A reauthorization bill should continue to provide the Government with the tools it needs to fight terrorism but must also include sufficient checks to protect against potential governmental abuse of these expansive powers. There is widespread bipartisan support for a reauthorization bill that will protect both national security and the rights of innocent Americans.

I applaud Senators SUNUNU, CRAIG, MURKOWSKI, and HAGEL for their principled stand on this issue. I urge the White House to work with these Senators and with Senators LEAHY and SPECTER to craft a bill that all Senators can support. If a compromise cannot be reached before the end of this week, we are willing to enact another short-term extension of the current law. There has already been discussion of a 6-week extension of the act to give negotiators time to finalize a long-term reauthorization bill. That approach will be satisfactory to this side of the aisle. We do not want the PATRIOT Act to expire. There is no reason it should.

RESERVATION OF LEADER TIME

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

EXECUTIVE SESSION

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

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

The legislative clerk read the nomination of Samuel A. Alito, Jr., of New Jersey, to be an Associate Justice of the Supreme Court of the United States.

The ACTING PRESIDENT pro tempore. Under the previous order, the time until 10:20 a.m. shall be equally divided.

The Senator from Illinois is recognized.

Mr. DURBIN. Mr. President, will the Chair clarify before the time begins how much time we have now to debate?

The ACTING PRESIDENT pro tempore. Right now the minority side has 12 minutes, 30 seconds.

Mr. DURBIN. I thank the Chair. If he will be kind enough to notify me when I have reached 6 minutes.

The ACTING PRESIDENT pro tempore. Certainly.

Mr. DURBIN. I ask unanimous consent that Senator SCHUMER be recognized to follow me for the remaining period of time allotted to the Democratic side.

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

Mr. DURBIN. Mr. President, after voting on war, a vote on a Supreme Court nominee is the most important vote a U.S. Senator can cast. The selection of a Justice to the Supreme Court of the United States is one of those moments when 100 Senators speak for the rights, the hopes, and the dreams of 300 million Americans. Soon this Senate will vote on a lifetime appointment to the Supreme Court for Judge Samuel Alito. Judge Alito is likely to receive more ''no'' votes than any confirmed Supreme Court Justice in the history of the United States, other than Clarence Thomas. Why?

Two reasons: The first is Sam Alito's legal career which separates him from the legal mainstream in America. The second is the judge whom Judge Alito would replace. This is no ordinary vacancy. This is the Sandra Day O'Connor vacancy on the Supreme Court. In case after case during her career, Sandra Day O'Connor has cast the fifth and decisive vote. Her votes helped preserve the constitutional rights that many of us cherish: workers' rights, disability rights, the right to privacy, the separation of church and state, and the principle that in a democracy no man or woman is above the law.

As we prepare to vote for Justice O'Connor's successor, I am reminded of the words of Justice Harry Blackmun. Like Justice O'Connor, Justice Blackmun was a lifelong Republican. He was chosen to write the majority opinion in Roe v. Wade. In his dissent in a 1989 case that narrowed the protections of Roe v. Wade, Justice Blackmun wrote:

> For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows.

I may be wrong about Judge Alito. If I am, no one will be more pleased. But I fear on this January morning in the Senate Chamber, a chill wind blows, a chill wind which will snuff out the dying light of Sandra Day O'Connor's Supreme Court legacy.

When you read his record as a Justice Department lawyer and a Federal judge, it seems unlikely that Justice Alito will preserve Justice O'Connor's respected record of measure and moderation. In case after case during his 15 years on the bench, Judge Alito has consistently sided with powerful special interests, big business, and the heavy hand of government against the individual. In many of these cases, Judge Alito was the lone voice. More than any of the 29 judges with whom he served, Sam Alito stood alone. Rarely did he stand on the side of the poor, the powerless, and the dispossessed.

Over the past several weeks during our hearings, we looked closely at the decisions he rendered. We heard about a case in which Sam Alito wrote a dissent denying a fair trial to an African-American defendant who was forced to stand trial for murder before an all-White jury. We heard about the case in which Judge Alito was the only judge on his court to rule that the Constitution authorized a strip-search of a 10-year-old girl not listed in the search warrant. We heard about a case in which Judge Alito was the only judge on his court to vote to dismiss the case of a mentally retarded man who was the victim of a brutal sexual assault in his workplace. He voted to dismiss this man's case because his lawyer wrote a poor legal brief.

Judge Alito has consistently ruled against those whose lives have been touched by the crushing hand of fate. As an ambitious young lawyer seeking a job with the Reagan administration, Judge Alito wrote flatly:

> The Constitution does not protect a right to an abortion.

As a judge, he voted to uphold a controversial restriction on reproductive freedom, a position later rejected by the Supreme Court and Justice O'Connor.

When I asked Judge Alito at his hearing, is Roe v. Wade settled law in America, he did the Federalist Society shuffle, dancing away from admitting what he really believes. In all his words, never once would he say what John Roberts said, that Roe v. Wade is settled precedent.

With Sam Alito's nomination, when it comes to privacy rights and personal freedom, a chill wind blows for America.

