even deny a woman's reproductive decisions.

And we face new attacks on the progress we've made in civil rights. The signs proclaiming whites only may be gone, but we know that discrimination and bigotry in countless other forms still blight our society and limit opportunity.

And one of the most important of all responsibilities of the Supreme Court is to enforce the constitutional limitations on presidential power. A justice must have the courage and the wisdom to speak truth to power, to tell even the president that he's gone too far.

Chief Justice Marshall was that kind of justice when he told President Jefferson that he had exceeded his war-making powers under the Constitution.

Justice Robert Jackson was that kind of justice when he told President Harry Truman that he could not misuse the Korean War as an excuse to take over the nation's steel mills.

And Chief Justice Warren Burger was that kind of justice when he told President Nixon to turn over the White House tapes on Watergate.

And Justice Sandra Day O'Connor was that kind of justice when she told President Bush that a state of war is not a blank check for the president when it comes to rights of the American citizens.

We need that kind of justice on the court as much as ever. And it's our duty to ensure that only that kind of justice is confirmed.

Today, we have a president who believes that torture can be an acceptable practice, despite laws and treaties that explicitly prohibit it. We have a president who claims the powers to arrest American citizens on American soil and jail them for years without access to counsels or the courts.

And we have a president who claims that he has the authority to spy on persons on American soil without a court order required by law.

The record demonstrates that we cannot count on Judge Alito to blow the whistle when the president is out of bounds. He is a long-standing advocate for expanding executive power, even at the expense of core individual liberties.

In his now-notorious job application to the Justice Department, he cast out on the role of the court as well. He said, I believe very strongly in the supremacy of the elected branches of government.

He never satisfactorily explained his reason for advocating such an extraordinary departure from the basic understanding of the Constitution, that the courts are intended to be coequal with the president and Congress.

When I asked him about his extreme statement, he said it was inapt. That's certainly true, but it does not begin to tell the American people why he would make a statement so at odds with the checks and balances that have guided our democracy for two centuries.

One thing is clear: If the elected branches become supreme, the Supreme Court will not be able to fulfill its historic role of enforcing constitutional limits on presidential power.

His statement might have been music to the ears of the Reagan Justice Department, but it was a shock of 1,000 volts to all of us who care about democracy and the rule of law.

Judge Alito's consistent advocacy of what he called the gospel of the unitary executive is just as troubling. Professor Steven Calabresi, one of the originators of the unitary executive theory and co-founder of The Federalist Society, has acknowledged that this concept could produce a radical change in how government operates.

And, as he wrote in the Harvard Law Review: The practical consequences of this theory is dramatic. It renders unconstitutional independent agencies and counsels to the extent that they exercise discretionary executive power.

Independent agencies, such as the Federal Election Commission, created to see how our voting laws are properly enforced and interpreted, would be subject to the president's control. The same would be true of the Securities and Exchange Commission. It would compromise the historic independence of the Federal Reserve Board, giving the president unprecedented and dangerous power to manipulate the economy.

Nor is the impact of this bizarre theory limited to the independence of administrative agencies. Discussing the president's aggressive claims for unprecedented executive power in the field of national security, Professor Calabresi stated recently that without accepting such a theory, there'd be no way that the Bush administration's anti-terrorism policy could be constitutionally justified.

Judge Alito's troubling views exalting executive power are also reflected in his decisions as a judge.

He refuses to enforce core constitutional standards protecting individuals against low-level government officials in routine situations. There's no reason to believe he'll say no to a president who violates individual rights under the cloak of national security.

This was true certainly, as Senator Leahy pointed out, in the Doe v. Groody case defending a strip-search of a 10-year-old warrant (sic), in the Mellot v. Hemer (ph) case, it was true when the marshals carrying out an unresisted civil eviction pumped a sawed-off shotgun at a farm family sitting in their living room, and the family committed no crime. A fellow judge in the case dissented, calling the marshals' conduct Gestapo-like.

His record includes his Reagan administration solicitor general's request which revealed his agenda to change a key area of constitutional law in that memo. He advised that the best way to undermine Roe was gradually chipping away at its protections. We have every reason to believe he'll do exactly that if confirmed to the Supreme Court.

On the court of appeals, he was required to follow the Supreme Court decisions, but as a member of the Supreme Court he'll be free to overrule those precedents with which he agrees no matter how well established or long standing.

Third area of major concern is Judge Alito's record on civil rights. The weight of his record in job discrimination cases against the victims of discrimination is time and time again.

Time and time again, he voted to make it more difficult than the law intended for victims to prevail in court and uphold a verdict in their favor.

In another case, Mr. Chairman, in the Riley v. Taylor, Judge Alito dissented from a ruling prohibiting the removal of African- American jurors because of their race. It's unbelievable in today's America, in a case involving a minority defendant, that he was willing to ignore overwhelming evidence that the government insisted on an all-white jury.

Justice Lewis Powell captured the spirit of America best when he said, Equal justice under law is not merely a caption on the facade of the Supreme Court building; it is one of the ends for which our entire legal system exists.

In evaluating the Supreme Court nominees, there's no more important question than whether they are dedicated to the equal justice under law.

Judge Alito is highly intelligent, but his record does not show a judge who is willing to enforce the Constitution limitations on executive power when government officials intrude on individual rights.

His record does not show does not show a judge who is open to the claims of vulnerable individuals asking only justice against powerful institutions.

His record does not show a judge who upholds the liberty and privacy of citizens seeking to protect their fundamental rights.

The record does not show a judge who'll uphold equal justice under the law.

That's why I oppose his confirmation to the Supreme Court and I hope my colleagues on the committee share these concerns and will join me.

Thank you, Mr. Chairman.

SPECTER: Thank you, Senator Kennedy.

Senator Grassley?

Grassley & Biden - Judiciary Vote on Alito

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U.S. SENATE JUDICIARY COMMITTEE MEETS TO VOTE ON THE NOMINATION OF JUDGE SAMUEL ALITO TO THE U.S. SUPREME COURT

JANUARY 24, 2006

SPECTER: Thank you, Senator Kennedy.

Senator Grassley?

GRASSLEY: I support Judge Samuel Alito to become a justice.

While I can't always accurately predict how an individual will make a decision once he or she is confirmed, we have to trust our judgment and we have to trust the confirmation process. And I believe history shows that that process has worked very well to bring balance to the court.

It's clear that Judge Alito did a good job responding to questions posed by members during the committee hearing. He seemed to be very thorough, very candid, very forthright.

Judge Alito demonstrated that he'll be a superb justice.

Judge Alito possesses the knowledge of and respect for the Constitution that's necessary for all who are on the Supreme Court. He understands the proper role of a justice.

He respects the separate functions of judicial and political branches, when he told the committee that, and I quote, the role of a practicing attorney is to achieve a desirable result for a client in a particular case at hand. But a judge can't think that way. A judge can't have any agenda. A judge can't have any preferred outcome in any particular case, and a judge certainly doesn't have a client. The judge's only obligation, and it's a solid obligation, is the rule of law. And what that means is that in every single case the judge has to do what the law requires, end of quote.

Alito understands that the judiciary has a role in our system of checks and balances.

And I believe, contrary to the fears of some of my colleagues, that Judge Alito will be a check on abuses of power -- and I am not only concerned about abuses of power by the president, but also abuses of power by the Congress -- and that he will, in the end, be an independent judge who will apply the law and the Constitution to every branch of government and every person.

Judge Alito also believes in justice for all, in accordance with the law and the Constitution. And he couldn't have said it any better than when he told us in the hearing, quote, No person in this country, no matter how high or powerful -- and I believe that would include the president of the United States; that's parenthetically mine -- No person high or powerful is above the law, and no person in this country is beneath the law, end of quote.

Not only is Judge Alito an intelligent and experienced juror, he's also open-minded and a fair judge.

He said, quote, Good judges develop a certain habit of mind. One is the habit of delaying reaching conclusions until everything has been considered. Good judges are always open to the possibility of changing their minds based on the next brief that they read or the next argument that is made by an attorney who is appearing before them or a comment that is made by a colleague during the conference on a case when judges privately discuss that case, end of quote.

What other kind of person, if you're concerned about abuse of power by the president of the United States, would you want considering all the evidence if the president went further than the constitutional law allows, or further than the law allows?

Judge Alito recognizes the importance of modesty and humility in the role of justice. He seems to be a man of honor, integrity and principle.

The ethics charges generated by Judge Alito's opponents are completely off the mark, and we have to dismiss those charges.

The ABA considered issues such as integrity and ethics when it evaluates any judicial nominee, and in evaluating Judge Alito found him to be unanimously well qualified. The ABA representatives looked specifically at the allegations that were raised and didn't find any merit to them.

Moreover, several leading ethicists from around the political spectrum concluded that Judge Alito acted properly and didn't violate any law. No complaint filed against Judge Alito has ever been validated. And most importantly, people who have worked most closely with him, they all say that he's a man of highest integrity.

Furthermore, contrary to what his misguided critics have alleged, Judge Alito has demonstrated that he will be fair, open-minded, and will approach cases without bias, without personal agenda.

Unfortunately, Judge Alito's record has been widely distorted. The reality is that, contrary to these critics' claims, Judge Alito has ruled for plaintiffs as well as defendants in civil rights, ADA and employment discrimination cases.

What's important to Judge Alito is ruling, then, in accordance with what the law says and what the Constitution requires.

In fact, Judge Alito's record shows that he practices judicial restraint. And this is what we should expect from all Supreme Court justices.

Moreover, the committee received many testimonials about Justice Alito, from judges, employees, lawyers who practiced with him, and lawyers who practiced before him. Their verdict was overwhelmingly supportive of a man who will apply the law fairly, will listen to all arguments with an open mind, and they've concluded will be an excellent justice.

So the people who know him best, without reservation, say that Judge Alito is a judge who follows the law and the Constitution without a preset outcome. They all say that he's an independent, fair and open-minded judge, committed to doing what is right rather than committed to implementing a personal agenda. They all say that he's a man of integrity, modesty and restraint.

Judge Alito will be a great justice. He won't be a politician, as maybe some hope, on the bench, legislating from the bench. He won't impose his personal views, as maybe some would want him to do, or fear that he might; but will make decisions as they should be decided, in an impartial manner and in accordance with those laws and the Constitution.

Judge Alito will carry out the responsibilities of a justice in an honorable, fair and effective manner. And we all ought to be proud of being a part of the process that puts a person like this on the courts, just as a lot of us are proud that, even though we disagree with them, there are people of the caliber of Ginsburg and Breyer on the Supreme Court.

So I'm pleased to support Judge Alito to be an associate justice.

I hope my colleagues will cast their vote based on Judge Alito's outstanding qualifications rather than on the distorted claims of outside liberal interest groups.

I urge my colleagues, then, to rise above partisan politics, as we have done so often in the case of Judge Ginsburg and Breyer, and support another worthy nominee to this court.

SPECTER: Thank you, Senator Grassley.

Senator Biden?

BIDEN: Thank you, Mr. Chairman. And thank you for conducting a good hearing.

In Senator Hatch's absence, I want to thank him for once again explaining why we're voting no; those of us who are voting no.

I plan to vote no on the nomination of Judge Alito to the Supreme Court, and I do so for three reasons: first, his expansive view of executive power; secondly, his narrow view of the role of the Congress; and third, his grudging reading of anti-discrimination law reflecting, in my view, a lack of understanding of congressional intent and the nature of discrimination in the 21st century.

