

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 battle-grounds—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.

I cherish our system of checks and balances in Government, where each branch of the Government is coequal with the other. I believe that it is critical that this balance, which our forefathers so wisely and carefully created, is protected and maintained. However, Judge Alito supports the “unitary executive” theory, an expansive view of Presidential powers that he and his colleagues set forth while working in the Office of Legal Counsel of the Reagan Justice Department. Since joining the Third Circuit, Judge Alito made it clear that he still holds the premise of the “unitary executive” theory to be true, and this approach concerns me, especially in this political climate. This approach also undermines Congress’s authority to protect the public. Judge Alito has ruled that Congress did not have the authority to pass the Family Medical Leave Act or to enact a Federal ban on the possession or transfer of machine guns. In both cases, the Supreme Court disagreed with Judge Alito’s conclusions and upheld these protections, demonstrating that Judge Alito’s opinions are not in the mainstream.

I take my responsibility to provide advice and consent seriously. I cannot support Judge Alito’s nomination. Unfortunately, Judge Alito is expected to be confirmed as Justice Sandra Day O’Connor’s replacement. This means he will be in the position to affect a number of critical issues in the coming years. Important questions on privacy, the environment, Presidential power, and women’s reproductive rights will all come before the Court to be resolved. With Judge Alito sitting on the Supreme Court, I am very concerned about the direction the Court will take our great Nation. Although during his hearings Judge Alito promised that he would not legislate from the bench, his record indicates otherwise. For the sake of our country, I am hopeful that Judge Alito will take seriously his commitments to uphold the principles of our Constitution.

Ms. CANTWELL. Mr. President I rise to discuss the nomination of Judge Samuel A. Alito, Jr., to the Supreme Court to the United States.

After closely and carefully studying his record and recent testimony before the Judiciary Committee, I have decided to vote against Judge Alito’s confirmation to the Supreme Court of United States.

Of course, it is vital that any lifetime appointee to the highest court in the Nation possess the breadth of experience and character necessary to review the most significant, complex, and far-reaching legal questions of our time.

But that is not enough. I see disappointing and clear evidence in Judge Alito’s long record, rulings, and statements of dangerously skewing the balance and relationship between our branches of Government. I do not expect any nominee to the Supreme Court to predict and promise with certainty how he or she will rule in any and all future cases.

But I do expect nominees to make clear that they would protect the most basic rights of individuals and the fundamental structure and foundations of our democracy. Yet I cannot be sure that Judge Alito would do either. Indeed, I question whether he would show due respect for the authority of Congress or apply a necessary check to the reach of the executive.

Serving as that check has long been one of the Court’s most solemn obligations. Today, that role is more important than ever. We have seen evidence of a National Security Agency’s eavesdropping program operating in question of a legal framework and without due oversight. We are seeing literally, in wartime, a President reach without probable cause or warrant at the expense of individual rights and the most basic protections of the Constitution. Yet it is a question whether Judge Alito would adequately control that reach.

Judge Alito has a record of concern when it comes to placing and consolidating the rights of the government over the rights of the individual. Consider, for example, how Judge Alito would give virtually unfettered authority to the police to trample on the clear privacy protections given to every American as demonstrated in his 2004 dissent in *Doe v. Groody*. In this case he would have upheld the strip search of a 10-year-old girl and her mother, despite the fact that they were not suspected of any crime nor named in any search warrant.

When asked at his hearing about this case, and his minority opinion, Judge Alito repeatedly sought to portray it as “a rather technical issue,” a question of whether the police affidavit should be incorporated into the warrant itself, and suggested that the police were operating under time pressure.

These claims are inconsistent with the facts, as made clear by Judge Alito’s colleague, then-Judge Michael Chertoff, now Secretary of Homeland Security. According to Judge Chertoff, the approach advocated by Alito in *Groody* “might indeed transform the judicial officer into little more than the cliché ‘rubber stamp.’” The American people deserve a Supreme Court Justice who understands how important privacy rights are to all Americans, even the most vulnerable. They deserve more than just a rubber stamp.

History shows that our courts have often stood up to Presidential overreaching during wartime: protecting the right of habeas corpus during the Civil War; forbidding the president from authorizing domestic warrantless wiretaps during the Cold War; and in the War on Terror by an 8-to-1 margin, the Supreme Court held that the President cannot indefinitely detain American citizens without allowing them to challenge their detentions before a neutral decisionmaker, another power this administration had claimed.

Worse still, in areas where precedent is sparse or dated—such as the war on

terror and the executive’s power to carry it out—Judge Alito’s record and testimony suggests that he is far more likely to defer to the ideological ambitions of our President than the protection and rights of our citizens.

To be sure, there is nothing wrong with an aggressive executive, especially at times of great peril. An aggressive executive, however, also requires a strong and functional Congress, the responsive voice of the people. I have questions, however, if Judge Alito’s rulings will narrowly define the law and therefore threaten the authority and ability of Congress to govern effectively and affirmatively.

Writing in *Chittister v. Department of Community & Economic Development*, Judge Alito wrote that parts of the Family and Medical Leave Act, FMLA, which allow employees to leave when they or family members are seriously ill, were not applicable against the States. When passing the legislation Congress had identified the importance of both men and women in caring for young children and family members with serious health conditions.

Congress also pointed to the burden that family caretaking imposes on women. But Judge Alito denied those findings. He saw no “existence, much less the prevalence, in public employment of personal sick leave practices that amounted to intentional gender discrimination in violation of the Equal Protection Clause.”

This view essentially deflated Congress’s ability to defend civil rights. He wrote: “Even if there were relevant findings or evidence, the FMLA provisions at issue here would not be congruent or proportional. Unlike the Equal Protection Clause, which the FMLA is said to enforce, the FMLA does much more than require nondiscriminatory sick leave practices; it creates a substantive entitlement to leave. This is ‘disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act.’”

The Supreme Court later rejected Alito’s position on the FMLA.

Ultimately, the Commerce clause is about understanding Congress’s power to protect our families and its ability to respond to threats that immediately affect those families. In February, for example, the Court is scheduled to hear arguments on the scope of the commerce clause in two critical cases that could restrict the geographic jurisdiction of the Clean Water Act to one percent of its current coverage.

In my State, we know how fragile our precious natural resources can be. The Pacific Northwest is blessed with incredible beauty. But habitat loss and other pressures threaten some of my State’s most iconic species, salmon that spawn our great rivers and birds that depend on old growth forests.