In the area of Executive power, I fear that Judge Alito will do the most damage to our constitutional rights and civil liberties. His history tells us he will be more likely to defer to the President's power than to defend fundamental rights. Judge Alito is a disciple of a controversial theory that gives Presidents extremely broad powers. The so-called unitary executive theory has been cited by the administration in more than 100 bill signings.

What it basically says, according to some of its proponents, is that a President can ignore the laws he doesn't care to follow. I fear that Judge Alito will be an easy ally for this President or any President who seizes more power than the Constitution ever envisioned.

Last Friday I was walking through O'Hare Airport. A woman in an airline employee uniform came by and said hello as she passed. Then she came back to me.

She stopped me and she said: Senator, isn't this Alito thing really about holding a President back from doing things he should not be allowed to do? Isn't this really about checks and balances? It was a wonderful moment, a moment when a person who is busy with their life and family paused to think about the values that make America so unique.

There are some who will cheer the elevation of Judge Alito to the Supreme Court.

Yesterday, the New York Times ran a story with the headline, ''In Alito, G.O.P. Reaps Harvest Planted in '82.'' The article lifted the veil behind the Alito nomination. It revealed that

Judge Alito is among a small group of lawyers who have been precleared by the ultraconservative Federalist Society.

We all remember the fury on the far right when President Bush first nominated Harriet Miers for this opening. Ms. Miers was not one of their chosen few, so they hounded her until the President withdrew her name from consideration.

But the far right is rejoicing with the name of Sam Alito. For the vast majority of Americans, there is no rejoicing. When we look to the Supreme Court as the last refuge for our rights and liberties, Sam Alito is no cause for celebration; he is a cause for great concern.

On this January morning, a chill wind blows.

Mr. President, I yield the floor.

Mr. SCHUMER. Mr. President, how much time remains before I begin?

The ACTING PRESIDENT pro tempore. There is 5 minutes 15 seconds remaining.

Mr. SCHUMER. Would it be possible to ask unanimous consent for an additional 2 minutes? I also ask unanimous consent that an additional 2 minutes be given to the other side.

The ACTING PRESIDENT pro tempore. Is there an objection?

Mr. SESSIONS. Mr. President, I thought the leaders agreed not to ask for additional time. Otherwise, I would not have an objection. I don't know what Senators Reid and Frist said. They have the time set for an 11 o'clock vote. So I am inclined to object unless——

The ACTING PRESIDENT pro tempore. There is objection. The Senator from Illinois is recognized.

Mr. DURBIN. I renew the request. At the risk of being smitten, I think we can afford 4 more minutes on a Supreme Court nominee.

Mr. SESSIONS. I will not object.

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

The Senator from New York is recognized.

Mr. SCHUMER. Mr. President, in a few minutes, we will vote on the nomination of Judge Samuel Alito to the Supreme Court. In a few hours, we will hear the President tell us about his view of the state of the Union. Without doubt, Judge Alito today has the votes to win confirmation. Without doubt, the President tonight will boast of his nominee's victory in this vote. But I must say that I wish the President were in a position to do more than claim partisan victory tonight. The Union would be better and stronger and more unified if we were confirming a different nominee—a nominee who would have united us more than divided us. Had he chosen such a person, the President could have taken the lectern this evening and rightfully claimed the mantle of leadership in the United States of America. Instead, this is not a day of triumph for anybody except the conservative minority who caused the President to capitulate to their demands when Harriet Miers was not to their liking. There will be more votes against this nominee than on any since Clarence Thomas, who was hardly a unifying figure.

Tonight, when the President announces, to applause, the fact of Judge Alito's confirmation, what he should really hear, because of the partisan nature of his choice, is the sound of one hand clapping. While some may rejoice at Judge Alito's success, millions of Americans will come to know that the lasting legacy of this day will be ever more power for the President and less autonomy for the individual.

While some may exalt at the packing of the Court with yet another reliable, extreme voice in the mold of Scalia and Thomas, millions of Americans will be at risk of losing their day in court when they suffer the yoke of discrimination. Some may celebrate the elevation of a Judge Alito to the Supreme Court, but millions of Americans will suffer the consequences of a jurisprudence that would strip Congress of the power to make their lives better in countless ways.

Why, then, with so many Americans at risk, so many rights at jeopardy, will Judge Alito win confirmation? What does his confirmation mean for the future of the Supreme Court? I have been thinking about this long and hard. It is an important question, and I don't have an easy answer, but I believe several things are clear.

For one thing, even though Judge Alito has demonstrated a record of being well out of the mainstream on a host of issues, my friends from across the aisle dutifully march in rigid lockstep when the President nominates one of their choosing but oppose those who do not share their values and visions. Republican Senators should be aghast at Judge Alito's endorsement of vast Executive power, and they should be alarmed at his rejection of a woman's right to choose.

The hill will be steeper when a nominee evades, as Judge Alito did, answering questions about his core judicial beliefs. All evidence points to the fact that he will still hold his constitutional view that the right to choose is not protected in the Constitution, that he will still believe the Federal Government doesn't have the power to regulate machine guns, and the evidence supported the conclusion that he will turn back the clock on civil rights. But he was clever enough not to say so directly. So that, too, has been a factor.