First, Judge Alito's expansive view of presidential power:

In 1984, Judge Alito wrote that he did not, and I quote, question the authority that the attorney general should have absolute immunity, end of quote, in cases involving wiretaps.

In 1986, he drafted a proposal to make full use of presidential signing statements in order, and I quote, to increase the power of the executive to shape the law, end of quote.

In November of 2000, he said that, quote, Unitary executive theory best captures the meaning of the constitutional text and structure.

At his hearing, Judge Alito did not, in my view, answer our questions directly on these points and, in doing so, confirmed my view that he should not be confirmed.

For instance, Justice Thomas in the Hamdi dissent lays out views of unchecked unitary executive to wage war and exercise foreign policy. Although Judge Alito says his interpretation of the unitary executive was much narrower and that he couldn't recall Justice Thomas using that term, I find his explanation not at all convincing.

Most use the term unitary executive in the manner in which John Yoo, the legal architect of the administration's views, conceives executive power, as well as the Professor Calabrese, who was quoted by Senator Kennedy.

I asked Judge Alito whether he agreed with Professor Yoo's reasoning that would allow, even in the absence of an emergency or imminent threat, the president under his plenary power to invade another country, to invade Iran tomorrow, no matter what Congress says.

Judge Alito declined to answer such a basic, fundamental question.

Second, Judge Alito has a very narrow view of congressional power.

I'm convinced that Judge Alito will join with the present members of the court who have struck down three dozen federal laws, more than six times the rate of activism over the history of our republic, laws which said you can't have guns within a hundred to a thousand feet of an

elementary school, laws battling violence against women, laws requiring the clean-up of low-level nuclear waste and laws designed to ensure freedom of religion.

On the bench, Judge Alito has fully embraced, in my view, even aggressively sought to increase this new activism.

When Chairman Specter asked Judge Alito whether he would, quote, overturn congressional acts, because Congress's method of reasoning, end of quote, Judge Alito gave the following, I think, very interesting answer, not followed up on: Quote, I think that Congress' ability to reason is fully equal to that of the judiciary.

I watch the folks in the audience nod their head like that's a very good answer. That's a very bad answer. That means that he believes that the rational basis test upon which Congress makes its judgment can be overruled by the court.

Congress's reasoning is why we did what we did, after all -- because we are able to have hearings. We can call witnesses. We can build a record, all things the court cannot do. Judge Alito's answer seems to question this bedrock principle.

And, third, Judge Alito lacks the understanding, in my view, as to how prejudice plays out in the real world and has a very restrictive view of the anti-discrimination legislation that Congress has passed over the last 30 years.

Last week, I was thinking, as I was preparing to speak before a Martin Luther King event, like many of us, probably all of us here did in our home states, about Dr. King.

And I reread -- I reread -- his letter from the Birmingham jail, in which he laid out the following standard: He said, and I quote, When you are harried by day and haunted by night by the fact you are Negro, living constantly at tip-toe stance, never quite knowing what to expect next, and you are plagued with inner fears and outer resentments, when you are forever fighting the degenerating sense of nobody-ness, then you will understand why we find it difficult to wait.

We shouldn't wait. We should own up to the fact that prejudice is still around and has moved. It's not quite the prejudice of the '60s when you would say, well, we don't want any blacks here, or more descriptive terms.

Now it's more subtle. They say, we are not sure you'd fit in. New words, for old sins.

All public officials including judges in my view must understand prejudice still lurks in the shadows. And my examination of Justice Alito's record demonstrates to me that he does not look into the shadows.

He disagreed with all 10 of his colleagues who would have overturned the jury in Barbara Sheridan's case, stating that an employer may not wish to disclose his real reasons for making personnel decisions.

In another solo dissent, he would have deferred to a corporation's, quote, subjective business judgment. An approach his other colleagues said would, quote, eviscerate the anti-discrimination law.

Judge Alito told me, and I quote, I can't know everything about the real world. So in the Family and Medical Leave Act case, he discounted any gender-related connection, despite the fact that

one in four people taking sick leave were pregnant and one of the reasons we wrote the law, one of the reasons we wrote the law, was because we know about the stereotyping of women.

When I look at all the evidence before us, Judge Alito's writings, his statements, his judicial records, and his opinions, and the little we learned about him in these hearings, I am forced to conclude that he should not serve in the Supreme Court. I will vote no.

SPECTER: Thank you, Senator Biden. Senator Kyl?

Kyl & Kohl - Judiciary Vote on Alito

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U.S. SENATE JUDICIARY COMMITTEE MEETS TO VOTE ON THE NOMINATION OF JUDGE SAMUEL ALITO TO THE U.S. SUPREME COURT

JANUARY 24, 2006

SPECTER: Thank you, Senator Biden. Senator Kyl?

KYL: Thank you, Mr. Chairman. My role here today, I submit, should be modest.

The question for this committee is whether Judge Alito is qualified, is a man of integrity and understands the judicial role as distinct from the legislative or executive role.

It is impossible for anybody here to say that Judge Alito does not meet those tests. He deserves confirmation.

Samuel Alito is one of the most qualified men or women every to come before be the Senate. He has more federal judicial experience than any nominee since the Taft administration. He's been a prosecutor, a Supreme Court advocate, a constitutional expert. He's been a devoted and patriotic public servant with an undeniable love of country, respect for the Constitution and devotion to the rule of law.

Judge Alito brings more appellate qualification to the table than any other sitting Supreme Court justice when nominated.

His integrity is beyond reproach. That was the unanimous conclusion expressed by his fellow judges who testified in support of his nomination.

I will note that the testifying judges had collectively served with him for more than 60 years. The ABA not only rated Judge Alito unanimously well qualified but it wrote the Judiciary Committee a letter noting that every single person it interviewed, more than 300 people, agree that Judge Alito is a man of high integrity.

And Judge Alito understands the judicial role as opposed to the legislative or executive role. He made this clear in his testimony repeatedly; for example, by explaining that unitary executive had

nothing to do with the scope of executive power, but rather who within the executive branch had the ultimate authority.

He believes in judicial restraint, and he respects the superiority of the legislative branch to make policy decisions.

There is not a trace of judicial activism in his opinions; just an earnest effort to get the law right and to apply precedent fairly within the rules of stare decisis.

But in this vein, most important is what his fellow judges have said about him. Who knows better what kind of judge Samuel Alito is and what he thinks, for example, about prejudice?

Should we listen to Former Judge Tim Lewis, the African American civil rights and human rights lawyer who served side by side with Judge Alito for seven years and enthusiastically supports his nomination?

In supporting Judge Alito, Judge Lewis testified, 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.

Should we listen to former Judge John Gibbons, who represents Guantanamo Bay detainees in lawsuits against this administration, but who believes that Judge Alito will give those litigants careful and thoughtful consideration without any predisposition in favor of the position of the executive branch?

Should we listen to the recommendations of the other four 3rd Circuit Court judges who testified in support of his nomination after having served with him for so many years?

Mr. Chairman, I was troubled by a concern expressed by the distinguished ranking member, who said that the president should be a uniter, not a divider.

And I understand the senator's criticism of President Bush. That's not surprising. But why is this committee divided over Judge Alito?

It cannot be because of his qualifications or temperament but only because our Democratic colleagues don't think he will vote the right way, the way that they think he should, on some cases.

For over 200 years, we have applied a different test in this committee. Otherwise, the courts are simply another kind of legislative branch, something that the late Lloyd Cutler warned us against when he testified before this committee.

I fear a very bad precedent is being set today, a precedent that a unanimous minority will oppose a nominee on political grounds, not because the nominee is in any way unqualified.

Republicans did not apply that test to Justices Breyer or Ginsburg.

And I say precedent because it is simply unrealistic to think that one party will put itself at a disadvantage by eschewing political considerations while the other party almost unanimously applies such considerations.

So I say to my Democratic friends, think carefully about what is being done today. Its impact will be felt well beyond this particular nominee.

Judge Alito deserves a yes vote from every member of this committee.

He's earned that support, and I believe the committee owes it to him.

SPECTER: Thank you, Senator Kyl.

Senator Kohl?

KOHL: (OFF-MIKE)

After thorough examination, Mr. Chairman, I regret that I cannot support the nomination of Judge Alito to the Supreme Court.

I fear that a Justice Alito will narrow our rights, limit our freedoms and overturn decades of progress.

To confirm Judge Alito to the Supreme Court would be to gamble with our liberties, a bet I fear the Constitution and the American people would lose.

Generations of Americans have looked to the Supreme Court as more than a simple legal tribunal asked to decide cases and controversies. Rather, we expect the Supreme Court to guard our liberties, protect our rights and, where appropriate, expand our freedoms.

This process of bringing light to the promises of the Constitution has never moved predictably or smoothly. As Martin Luther King Jr. once noted, quote, Human progress is neither automatic nor inevitable. Every step toward the goal of justice requires the tireless exertions and passionate concern of dedicated individuals, unquote.

Throughout American history, those dedicated individuals have fought on many battlegrounds, from the steps of the White House and Congress to the dangerous back roads traveled by the Freedom Riders.

And somehow the fight always leads to the Supreme Court. It is there that these brave individuals have found refuge and, through their victories, changed America for the better.

Many of these victories are now identified with individuals through familiar cases: Brown v. Board of Education, Gideon v. Wainwright, Baker v. Carr and Miranda v. Arizona.

Judge Alito has stated his allegiance to principles of these cases, and we are grateful for that, but we would expect any nominee to any court in this land to agree that schools should not be segregated and votes should count equally. This is but a starting point, but we must dig deeper to discover whether Judge Alito should serve as an associate justice on the Supreme Court of the United States.

We must ask ourselves: How will Judge Alito view the next dedicated individuals who come before him seeking justice?

What of the next Brown? The next Gideon?

We do not consider Judge Alito for a seat on the bench in 1954 and 1965, but rather in 2006, and even 2036.

Given his narrow judicial philosophy on display throughout his career, Judge Alito is unlikely to side with the next dedicated individual. This narrow judicial philosophy is clear, for example, in his views on civil rights. In his now-famous 1985 job application, he took issue with the Warren Court decisions that established one person, one vote, Miranda rights and protections for religious minorities.

These statements leave the clear impression that his antagonism towards decisions motivated Judge Alito's pursuit of the law. While Judge Alito claimed that he was merely describing his opinions as a young man, his judicial opinion suggests a more well formed philosophy of limited rights and restricted civil liberties.

He was in the extreme minority of judges around the country when he found that Congress has no ability to regulate machine guns. His efforts to strike down portions of the Family and Medical Leave Act were rejected by then-Chief Justice Rehnquist.

He raised the bar to unreachable heights repeatedly in employment discrimination cases, to the point where the majority of his court concluded that he was attempting to eviscerate the laws entirely.

His restrictive view of constitutional liberties was echoed in his thoughts about a woman's right to choose. In the 1985 job application, he expressed a legal view that there was no such right and worked hard to craft a legal strategy that would chip away at and ultimately eliminate that right from the Constitution.

When asked about this, Judge Alito has said, in essence, that was then, and this is now. Yet even years after his work for the Reagan administration, his narrow views on privacy echoed throughout his opinion, in *Planned Parenthood v. Casey*. He would have placed more restrictions on a woman's freedom than other conservative judges, including the woman he seeks to replace on the Supreme Court.

Even today, Judge Alito is unwilling to declare that *Roe v. Wade* is settled law, a pronouncement that Chief Justice Roberts made with ease.