We also know that how we treat those resources and that wildlife speaks to our priorities as a people and a nation. How do we value our communities and ensure their safety? How do

we honor an individual's freedom and his or her rights?

While I do not expect any judicial nominee to prejudge future cases, I do expect all nominees to make their positions clear on protecting the most basic rights of individuals and the fundamental structure and foundations of our democracy. In the end, I cannot be sure that Judge Alito would do either.

As I mentioned earlier, I believe that Judge Alito has a record of concern when it comes to placing and consolidating the rights of the government over the rights of the individual, and he has not provided the answers to adequately reassure the people of our Nation. I must conclude that he would neither show due respect for the authority of Congress nor apply a necessary check to the reach of the executive. With great respect for the institution, I cannot vote to confirm Judge Alito to the Supreme Court of the United States.

Mr. CHAFEE. Mr. President, President Bush has nominated Judge Samuel Alito to replace Justice Sandra Day O'Connor on the Supreme Court. Justice O'Connor has had a remarkable career of public service. Her strong and moderate voice on the Supreme Court will be missed. I was lucky to get to socialize with her and her husband through mutual acquaintances and recommend her book about growing up on a ranch in arid Arizona—The Lazy B. She is an exceptional person.

As is the custom, Judge Alito sought a meeting with any Senator so interested. For our meeting, I suggested the Capitol steps and he agreed since it was a warm sunny day. I thought it was appropriate to be visually connected to two of the three branches of government as we talked about constitutional issues. If confirmed, the decisions he will make on the Supreme Court will affect the lives of Americans profoundly.

Judge Alito has outstanding legal credentials and an inspiring life story. However, I am greatly concerned about his philosophy on some important constitutional issues. In particular, I carefully examined his record on executive power, women's reproductive freedoms and the commerce clause of article 1, section VIII of the Constitution.

On executive power, it is likely that cases dealing with the fourth amendment will be heard by the Supreme Court. The fourth amendment reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

To me this language is very clear that a warrant is required for a search. That premise is now being questioned regarding warrantless wiretaps.

At the Judiciary Committee hearings, Judge Alito was asked a question on executive powers and warrantless

wiretapping. He said he would have to determine "whether the President's power, inherent powers, the powers given to the President under article 2 are sufficient, even taking away congressional authorization, the area where the President is asserting a power to do something in the face of explicit congressional determination to the contrary".

The only power in article 2 that Judge Alito could be referring to would be:

The President shall be Commander in Chief of the Army and Navy of the United States. . . .

Judge Alito was also asked ". . . is it possible under your construct that an inherent Constitutional power of the President could, under some analysis or some case, override what people believe to be a Constitutional criminal statute?" Judge Alito responded that this was possible, noting a "possibility that that might be justified".

How far do we want Commander in Chief stretched? As Justice O'Connor wrote in a recent case, "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens".

On the issue of *Roe v. Wade* as with other issues, I am less interested in what Judge Alito wrote or said as a lawyer for his client the Reagan Administration, than how he has ruled as a judge and how he testified at his nomination hearing. As an appellate court judge, Judge Alito was the lone dissenter on *Planned Parenthood v. Casey*, a court case reviewing the *Pennsylvania Abortion Control Act*.

The Supreme Court wrote on this landmark affirmation of *Roe v. Wade*:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the state.

The five majority Justices, who wrote that, were all Republican appointees: two Reagan appointees, one each of Bush "41", Ford and Nixon.

An important standard of law is the concept of *stare decisis*—it stands decided. At the hearing Chairman SPECTER asked Judge Alito to discuss his view of *stare decisis*. He responded:

It's not an inexorable command, but it is a general presumption that courts are going to follow prior precedents". In the Supreme Court dissent on *Casey*, the justices who arguably wanted to overturn *Roe v. Wade* wrote "*stare decisis* is not . . . a universal inexorable command.

Not only did Judge Alito rule in favor of the *Pennsylvania Abortion Control Act* as a lower court judge, he used the same language as the high court dissenters at his Supreme Court nomination hearing. *Stare decisis* is not an inexorable command.

Additionally, at his nomination hearing Judge Roberts was willing to call *Roe v. Wade* "settled law" but Judge Alito refused to make a similar statement.

The last point I would like to make concerning constitutional law is on the commerce clause. As you know the Constitution creates a Government of limited power—Congress can only enact legislation in areas that are specifically set out under the Constitution. Congress is expressly prohibited from enacting legislation in other areas, leaving this authority to the States per the tenth amendment:

The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people.

Every law enacted by Congress must be based on one of the powers enumerated in the Constitution. The Framers of the Constitution gave Congress broad power to regulate immigration, national security and economic activity between the states, and left most other power with the States.

However, section VIII of article 1 states that "the Congress shall have the power to regulate Commerce . . . among the several states". This is the commerce clause and it is the most powerful provision in the Constitution providing Congress the authority to enact legislation in a host of areas—including environmental protection. A key Supreme Court case regarding the commerce clause was in 1942 when the Supreme Court upheld legislation that allowed USDA to set quotas on local wheat growing. The Court noted that while crops regulated may never actually enter into interstate commerce, such local activity, coupled with similar activity in other States as an aggregate has a direct impact on interstate commerce. Since then using the "aggregate effects test" or "substantial effects test" Congress has passed broad ranging environmental legislation such as the Clean Air Act, Clean Water Act and the Endangered Species Act, all of which were signed into law by Republican President Nixon.

While I agree there should be constitutional limits on legislative power, Judge Alito seems to have agreed with Justice Thomas who wrote:

I believe we must further reconsider our substantial effects test with an eye toward constructing a stand that reflects the text and history of the Commerce Clause.

Indeed in a dissent to a gun case heard before his court Judge Alito wrote:

In sum, we are left with no appreciable empirical support for the proposition that the purely intrastate possessions of machine guns, by facilitating the commission of certain crimes, has a substantial effect on interstate commerce, and without such support I do not see how the statutory provision at issue here can be sustained.

What is noteworthy in this dissent is that Judge Alito was alone with all members of his appeals court ruling the other way.

If "the aggregate or substantial effects tests" are overruled as Justice

Thomas has advocated, federal environmental laws could be ruled unconstitutional. Indeed on February 21, the Court is scheduled to hear arguments on two cases, *Carabell v. United States* and *United States v. Rapanos*.