In the end, there is one more thing at work here. The American people have grown accustomed to the umbrella of protection they have under the Constitution. They are loathe to believe that those rights could, with one nominee, evaporate into thin air. Who can believe it? Who wants to believe it? Even though no nominee since Robert Bork has such a clear record of being opposed to so many things the American people hold dear, the public doesn't want to believe that Judge Alito will remove those protections, even when the record is clear. Who wants to believe that after 40 years, a single nominee to the Supreme Court could eviscerate title VII? Yet that is just what his colleagues on the Third Circuit accused him of attempting to do. Who wants to believe that a single nominee, one so seemingly soft-spoken and erudite, would, with the stroke of a pen, take average Americans' rights away and not give them their day in court?

People naturally don't want to believe the worst. Perhaps people think of Earl Warren and David Souter, who defied their President and did not stroke as hard a line as their benefactors might have hoped. But I say to the American people, the days of Warren and Souter are over. The days of stealth nominees whose views may not match the President are over. That is clear when a small minority pushed the President to withdraw Harriet Miers.

In the coming months and years, we will be watching the Court. We will be watching the votes. We will be watching our two newest Justices. And make no mistake, we will make sure the American people understand the implication of these votes today. Elections do have consequences. But votes such as these also have consequences on future elections, and I believe that when the American people see the actual Court decisions which are rendered by the new Court, they will have a strong and countervailing reaction.

Again, I wish President Bush could tonight claim to lead a united country, but with this nominee and with this vote, sadly, he cannot.

I yield the remainder of my time to the Senator from Alabama.

Mr. SESSIONS. Mr. President, I thank the Senator.

Indeed, it has been most distressing to me to see this nominee, the epitome of a restrained, principled and highly respected judge, be portrayed as some sort of extremist. It is beyond my comprehension, frankly. Questions have been raised about different cases. Alito answered each and every one of those questions in front of the Judiciary committee. Senator SCHUMER and I serve on the committee. He was asked about them repeatedly. He was asked 677 questions, and he answered a higher percentage of them than perhaps any judge in history—97.3 percent. A Clinton appointee, Justice Ginsburg, for example, was only asked 384 questions, and she only answered 80 percent of them. Justice Breyer, another Clinton appointee, was asked 355 questions, and he answered 82 percent.

So Judge Alito was most forthcoming. He was asked more questions and grilled and grilled, and he answered them with skill, fairness, and reasonableness. He was unflappable in his testimony and so judicious in his approach to every question. It was a tour de force, a real model of how a judge should perform. I could not be

more proud of him and more proud of President Bush for nominating him.

They say this nomination divides the country. Whom does it divide? It divides the hard left, who wants the Court to eliminate all expression of religion from public life. We see the words ''In God We Trust'' above the door in this Chamber. We had a chaplain open this Senate with prayer. Are we going to have the Supreme Court come in and strike those things down? People are very confused about those issues today. We have people who want to get rid of religion from the public square. They know they cannot achieve this by votes, so they want a judge to do these things. They are not happy with the U.S. Constitution. They want a judge to quote foreign law to reinterpret the words in our statutes and in our Constitution. That is not what the rule of law in America is about.

We have had a lot of extreme cases redefining the meaning of marriage. States have defined marriage since the founding of the Republic. Now all of a sudden we have lifetime-appointed, unelected judges discussing, and some court finding, that the legislature's definition of marriage—people who are responsible to the people, the legislative branch—is not correct. So the judges are now going to reinterpret that definition and make it say what they want it to say. They are going to take people's private property, not for public use, as the Constitution says. Now the court says we can take even poor people's homes so that someone can build a private shopping center. That is not what the Constitution says.

I know of judges who thought it would be better policy if the Constitution said what they want it to, so they just made it say that. But that is not a principled approach to the law; it is not the American approach to law. President Bush said we don't need that kind of judge. We want judges who are faithful and principled to the rule of law. They say Judge Alito is extreme. That is not so. It is an incredibly false charge.

What about the American Bar Association? Those of us on the Republican side have been somewhat critical of them over the years. The ABA is pretty liberal in all of the resolutions it passes. Sometimes it is very liberal. We felt that liberal persuasion infected their evaluation of judicial nominees. But they still evaluate nominees in a very careful way.

The American Bar Association reported to our committee, after surveying 2,000 people, personally interviewing 300, having teams of scholars read all of the writings Judge Alito ever wrote or participated in, and then they voted among themselves. They talked to lawyers who litigated against Judge Alito when he was in practice and judges who served with him and litigants who appeared before him, people who have known him, judges who served with him, and 300 were interviewed in depth. This committee of the American Bar Association—15 of them from all over the country—reviewed all of that. Many of them participated directly in the interviews. Sometimes, people will tell the ABA things they may not tell the newspaper, things that are bad about somebody. They came back with a unanimous conclusion that Judge Alito was entitled to the highest possible rating. The American Bar Association, after a most intensive review, has given him the highest possible rating. Would they have done that if they thought he was an extremist? Would they have done that if they thought some of these cases we have heard about were wrongly decided or extreme in any way? No, they would not. So did his colleagues on the bench. One of the most extraordinary panels of witnesses I have ever seen involved judges who served with him on the Third Circuit, not a rightwing circuit. The Third Circuit, if anything, is considered a moderate to liberal circuit. It is in the Northwest, and Philadelphia is the seat of the Third Circuit. New Jersey is also in that circuit. Judge Alito served on that bench for 15 years.