Judge Alito felt free to confirm that one person, one vote, integrated schools, and some privacy rights were settled, but not a woman's right to choose.

In addition, Judge Alito's decisions call into question our right to be free of police intrusion and government power.

For example, Judge Alito in disagreement with his colleagues in the Reagan Justice Department argued that the police acted reasonably in shooting and killing a fleeing, unarmed teenage suspect.

In many opinions as a judge, he defers reflexively to the police in cases involving interpretation of search warrants, including one permitting the strip-search of a 10-year-old girl.

At a time in our history when the balance between our security and our civil liberties requires the active involvement of the courts, Judge Alito deference to presidential power concerns us.

He promoted the radical idea of unitary executive, the concept that the president is greater than, not equal to, other branches of government.

Judges are meant to protect us from unlawful surveillance and detention, and not simply abide the president's wishes.

Although it is a most important stand, the judicial philosophy is not the only measure of a nominee.

We had hoped Judge Alito would have been able to satisfy the concerns we had with his record at his hearing. Instead, he chose to avoid answering many of our questions. His inability or unwillingness to answer those questions in even the most general manner did a disservice to the country and to his nomination.

For example, when questioned on support for Judge Bork, calling him, quote, one of the most outstanding nominees of the century, Judge Alito answered that he was just supporting the administration's nominee.

On a question about his membership in the Concerned Alumni of Princeton, he said he could not remember the group, despite citing it with pride in a job application.

And when questioned about Bush v. Gore and whether it should have been heard by the Supreme Court, Judge Alito said that he had not thought about it as a judge and did not have opinion.

Mr. Chairman, in each of the six Supreme Court nominations that I have voted on, I have used the same test of judicial excellence. Justices Souter, Breyer, Ginsburg and Roberts passed that test. I fear that Judge Alito does not. Judge Alito's record as a professional, both as Justice Department official and as a judge, reflects something more than neutral judicial philosophy. Instead, I believe it suggests a judge with strong views on a variety of issues, and uses the law to impose those views.

Judge Alito does have the right to see, read, and interpret the Constitution narrowly. But we have the obligation to decide whether or not his views have a place on the Supreme Court.

I have decided they do not, and so I will oppose his nomination.

Thank you.

SPECTER: Thank you, Senator Kohl.

DeWine & Feinstein - Judiciary Vote on Alito

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U.S. SENATE JUDICIARY COMMITTEE MEETS TO VOTE ON THE NOMINATION OF JUDGE SAMUEL ALITO TO THE U.S. SUPREME COURT

JANUARY 24, 2006

SPECTER: Thank you, Senator Kohl.

Senator DeWine?

DEWINE: Mr. Chairman, thank you very much.

I met with Judge Alito on the day after his nomination. And I must say I was impressed with him from the start. After spending about an hour with the judge, I felt that he was a modest, honest and fair man.

At the time, however, I didn't make a final decision about his nomination. I never do. I started my career as a county prosecutor. I believe in trials before verdicts.

Well, we just, in a sense, had a trial, and this is what I found. I saw a man of character and integrity. The best evidence on this point is the testimony of those who know him best, his colleagues on the 3rd Circuit.

Judge Edward Becker said of Judge Alito, and I quote, I have never seen a chink in the armor of his integrity, which I view as total.

Judge Leonard Garth called Judge Alito a, and I quote, morally principled judge.

To me, Mr. Chairman, this testimony carries substantial weight. We can judge a man by his record. We can judge him by his judicial philosophy. But, really, there is no better judge of a man than those who really know him best.

At the hearing, I saw an experienced judge with a brilliant legal mind. Judge Alito has served as a federal prosecutor and has argued 12 cases before the United States Supreme Court. For more than 15 years, he has served on the 3rd Circuit, deciding thousands of cases.

This background certainly explains why he earned a unanimously well-qualified rating from the American Bar Association.

Mr. Chairman, I also saw a man who is open-minded and fair. The testimony of his former law clerks, I think, shows this. Kate Pringle, a self-described, committed and active Democrat, said that Judge Alito treated all litigants, and I quote, in a fair and open-minded way.

Jack White, a member of the NAACP and the ACLU, said that Judge Alito had, and I quote, an abiding loyalty to a fair judicial process, not, and I quote again, an enslaved inclination toward a political or personal ideology, end of quote.

Judge Alito also understands that judicial opinions affect real people and have real consequences.

I think, Mr. Chairman, the judge put it himself best, let me quote.

This is what the judge said: When I have cases involving children, I can't help but think of my own children. When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender. And I do take that into account.

The judge continues: When I have a case involving someone who has been subjected to discrimination because of disability, I have to think of people who I've known and admired very greatly who had disabilities, and I've watched them struggle to overcome the barriers that society puts up, end of quote.

No matter what the case, Judge Alito approaches each issue with an open mind and a real-world sense of the consequences of his actions. To me, Mr. Chairman, that is truly the approach of a fair and open-minded judge.

That's what we want on the bench.

Finally, I saw a man who understands the proper role of a judge. I believe that judges play an important, but limited, role in our constitutional system. Judge Alito seems to embody this thinking as well.

Several years ago, Judge Alito reminded his fellow judges about the attributes of a good judge. Always remember, he said, to, and I quote, act like a judge.

Then he went on to say, and I quote, Do what good judges do, what they have done for a long time. Decide the cases that come before you, decide them as best you can. Speak straightforwardly on the matters that are properly before you. Exercise the important powers that are rightfully yours, but keep in mind that you are a judge, end of quote.

As I said, Mr. Chairman, on the first day I met Judge Alito, I was impressed with him. But, frankly, I'm even more impressed today after going through the hearing. He's a good, decent, honest man. He has an extraordinary legal talent. And he approaches each case with an open mind and an understanding heart.

Throughout this process, Judge Alito has conducted himself with dignity, patience and poise. In my opinion, he will make an outstanding addition to the United States Supreme Court.

I am proud to support his nomination.

SPECTER: Thank you, Senator DeWine.

Senator Feinstein?

FEINSTEIN: Thank you very much, Mr. Chairman.

I want to try to answer Senator Kyl's question and to an extent, my answer to what Senator DeWine has just said.

Senator Kyl asked the question, I think it was rhetorical, but he said, Why is this committee so divided over Judge Alito?

And I'd like to say this, the response is what's happening within this court, first; and secondly, what is happening within this nation; and thirdly, this president has clearly indicated that he wants to take the court even further to the right than it has been in the last 10 years.

Now, that's a consequential movement. And it's a very different day and time than when Justice Ginsburg and Justice Breyer was before this court (sic). There was not the polarization within America that is there today and not the defined move to take this court in a singular direction.

I believe that decisions in this court are not mathematical computation of legal points. Senator DeWine mentioned that this man is credentialed and qualified. I don't disagree with that. If they were mathematical computations, I'd vote aye.

But the fact of the matter is that legal philosophy and personal views do play a role on the Supreme Court. The recent 6-3 decision in *Gonzales v. Oregon*, where the Supreme Court upheld Oregon's Death with Dignity Act, I think is a good example.

When Chief Justice Roberts came before the Senate, many of us were interested in his view of the federal court's end-of-life role.

Judge Roberts told us that he had the view that the federal government should not enter this arena. And when discussing my point, what he would not want the government to do, he said this, quote, The basic understanding is that it's a free country and that the right to be left alone is one of our basic rights, end of quote.

Now, just last week, he joined the two most conservative members of the court, Justices Scalia and Thomas, and would have overruled a referendum twice supported by Oregon state voters.

So while none of us can predict how someone will vote on the court, personal views and legal philosophies do play a role. Perhaps not the majority of times when the question isn't that controversial. But certainly when the question is controversial, personal views and legal philosophies do play a role.

It is my conclusion that Judge Alito would most likely join Justices Thomas and Scalia in the originalist and strict constructionist interpretations of the Constitution.

Those are the interpretations that have been used by the Rehnquist court in the past decade to overthrow all or portions of 30 laws passed by the Congress of the United States.

I have come to this conclusion based on Judge Alito's record in the Reagan administration and on the bench.

In 1986, he was a deputy in the Office of Legal Counsel, and that's where he recommended that President Reagan veto the Truth in Mileage Act, because it violated the principles of federalism.

His argument was that the federal government should not be involved with the health, safety and welfare of citizens. And instead, he believed that was best regulated by the states.

His restricted views of congressional authority also surfaced in his decisions in the 3rd Circuit. And a prime example was *Rybar*. And Senator Graham and I discussed *Rybar* on Fox News Sunday, and we have a very different view of *Rybar*.

In *Rybar*, Judge Alito dissented. And in his dissent, he concluded that Congress did not properly enact this law, which had to do with the intrastate sale of two machine guns bought at a gun show, one one day, one the next day, and sold the following day.

In reaching his decision, he said that the specific finding that the regulation of firearms purchased and sold in her state was governed by Congress' authority under the commerce clause. He seemed to ignore past precedents clearly establishing congressional authority to restrict firearms and previous statutes that had already outlined the obvious impact.

Now, what's the point in all of this? The point in all of this is the use of the dissent in a situation where it has been clearly established.

I believe that this means it would be very difficult for us to pass law to protect families from gun violence, something I care about deeply; to protect worker safety standards, something I care about deeply; to establish consumer protection laws; and to ensure equal opportunity for all Americans.

This could be severely weakened by the use, the limited use of the Constitution that the Rehnquist court has allowed in more than 30 cases before where they have invalidated some or part of laws passed by the Congress.

Now, there are two cases currently before the court that Judge Alito could rule on. One is *Rapanos v. United States*, and the other, *Carabell v. U.S. Army Corps of Engineers*. The issue in both is whether Congress has the authority to regulate non-navigable waterways under the Clean Water Act.

If the Supreme Court were to strike down this provision of the Clean Water Act, the federal government would lose its primary tool to protect wetlands.

That's one indication how important this is. And every indication Judge Alito has given is that he would use this restrictive interpretation of the Constitution.

Now the comments about executive power that have been made by my colleagues, I think are correct. Today, our nation is in a very different place than it was 10 years ago. We face profound questions about our constitutional framework of checks and balances.

At the Department of Justice, Judge Alito was part of the effort to press for expanded presidential power. There's no doubt about that.

It is clear he still held these views as late as 2000, when he gave a speech before the Federalist Society, and let me quote him on signing statements, presidential signing statements: From the perspective of the executive branch, the issuance of interpretive signing statements would have two advantages. It would increase the power of the executive to shape the law -- the power of the executive to shape the law.

Do we believe this is correct? Or do we believe that the ability to make the law rests with the Congress, and the president can sign it or veto it and indicate his reasons for so doing, but not shape the law to his specific demand?

And despite the fact that this theory had been overwhelmingly rejected by the Supreme Court a decade ago, he said, and I quote, I still think that this theory best captures the meaning of the Constitution's text and structure.

Now, let me get to my last point. If one is pro-choice, in this day and age, in this structure, one can't vote for Judge Alito. It is simply that simple. I am very concerned about the impact he would have on women's rights, including a woman's right to make certain reproductive choices, as limited by state regulation in many cases.

When the issue of *Roe* and precedent came up during the hearings, he engaged in a conversation with us. And Judge Roberts had acknowledged that *Roe* was well-settled. I actually read part of Roberts' transcript and handed a copy to Judge Alito to review. I asked where he differed with Chief Justice Roberts and if he, too, believed that *Roe* was well-settled.