In both cases the lower court upheld protection of wetlands, which are currently protected under the Clean Water Act. Environmentalists argue that these wetlands are critical to the health of our nation's water supply and wildlife habitat.

Industry groups argue that the Army Corps of Engineers has no authority under the Clean Water Act to regulate "isolated wetlands" that have no connection with "navigable waters." This would be a major setback to the Clean Water Act.

The critical issue is whether under the commerce clause, Congress has the authority to regulate non-navigable bodies of water within a single State. Based on the writing of Judge Alito, he would appear to side with the faction what would greatly limit the ability of Congress to protect such "intrastate" issues.

These constitutional issues, the scope of executive power, women's reproductive freedoms and the commerce clause are likely to be heard by the Supreme Court in the coming months. I care deeply about these issues.

Believe me, having been an executive in government, I want to support President Bush's choice to the Supreme Court. The President did win the election. He has made his promises and I have made mine.

I am a pro-choice, pro-environment, pro-Bill of Rights Republican and I will be voting against this nomination.

Ms. LANDRIEU. Mr. President, confirmation of a Supreme Court Justice is one of the most important duties the Senate performs under the Constitution. We should consider the nomination of Judge Alito carefully and conduct our debate on this nominee with dignity and respect.

The Supreme Court is the final arbiter of whether the laws of our land conform to the Constitution. Once confirmed to the Court, Justices serve for life, beholden only to the Constitution and the rule of law. It is an awesome responsibility; and for such an important event, we must have a confirmation process fitting of that responsibility. Too often in recent years, we have not.

Though the judicial branch of our government is supposed to be independent of politics, the nomination and confirmation process has become far too political to the point that it no longer serves the Nation's interests, regardless of partisan or philosophical differences.

Judge Alito, whom I have met and found to be an honorable, intelligent man, was placed in the unfortunate position of having been selected as a result of this process. As my colleagues know, he was not the President's first choice to fill Justice Sandra Day

O'Connor's seat. John Roberts was. After his nomination was switched to become Chief Justice, Harriet Miers became the President's second choice. After she was attacked by members of the President's own party, her nomination was withdrawn. Again, politics prevailed.

Judge Alito's nomination was the President's third choice for this seat and, in many ways, a gesture to the organized interest groups of the President's party who had derailed Ms. Miers' nomination. Unfortunately, it was a nomination of, by, and for politics.

This highly charged political process spilled over into the confirmation hearings before the Judiciary Committee. To secure confirmation, Judge Alito said as little as possible. The strategy was clear: hide, don't explain or embrace, your judicial philosophy.

The Supreme Court nomination and confirmation process has become a game of hide-the-ball. It is a process that does not help to inform Senate deliberations, and it sadly leaves the American people uninformed about who will be sitting on this highest of American courts until it may be too late.

The chairman and ranking member of the Judiciary Committee are not to blame for what has happened to the confirmation process. I also thank Judge Alito for his willingness to appear before the committee for as long as he did. But the entire process is clearly not what the Framers of our Constitution intended. No one in America should be afraid to speak his or her mind openly and honestly. The American people are poorly served by a process that places tactical politics above guiding principle.

If confirmed, Judge Alito will replace one of the most important justices on the Court today, Sandra Day O'Connor. Justice O'Connor is a conservative, appointed by a conservative President. Over time, she became a consensus builder on the Court who took great pains to strike a careful balance in her opinions, never forgetting that the Court's decisions have real consequences for real people. She was open-minded and independent. Her influence on the Court was tremendous and her reasoning always carried great weight. She did not prejudge cases and applied the law to the facts in a fair manner.

Justice O'Connor, who was appointed by President Reagan, was a swing vote on a number of important decisions. Whether you or I agree with her individual opinions or not, I think she acted responsibly: someone committed to equal justice under the law, who applied the law to the facts as presented to her and did not "overreach" from the bench. She showed proper respect for the legislative branch and was careful not to cater to Executive authority.

While Samuel Alito has solid qualifications to become a Supreme Court Justice, it is our duty to look deeper.

Though we can never know how a Justice will decide a case before it is presented and argued, it is important to know, during the confirmation process, which principles of judicial philosophy will underlie a potential Justice's future constitutional interpretations. We can give advice and consent to a Supreme Court nomination without this information or these insights, as this Senate is about to do. But without this information and these insights, we cannot give informed advice or informed consent.

It was never intended that the Senate be a rubberstamp, approving everyone the President nominated simply because he sent them to us. The Framers expected Senators to bring wisdom and understanding to the task, not to simply check off boxes on an application form.

Judge Alito's record gives me cause for concern. And his testimony during the confirmation hearings unfortunately did very little to lessen that concern. His opinions and dissents on the bench leave open very serious questions as to how he views fundamental civil rights for all Americans and how he views protecting the individual rights of average citizens, especially when they are threatened by powerful forces, including the government itself. Judge Alito's nonanswers to so many questions presented to him at the confirmation hearing added to those troubling concerns.

I have voted for conservative judges nominated by Republican Presidents many times. John Roberts was the most recent. But I must oppose this nomination. I want my vote against confirmation to send a signal to all who care that the Supreme Court nomination process has become far too political and far too removed from the original purposes set forth by the Framers of the Constitution.

It is time for all of us, Republicans and Democrats of every possible philosophical persuasion, to stand up against a process that so poorly serves the people of the States we represent in this great body.

The ACTING PRESIDENT pro tempore. The Senator from Vermont is recognized.

Mr. LEAHY. Mr. President, on this rainy morning in our Nation's Capital, we just learned the sad news of the passing of Coretta Scott King. We are reminded again of the crucial role our courts played in making real the promises of our national charter, the Constitution. It was the courts to whom Dr. Martin Luther King spoke, and they responded.

The Nation mourns the loss of another civil rights leader and is reminded again of the vital role our courts play as the place where ordinary Americans can turn for justice when justice is denied them. Coretta Scott King and her late husband, Dr. Martin Luther King, Jr., put their lives on the line to bring those promises to untold millions of Americans. Let us never

squander or take for granted all that has been achieved. Let us keep their dream alive.

That is why, since this debate began last Wednesday, I posed the fundamental question this nomination raises: whether the Senate is going to 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.

This nomination now before us is an unacceptable threat to the fundamental rights and liberties for all Americans now and for generations to come. This President is in the midst of a radical realignment of the powers of the Government and its intrusiveness into the private lives of Americans.