People have suggested that somehow he is a tool of President Bush. He had a lifetime appointment on the Federal bench in the Third Circuit and has served for 15 years. He has not been a part of any of this terrorism stuff we have heard about or any of these rulings involving the Administration. He hasn't been a part of it at all. He comes to it with all his skills and intelligence as an honored graduate at Princeton and Yale, where he served on the Yale Law Review. He will bring his insight into these cases, which is exactly what we want—an unbiased umpire to deal with the issues.

Mr. Stephen Tober and others explained how one gets a unanimous ABA rating. The American Bar Association panel repeatedly gave him high marks. They said Judge Alito ''has . . . established a record of both proper judicial conduct and evenhanded application in seeking to do what is fundamentally fair.''

One of the three members of the ABA who testified was a civil rights attorney, an African American who represented the University of Michigan in that famous affirmative action quota case. He said this about Alito. He said that all the people they contacted concluded that Judge Alito was held in ''incredibly high regard.''

The ABA witnesses said they were unaware of anyone who has claimed that Alito intentionally did anything wrong with regards to the Vanguard matter that has been raised repeatedly and I guess dropped now since we haven't heard that much about it.

We now hear this interesting argument that we needed Harriet Miers. They are now harkening back to Harriet Miers nomination, claiming the Republicans are at fault for her withdrawal. Not one Republican Senator I am aware of ever said Harriet Miers should not be voted on or said they would vote against Harriet Miers. Some raised questions about her experience, as did Senator SCHUMER, who raised the issue a few moments ago. When Harriet Miers was being considered, Senator SCHUMER said:

> I think there are three places where Harriet Miers yet hasn't sort of met the burden of proof. The first is qualifications, the second is independence, and the third, most importantly, we have to know her judicial philosophy.

So Senator SCHUMER, who is now asking that we have Harriet Miers, was raising serious questions about her a few weeks ago.

She withdrew. She withdrew because she was sitting at the right hand of the President during so many of these matters involving the war on terrorism. The other side had already made clear they were going to demand her personal conversations, her personal documents, her communications with the President, which are legal documents protected by client-attorney privilege. She realized it was going to be a matter that would probably not be acceptable to the Members of the Senate. It would be an uncomfortable process for her, and she withdrew.

Mr. President, what is the remainder of the time on this side?

The ACTING PRESIDENT pro tempore. The Senator has 5 minutes remaining.

Mr. SESSIONS. Mr. President, the case we have heard the most about is Doe v. Groody. The allegation has been made time and again that Judge Alito ordered the strip search of a 10-year-old girl.

I was a prosecutor for nearly 15 years. I read the case. I was at the Judiciary Committee and heard Alito testify. I would like to share some thoughts about that case. The reason I would like to talk about it is because I would like for everyone who is hearing me talk to understand that this is a typical example of distortion and misrepresentations of the actions of Judge Alito. It is so wrong and so biased and so unfair that it ought to embarrass those who made the charges against him. He clearly did the right thing, in my opinion and it has been misrepresented. It is symbolic of what has been said about other cases that I don't have time to talk about at this late date.

In Doe v. Groody, police officers were investigating a drug-dealing group at a certain house. They went to the judge and presented an affidavit to search that house and all persons on the premises. They presented adequate probable cause to believe that a drug-dealing operation was going on in the house, and the judge agreed.

There was a form for a search warrant and that said John Doe was to be searched. In this case, the judge directly incorporated an affidavit attached to the warrant for purposes of probable cause. The affidavit is where officers asserted probable cause to search all persons on the premises. This was a magistrate in a State court

years before Judge Alito ever knew the case existed. He was sitting on the Federal appellate bench at the time.

So officers go out and do a search, and a female police officer takes the mother, along with the 10-year-old child, into the bathroom. She asks them to pull down their trousers and lift up their shirts so that she could detect whether there were any hidden drugs or weapons. They did not take off their undergarments, nor was there any intrusive touching. The female officer saw no drugs hidden on the mother or the girl, and that was the end of that until sometime later when the police officers were sued personally for money damages.

When it came before Judge Alito, he concluded that the affidavit had been made a part of the warrant that asked for the privilege of searching people on the premises, which gave the police officers at least a reasonable basis to believe they had the authority to do so. They got a warrant. They asked for this privilege. They thought, by attaching the affidavit to the warrant that they had the power to search everyone on the premises. I don't know what the right answer is legally, but I do agree with Judge Alito that the police officer could reasonably have felt that they were operating under the law, and should not be personally liable for money damages to some dope dealer.

American police officers need to pay attention to this matter if this is what my colleagues think is bad law. They get sued enough trying to do their duty.