And Judge Alito's response was, and I quote, I think that depends on what one means by the term 'well-settled,' end quote.

Now, that was just after reading a very explicit description and a full description that Judge Roberts then had made before us. It clearly indicated, in my view, at least, that he didn't regard precedent that highly.

I next tried to talk to him about these views and what he meant when he said, in response to a question, precedent is not an inexorable command.

Now, what's interesting about that is that's exactly the language Justice Rehnquist used, arguing to overturn Roe.

So that spoke volumes to me. That said that Judge Alito probably would not uphold Roe, given the chance.

And then I listened very carefully to the testimony of many legal specialists, including professors in constitutional law. And I listened to Professor Tribe. And something he said really struck me.

And this is what he said, The court will cut back on Roe v. Wade step by step, not just to the point where, as the moderate American center has it, abortion is cautiously restricted, but to the point where the fundamental underlying right to liberty becomes a hollow shell, end quote.

And then I began to think of all of the things that the fundamental right to liberty in this country encompasses.

And we're going to -- on February 6, we begin the discussion and hearing on an interpretation of the use of force resolution, to countenance something none of us thought it would ever countenance.

And I came to the conclusion that the fundamental right to liberty is at question in this nominee.

It has nothing to do with his qualifications and his credentials. But it does have something to do with how far we are willing to see this court move to the right and out of the mainstream of legal thinking in this great country.

And I, for one, really believe that there comes a time when you just have to stand up, particularly when you know the majority of people think as you do.

And I truly believe that. I really believe the majority of people in America believe that a woman should have certain rights of privacy; modified by the state, but certain rights of privacy. And if you know this person is not going to respect those rights but holds to a different theory, then you have to stand up.

And so all of this is in answer to Senator Kyl, because this is a hard vote. But it's a vote that is made with the belief that legal thinking and personal views at times of crisis, at times of conflict and at times of controversy do mean something. And those of us who don't agree with the view have to stand up and vote no.

So I am one of those.

Thank you, Mr. Chairman.

SPECTER: Thank you, Senator Feinstein.

Sessions & Feingold - Judiciary Vote on Alito

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U.S. SENATE JUDICIARY COMMITTEE MEETS TO VOTE ON THE NOMINATION OF JUDGE SAMUEL ALITO TO THE U.S. SUPREME COURT

JANUARY 24, 2006

SPECTER: Thank you, Senator Feinstein.

Senator Sessions?

SESSIONS: Thank you, Mr. Chairman.

I am disappointed that the Democratic leader, Harry Reid, has apparently urged his colleagues to vote no on this nomination. I don't know that it would have affected any members of this committee, but I think it may affect votes on the floor to make this a leadership issue.

This is a towering legal figure, a person who has been on the bench for 15 years; not a part of the Bush team or administration, but has been there ruling fairly and justly with wisdom and intelligence and restraint throughout those years.

As a result, the American Bar Association, after making inquiry of 2,000 people and interviewing 300, have found uniformly that -- I think every single person said he has the highest of integrity. No one disputes his legal ability. And that he's well within the mainstream of legal thought. They gave him their highest possible rating.

And, in fact, one of the members of that committee that testified are John Payton, an African-American who argued before the Supreme Court -- the University of Michigan quota case -- strongly supported him and noted that he had the, quote -- he was held in, quote, incredibly high regard by those who knew him -- incredibly high regard by those who knew him.

His fellow judges who testified here, many senior judges who've seen a lot of people come and go on the bench, could not have been more complimentary. It was almost stunning the respect they had, the genuine admiration and affection that they had for Judge Alito.

I don't think I've ever seen a panel, Mr. Chairman, more impressive, that knew the judge so well, having served with him on average nearly 10 years each, who would say those kinds of things.

And as Senator DeWine said, he was a magnificent witness. When we saw him there, he was unflappable. He answered the questions more than John Roberts, more than others that we've had come before the committee -- far more -- without ever crossing that line in expressing an opinion on the ultimate issue of a case that would come before the court.

It was extraordinary to see him perform that way. He represented the very best in judges.

Look, a judge is not a politician. A judge is there to decide discrete cases before that court, base it on the law and the facts of that case. That's what they do. That's what we pay them to do. That's what we want them to do.

Their personal, philosophical bent or political ideas or social concepts should be irrelevant to them.

Let me tell you what the standard should be here.

The standard should be not whether he has any political, social, economic views, whatever they are. His classmate at Princeton said he never knew whether he was a Republican or Democrat. He certainly was not an activist in that way.

The question is not what his views are. The question should be, of any nominee that comes before this bench -- this court -- this committee: Will they follow the law even if they don't like it? Will they be faithful to the Constitution, the good and bad parts?

As Professor Van Olstein (ph) said, If you respect that document, you respect the rule of law in America, you will follow the law as written, whether or not you like it.

And that's what his record is. That's what his heritage is. That's what his basic philosophy of judging is: I am bound to follow the law.

We have taken cases out of context here.

They talked about searching the young girl. The affidavit that was approved by a magistrate long before Judge Alito ever knew that case existed. He attached the affidavit to the search warrant, and the affidavit asked to search all parties on the premises. And the police officers thought they had the right to do that. Somebody later said, Well, the affidavit shouldn't be made a part of the warrant and he shouldn't have been able to search it.

But the case before Judge Alito was whether that police officer could be sued personally for money damages for violating the warrant. And he said, under the standard of law, he was acting within the scope of his employment and was acting sufficiently within his duties that he couldn't be sued personally.

To have police officers sued every time some judge concludes the search warrant isn't perfectly written?

You know, so, Mr. Chairman, I urge my colleagues, as we think about how we analyze the confirmation process, that the question is, Do we love the law? What do we want out of a judge?

We want a judge who every day will go in and call the law according to the facts and the law. If he will make his decisions based on the facts and the law, as a practitioner before federal judges for 15 years, I'm satisfied with that. I'll win some; I'll lose some, but the legal system will be affirmed and strengthened.

It's when judges take the liberty to allow their personal values and insights and concepts and social agendas to infect their decisions, that's when we have a problem with the law.

I believe this judge, his philosophy is to show restraint. He's committed to showing restraint. He will follow the law day after day. And some days conservatives will win and some days liberals will win. And that's what we want in a judge.

Thank you, Mr. Chairman.

SPECTER: Thank you, Senator Sessions.

Senator Feingold?

FEINGOLD: Mr. Chairman, Justice O'Connor's retirement in July touched off a period of intense and important work in this committee. Just over six months later, that work finally seems to be coming to a close, at least for now.

And I do want to commend you, Mr. Chairman, for the thorough and fair process that you've overseen. The nominees, in my view, have been treated fairly and both sides of the committee have been treated fairly, as well. And I want to thank you for that.

Supreme Court nominations truly are among the most important responsibilities of this committee and the Senate. And I have given the nominations the president has sent to us in the past six months serious and careful consideration.

The test to be applied to a president's nominee to the Supreme Court is, of course, the highest of any nomination that a president can make. I have voted for executive branch appointees and even for court of appeals nominees whom I would not necessarily vote to put on the Supreme Court.

The Supreme Court alone among our courts has the power to revisit and reverse its precedents. And so, I believe anyone who sits on that court must not have a preset agenda to reverse precedents with which he or she disagrees and must recognize and appreciate the awesome power and responsibility of the court to do justice when other branches of government infringe on or ignore the rights of all citizens.

This is not a new standard, Mr. Chairman. It's the same standard I applied to the nomination of Chief Justice Roberts. In that case, after careful consideration, I decided to vote in favor of the nomination.

In the case of Judge Samuel Alito, after the same careful consideration, I must vote no.

I do want to say what a distinguished legal career the judge has had and how much I enjoyed getting to know him and learning about him, but I do have grave concerns.

I have grave concerns about how this nominee would rule in cases involving the application of the Bill of Rights in time of war. Some of the most important cases of that the Supreme Court will consider in the coming years will involve the government's conduct in the fight against terrorism. It is critical that we have a strong and independent Supreme Court to evaluate these issues and to safeguard the rights and freedoms of Americans in the face of enormous pressure.

Confronted with an executive branch that has jealously claimed every possible authority that it can and then some, the Supreme Court must continue to assert its constitutional role as a critical check on executive power.

Just how critical that check is has been made clear over the past few weeks, as Americans have learned that the president thinks his executive power permits him to violate explicit criminal statutes by spying on Americans without a court order.

With the executive and the legislature at loggerheads, we may well need, Mr. Chairman, the Supreme Court to have the final word on this matter. In times of constitutional crisis, the Supreme Court can tell the executive it has gone too far and require it to obey the law.

Yet, Judge Alito's record and testimony strongly suggest that he would do what he has done for much of his 15 years on the bench: defer to the executive branch in case after case at the expense of individual rights.

Although he has not decided cases dealing with the Bill of Rights in wartime, he has a very long record on the bench of ruling in favor of the government and against individuals in a variety of contexts.

Indeed, Mr. Chairman, this is an important distinction between Judge Alito and Chief Justice Roberts. Our new chief justice had a very limited judicial record before his nomination. Judge Alito has an extensive record.

There is no better evidence what kind of justice he will be on the Supreme Court than his record as a court of appeals judge. He told us that himself.

A whole series of analyses by law professors and news organizations has shown that Judge Alito is very deferential toward the government. And one detailed analysis by The Washington Post concluded he is more deferential than his 3rd Circuit colleagues, and even than Republican-appointed appeals judges nationwide.

This vividly demonstrates the concern I have about this nomination. Judge Alito is not simply a conservative judge appointed by a conservative president. His record is that of a jurist with a clear inclination to rule in favor of the government and against individual rights.

In particular, Judge Alito's record in Fourth Amendment cases shows a recurring pattern. In almost every Fourth Amendment case in which Judge Alito wrote an opinion, he either found no constitutional violation or argued that the violation should not prevent the illegally obtained evidence from being used.

In more than a dozen dissents in criminal or Fourth Amendment cases, not once did Judge Alito argue for greater protection of individual rights than the majority.

In one case that he was asked about on several occasions at his hearing -- and it's already been referred to by several people today -- Judge Alito in dissent argued that the strip-search of a 10-year-old girl and her mother passed constitutional muster even though they were not suspected of any crime or specifically mentioned in a search warrant.

Judge Alito's answers to questions at the hearing about this case only reinforced my concerns that were identified by outside scholars that he seems to ignore the serious interests of privacy and personal dignity protected by the Fourth Amendment, and instead relies on technical readings of warrants so he can authorize the government action.

Cases challenging government power comprise nearly half of the current Supreme Court's docket. A Supreme Court justice should protect individual freedoms against government intrusion

where justified and specifically should appreciate that the Fourth Amendment serves to limit government power.

As Yale Law School Professor Ronald Sullivan testified, In the United States perhaps no right is more sacred, more worthy of vigilant protection, than the right of each and every individual to be free from government interference without the unquestionable authority of the law.

Judge Alito shows an inadequate consideration for the important values that underwrite these norms of individual liberty, the very norms upon which this democracy relies for its sustenance.

This Senate's decision, he wrote, on whether to consent to Judge Alito's nomination will profoundly impact how liberty is realized in the United States.

At the hearing I and other senators repeatedly asked Judge Alito whether the president can violate a clear statutory prohibition such as the Foreign Intelligence Surveillance Act and the ban on torture. He never answered the question. We kept trying.

He returned again and again to a formulated response to told us nothing at all. He said the president must follow the Constitution and must follow the laws that are consistent with the Constitution.