I am concerned that if confirmed, this nominee is going to further erode the checks and balances that have protected our constitutional rights for more than 200 years. This is a crucial nomination, one that can tip the balance of the Supreme Court radically away from constitutional checks and balances and from the protection of Americans' fundamental rights.

The vote that the Senate is about to take has real consequences, not just for the 100 of us in this body but for 295 million Americans. We stand in their shoes. We stand in the shoes of generations to come. The vote will determine whether Samuel Alito, Jr., replaces Justice Sandra Day O'Connor on the Supreme Court of the United States. A vote for this nomination is a vote against constitutional checks and balances. A vote for this nomination is a vote against maintaining the fundamental rights and liberties of ordinary Americans.

Republican Senators have pretended that judicial philosophy and personal views do not matter because judges simply apply the rule of law, as if it were some mechanical calculation. Personal views and judicial philosophy often come into play on close and controversial cases. We all know this to be true. Why else did Republican supporters force President Bush to withdraw his previous nominee for this vacancy, Harriet Miers, before she even had a hearing? It mattered to them when the nominee was Harriet Miers. And it matters now. The only difference is that those who hounded Harriet Miers to withdraw are confident that Judge Alito will pass their litmus tests. Harriet Miers failed their litmus tests because, despite all the backroom whispers and public winks and nods, her conservative opponents were not confident that she would rule the way they wanted. Those from among the President's supporters who castigated Ms. Miers wanted certain results. The President allowed his choice to be vetoed by an extreme faction within his party, before hearings or a vote. As Chairman SPECTER has said, they ran her out of town on a rail. Like the more than 60 moderate and qualified judicial nominees of President Clinton on whom Republicans would neither

hold hearings or votes—by what was in essence a pocket filibuster. They do not want an independent federal judiciary. They want certain results.

The President says he is fulfilling a campaign promise. I remind him of his biggest campaign promise to be a uniter and not a divider. He could have nominated so many people who would have united this country, would have gotten 90 to 100 votes in the Senate. Republicans and Democrats would have felt united, and the country would have felt united. But instead of uniting the country through his third choice—and this was his third choice—to succeed Justice O'Connor, the President has chosen to reward a faction of his party at the risk of dividing the country.

Those so critical of his choice of Harriet Miers were the very people who rushed to endorse the nomination of Judge Alito. Unlike what has been said on this floor, the criticism of his choice of Harriet Miers came from the Republican Party. But instead of rewarding his most virulent supporters, the President should have rewarded the American people for the unifying choice that would have broad support.

Think how much better America could have done. America can do better if we have consultation—here we didn't have it—to select one of the many consensus conservative Republican candidates who could have overwhelmingly been approved by the Senate.

Judge Alito was asked at the hearing how he got to this nomination. I think we understand the real answer to that question. It has little to do with Judge Alito's family story and a great deal to do with the pressures that forced the President to withdraw the nomination of Harriet Miers and this President's efforts to avoid any check on his expansive claims of additional powers.

This is a President who has been conducting secret and warrantless eavesdropping on Americans for more than 4 years. This President has made the most expansive claims of powers since America's patriots fought the War for Independence to rid themselves of the overbearing power of King George III. He has done so to justify illegal spying on Americans without the essential check of judicial oversight to justify actions that violate our values and laws against torture and protecting human rights, and in order to detain U.S. citizens and others on his say-so—just on his say-so—without any judicial review or due process. This is a time in our history when the protections of Americans' liberties are at risk, as are the checks and balances that have served to constrain abuses of power for more than 200 years.

The President wanted a reliable Justice who would uphold his assertions of power, his most extreme supporters want someone who will revisit the constitutional protection of privacy rights, and his business supporters wanted somebody favorable to powerful special interests.

A Supreme Court nomination should not be conducted through a series of

winks and nods designed to reassure the most extreme factions while leaving the American people in the dark. No President should be allowed to pack the courts, but especially the Supreme Court, with nominees selected to enshrine Presidential claims of Government power. The checks and balances that should be provided by the courts, Congress, and the Constitution are too important to be sacrificed to a narrow, partisan agenda. A Democratic-controlled Senate stood up to Democratic President Franklin Roosevelt when he proposed a Court-packing scheme. The Senate acted as the Senate should and so rarely does today, to say "no" to a President. I will not lend my support to an effort by this President to undermine our constitutional checks and balances or to move the Supreme Court radically to the right.

The Supreme Court belongs to all Americans, not just the person occupying the White House, not just to a narrow faction of a political party. The President continues to choose confrontation over consensus and to be a divider rather than the uniter he promised Americans he would be. Rather than sending us a nominee for all Americans, the President chose a divisive nominee who raises grave concerns about whether he would be a check on Presidential power and whether he understands the role of the courts in protecting fundamental rights.

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

As the Senate prepares to vote on this nomination, we should be mindful of Justice O'Connor's critical role on the Supreme Court. Her legacy is one of fairness I want to see preserved. Justice O'Connor has been a guardian of the protections of the Constitution provides the American people. Of fundamental importance, she has come to provide balance and a check on Government intrusion into our personal privacy and freedoms. In the Hamdi decision she rejected the President's claim he could indefinitely detain a U.S. citizen. She said not even the President is above the law. She upheld the fundamental principle of judicial review. She wrote that even war "is not a blank check for the President when it comes to the rights of the Nation's citizens."

The American people deserve a Supreme Court Justice who inspires confidence that he or she will not be beholden to the President, but will be immune to pressures from the Government or from partisan interests. The stakes for the American people could not be higher. The appointment of the next Supreme Court Justice must be made in the people's interest and in the Nation's interest, not partisan interest or the President's interest.

It is as the elected representatives of the American people, all the people,

that we are charged with the responsibility to examine whether to entrust their precious rights and liberties to this nominee. The Constitution is their document. It guarantees their rights from the heavy hand of Government intrusion and their individual liberties to freedom of speech and religion, to equal treatment, to due process and to privacy. I want all Americans to know that the Supreme Court will protect their rights. I want a Supreme Court that acts in its finest tradition as a source of justice. The Supreme Court must be an institution where the Bill of Rights and human dignity are honored.

This is Judge Alito's single moment in his lifetime, the only moment in his lifetime, of accountability before the prospect of a lifetime on our Nation's highest Court. But it is also an accountability moment for each of the 100 Senators in the decision we reach on this crucial nomination because we have to speak for 295 million Americans.