One of the more fabulous panels we ever had, I thought, were colleagues on the bench who served with Judge Alito. Judge Edward Becker has been on the bench for 25 years, the full time that Judge Alito has been on that bench. One of the more respected appellate judges in America said these things about Judge Alito. This is a man they are accusing of being some radical, some extremist. This is what Judge Becker, who has been on the Federal bench for 25 years, said: Sam Alito ''is gentle, considerate, unfailingly polite, decent, kind, patient, and generous. I have never once heard Sam raise his voice, express anger or sarcasm or even try to proselytise. He expresses his views in measured and tempered ways.''

On integrity, Judge Becker says:

Judge Alito is the soul of honor. I have never seen a chink in the honor of his integrity which I view as total.

On intellect:

He is brilliant, he is analytical and meticulous and careful in his comments and his written word.

The ACTING PRESIDENT pro tempore. The Senator's time has expired.

Mr. SESSIONS. Mr. President, I conclude with these words:

He is not doctrinaire, but rather open to differing views and will often change his mind in light of the views of a colleague.

This is the man who has been nominated and who is entitled to confirmation by the Senate. I thank the President and yield the floor.

The ACTING PRESIDENT pro tempore. Under the previous order, the time from 10:24 a.m. to 10:34 a.m. shall be under the control of the Senator from Vermont.

Mr. LEAHY. Mr. President, I yield to the distinguished Senator from Delaware.

The ACTING PRESIDENT pro tempore. The Senator from Delaware.

Mr. BIDEN. Mr. President, I will vote no on the nomination of Judge Alito to the Supreme Court for three reasons: first, his expansive view of Executive power; second, his narrow view of the role of the Congress; and third, his grudging reading of antidiscrimination law reflecting 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 November 2000, Judge Alito said that ''the unitary executive theory . . . best captures the meaning of the Constitution's text and structure.''

Justice Thomas in his Hamdi dissent lays out his views on the power of an unchecked unitary executive to wage war and exercise foreign policy.

Although Judge Alito said his interpretation of the unitary executive was much narrower and that he couldn't recall Justice Thomas using that term, I find Judge Alito's explanation not at all convincing.

I understand the term ''unitary executive'' in the manner in which John Yoo—the administration's legal architect—conceives of executive power.

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

Judge Alito declined to answer this basic, fundamental question.

Traditionally ''conservative'' Justices, such as Robert Jackson, strongly believed in the wisdom of checks and balances.

Judge Alito was asked repeatedly at the hearing about Justice Jackson's famous concurring opinion in the 1952 steel seizure case. During the Korean War, President Truman attempted to nationalize the steel mills in order to avoid a labor work stoppage that would have had negative effects on the war effort. A 6 to 3 Supreme Court ruled against President Truman.

Justice Jackson put it this way about what was at stake:

[N]o doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture. . . . That military powers of the Commander in Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history.

Justice Jackson also laid out a three-part framework for how to view subsequent cases in which the President is arguing he's doing something under his Commander in Chief authority—a framework the Rehnquist Court embraced as ''analytically useful'' in the 1981 case of Dames & Moore v. Regan. First, is the instance in which ''the President acts pursuant to an express or implied'' authorization of Congress. Second, ''when the President acts in absence of either a congressional grant or denial of authority.'' And third, when the President takes ''measures incompatible with the expressed or implied will of Congress.''

Judge Alito showed remarkably little appreciation and understanding of this framework, at one point confusing prong two and prong three of Justice Jackson's framework. Judge Alito's record and his answers at the hearing raise great concern that both individual freedoms and the separation of powers are in jeopardy.

In 1984, Judge Alito wrote that he did not ''question the authority that the Attorney General should have absolute immunity'' in cases involving wiretaps. This again signifies a willingness by Judge Alito to give the President and his officers dangerously expansive powers.

At his hearings, Judge Alito tried to distance himself from his previous statement, claiming he was only doing the bidding of his clients. But at the same time, he refused to definitively say that he did not personally believe his previous assertion.

It is also useful to note that we are currently in midst of a potentially endless war. The war on terror is almost 5 years old; and, unfortunately, shows no signs of abating. Will these expansive Presidential powers become a permanent fixture? What kind of powers do we want our President to have in dealing with a war that may go on for decades? Should our courts have no role?

In 1986, Alito drafted a proposal to make full use of presidential signing statements in order to ''increase the power of the Executive to shape the law.'' It was yet another way to increase the power of the executive at the expense of the other branches.

Senator LEAHY asked Judge Alito at the hearing, ''wouldn't it be constitutional for the Congress to outlaw Americans from using torture?'' This is exactly what the Senate attempted to do in voting overwhelmingly on a bipartisan basis to support the so-called McCain anti-torture amendment.

But when this legislation was signed into law by President Bush on December 30, 2005, he issued a ''Presidential signing statement'' stating basically that no matter what me legislation says on its face, he could still order torture in certain circumstances. Specifically, the statement read that the ''executive branch shall construe this [prohibition] in a manner consistent

with the constitutional authority of the President to supervise the unitary executive branch. . . .''