Mr. Chairman, any first-year law student could tell you that. That kind of stock phrase, which Judge Alito repeated over and over again, tells us absolutely nothing, absolutely nothing about his view of whether the president can, consistent with the Constitution, violate a criminal law.

Judge Alito did point to Justice Jackson's three-point analysis in *Youngstown*, and of course that is an appropriate framework. But merely citing *Youngstown* doesn't tell you anything about how he would apply that framework.

Even when presented with the alarming hypothetical of whether a president can authorize a murder in the United States, Judge Alito would say no more than just citing the *Youngstown* three-part analysis of Justice Jackson.

These practiced and opaque responses gave me no reassurance about Judge Alito's views on these issues. But what troubled me even more was that he repeatedly, and in some cases gratuitously, Mr. Chairman, raised issues of justiciability and the political question doctrine. That is, he seemed to question whether the courts can even weigh in on these serious legal battles between the legislature and the executive.

Although he said he thought the courts could address questions involving individual rights, Judge Alito's instinct in discussing these historic issues was to focus on whether the courts even had a role to play. It wasn't to talk about the gravity of the issues at stake or our system of government, but to question simply whether he as a judge could even participate in the resolution of such constitutional conflicts.

Mr. Chairman, I found that very disturbing. And it played a significant role in my decision to vote against him.

Judge Alito's record and his testimony have led me to conclude that that his impulse to defer to the executive branch would make him a dangerous addition to the Supreme Court at a time when cases involving executive overreaching in the name of fighting terrorism are likely to be such an important part of the court's work.

Now, Mr. Chairman, I'm also concerned about Judge Alito's record and testimony on cases involving the death penalty. The Supreme Court obviously plays a crucial role in death penalty cases.

Judge Alito participated in five death penalty cases that resulted in split panels, and in every single one of those he voted against a death row inmate.

A Washington Post analysis found that he ruled against defendants and for the government in death penalty cases significantly more often than other judges. And his testimony gave me no reason to believe that he will approach these cases any differently as a Supreme Court justice.

To be blunt, Mr. Chairman, I found Judge Alito's answer to my questions about the death penalty to be chilling. He focused almost entirely on procedures and deference to state courts and didn't appear to recognize the extremely weight constitutional and legal rights involved in any case where a person's life is at stake.

I was particularly troubled by his refusal to say, in response to my question, that an individual who went through a procedurally perfect trial but was later proven innocent had a constitutional right not to be executed.

Well, the Constitution states that no one in this country will be deprived of life without due process of law.

It's hard to even imagine any how process that would allow an execution of someone who is known to be innocent could satisfy that requirement of our Bill of Rights.

I pressed Judge Alito on this topic, but rather than answering the question directly or even acknowledging how horrific the idea of executing an innocent person is or even pointing to the *House v. Bell* case currently pending in the Supreme Court on a related issue, Judge Alito mechanically, again, mechanically, laid out the procedures of what a person would have to follow in state and federal court to raise an innocence claim and the procedural barriers the person would have to surmount.

So Judge Alito's record in response suggests that he analyzes death penalty appeals as a series of procedural hurdles that inmates must overcome rather than as a critical backstop to prevent grave miscarriages of justice.

The Supreme Court plays a very unique role in death penalty case. And Judge Alito left me with no assurance that he would be able to view these cases without a weight on the scale in favor of the government.

One important question that I had about Judge Alito was his view on the role of precedent and *stare decisis* in our legal system.

At his hearing, while restating the doctrine of *stare decisis* -- Senator Feinstein just referred to this -- Judge Alito repeatedly qualified his answers with the comment that *stare decisis* is not, quote, an inexorable command, unquote.

While this is most certainly true, his insistence on qualifying his answers with this formulation was troubling, combined with a judicial record in which fellow judges have criticized his application of precedent in several cases.

Judge Alito's record and testimony do not give me the same comfort with Chief Justice Roberts that he has adequate respect for and deference to precedent that I would like to see in a Supreme Court justice.

With respect to reproductive rights, Judge Alito said that he would look at any case with an open mind.

Judge Alito said that he would look at any case with an open mind.

But that promise is not reassuring, given his previous and prior denunciations of Roe, his legal work to undermine Roe, and his failure to disavow the strong legal views that he expressed in the 1980s when given the opportunity at his hearing.

In his 1985 Justice Department application, Judge Alito wrote that he believed that the Constitution does not protect the right to abortion. And, as an assistant to the solicitor general, he wrote a memo advocating a strategy for the Reagan administration to chip away at Roe v. Wade with the ultimate goal of overturning that decision.

Since he refused to say that he changed his mind, despite numerous chances, one can only think that he still believes what he said in 1985. And his opinions as a 3rd Circuit judge raise a legitimate concern that he will, if given the opportunity, he inclined to narrow reproductive rights.

Finally, Mr. Chairman, I want to just say just a brief word about ethics. The Vanguard case could have been disposed of fairly easily if Judge Alito had only admitted to his mistake up front.

Under questioning, Judge Alito finally admitted that there is no evidence that he followed through on his 1990 promise this committee to recuse himself from any cases involving Vanguard.

He also said that some of the explanations that he and his supporters gave for his failure to recuse from the Vanguard case in 2002 such as a computer glitch or the fact that his promise to the committee was somehow time limited were not, in fact, the true reasons that he failed to recuse himself from the 2002 case.

Now, while I am not basing my vote on this matter, it continues to trouble me to some extent.

First, it is not clear to me that Judge Alito took his 1990 promise to the committee seriously. Second, he failed to clear up the inconsistent explanations before or at the outset of his hearing -- after documents revealed that those explanations were implausible and even though he knew that they were not the real reasons that he failed to recuse himself in 2002.

The concept of recusal, which recognizes that from time to time the public might reasonably believe that judges' biases or interests may cast doubt on the integrity of a judicial decision, is part of ensuring due process and protecting the public's confidence in the integrity of our system of justice.

Despite numerous other reports of Judge Alito's honesty and integrity, which I acknowledge, I am not satisfied that he appreciates the importance of recusal.

His written answer to how he would analyze recusal motions related to the 3rd Circuit judges who testified on his behalf raises some concerns for me about his approach to conflicts of interest.

Judge Alito wrote that he thinks the Supreme Court justices have, quote, less latitude to err on the side of recusal, unquote, than other judges, because recusal could lead to evenly decided decisions.

But, Mr. Chairman, when Congress amended the federal recusal law in 1974, it specifically removed any so-called duty to sit in favor of a general standard, requiring recusal if there is a reasonable basis for doubting the judge's impartiality.

The purpose of that change was to enhance public confidence in the impartiality and fairness of the judicial system.

In my view, Supreme Court justices should have no more latitude in interpreting ethics rules than other judges. Indeed, the recusal statute specifically applies to Supreme Court justices.

I would argue that treating recusal issues seriously is even more important for Supreme Court justices, since they are solely responsible for their own recusal decisions. There is no judicial review of their decisions, no formal procedure for the full court review of such decisions. And when a justice improperly participates, a tainted constitutional decision cannot be undone.

That is why it is so important to have justices who adhere to the highest ethical standards. Judge Alito repeatedly told us that he seeks to carry out his duties in accordance with both the letter and the spirit of all applicable rules of ethics and canons of conduct. He wrote in a letter to the chairman, quote, My personal practice is to recuse myself when any possible question might arise, unquote.

Unfortunately, his description of how he would handle recusal motions as a Supreme Court justice does not seem consistent with those statements.

Mr. Chairman, it gives me no pleasure or satisfaction to vote against a nominee to the Supreme Court. If confirmed, he may well serve for 20 or more years. I would very much like to have confidence that this new justice, who plainly has a keen legal mind, would be the kind of impartial, objective and wise justice that our nation needs, but I do not. So, Mr. Chairman, I will vote no.

And I thank you, Mr. Chairman.

BIDEN: Mr. Chairman, could you yield to me for 30 seconds for a parliamentary point?

SPECTER: Senator Biden?

BIDEN: I am required to leave at 11:30 to catch a plane to Israel to monitor the Palestinian elections. If I don't leave at 11:30, I will not be able to do that.

SPECTER: Well, we have two minutes, then, to finish the rest of the speeches.

BIDEN: I will leave my proxy with my senior senator here, my boss, Senator Leahy. And I just wanted to explain my absence.

SPECTER: Well, thank you, Senator Biden. We understand.

BIDEN: Thank you.

SPECTER: And happy landings.

Senator Graham?

Graham & Schumer - Judiciary Vote on Alito

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U.S. SENATE JUDICIARY COMMITTEE MEETS TO VOTE ON THE NOMINATION OF JUDGE SAMUEL ALITO TO THE U.S. SUPREME COURT

JANUARY 24, 2006

SPECTER: And happy landings.

Senator Graham?

GRAHAM: Thank you, Mr. Chairman.

I guess there's 18 ways of saying the same thing...

(LAUGHTER)

... broken into two different categories.

Number one, what did you expect President Bush to do when he won?

I am very pleased with Roberts and Alito. There's some people I wouldn't have pleased with that were on the list. And I think he's made an outstanding choice with Judge Alito, an outstanding choice with Judge Roberts.

And to long for the good ol' days of the united nation under President Clinton is, sort of, rewriting history. I don't remember it being that united. I remember it being pretty contentious, but we made it through.

I also remember President Clinton getting two picks. And Justice Ginsburg -- everything you'll have said about Judge Alito we could say in spades about Justice Ginsburg if we wanted to look at the causes she represented and look at some of her political philosophy or statements she's made. But that was not chosen.

People say it's different because Senator Hatch suggested Ginsburg to President Clinton. Well, I want to compliment you for looking at her qualifications and her being a decent person, and ignoring the huge differences you have with her on the law and life in general.

What's changed? It's not the quality of the nominees, it's the quality of the process.

To my friend, Senator Feinstein, from a pro-life point of view, Justice Ginsburg replaced a vote on Roe v. Wade. Justice Byron White voted against Roe v. Wade. We knew that would be a change, I guess, from the pro-life side and decided not to make our vote dependent upon Roe v. Wade.

Every Democratic nominee that I can remember has openly campaigned on the idea that, if I get to make a Supreme Court choice, I will make sure it will be a judge who will honor Roe v. Wade. There is no hiding that; that's said at the convention.

But Breyer and Ginsburg got 96 votes and got 89 votes.

I really do worry that we're going to take the Supreme Court nominating process and boil it down to abortion. And that won't be good for the country, but that's definitely the direction we're headed.

And let me tell you another thing that's not good for the country. With little chance of stopping Judge Alito confirmation to the Supreme Court, Senate Democratic leaders urged their members Tuesday to vote against him in an effort to lay the groundwork for making a campaign issue of the decisions on the court.

I'll just tell you right now we welcome that debate on our side. We'll clean your clock.

I mean, Judge Alito is closer to the mainstream of America than Citizens for American Way. We'll win that debate, but the judiciary will lose if we continue to do this.

I'm not afraid of the politics of judging. I've engaged in some politics of judging, looking back, that I probably shouldn't have done. I do worry about the independence of the judiciary being eroded.

As to who he is and whether or not he's too deferential to the government, after listening to Senator Feingold, it's amazing he would even be considered for nomination.

He should be under house arrest.

(LAUGHTER)

Why did seven judges who served on the 3rd Circuit come to his aid? How do you ignore that? How could someone who is that hard-hearted, that bent on ignoring the law and following a narrow agenda, get a well-qualified rating after thousands of cases have been analyzed by the American Bar Association?