I urge all Senators to consult their consciences and their best judgment before casting their votes on this critically important nomination. But, in good conscience, based on the record, I cannot, I will not, vote for this nomination.

Mr. President, what is the parliamentary situation?

The ACTING PRESIDENT pro tempore. The Senator has 25 seconds remaining.

Mr. LEAHY. Mr. President, obviously I am distressed for many reasons about this nomination, not the least of which is everything Judge Alito said indicated he would not be a check and balance. I so wish—and I have said this to President Bush personally—I so wish he had been a uniter and not a divider. We could be here with a Senate unanimously approving a nominee, instead of this divisive battle.

I yield the floor.

The ACTING PRESIDENT pro tempore. Under the previous order, the time from 10:34 until 10:44 shall be under the control of the Senator from Pennsylvania. He is now recognized.

Mr. SPECTER. I thank the Chair.

Mr. President, as the Senate moves toward the vote on the nomination of Judge Samuel A. Alito, Jr., to be Associate Justice of the Supreme Court, we are mindful of the very heavy responsibility under the Constitution which the Senate has for confirmation of a Supreme Court Justice for a lifetime appointment. There is no vote as important, except for a declaration of war or the resolution authorizing the use of force, which is the practical equivalent of a declaration of war.

In our society, the Supreme Court of the United States is the final decision-maker in, as the process has worked out, many cutting-edge questions that come before the Supreme Court. The Supreme Court decides the issue of who shall live, who shall die—the decision which they had recently on the Oregon

law or the application of the death penalty. It is the final protector of civil rights, the adjudicator of the Commerce clause, as to what Congress can do by way of legislation, and its authority and power is magnified because so many of the decisions of the Court are on a 5-to-4 count. When we have Justice O'Connor retiring as the swing vote on so many cases, there is an even heavier air of responsibility as we move through the confirmation process of Judge Alito.

It is our responsibility to examine the nominee in terms of his qualifications. Those qualifications have been established by virtue of his educational background and his professional background. We have to make a determination of his temperament, and I believe we saw poise and patience under a very difficult confirmation process. The confirmation process has evolved and, candidly, I think Judge Alito's was a little tougher, a little more confrontational than most. That is the right of the Senators. But he certainly had ample poise and ample calm and demonstrated steadfastness and temperament.

The tougher inquiry is when we bear in and focus on what he is going to do if confirmed? What are his jurisprudential approaches? I think we have come too much to the point in our confirmation process of looking for definite answers. Some have objected to the confirmation of nominees because there is no guarantee on how they will vote in certain cases. A nominee to the Supreme Court is not supposed to give guarantees. A nominee to the Supreme Court is supposed to respond as to factors to be considered and give us an idea of his or her reasoning power. He or she is not supposed to give us guarantees on how they would rule. This goes back to President Lincoln, who said we should loathe somebody who told us in advance how he or she would rule when nominated to the Supreme Court of the United States.

There is a lot of anxiety about a woman's right to choose. I share that anxiety and I share that concern. We have seen in the history of the Court that early indications as to how an individual may feel about a woman's right to choose will not necessarily be the determinant as to how that nominee will vote when the nominee is a Justice on the Supreme Court. We have the operative case on a woman's right to choose. It is *Casey v. Planned Parenthood*, decided in 1992. It retained the woman's right to choose but modified the rationale from *Roe v. Wade* in 1973. The opinion was written jointly by Justice O'Connor, Justice Anthony Kennedy, and Justice David Souter. Prior to their becoming Supreme Court Justices, all had expressed opposition to abortion rights, opposition to a woman's right to choose. But when they came to the Court and they took a look at the precedents, when they took a look, as their joint opinion said, on reliance, they sustained the principle of a woman's right to choose.

While you had Judge Alito's statement in 1985, 21 years ago, about his own view on the subject, he made it emphatic that as a jurist he would look to precedent and his own personal views would not dominate his thinking as he applied the law in a constitutional setting.

He was also questioned at length about his work in the Solicitor General's Office on the Thornburgh case. Too much is made of what an individual does in an advocacy capacity representing a client. But Judge Alito was questioned at great length about the philosophical underpinnings of a woman's right to choose. He agreed with Justice Harlan's dissent in *Poe v. Ullman* about the Constitution being a living document. And he agreed with Cardozo in *Palko v. Connecticut*, that constitutional interpretation represents the values of an evolving society. He went about as far as he could go without making a commitment in advance.

When it came to the question of Executive power, here again he described the philosophical underpinnings of the President's authority and he agreed with Justice O'Connor that a state of war does not give a President a blank check. He outlined the considerations going to Justice Jackson's concurrence in the steel seizure case, about how he would face an issue on Executive power.

The Congress of the United States can do considerably more by way of oversight on what the Executive does, and we are going to have a hearing next Monday on the President's power for surveillance. What is the President's authority in the face of a statute, the Foreign Intelligence Surveillance Act, which requires court approval for certain surveillance operations? What are the President's article II powers as Commander in Chief? There could be a great deal more activism by the Congress. You don't have to wait for these cases to come to the Supreme Court of the United States. But if, as, and when the question does arise, I think Judge Alito outlined the jurisprudential considerations, and he is on target.

When it comes to congressional power, we could also do a lot more. The Supreme Court has been insulting in its characterization of our reasoning power, striking down legislation to protect women against violence, disagreeing with our method of reasoning, or striking down portions of the Americans With Disabilities Act, as Justice Scalia said, being a taskmaster. We are preparing legislation in the Judiciary Committee to grant Congress standing to go to court to uphold the constitutionality of our statutes.

Mr. President, how much time do I have remaining?

The PRESIDENT pro tempore. The Senator has 40 seconds.

Mr. SPECTER. When you take a look at the values of an individual, who knows him better than the judges with whom he worked?

Seven judges came before the Committee to testify and they all authenticated the conclusion that he does not have a predetermined set of values that he is going to try to force upon the country.

All factors considered, I think he is worthy of confirmation by this body.

I thank the Chair, and I yield the floor.

Mr. ROBERTS. Mr. President, I rise today to offer my support for Judge Samuel Alito, Jr., for Associate Justice to the U.S. Supreme Court. I am honored to have the opportunity to again participate in a nomination for the Supreme Court. The casting of our votes from our Senate desks, as set forth by Senate tradition, is indicative of the meaningfulness and the importance of the confirmation vote for a judicial nomination to the Supreme Court. As before, I am humbled and honored to represent my fellow Kansans in this manner.