That is what is at stake with ''Presidential signing statements.'' As my colleague Senator LEAHY has pointed out, President Bush has cited the unitary executive 103 times in these ''Presidential signing statements.''

Judge Alito, at this hearing, responded to Senator LEAHY's question about whether Congress could outlaw torture this way:

Well, Senator, I think the important points are that the President has to follow the Constitution and the laws. . . . But, as to specific issues that might come up, I really need to know the specifics.

To me this is a dangerous nonanswer and one that is entirely consistent with President Bush's use of a signing statement to override Congress's outlawing of torture. The implications are very troubling.

Judge Alito's view of the Executive is what worries me most. He referred to Justice Jackson in the Steel Seizure case many times. But I want to read one, short quote by Justice Jackson.

Justice Jackson said in 1952:

With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such limitations may be destined to pass away. But it is the duty of the Court to the last, not first, to give them up.

I believe they'll be destined to pass away with this Justice.

To allow the President—whether this one or any future one—to be unconstrained in his or her powers; to be able to pick and choose which laws he or she wants to follow, is unacceptable. The Supreme Court was intended by our Founders to serve as a bulwark against executive overreaching. Any nominee to the Court who doesn't agree is a nominee who should not be confirmed.

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

Judge Alito will very likely join with the present members of the Court who have struck down three dozen federal laws in less than 20 years—laws which said, for example, you can't have guns within 1,000 feet of an elementary school; laws requiring a 5-day background check for a handgun purchase; laws battling violence against women; laws requiring the clean-up of low level nuclear waste; laws designed to ensure freedom of religion; laws saying states can't steal somebody's ideas and inventions.

This recent level of ''conservative'' judicial activism is more than six times the rate over the history of our Republic. Over the first seven decades of the Court's existence, in comparison, only two federal laws were held unconstitutional.

On his 1985 job application, Judge Alito wrote, ''I believe very strongly in . . . federalism''—the principle that has been used by this activist court to knock down Federal law after Federal law.

In an October 27, 1986, draft letter on behalf of Assistant Attorney General for Legislative Affairs, John Bolton, Alito urged President Reagan to veto the ''Truth in Mileage Act.'' Alito drafted these words for President Reagan:

My Administration believes that the Constitution intended to establish a limited Federal government, one that would not interfere with the vast array of activities that have been in the states' traditional concern. Over time, Congress has taken steps to eviscerate that constitutional scheme by legislating in numerous areas that should be governed by State law.

Judge Alito continued his federalist activism on the bench. As a judge, he has fully embraced—and even aggressively sought to broaden—the Supreme Court's federalism opinions, most centrally in his sole dissenting opinion in the Rybar case.

In that case, Judge Alito called federalism ''vital'' and said that ''even today, the normative case for federalism remains strong.'' The majority of his colleagues in that case sharply criticized Judge Alito's opinion:

While the dissent writes in the name of 'constitutional federalism' it recognizes that even Lopez abjures such a requirement . . . but overlooks that making such a demand of Congress or the Executive runs counter to the deference that the judiciary owes to its two coordinate branches of government, a basic tenet of the constitutional separation of powers. Nothing in Lopez requires either Congress or the Executive to play Show and Tell with the Federal courts at the peril of invalidation of a Congressional statute.

At his hearings, Judge Alito did nothing to allay concerns that he would continue to push this activist federalism agenda if confirmed to the Supreme Court. For example, he refused to recognize the well-settled nature of some of the Court's bedrock Commerce Clause precedents. And as a Supreme Court Justice, he would no longer be bound to follow these precedents.

When asked about these issues by Chairman SPECTER and others, Judge Alito provided answers that reinforced my view that he has a very low regard for Congress's power to legislate. When Chairman SPECTER asked Judge Alito whether he would ''overturn [] congressional acts because of [Congress's] method of reasoning,'' Judge Alito gave the following answer:

I think that Congress's ability to reason is fully equal to that of the judiciary.

On its face, that may sound like a good answer; but it's not. Under the rational basis test—a cornerstone of constitutional law—the Supreme Court has greatly deferred to Congress's judgment and reasoning ability.

Under the rational basis test, the Supreme Court has historically and rightfully deferred to Congress's reasoning as to why it did what it did—after all, this is the branch that can hold hearings; the branch that can call witnesses; and the branch that can build a record . . . all things the Court can't do. Judge Alito's answer seems to question this bedrock principle.

What does this mean? What is at stake here? Does Judge Alito agree with those on the intellectual right who are attempting to reverse a healthy consensus going back to the days of the Great Depression that our government can act as a shield to protect Americans from the abuse of powerful interests?

Michael Greve of the American Enterprise Institute puts it straight forwardly:

I think what is really needed here is a fundamental intellectual assault on the entire New Deal edifice. We want to withdraw judicial support for the entire modern welfare state.

What is at stake if this view gains ascendancy in our Supreme Court?

If the Court is allowed to second-guess congressional judgment, a broad range of vital Federal legislation could potentially hang in the balance.

Can we protect the air we breathe? Can we keep arsenic out of our drinking water? Can we keep tobacco companies from targeting our kids? Can we establish minimum national standards to provide equal opportunity and human dignity for society's most vulnerable members—our elderly, our disabled, women victimized by violence? That is all at stake.