Why would these judges come up and embrace such a character, if all that were really true?

I would suggest to you that he has not been treated fairly. I would suggest to you he's been treated poorly. And this is a sign of things to come.

Vanguard, if it bothers you, it really is more about you than the facts. What would he gain by intentionally not recusing himself? Nothing. It was a mistake and he said it was a mistake.

The bottom line, ladies and gentlemen, we're going to have a party-line vote in this committee.

Judge Roberts received 50 percent of the Democratic caucus vote and he's one of the most stellar nominees in the history of the country. Judge Alito is one of the most well-qualified people to be nominated in 70 years and he'll be lucky to get a handful of Democratic senators.

I look forward to working with my colleagues on the other side and my chairman and ranking member to find a way to collaborate with the White House on the NSA issue. I am sympathetic to your concerns. I am very concerned that the war resolution is being interpreted overly broad. I think that is a legitimate concern for the Congress to have and I look forward to working with you.

What's going on in the Judge Alito nomination, I think, is not advising and consenting. It's more about politics.

Professor Michael Gerhardt, who's an adviser to our Democratic friends about the confirmation process, wrote, The Constitution establishes a presumption of confirmation that works to the advantage of the president and his nominee. Furthermore, once a nomination is made, it is likely, by virtue of having been formally made by the president of the United States, to be clothed with an aura of respectability, credibility and presumptive merit unless a critical mass of senators can show otherwise.

A majority of the American people see the same qualities in Judge Alito that his colleagues who have served with him on the bench see; all those who have worked for him and against see.

What we have is a record replete with a decent man with a strict constructionist judicial philosophy consistent with what the president said he would nominate if chosen to be president: a legitimate legal philosophy to have, just as Justice Ginsburg has a legitimate legal philosophy.

We're no longer advising and consenting. We're jockeying for the next election. And over time we'll erode the quality of the judiciary.

I welcome the debate in the years to come about what kind of judges Roberts and Alito will be. I think it will be in the mainstream of the law, but more importantly in the mainstream of where the American people are regarding the law.

I look forward to supporting this nomination on the floor.

SPECTER: Thank you, Senator Graham.

Senator Schumer?

SCHUMER: Thank you.

And as you know, the hearing, this hearing that we've had, is the one time a Supreme Court nominee takes center stage, to clarify past statements, to explain previous views, and to reassure senators and citizens alike that he or she is in the broad judicial mainstream.

The purpose of such hearings is for the nominee, speaking frankly and forthrightly, to advance our understanding of his views, temperament and judicial philosophy.

If that does not happen, if the public is no better informed about a nominee at the conclusion of a hearing than at the start, the blame for that must be laid correctly at the feet of the nominee.

This morning I wanted to discuss my reasoning as to why I'll vote no on the nomination.

First, Judge Alito was not forthcoming about his own constitutional views on too many issues, despite in many instances having a prior written record on those views.

Second, and most importantly, Judge Alito's record on the bench is very far out of the mainstream on these issues.

And finally, the only mitigating factor Judge Alito offers is not a rejection of those views, but rather a pledge to respect stare decisis.

Given, however, what past nominees have said on the subject and given his own 3rd Circuit history of ignoring or circumventing precedence, these pledges do not mitigate those extreme positions and are hardly reassuring.

First, because of the approach taken by this nominee and his handlers, we did not much advance our knowledge of Sam Alito during the just-concluded hearings.

Although Judge Alito responded to hundreds of questions, he meaningfully answered far too few of them. On many issues -- on too many issue -- we were treated to artful evasions and pleasant banalities.

Time and time again, Judge Alito took cover in cover in platitudes about the law with which no nominee has ever come before the committee could have disagreed.

Judge Alito declared, for example, no fewer than eight times that he'd keep an open mind. But has any nominee ever told us he'd have a closed mind?

He intoned no fewer than six times that no one's above the law. But has any nominee ever said certain people are above the law?

He continually invoked the phrases judicial restraint and self-restraint. And, of course, he repeatedly paid homage to precedent and the doctrine of stare decisis. And maybe most of all, Judge Alito sought to give the impression that he, like any judge, simply did what the law requires. But there is much that this facile formulation ignores.

If it were so simple to do what the law requires we would hardly need judges, juries and legal advocates. Sometimes, indeed often, the law is silent. Sometimes the law requires judges to use his or her discretion. And, of course, very often, what the law requires means different things to different people of good faith.

So these statements tell us absolutely nothing about his views and can hardly be reassuring to anyone. The American people were entitled to honest answers, not practiced platitudes. The American people deserve to hear more.

Of course, as these hearings evolve and as witnesses perfect the artful dodge, the only people being disserved are the American people.

Even a supporter of Judge Alito, Stuart Taylor of the National Journal, described the nominee's performance in these terms, quote, Again and again Alito ducked and dodged. The questions seemed fair. The answers seemed lame, evasive, even infuriating, to those of us who want straight answers.

Now some will say, as Senator Specter has, that a nominee will answer as few questions as he can get away with. Perhaps that makes him look better at the hearings, perhaps it even gets him confirmed, but it does a disservice to the American people and to our democracy.

That is so because it is in the instances when, quote, what the law requires is not at all clear or unanimously accepted that Judge Alito invariably charts a rightward course.

When what the law requires is that Judge Alito exercise his discretion whether to overrule a precedent protective of personal autonomy, whether to uphold the dismissal of a civil rights claim or whether to defer to the judgment of the legislature, he too often sails out of the mainstream.

So in light of his refusal to explain his views on particular constitutional questions at the hearings, we must examine his written record even more closely. And that examination tells us that in case after case, on issue after issue, especially when left to his discretion and especially when there is any plausible legal wiggle room, Judge Alito is a judicial outlier who stands well out of the mainstream. The evidence is simply overwhelming.

During the time he served on the 3rd Circuit, not one other judge has dissented as many times as Judge Alito -- not one. Indeed, many have dissented only a fraction of the time.

As I said at the start of the hearings, Judge Alito certainly gives the impression of being a meticulous legal navigator. But in the end, he always seems to chart a rightward course.

During the week-long hearing, Judge Alito did nothing -- nothing -- to dispel that assessment. He has stood alone at the edge of the judicial mainstream in too many important cases and on too many important issues.

Taken together, these cases paint an unmistakable portrait in the area of sex discrimination law, in the area of civil rights law, in the area of presidential power, in the area of congressional authority, in the area of criminal law enforcement. And, of course, when it comes to a woman's right to choose, Judge Alito has shown himself to be outside the mainstream.

So the only thing that could serve to temper Judge Alito's views on the bench -- he and others tell us -- is faithfulness to the principles of stare decisis, respect for precedent.

But we have been down that road before. After all, we have seen other nominees come before us and solemnly swear fealty to the same broad precepts.

Before this committee, then-Judge Bork claimed loyalty to the notion of stability and to stare decisis; but outside the hearing room, it turns out, Robert Bork, whom Judge Alito inexplicably called one of the most outstanding nominees of the 20th century, had said, I don't think in the field of constitutional law, precedent is all that important.

Then-Judge Thomas similarly pledged allegiance to the doctrine of stare decisis. But as we showed at the hearing, since taking his seat on the Supreme Court, he has voted to overrule or unravel more than 30 precedents of the court.

So given what other nominees like Judge Thomas who have pledged fealty to stare decisis and then gone on to ignore precedent, and given President Bush's own pledge to nominate judges in the mold of Clarence Thomas, Judge Alito's invocation of the doctrine is of small consolation. Even more troubling is Judge Alito's own record on the 3rd Circuit. His fellow judges have repeatedly criticized him for ignoring and side-stepping the precedents of his own court.

On the Supreme Court, Judge Alito would have even greater freedom to ignore or overrule precedent.

Given his record on the 3rd Circuit, what can Americans expect him to do on the Supreme Court?

In one case in the 3rd Circuit, the majority of the court said that his opinion guts the statutory standard and ignores our precedent. In another, the en banc majority argued that Judge Alito's views ignored case after case relied upon by the majority and, quote, accords little weight to those authorities.

In yet another, the majority said Judge Alito's dissent, quote, does not comport with our reading of the relevant case law.

In another, Judge Alito said he wanted to, quote, overrule Bellow and the cases that followed it.

And in one case, Judge Garth wrote that Judge Alito's opinion was, quote, unprecedented in its disregard of established principles of stare decisis.

These examples, Mr. Chairman, are just some of the cases in which Judge Alito found himself alone in disagreement with his colleagues on 3rd Circuit precedents.

I recite these examples because of the critically important question they raise.

If Judge Alito has been so willing to disregard the precedents of his own court in unprecedented ways, what solace can we take in his professed allegiance to stare decisis should he be confirmed to the Supreme Court where he would have even more freedom to overturn important and settled precedents relied upon by millions of Americans?

What of *Gonzales v. Raich*, which upheld the federal government is to protect public safety by regulating illegal drugs within the states? There is certainly cause for alarm because he voted in the 3rd Circuit to strike down federal firearms regulation in strikingly similar legal circumstances.

What of *Morrison v. Olson* which held that the president does not have the total and unfettered power to fire independent officials? Here, too, there is cause for alarm because Judge Alito has stridently endorsed the view of the lone dissenter, Judge Scalia, and refused meaningfully to distance himself from that view in the hearings.

What of *Mitchell v. Forsythe*, which held that executive branch officials cannot completely escape accountability for warrantless wiretapping?

And, again, there is cause for alarm because Judge Alito argued the losing side in that case in a memo explaining his personal legal perspective that officials should have absolute immunity from warrantless wiretapping.

And of course, what of *Roe v. Wade*, which this week marks the 33rd anniversary of protecting a woman's reproductive rights?

Here the alarm is greatest because Judge Alito repeatedly and inexplicably refused to say whether he still held the views that he once stated so proudly, that, quote, the Constitution does not protect, unquote, a woman's right to choose.

He was also asked whether he believed that *Roe v. Wade* was settled law. Again he refused to answer.

This was particularly troubling, because on some questions, of course, Judge Alito was forthcoming. He was prepared to distance himself, for example, from earlier statements that he did not believe in the principle of one person, one vote. And he was prepared to distance himself from earlier statements that the elected branches were supreme.

On this vital constitutional question, however, Judge Alito remained utterly opaque, leading to the only plausible, possible reasonable explanation: that he still believes that the Constitution does not protect a woman's reproductive rights but does not want to tell the American people because he knows how unpopular that view is.

In light of all the evidence, to suggest, as some have, that Judge Alito will not vote to overrule *Roe v. Wade* is to ask us not just to take a leap of faith but to suspend disbelief. Indeed, it asks too much.

In the end, Mr. Chairman, given Judge Alito's refusal to answer many important questions, given that he's out of the mainstream on too many issues and would move the country backward, and given that pledges to follow precedent provide little consolation both in the records of others who have come before this committee and Judge Alito's record in the 3rd Circuit, I have no choice but to vote nay and urge my colleagues to do the same.

SPECTER: Thank you, Senator Schumer.

Senator Cornyn?

Cornyn & Durbin - Judiciary Vote on Alito

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U.S. SENATE JUDICIARY COMMITTEE MEETS TO VOTE ON THE NOMINATION OF JUDGE SAMUEL ALITO TO THE U.S. SUPREME COURT

JANUARY 24, 2006

SPECTER: Thank you, Senator Schumer.

Senator Cornyn?