Over the course of the hearings, the Nation has had an opportunity to learn more about Judge Alito's character, professional experience, and approach to the law. It is clear that Judge Alito's educational background is quite impressive. The son of public school teachers, Judge Alito grew up in a family in which the importance of education and hard work were firmly rooted. His father, who arrived in the United States as an infant, knew firsthand the struggles of growing up in poverty. His ability to pull himself up by his bootstraps and emphasizing education as the window to a better life laid a firm foundation for his family.

It is no surprise that Judge Alito's exceptional educational background boasts of two formidable Ivy League universities—a notable accomplishment resulting from hard work and a keen mind. However, during his testimony, his statements demonstrated that he fully recognized what an opportunity it was to attend these renowned universities and took full advantage. He said:

It was a time of turmoil at colleges and universities. And I saw some very smart people and very privileged people behaving irresponsibly. And I couldn't help making a contrast between some of the worst of what I saw on the campus and the good sense and the decency of the people back in my own community.

It is this type of commonsense that resonates with my Kansas constituents.

One only needs to look at Judge Alito's résumé to see his extensive experience in both prosecuting and applying the law. His distinguished career includes almost 15 years as a Federal prosecutor within the Department of Justice, 3 years as the U.S. Attorney for New Jersey, and most recently, 15 years as a Federal judge on the U.S. Court of Appeals for the Third Circuit. Judge Alito is well versed in the law. While some have alleged that his decisions are biased and that he is an ideologue with a political agenda, his

record, his testimony, and the testimony of his colleagues and others who have worked with him dispel those allegations. During his confirmation hearing before the Senate Judiciary Committee, Judge Alito stated:

The role of a practicing attorney is to achieve a desirable result for the client in the 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 solemn obligation—is to the rule of law, and what that means is that in every single case, the judge has to do what the law requires.

His fellow colleagues on the U.S. Court of Appeals affirm his open-mindedness, impartiality, and decisions based on the facts and the law. Notably, the American Bar Association—long viewed as the gold standard among my colleagues on the other side of the aisle—reviewed Judge Alito's judicial background and gave him their highest rating of "Well Qualified."

In a time of judicial encroachment in which courts are increasingly imposing their political will on the Nation, Judge Alito's judicial record demonstrates his efforts to stem that tide. In his testimony he refers to the role of the judiciary as very important, but limited by the authorities set forth in the Constitution. The judicial branch's responsibility lies in interpretation and application of the law and not enacting policy judgments. In other words, he is guided by the rule of law set forth by the Constitution. Others describe Judge Alito's judicial philosophy as a philosophy of restraint and in accordance with the rule of law. Other witnesses from a broad range of ideologies who know Judge Alito confirm that he is measured and judicial in his decisions.

In closing, I would like to comment on the increasing political nature in which judicial nominees are subjected to during the nominations process. During my remarks on the nomination of now Chief Justice John Roberts, I highlighted the elevated level of partisanship in the Senate. This trend of partisan bickering further threatens the comity and respect that has long been the standard for conducting Senate business. The tenor and manner of questioning, or grilling as referred to in the news headlines, of Judge Alito frays the spirit of our constitutional fabric under which we operate. I call on my colleagues to work together to raise the level of discourse in these hallowed Halls of Congress.

Mr. SHELBY. Mr. President, I rise today to support the nomination of Judge Samuel Alito to be an Associate Justice of the U.S. Supreme Court.

Judge Alito's education, legal training, and judicial record have positioned him well to serve our Nation with honor and dignity on the Supreme Court. A graduate of Princeton and Yale, Judge Alito has more than 30 years of legal experience. Over the years, he has served as a judicial clerk,

a prosecutor, an appellate lawyer before both the U.S. Court of Appeals and the U.S. Supreme Court. He has served as legal counsel to the U.S. Government and most recently as a judge on the U.S. Court of Appeals for the Third District. Judge Alito has a full breadth of experience in both criminal and civil cases as well as the trial and appeals phases of the judicial system.

I believe Judge Alito's record on the U.S. Court of Appeals for the Third District shows that he is a fair and impartial jurist. During his tenure on that court, it has been clear that he takes all legal theories and arguments into account when making decisions and issuing rulings. Judge Alito is well respected by his colleagues and has even received their praise for the manner and tone he takes in working through the facts to arrive at a decision. I do not recall anyone questioning his ability to do the job and in fact, he received a unanimous "well-qualified" rating from the American Bar Association, its highest rating.

While many have criticized Judge Alito's supposed judicial philosophy, I believe that his written decisions and statements as well as his appearance before the Judiciary Committee confirmed his ability to set personal views and ideology aside so as to not cloud his interpretation of the law. I commend Judge Alito for his poise and composure throughout one of the most arduous hearings in recent memory.

The time has come for Congress and the President to serve as a check on the judicial activism that has become so prevalent in the judiciary today.

I believe that we must have judges that interpret the Constitution and the law rather than manipulate it to meet their personal ideologies. Judge Alito fits that mold.

Mr. President, I am proud to support Judge Alito and look forward to him becoming the next Associate Justice on the United States Supreme Court.

The PRESIDENT pro tempore. Under the previous order, the Democratic leader is recognized time until 10:54.

Mr. REID. Mr. President, in his opening statement to the Judiciary Committee, Judge Samuel Alito asked, "How in the world did I get here?" That rhetorical question raises a serious concern about him, and it has shadowed his nomination from the very beginning. The fact is, Judge Alito became President Bush's candidate to replace Justice Sandra Day O'Connor only after the radical rightwing torpedoed the nomination of White House counsel Harriet Miers and insisted that someone with Sam Alito's ideology be put in her place. That is how Judge Alito "got here."

I continue to believe that Harriet Miers received a raw deal. She is an accomplished lawyer, a trailblazer for women, and a strong advocate of legal services for the poor. Not only was she denied the up-or-down vote that my Republican colleagues say every nominee deserves, but she was never even

afforded the chance to make her case to the Judiciary Committee.

I believe radical elements in the President's own party demanded that Miers withdraw not because of her lack of judicial experience as some exclaimed but because they were insufficiently confident she would support their extreme agenda. Remember, approximately 40 percent of all people who have ever served on the Supreme Court had no judicial experience.