Listen to the debates going on behind these constitutional issues. It's about devolution of government. It is about stripping—as a matter of law—the right of the Federal Government to do much of anything other than provide the national defense.

Justice Thomas has voted to strike down over 65 percent of the Federal laws that have been challenged before the Supreme Court. Justice Thomas wrote in one of his opinions recently, ''If anything, the wrong turn was the Court's dramatic departure in the 1930s.'' What most view as a ''healthy consensus,'' Judge Thomas and others call ''a wrong turn.''

What is at risk if this view of the Constitution ever gained full ascendancy? The Clean Air Act, the Safe Drinking Water Act, the Clean Water Act, and the Endangered Species Act, all rely on the Congress's commerce clause power.

The intellectual right is also determined to elevate private property at the expense of protecting our safety, well-being, and communities. Under their reading of the appropriate language in the Constitution—the takings clause of the fifth amendment—the only way to keep a chemical plant out of your neighborhood would be to compensate the chemical plant to not build because you are taking their property.

Our bedrock civil rights laws are also based on post-1937 constitutional interpretations.

There also could be no Federal minimum wage and no maximum hour laws. We wouldn't be having a debate about increasing the minimum wage because there wouldn't be one.

The consequence of this judicial philosophy is to shift power to the already

powerful and eliminate the ability of the less powerful to use the democratic branches of government to rebalance the playing field.

And the intellectual right understands that in order to shift power, you need to focus on the courts. In 1988, a Reagan Justice Department document stated:

> There are few factors that are more critical to determining the course of the nation and yet are more often overlooked than the values and philosophies of the men and women who populate the third co-equal branch of the government, the federal judiciary.

Obviously, every judge could impact the course of the Nation; but most important are the nine Justices on the United States Supreme Court.

And that is why Judge Alito was selected to our highest Court, a consequence of which will be to threaten Congress's power to protect the American people.

Third, Judge Alito lacks an understanding as to how prejudice plays out in the real world and has a very restrictive view of the antidiscrimination legislation Congress has passed.

Earlier this month, I was thinking about my vote as I was preparing to speak before a Martin Luther King, Jr., event. And I reread his letter from the Birmingham jail.

Everybody was telling him, ''We won. Give it up. Give it up.'' And here is what he wrote, laying out a standard by which to measure ourselves.

Dr. King wrote:

> When you are harried by day and haunted by night by the fact you are Negro, living constantly at tiptoe stance, never quite knowing what to expect next, and are plagued with inner fears and outer resentments; when you [are] forever fighting a degenerating sense of 'nobodiness,' 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 evolved. It's not the prejudice of the '60s when they would say, ''we don't want any blacks here,'' or more descriptive terms.

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

All public officials, including judges, must understand prejudice still lurks in the shadows. Judge Alito's record demonstrates that he does not look into the shadows.

There is no question Judge Alito has ruled a number of times for the little guy, women, and minorities, but it's mostly in cases where the outcome was clear. When it was a close call, time and again Judge Alito ended up almost inevitably on the other side, many times dissenting from every one of his colleagues looking at the case.

Judge Alito disagreed with all 10 of his colleagues and 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 ''subjective business judgment.'' His other colleagues said his approach would ''eviscerate'' antidiscrimination law.

Our courts are where the less powerful are supposed to get a fair shake. Our courts are supposed to safeguard individuals against powerful institutions; they are where a single individual—even one who's not wealthy or well-connected—is on the same footing as a powerful corporation.

I focused on discrimination cases to try to find out how Judge Alito reasoned. What I found troubled me, as did how he reasoned in other cases I asked him about, including the Family and Medical Leave Act case.

Judge Alito told me that he ''can't know everything about the real world.'' So, in this case, he discounted any gender-related connection to the sick leave provisions, despite the fact that one in four people taking sick leave under the Act were women with difficult pregnancies, and one of the reasons we wrote the law was because we know about the stereotyping of women.

Now, I don't think Judge Alito is a bad guy, but it is clear he has a blind spot; a dangerous blind spot for millions of Americans who still suffer from discrimination and stereotypes—however subtle or sophisticated.

To my colleagues who would say it is inappropriate to look at the judicial philosophy or substantive rulings of our nominees to the Supreme Court, I would ask the following rhetorical question. Can you imagine on that hot, steamy Philadelphia summer in 1787, with the Founders sitting on the second floor so no one could hear what they were doing; can you imagine them saying, by the way, we are going to have three coequal branches of government. Two of them will be scrutinized by the American people, and the presumption will be that they are not entitled to the office unless a majority of the people conclude they should hold the office. But as for the third branch, all we want to know is are they honorable, decent, and straightforward?

It is also useful to point out that it is right to subject nominees to the Supreme Court to more exacting standards than nominees to the lower courts, for as the highest court in the land, the Supreme Court dictates the judicial precedents that all lower courts are bound to respect.

As a result, there are hundreds of lower court nominees I would neither have personally nominated nor would have voted for confirmation to the Supreme Court, but whom I did support for lower courts.