CORNYN: Thank you, Mr. Chairman.

The question I think that all of us are confronted with when we hear such contrasting views of a nominee is: Who should we believe?

Of course, those of us on the committee who are lawyers know that the law is pretty clear about how you approach those issues. You look to people who have personal knowledge over those who are merely repeating what they've heard or speculating. You look to the motive of the witness or the person to see if they have some motive for not telling the truth. And, ultimately, you have to make a credibility judgment.

We heard a number of witnesses who testified on behalf of this nominee who know him very well: his law clerks, his fellow judges on the 3rd Circuit, people with personal knowledge, not those that

are repeating rumor or speculation or some of the shrill attacks we have heard from those on the outside without any apparent justification.

We've also seen independent groups like the American Bar Association Standing Committee on the Judiciary rank this nominee well qualified after considering his qualifications, his judicial temperament and his integrity.

So, on balance, I must conclude that I believe those that know this nominee best and those who have the professional training and stature to judge this nominee based on the criteria that I think we ought to consider, I believe that he is well qualified.

And that's my conclusion and I'll support his nomination.

Notwithstanding your best efforts, Mr. Chairman, I have some reservations about this committee process that we subjected Judge Alito to. I was very proud of the whole committee. Notwithstanding some of the negative votes about Chief Justice Roberts, I thought this committee discharged its responsibilities well during the Roberts hearing.

But perhaps the most enduring image of this hearing is this picture of Ms. Alito on the front of National Journal, Enough to make you cry.

A lot of the debates we had about stare decisis, about the proper interpretation of the commerce clause, these are discussions lawyers love and I enjoyed my share of them, but this is something America understands, because it has to do with the fairness of the process and the way that these nominees are treated and the likelihood that if it gets bad enough, that there are going to be people who simply decline to answer the call to public service. And that would be a tragedy.

So I think this hearing, notwithstanding the nominee's qualifications and his performance, which I thought was a good one, notwithstanding my willingness to support the nomination, I find myself tending to agree a little bit with Senator Biden who questioned whether such a process really has a meaningful purpose.

I don't think the hearings should be a place to dump one's political or ideological outbox. And we've heard discussions about this nominee and how he will view presidential power, executive power, how he will regard individual liberties and individual rights. And of course all that is largely speculative and, based on what I see of the evidence, I think unwarranted.

I do conclude, on balance, though, that this has been a useful process. I hope that beyond the posturing and the name-calling and the shrill accusations that the American people have come to see that the judiciary is not about power, political power, it's about the law; it shouldn't be about politics, it should be about principle; and that it's not about the results and result-oriented decision making but rather equal justice under the law.

I think some of my colleagues are opposing Judge Alito not so much because he didn't answer their questions adequately, but because they didn't like the answers he gave.

If you listen to his detractors carefully, you'll hear them say things like they cannot be sure or certain of how Judge Alito will vote on things like abortion on demand or for special rights for those who are suspected of plotting terrorism.

But the only way that you can be certain that Judge Alito will vote a particular way is if Judge Alito promised to do so during this confirmation hearing, and I think he correctly declined to do that.

It would be inappropriate for a nominee to make promises, to run in essence on a political platform of how they will perform if confirmed. And Judge Alito, I think, drew the line correctly and did not do so.

But the statements made by those who are opposing his nomination and some on the outside appear to be based on the fact that he won't support a liberal agenda on the bench.

The sad truth is that there are those in this country who don't want independent, thoughtful, open-minded judges on the courts. There are some people who have views that can't prevail at the ballot box so the only way that they can get their views as part of the law of the land is to circumvent the democratic process and pack the courts with like-minded judges.

They favor things like an end to traditional marriage between one man and one woman, continuation of the barbaric practice of partial- birth abortion, and abolition of the Pledge of Allegiance.

Judge Alito's detractors oppose this nomination because he will not go along with this agenda. When they say, He's outside the mainstream, what they really mean, as Senator Hatch has said, is he's outside the liberal mainstream.

And this is, of course, is a new standard for Supreme Court justices. Judge Alito is no more conservative than Justice Ginsburg was liberal. Indeed if anything, he's less conservative than she was liberal, yet her nomination was supported by the committee.

If qualifications, integrity and fairness and judicial philosophy were all that mattered in the process, Judge Alito would be voted out of this committee by a unanimous vote. But the new rule, the new standard is that any nominee who refuses to promise to impose a certain agenda from the bench, and one that is to the left of America, I believe, as a whole -- as one of his opponents called it, justifies the you-name-it-and-we'll-do-it tactics of distortion and smear.

I'm happy Judge Alito survived these unwarranted attacks. I'm also sorry that his family had to be subjected to them, as well.

At some point, however, we as a committee will need to come to terms with our confirmation process. The current regime treats Supreme Court nominees more like pinatas than human beings. And that's something none of us should be willing to tolerate.

Thank you, Mr. Chairman.

SPECTER: Thank you, Senator Cornyn.

Senator Durbin?

DURBIN: Thank you very much, Mr. Chairman. Mr. Chairman, how can we ignore the circumstances that bring to us this moment?

This was not supposed to be about the nomination of Sam Alito to the Supreme Court. We were supposed to be meeting on the nomination of Harriet Miers to the Supreme Court, a woman trusted by the president -- still serving as general counsel in the White House.

And what happened to her nomination? We know what happened. She didn't pass the litmus test of the extreme right of the Republican Party. She was rejected by the Republican Party to the point where the president had to withdraw her nomination.

The same groups that gave Harriet Miers the back of their hand embraced Samuel Alito, raising important questions.

Secondly, we know this is not just another nomination to the Supreme Court. It is truly going to tip the balance of the scales of justice.

You've heard the numbers. In 193 cases decided in the last 10 years in 5-4 decisions, Sandra Day O'Connor was the decisive vote in 148 cases.

This truly is an historic nomination.

And then comes Judge Alito before us with 15 years of a record on the 3rd Circuit, but also with an extensive array of writings and speeches that he's made.

And one of them stood out: a memo he had written in 1985 in application for a job with the Department of Justice. Was Samuel Alito at that moment in time some callow youth, some brand new graduate of Princeton Law? No.

It turns out that, at that moment in time, he had served in the military, one year as a clerk on the federal bench, four years as an assistant United States attorney, and four years as an assistant in the Office of Solicitor General.

So what we saw in that memo were not the musings of a child, but the reasoned judgment of a person who had been exposed to the law at the highest levels for 10 years.

As we read that memo, it confirmed suspicions and fears on our side of why the same groups that condemned and excoriated Harriet Miers had embraced Sam Alito.

The views which he expressed in that memo were not views that evidenced an open mind. They evidenced a closed mind.

To refer to the Concerned Alumni of Princeton, which Judge Alito did not recollect when he came before us, was clearly to feed raw meat to the Reagan administration who loved the agenda of this fringe organization dedicated to keeping women and minorities out of Princeton University.

When you walk through the statements made by Judge Alito in that memorandum, they were troubling and unsettling. To think that he would take these same views to the Supreme Court and follow them mean that many of the things we assume in America would change.

So a lot of you have said, well, all of you just went too far in the questions you asked. That's the context.

After we saw Harriet Miers, the president's counsel in the White House go through the process of being removed because she couldn't meet the litmus test, after we understood the gravity and seriousness of this nomination, and after we saw the writings of Judge Alito, is it any wonder that we had questions that we wanted answered? Questions that not just we wanted answered, but the American people wanted answered. Very fundamental and basic questions that are even more propitious because of the times we find ourselves in.

To talk about the power of the president today is a lot different than talking about it 10 years ago. We're likely to be involved in this war on terrorism for as long as we can imagine.

Sadly, we're going to face these decisions time and again, where presidents ask, How far can we go?, if, in fact, they ask.

I salute Chairman Specter. He has stood up, not a lone voice on your side of the aisle but one of the few voices on your side of the aisle, to raise important questions and to suggest a hearing on the power of the president over our rights of privacy.

Some of your expressed concerns as well and I welcome that because I think that's an important bipartisan discussion.

But when it comes to that part of the presidency and that right of privacy, when we ask those questions of Judge Alito, it's because many of us believe, fundamentally, that's why we are here.

If we are here to uphold and defend that Constitution, does it not include, most fundamentally, our right as Americans to be left alone when it comes to our communications, to our medical records, to our business records, to the most personal decisions a person and a family can make?

That's why we asked these questions. And many of the responses from Judge Alito didn't give us much refuge or solace.

When it came to a woman's right to choose, I asked him, Senator Feinstein asked him, Do you agree with Chief Justice Roberts that, in *Roe v. Wade*, as the chairman has said, we have a value embedded in America's culture, a settled law and precedent that must be followed?

And, time and again, he refused to say the same thing that John Roberts would say. Now, what conclusion can we draw from that other than the fact he would take a more critical eye toward that decision if he faced it again on the Supreme Court?

I don't think that's an unreasonable conclusion or leap of faith. I think that is the reality.

And when we asked him fundamental questions about his values -- who was he? -- we wanted to find out if his brand of conservatism had any compassion in it.

And what did we find, as we went through the decisions? I remember several in particular.

There's one that stands out in my mind, related to a case involving a man who had been accused of murder and came before Judge Alito's court. The argument before the court was that he didn't get a fair trial.

Why? Because this African American argued that he faced an all- white jury from a prosecutor who had, in three previous murder cases, used every challenge they had to make certain that only white jurors would stand in judgment of black defendants.

The majority on that court found that that was unfair to this criminal defendant, but not Judge Alito. He argued that it was as irrelevant as the fact that five of the six last presidents of the United States were left-handed.

He was more committed to the principles of statistics than to the principles of racial justice we found in the majority decision.

When I asked him about a man who came before him on appeal, who had been an alleged victim of sexual harassment, a mentally retarded individual who had been brutally attacked on his job site -- I didn't read into the record then and I won't now the details of that attack, what happened

to that poor man, the grisly specifics of what happened to him -- and I asked Judge Alito again: You were the dissenting judge; why did you toss out this man's case? Why wouldn't you let him at least make an argument before the jury?

The argument he made in his decision is the same he made before us: The man's lawyer didn't do a good job writing the brief.

That's justice? Does that reflect the caring heart that we're looking for in a person who is supposed to bring wisdom to the Supreme Court? Is it any wonder that many of us wonder what will happen over 20 or 30 years if Sam Alito is the deciding vote on the United States Supreme Court?

When it comes to fundamental questions as to whether this government will go too far to pry into our personal lives and infringe on our freedoms, whether this country is going to move forward or backward on issues of civil rights and women's rights, whether he will side with special interest or the poor, the dispossessed and those who have to fight their way into our court system for an opportunity for justice?

These are legitimate concerns and questions I have in my mind. They have drawn me to the conclusion that he is not the right person for the Supreme Court at this time.

And I will oppose his nomination.

SPECTER: Thank you, Senator Durbin.

Senator Brownback.

Brownback, Coburn, & Final Vote - Judiciary Vote on Alito

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U.S. SENATE JUDICIARY COMMITTEE MEETS TO VOTE ON THE NOMINATION OF JUDGE SAMUEL ALITO TO THE U.S. SUPREME COURT

JANUARY 24, 2006

SPECTER: Thank you, Senator Durbin.

Senator Brownback.

BROWNBACK: Thank you, Mr. Chairman.

And I want to thank you for the process. It's an excellent -- I think you've really conducted this very well and in a fine fashion.

In a bygone era that's not so bygone, Sam Alito would be approved overwhelmingly.