The rightwing distrust of Harriet Miers and their immediate elation when Judge Alito was named raised my suspicions on the day that he was nominated. Those suspicions were heightened when Alito's 1985 application for a job in the Reagan administration came to light. In it, Alito stated, "I am and always have been a conservative." He spoke proudly of his work on behalf of the extreme agenda of the Reagan Justice Department, his disagreement with landmark rulings of the Warren Court in favor of equal rights, and his membership in rightwing organizations. In effect, the 1985 document amounted to Judge Alito's pledge of allegiance to conservative, radical Republican ideology.

I don't propose the Alito nomination is on the basis of a 20-year-old job application. Instead, I view that document as a roadmap to Judge Alito's subsequent judicial opinions and speeches.

Judge Alito's judicial opinions have been largely consistent with his ideological signals; that is, the signals he sent in the 1985 job application. One of the most prominent and eminent legal scholars in all of America, Professor Cass Sunstein of the University of Chicago Law School, who generally supported the nomination of Chief Justice John Roberts, analyzed Alito's opinions and found "a remarkable pattern" of "almost uniformly conservative" dissents. Professor Sunstein concluded that "the real question about Alito involves the disturbingly close link between his political convictions and his legal conclusions."

My concern about Judge Alito falls into three broad categories. First, I fear he will not vindicate the role of the judiciary as a check on executive branch power. Second, he is a leader in the so-called federalism movement which would limit congressional power to pass environmental laws and remedy other national problems. Third, in disputes between ordinary American citizens and the powerful corporations and government, Judge Alito is often—and too often—on the side of the powerful and against the interests of the individual.

First, I am disturbed by Judge Alito's overall bowing to Executive pressure, bowing to Executive power. At a time when President Bush asserted unprecedented authority over the lives of American citizens and the Republican-controlled Congress seems too willing to cede those powers to him, I cannot support the nomination

of a judge predisposed to giving the President the benefit of every doubt.

In matters ranging from domestic spying to the use of torture, the current President has effectively declared himself above the law. Meanwhile, a Congress controlled by the President's party has stripped the courts of jurisdiction to hear habeas corpus cases brought by Guantanamo detainees, some of whom have absolutely nothing to do with terrorism. In the face of such profound threats to the separation of powers in our Constitution, we need a Supreme Court comprised of independent and impartial judges willing to stand up to imperial Presidencies.

Rather than serving as a check on President Bush's abuses of power, I worry that Judge Alito will instead serve as a rubberstamp. Both on and off the bench, Alito's writings and opinions show a record of extreme deference to Executive power, whether exercised by the President or by Federal and local law enforcement officials.

Even before he was a judge, Alito made a name for himself arguing for expansive Executive power. As a Justice Department attorney, he wrote that the Attorney General should have absolute immunity from lawsuits arising from illegal wiretaps. He also argued on the side of a Tennessee police officer who shot and killed an unarmed 15-year-old boy not because the officer believed the boy was armed, but to prevent escape from a petty crime.

Alito's judicial rulings on executive power heighten my concerns in this area. In the recent decision of *United States v. Lee*, he found that an FBI undercover probe that included audio and video surveillance of the defendant's hotel suite without a warrant did not violate the Fourth Amendment.

The government wins, you lose.

In an earlier case in which Judge Alito voted to uphold the strip-search of a 10-year-old girl, then-Judge Michael Chertoff, now President Bush's Secretary of Homeland Security, criticized Alito's views as threatening to "transform the judicial officer into little more than the cliché 'rubber stamp.'"

Again, government wins, you lose.

Judge Alito's unshakable deference to police officers conducting intrusive searches seems to extend to his view at the power of the President to act unilaterally when setting national policies.

In a speech to the Federalist Society in November 2000, he professed his strong belief in the so-called "unitary executive" theory of constitutional law, a theory embraced by those who advocate for expanding executive powers at the expense of the judicial and legislative branches of government.

Judge Alito's disturbing views on the constitutional separation of powers is also reflected in his refusal to condemn laws in which Congress strips courts of jurisdiction to hear certain disputes. For example, Senator LEAHY asked the

nominee if Congress could strip the Supreme Court of jurisdiction over all cases arising under the First Amendment. Alito declined to respond directly, saying the matter was the subject of academic dispute.

These comments lead me to doubt that Judge Alito fully appreciates that the role of the courts is to protect constitutional rights and liberties in the face of an overreaching majority.

Second, I am concerned that Judge Alito would limit the authority of Congress to address environmental protection and other national needs. I fear that Alito would join Justices Scalia and Thomas in their activist campaign to narrow congressional power under the Commerce Clause, a movement that threatens important public health and welfare laws in the name of "federalism."

Once again, the roots of Judge Alito's ideology can be found in his work during the Reagan Administration. As Deputy Attorney General in 1986, Judge Alito recommended that President Reagan veto the Truth in Mileage Act, a law designed to prevent odometer tampering, because "it violates the principles of federalism."

And again, Judge Alito seems to have carried his Reagan-era ideology with him when he joined the Third Circuit. In the *Chittester* case, for example, he held that Congress lacks authority to allow State employees to enforce aspects of the Family and Medical Leave Act. His logic would cripple the ability of Congress to help people with real problems, such as those who are disabled. Again, government wins, you lose.

There is every reason to fear that Judge Alito will work to continue the Court's unwarranted restriction of Congressional power in these areas.

Third and finally, Judge Alito's nomination troubles me because in his 15 years on the bench he has repeatedly and consistently favored the power of government and corporations over the rights of individual American citizens. As many commentators have observed, Judge Alito hardly ever sides with the proverbial "little guy."

The government wins, you lose.

A Knight-Ridder review of Alito's 311 published opinions on the 3rd Circuit Court of Appeals found that Judge Alito very rarely supports individual rights claims. In a separate study, Professor Sunstein found that Judge Alito ruled against the individual in 84 percent of his dissent—84 percent of the time.

Again, government wins, you lose.

In civil rights cases, Judge Alito has often voted to impose higher barriers for people with claims of discrimination.

In *Bray v. Marriott Hotels*—a case dealing with race discrimination—his colleagues said Title VII of the Civil Rights Act "would be eviscerated" if Alito's approach were followed. Again, big business would win, and you would lose. And in *Nathanson v. Medical College of Pennsylvania*, he dissented in a

disability rights case where the majority said: "few if any Rehabilitation Act cases would survive" if Judge Alito's view were the law.

Again, big business and government wins, you lose.

Perhaps the most important instance when the rights of an individual conflict with the interests of the government are when the state seeks to carry out the death penalty.