But the Supreme Court is different. Because the Supreme Court is not bound by precedent in the way lower courts are—a point Judge Alito agreed to at his hearing—the judicial philosophy of Supreme Court nominees is not only fair game; it is crucial. This is the reason I have voted against a much higher percentage of Supreme Court nominees than lower court nominees during my time in the Senate, from Bork to Thomas, from Rehnquist to Roberts.

It is also important to remember that we currently have a Justice serving on the Supreme Court nominated by President Ford. We even have judges still serving in the lower courts appointed by Presidents Kennedy and Eisenhower. From the early 1800s, in fact, the average time federal judges spend on the bench has increased from 15 years to 24 years. By that count, a Justice Alito may still be handing down decisions in the year 2030.

Judge Alito, like Justice Thomas before him, has supported the theories of strict construction and originalism. He stated:

> I think we should look to the text of the Constitution and we should look to the meaning that someone would have taken from the text of the Constitution at the time of its adoption.

According to originalist logic, many Supreme Court decisions that are fundamental to the fabric of our country are simply wrong. Perhaps even more importantly, how would a Justice Alito deal with the big issues of the future: for instance, can microscopic tags be implanted in a person's body to track his every movement? Can patents be issued for the creation of human life? Can brain scans be used to determine whether a person is inclined toward criminal behavior? What about the questions we can't even conceive of from this vantage point?

Twenty or 30 years into the future, what would a Justice Alito be saying about important issues of the day? That is what makes today's vote so momentous.

And when I look at all the evidence before us—Judge Alito's writings, his statements, his judicial records, his opinions, and the little we learned about him in these hearings—I am forced to conclude that he should not serve on the Supreme Court. That is why I am voting no.

I yield the floor and thank my colleague.

Mr. KOHL. Mr. President, I rise today after a thorough examination of the nomination of Judge Samuel Alito, Jr., to the Supreme Court. After that thorough examination, 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 life to the promises of the Constitution has never

moved predictably—or smoothly. As Martin Luther King, Jr., once noted, ''Human progress is neither automatic nor inevitable. Every step toward the goal of justice requires . . . the tireless exertions and passionate concern of dedicated individuals.'' 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 case names: Brown v. Board of Education, Gideon v. Wainwright, Baker v. Carr and Miranda v. Arizona. Judge Alito has stated his allegiance to the 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. That is a starting point. But we must dig much 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 or 1965 but, rather, in 2006, and possibly 2036. Given his narrow judicial philosophy—on display throughout his legal 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 toward these decisions—decisions that helped religious and racial minorities receive protection from majority abuses—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 opinions suggest 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 a 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 affirmed 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 deferred reflexively to the police in cases involving the 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's deference to Presidential power concerns us. He promoted the radical idea of a ''unitary executive''—the concept that the President is greater than, not equal to, the other branches of Government. Judges are meant to protect us from unlawful surveillance and detention—not simply abide the President's wishes.

Although it is the most important standard, judicial philosophy is not the only measure of a nominee. We had hoped that 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 his support for Judge Bork—calling him ''one of the most outstanding nominees of the century''—Judge Alito answered that he was just supporting the administration's nominee.

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

When questioned about whether Bush v. Gore 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 an opinion.

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. Judge Alito does not.

Judge Alito's record as a professional—both as a Justice Department official and as a judge—reflects something more than a neutral judicial philosophy. Instead, it suggests a judge who has strong views on a variety of issues, and uses the law to impose those views.

Judge Alito has the right to see, read, and interpret the Constitution narrowly. And we have the obligation to decide whether his views have a place on the Supreme Court. I have decided they do not, and so I will oppose Judge Alito's nomination today.

NOMINATION OF JUDGE SAMUEL ALITO TO THE U.S. SUPREME COURT

Mr. AKAKA. Mr. President, I rise today in opposition to the confirmation of Judge Samuel Alito as an Associate Justice of the United States. In the months since President George W. Bush nominated Judge Samuel Alito as an Associate Justice on the U.S. Supreme Court, I have carefully considered his record. I evaluated his long history of government service and his work on the U.S. Court of Appeals for the Third Circuit, and I have closely followed his confirmation hearings.

When I review all the evidence before me, I do not believe Judge Alito will be able to fairly apply the principles embodied in the U.S. Constitution. Our Constitution sets forth important civil rights and privacy protections that are fundamental to our way of life today. In recent years, these freedoms have been precariously protected by a delicate balance on the Supreme Court, with Justice O'Connor frequently tipping the scales in favor of the civil rights and privacy protections that so many Americans depend upon. I am disheartened by the reality that so many of these freedoms will likely be eroded when Judge Alito joins the Court.

Judge Alito's approach to the law is not merely conservative, it is extreme. Judge Alito's opinions in race and gender employment discrimination cases have crafted a restrictive interpretation of civil rights laws that would make it much more difficult for women and minorities to prevail or even receive a jury trial. I am also troubled by Judge Alito's statement in his infamous 1985 job application that he was ''particularly proud'' of his work in the Reagan administration, where he counseled the administration to restrict affirmative action and limit remedies for racial discrimination.