He's qualified, he has a judicial temperament, and he's fair.

He's displayed all those qualifications. He has an encyclopedic knowledge of constitutional law. I was impressed throughout the hearings that you would ask him any question on any constitutional issue, and there's not a not in front of him and he responds, Well, this was the case, that was the facts, and here is the test -- a brilliant legal mind.

Judicial temperament, taking such difficult -- and I thought, at many times, poor -- questions on character-type issues. I mean, there were legitimate ones to ask and then just keeping drilling on it, and he just kept peacefully answering the questions very, very modestly and, I think, very carefully, and has a great judicial temperament.

And he's fair. He's been 15 years on the bench and he's fairly decided cases. In a bygone era that would have been enough for us to have approved him. And I say a bygone era ; bygone era of a time period of when John Roberts came through the hearing and was approved by this committee 13-5, and on the floor, 78-22.

My colleagues have attempted to differentiate, I guess, in some ways between John Roberts and Samuel Alito, but I've gone back through and looked at the record on some of these key issues that each have testified about.

Executive powers: That's been a key one raised. Samuel Alito says no person in this country is above the law, and that includes the president, includes the Supreme Court. Everybody has to follow the law, and that means the Constitution of the United States and it means the laws that are enacted under the Constitution of the United States. That's Samuel Alito, January 10, 2006.

What does John Roberts say about it? I believe that no one is above the law under our system, and that includes the president. The president is fully bound by the law, the Constitution and the statutes.

Executive powers: They answered the same way and, I believe, will act the same way in limiting and appropriately deciding cases.

I don't think they can prejudge cases. And a number of them were asked specific cases, and they said, you know, basically this is a live issue; that the Congress is asserting this; the president's asserting that; the court's going to have to wait.

You can't prejudge a case like that. That's not appropriate to do.

On judicial restraint, which is something that a number of us care about, that we are three coequal branches of government, and there needs to be some judicial restraint at some point in time.

And here a number of my colleagues seem to say that: Well, the court is all supreme on all matters. Just read the Constitution. In all cases affecting ambassadors, other public ministers and councils and those which a state shall be a party, the Supreme Court shall have original jurisdiction.

In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction both as to law and effect, with such exceptions and under such regulations as the Congress shall make.

I asked both John Roberts and Samuel Alito about judicial restraint. Both said, yes, the court needs to show restraint and needs to show more restraint.

As a matter of fact, you may remember John Roberts starting out with an analogy about an umpire. And that's what a judge is to be, an umpire. Call balls and strikes. And it's a bad thing, he told me in the private meeting, when the umpire becomes the most watched player on the field.

That's not the way the system is supposed to be. And you need to show that judicial restraint. That's John Roberts. That's Samuel Alito.

Roe v. Wade: that's come up a great deal on abortion, whether this is in the Constitution or not. Samuel Alito is saying it's an active area of the law. He did cite to a right to privacy in Griswold, but said, I'm not going to tell you how I'd rule on Roe v. Wade because it's an active area of the law.

What did John Roberts say? John Roberts, responding to the chairman, question on Roe by Senator Specter, says, quote, It's settled as a precedent of the court, entitled to respect under the principles of stare decisis.

Now, that sounds like to me Samuel Alito's answer on Roe v. Wade.

I don't know how either of them will rule on Roe v. Wade. I think there's a real question that neither of them know how they are going to rule on an abortion type of case.

I wish I did know. This is a matter, I think, of incredible importance to this country, on what we do on issues of life -- the very basic issues of life, and particularly when you're talking about classes of people being aborted for just who they are, like I brought up in front of this committee numerous times, about the number of Down syndrome children that are being aborted just because they're Down syndrome, 90 percent. We're aborting a whole class. And seems like to me we ought to be concerned about when you abort a whole class of people.

Religious liberties issues came up under both gentleman, talking about separation of church and state, which is good, but not an elimination.

Samuel Alito's written on this several times. I think he's done a very good job on that. And John Roberts is going to see these cases.

It's an area of law that needs some cleaning up, I think, where you've got several different tests that are being used, and now you come out with cases that in Texas you can display the 10 Commandments, but in Kentucky you can't.

Well, how is that a test that is of any clarity, that we're going to know or people can resolve what can be done?

Both of them testified pretty similarly in cases there.

And then what about, just fundamentally, dealing with inequities of what the court has done? And we treat the court with reverence, and I think we should treat it with reverence. I think we should also recognize that the court makes mistakes and has and it has overturned itself, I believe the number is nearly 200 times in the history of the court. And it's gotten it wrong in the past, and at times it needs to clean things up.

And fortunately, fortunately, we've had a court that's been willing to do that. And I hope they never forget that principle.

As I've cited of cases like Buck v. Bell and in which the Supreme Court upheld a sterilization program directed at the so-called feeble-minded, and that law is still on the books.

And how can a Constitution meant to secure liberty's blessings, not just for us, but for our posterity restrict enjoyment of those blessings to just the strongest amongst us? Is that right? The law is still on the books.

Or I cited the state of Korematsu, the Japanese internment program, where a whole class of people were neglected their dignity based on being a racial minority. Is that right? Clearly, it's not. It doesn't provide the dignity to that group of people.

And I believe the same exists in Roe v. Wade -- violates the dignity of the unborn, particularly certain classes of the unborn, who are legally powerless under the Constitution to defend themselves.

And I would note to my colleagues as we debate this issue, if Roe was overturned, the issue goes back to the states for each of them to decide, the way it was prior to 1973.

It seems clear to me that Judge Alito has the acumen and the temperament to serve this nation well on the Supreme Court, and that he is being treated by a different standard than John Roberts was treated by.

I say in a bygone era; that's not so far in the past. That wasn't that far in the past. And you've got individuals that would have ruled very similarly -- excuse me, you have individuals that have answered questions very similarly on similar matters. One is approved by the Senate 78 votes and one's approved in this committee 13-5, and the other is not.

As far as being outside of the mainstream and that Harriet Miers -- if I could briefly respond to my colleague that just put this up that she was run out by one group and there wasn't any concern by the Democrats on Harriet Miers -- I quote Senator Dayton, Democrat out of Minnesota: He said, I believe Ms. Miers' withdrawal is in her own best interest and the best interest to the country.

Senator Boxer said of Harriet Miers, Miers has taken the most extreme position of anyone I have ever known on abortion, assuming she believes there ought to be a constitutional ban on abortion, which would make it a crime except if a woman's life is at stake.

Senator Durbin himself expressed, I'm really concerned about Harriet Miers.

Senator Feingold: I remain concerned about whether she's qualified for the Supreme Court.

I think to lay that at one side or the other is not a fair reading of the situation from Ms. Miers, who's an outstanding individual, but a number of concerns were being raised about her.

Mr. Chairman, I believe that this nominee, Judge Alito, will do an outstanding job. I believe he has already for the country. I believe he deserves to be treated with the same standards as John Roberts was treated by. And by those standards, I think he should get a broad bipartisan vote. And he will serve well.

I don't know if other standards are being applied. It seems like they are in this nominee.

I will support him and I look forward, hopefully, to his confirmation and service to this country.

SPECTER: Thank you, Senator Brownback.

Senator Leahy has sought recognition for some unanimous consent requests. Then we will turn to the Senator Coburn.

LEAHY: Thank you, Mr. Chairman. I'd ask my full statement be made part of the record...

SPECTER: Without objection.

LEAHY: ... and the list of letters regarding Judge Alito, and editorials -- many that came out since the hearing -- be placed in the record at the appropriate spot.

SPECTER: Without objection, those documents will be made a part of the record.

Senator Coburn?

COBURN: Mr. Chairman, thank you for your leadership.

There's a lot of learned lawyers on this committee. And you can learn a lot by the words that they use.

And I've been struck both in the hearings and today, the use of the word integrity, and the challenge of that word.

And I'm reminded that we can only challenge someone's integrity to the extent of our own.

And the points that have been made about the conduct of the hearings and the future course of judicial nominations in this country should not go unheeded. We will not have people come forward to serve this nation if we continue the process that was held this time.

The other thing that I've learned is tremendous amount of prophets on the Senate Judiciary Committee about what he will or won't do. And I'm, kind of, reminded, as we've looked back at the last 30 years, we're all surprised at what some have and haven't done, and we're surprised every time.

The third thing is this new constitutional mandate that you have to replace somebody with the same ideology that was on there, which I've, kind of, looked through my little paperback copy of the Constitution, I can't find it. I can't find it anywhere in the Constitution that we're mandated to keep the court ideologically balanced in terms of what somebody's perception might be.

Then the other thing that I've heard so many times in this committee is liberty. My understanding of liberty is my liberty's only good if it doesn't impinge on somebody else's.

But we've had the little guy mentioned time and time again, and I think about the most vulnerable little guy in this world, which is the unborn child, which we attain no liberty for in this country any longer. And how can we claim to be for the little guy and ignore that little guy?

And then I guess the final thing is, what is mainstream? There certainly would be a debate between a constituent from Oklahoma and New York or California on what mainstream is.

I appreciate Senator Feinstein being dead honest about her problems with this nominee, the worry that he may reverse something. But the fact is is that doesn't disqualify him from being a great justice. If anything, the fact that he won't say where he is is one of the qualifications that we ought to like about him.

So it really boils down is, it's like I said in the hearing: We can find all the reasons in the world to reject him, but the real reason he'll be rejected is because he might -- might -- vote to give liberty to the weakest of all in this country.

And that's the very reason why I would support him. And I do support him.

Thank you.

SPECTER: Thank you, Senator Coburn.

Without objection, we will include in the record the Philadelphia Inquirer editorial, The Washington Post editorial, the Chicago Tribune editorial, the Dallas Morning News editorial, the Rocky Mountain News editorial, the Orlando Sentinel editorial.

Anybody else have anything they'd like to say?

SCHUMER: Mr. Chairman, I'd just ask unanimous consent my entire statement be placed in the record.

SPECTER: All statements, without objection, will be placed in the record.

The clerk will call the roll.

CLERK: Mr. Hatch?

HATCH: Aye.

CLERK: Mr. Grassley?

GRASSLEY: Aye.

CLERK: Mr. Kyl?

KYL: Aye.

CLERK: Mr. DeWine?

DEWINE: Aye.

CLERK: Mr. Sessions?

SESSIONS: Aye.

CLERK: Mr. Graham?

GRAHAM: Aye.

CLERK: Mr. Cornyn?

CORNYN: Aye.

CLERK: Mr. Brownback?

BROWNBACK: Aye.

CLERK: Mr. Coburn?

COBURN: Aye.

CLERK: Mr. Leahy?

LEAHY: No.

CLERK: Mr. Kennedy?

KENNEDY: No.

CLERK: Mr. Biden?

LEAHY: As Mr. Biden explained, he's required to be overseas monitoring an election on the part of our government, and I will vote his proxy no.

CLERK: Mr. Kohl?

KOHL: No.

CLERK: Mrs. Feinstein?

FEINSTEIN: No.

CLERK: Mr. Feingold?

FEINGOLD: No.

CLERK: Mr. Schumer?

SCHUMER: No.

CLERK: Mr. Durbin?

DURBIN: No.

CLERK: Mr. Chairman?

SPECTER: Aye.

CLERK: Mr. Chairman, the votes are 10 yeas, eight nays.

SPECTER: The committee approves the nomination of Judge Alito for floor action. And we will report the nomination to the floor.

That concludes our meeting.