How anyone could come up with the conclusion of Judge Alito's is really hard to understand.

Senators LEAHY and FEINGOLD asked Judge Alito whether it would be unconstitutional to execute an "unquestionably innocent man."

The obvious answer from anyone would be quite clear. It would be plainly unconstitutional. But Judge Alito refused to say so. Instead, he spoke in bland bureaucratic terms about the need for the innocent person to file the proper petitions under proper Federal rule.

Remember, the question was, "Would it be unconstitutional to execute an unquestionably innocent man?" Of course, it would.

That was a chilling moment. If the Constitution means anything it means that the state cannot put to death an "unquestionably innocent" person. If Judge Alito cannot say that without equivocation, he is not the kind of judge I want on the Supreme Court of the United States.

These three broad concerns about Judge Alito's record on the bench are all the more troubling in light of the fact that Judge Alito has been nominated to replace Justice Sandra Day O'Connor, a national icon who has been a voice of moderation and reason on the Court for the last quarter of a century.

President Bush was not obligated to nominate a clone of Justice O'Connor. But this President has no mandate to move the Supreme Court and American law in a radical rightward direction. That is precisely what replacing Justice O'Connor with Judge Alito will accomplish.

That Judge Alito has been nominated to replace Justice O'Connor is relevant in another sense. Justice O'Connor was the first of only two women ever to sit on the Supreme Court. It remains disturbing to me that she would be replaced by a man, leaving only one woman on the nine-member Court.

Today, more than half of the nation's law students are women. There are countless qualified women on the bench, in elective office, in law firms, and serving as law school deans. I can't believe the President searched the country and was unable to find a qualified female nominee. But maybe he was unable to find a qualified female nominee who satisfied the radical far right wing of the Republican Party.

Meanwhile, for the third time, this President has turned down the opportunity to make history by nominating the first Hispanic to the Court. How

much longer must Hispanics across America wait before they see someone on the nation's highest court who shares their ethnic heritage and their shared experiences?

I have no doubt that Sam Alito is a decent man.

But a confirmation debate is not a popularity contest. The rights and liberties of the American people are at stake. This particular nomination raises profound questions about our system of checks and balances.

We need to ask whether a Justice Alito will serve as an effective check on a swaggering President and his reckless policies.

At this critical moment in our Nation's history, I cannot support the confirmation of this nominee to fill this vacancy on the Supreme Court of the United States.

The PRESIDENT pro tempore. Under the previous order, the majority leader is recognized.

Mr. FRIST. Mr. President, at the end of a debate in the Senate there is rarely a question of whether everything has been said—only whether every Senator has said it.

After 92 days since this nomination was announced, after 30 hours of Judiciary Committee hearings, after Judge Alito answered more than 650 questions, and after 5 days of debate on the floor of the Senate, there is little left to be said. So I will be brief.

To President Bush I say thank you. To President Bush I say thank you for nominating such an exceptionally qualified individual as Sam Alito to serve on the Supreme Court.

To my Senate colleagues I say well done to the supermajority of Senators who joined yesterday to elevate principle above partisan politics and defeat an unjustified filibuster of this nomination.

And to Judge Alito I say: You deserve the seat on the Supreme Court. Today, you will become the 110th Justice to serve on the Court throughout America's history. It is a seat that is reserved for a few but that impacts millions. May the Constitution and rule of law be the light that illuminates each case that comes before you.

So, momentarily, we will vote from our desks, a time-honored tradition that demonstrates, once again, how important and consequential every Member takes his duty under the Constitution to provide advise and consent on a Supreme Court nomination and to give the nominee the fair up-or-down vote he deserves. It is time to call the roll.

There is only one thing left to say. I ask for the yeas and nays on the nomination of Samuel Alito to serve as Associate Justice of the Supreme Court of the United States.

The PRESIDENT pro tempore. Is there a sufficient second?

There is a sufficient second.

The question is, Will the Senate advise and consent to the nomination of Samuel A. Alito Jr., of New Jersey, to be an Associate Justice of the Supreme

Court of the United States? On this question, the yeas and nays have been ordered. Senators are requested to vote from their seats.

The clerk will call the roll.

The assistant legislative clerk called the roll.

The PRESIDENT pro tempore. The Chair admonishes all present that no reaction to a Senate vote is permitted under Senate rules.

The result was announced—yeas 58, nays 42, as follows:

[Rollcall Vote No. 2 Ex.]

YEAS—58

Alexander	DeWine	McConnell
Allard	Dole	Murkowski
Allen	Domenici	Nelson (NE)
Bennett	Ensign	Roberts
Bond	Enzi	Santorum
Brownback	Frist	Sessions
Bunning	Graham	Shelby
Burns	Grassley	Smith
Burr	Gregg	Snowe
Byrd	Hagel	Specter
Chambliss	Hatch	Stevens
Coburn	Hutchinson	Sununu
Cochran	Inhofe	Talent
Coleman	Isakson	Thomas
Collins	Johnson	Thune
Conrad	Kyl	Vitter
Cornyn	Lott	Voinovich
Craig	Lugar	Warner
Crapo	Martinez	
DeMint	McCain	

NAYS—42

Akaka	Feingold	Menendez
Baucus	Feinstein	Mikulski
Bayh	Harkin	Murray
Biden	Inouye	Nelson (FL)
Bingaman	Jeffords	Obama
Boxer	Kennedy	Pryor
Cantwell	Kerry	Reed
Carper	Kohl	Reid
Chafee	Landrieu	Rockefeller
Clinton	Lautenberg	Salazar
Dayton	Leahy	Sarbanes
Dodd	Levin	Schumer
Dorgan	Lieberman	Stabenow
Durbin	Lincoln	Wyden

The nomination was confirmed.

The PRESIDENT pro tempore. The majority leader.

Mr. FRIST. I move to reconsider the vote.

Mr. McCONNELL. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. FRIST. Mr. President, I ask unanimous consent that the President be immediately notified of the Senate's action.

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

NOMINATIONS OF BEN S. BERNANKE TO BE A MEMBER AND CHAIRMAN OF THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

Mr. FRIST. Mr. President, I now ask that the Senate proceed to the nominations of Ben Bernanke, as under the previous order.

For the information of colleagues, we will begin debate on the Bernanke nominations now and will conclude the remaining debate after the policy lunches.

The PRESIDENT pro tempore. I cannot hear the leader.

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