

would rule on issues. And I was pleased to see that Chief Justice Roberts refused to prejudge issues or make promises in exchange for confirmation votes. We are all better off because of his principled stand.

Soon after his confirmation, Justice Ginsburg was asked about this Ginsburg standard as applied to the Roberts hearings, and she said, "Judge Roberts was unquestionably right. My rule was I will not answer a question that attempts to project how I will rule in a case that might come before the Court." In other words, Justice Ginsburg reaffirmed the Ginsburg standard.

In light of the Chief Justice's confirmation hearings and Justice Ginsburg's later remarks, I asked my colleagues for basic fair play. Apply the same standards to Judge Alito that we applied to John Roberts, Stephen Breyer, Ruth Bader Ginsburg, and all of the other sitting Justices. Let's not invent a new standard for Judge Alito or change the rules in the middle of the game. Politicians must let voters know what they think about issues before the election. Judges should not.

And it is not a hypothetical matter. Senator Kennedy in his opening statement expressed concern about the extent of the executive branch's authority to conduct surveillance of terrorists and said ultimately the courts will decide whether the President has gone too far. Indeed they will.

Judge Alito, I will tell you the same thing I told John Roberts. I expect you to adhere to the Code of Judicial Conduct, and I want you to know that I will strongly defend your refusal to give any indication of how you might rule on any matter that might come before you as a judge or to answer any question that you believe to be improper under the circumstances. Congratulations, Judge Alito, on your nomination.

Chairman SPECTER. Thank you, Senator Kyl.  
Senator Kohl?

**STATEMENT OF HON. HERBERT KOHL, A U.S. SENATOR FROM  
THE STATE OF WISCONSIN**

Senator KOHL. Thank you, Mr. Chairman.

Judge Alito, let me also send my welcome to you this afternoon and to your family. You are to be congratulated on your nomination.

Through its interpretation of the Constitution, the Supreme Court hugely shapes the fabric of our society for us and for future generations. Over the course of more than 200 years, it has found a right to equal education regardless of race. It has guaranteed an attorney and a fair trial to all Americans, rich and poor alike. It has allowed women to keep private medical decisions private. And it has allowed Americans to speak, vote, and worship without interference from their Government.

Through these decisions and many more, the judicial branch has in its finest hours stood firmly on the side of individuals against those who would trample their rights. In the words of Justice Black, "The courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice or public excitement."

As the guardian of our rights, the Supreme Court makes decisions every year which either protect the individual or leave him at the mercy of more powerful forces in our society. They consider questions like when can a disabled individual sue to gain access to a courthouse, when can a parent leave work to care for a sick child, when should the Government be allowed to listen to a private conversation, and when will the courthouse doors open or close to an employee suffering discrimination at work.

Whether interpreting the Constitution or filling in the blanks of a law or a regulation, every word of the Court's opinion can widen or narrow our rights as Americans and either protect us or leave us more vulnerable to any winds that blow. If confirmed, you will write the words that will either broaden or narrow our rights for the rest of your working life. You will be interpreting the Constitution in which we as a people place our faith and on which our freedoms as a Nation rest. And on a daily basis, the words of your opinions will affect countless individuals as they seek protection behind the courthouse doors.

Despite your enormous power, you will be free of all constraints, unaccountable and unrecalable. We give Supreme Court Justices this freedom because we expect them to remain above the pull of politics, to avoid the effects of public excitement and allow a broader view, not tied to the whims of the majority at a certain moment in the history. So for only a short time this month will the people through their Senators be able to question and to judge you. In short, before we give you the keys to the car, we would like to know where you plan to take us.

To a certain extent, we know more about what is in your heart and in your mind than we did with now Justice Roberts. You have a long track record as a judge and as a public official in the Justice Department. When we met privately and I asked you what sort of Supreme Court Justice you would make, your answer was fair when you said, "If you want to know what sort of a Justice I would make, then look at what sort of a judge I have been."

Taking this advice, your critics argue that your judicial record demonstrates that you will not sufficiently protect the individual, but will instead side with more powerful interests, narrow the rights we enjoy, and leave individual Americans more vulnerable to abuse. For example, they cite your *Casey* dissent as diminishing the power of married women over their own bodies. They identify your decision in the *Chittister* case as evidence that you will make it harder for working people to care for a family. They cite the *Bray* case and others where you often side with corporations to block the victims of discrimination from getting their day in court. Others raise concerns about your views on the rights of the accused when faced with the Government's enormous power in the criminal justice process.

In addition to your record on the bench, your opponents identify memos you wrote while in the Justice Department as further evidence of your hostility to individual rights. For example, in your now famous 1985 job application, you expressed pride in some of the work you did in the Solicitor General's office. You chose to single out the assistance that you provided in crafting Supreme Court briefs urging that "the Constitution does not protect a right to an

abortion.” While these statements came in the context of your work on behalf of the Reagan administration, they were, nevertheless, your self-proclaimed personal views.

In the same job application, you wrote that you had pursued a legal career because you disagreed with many of the decisions of the Warren Court, especially, and I quote, “in the areas of criminal procedure, the Establishment Clause, and reapportionment.” These Warren Court decisions establishing one person/one vote, *Miranda* rights, and protections for religious minorities are some of the most important cases protecting our rights and our liberties, protecting minorities against majority abuses and protecting individuals against Government abuses, and yet antagonism toward these decisions seems to have motivated your pursuit of the law.

Your supporters, on the other hand, contend that it is not fair to select a few specific cases in light of a career as a judge spanning 15 years. Further, they dismiss some of your early memos in the Justice Department as old and not particularly relevant. They argue that you are well within the mainstream of judges, especially Republican-appointed judges.

So it is our job to sort out the truth about your record, separate the rhetoric from the reality, and decide where you will lead the country. We will need to examine whether, as your critics contend, you will consistently side against the individual or whether, as your supporters contend, you are a mainstream conservative who will fairly decide all cases. I hope these hearings will add to our record in making this critical determination.

This would be an appropriate time to share my perspective on how we will judge the nominee. We have used the same test for each of the five previous Supreme Court nomination hearings: a test of judicial excellence. Judicial excellence, it seems to me, involves at least four elements:

First, a nominee must possess the competence, character, and temperament to serve on the bench.

Second, judicial excellence means that a Supreme Court Justice must have a sense of the values from which the core of our political and economic system goes. In other words, we should not approve any nominee whose extreme judicial philosophy would undermine rights and liberties relied upon by all Americans.

Third, judicial excellence requires an understanding that the law is more than an intellectual game and more than a mental exercise. He or she must recognize that real people with real problems are affected by the decisions rendered by the Court. Justice, after all, may be blind, but it should not be deaf.

And, finally, judicial excellence requires candor before confirmation. We are being asked to give the nominee enormous power, and so we want to know what is in your mind and in your heart.

Judge Alito, we are convinced that your intellect and experience qualifies you for this position. I enjoyed meeting you a few weeks ago and appreciated our discussion. Your legal talents are undeniably impressive, and your opinions are thoughtful and well reasoned. We are now familiar with your abilities in your long tenure as a judge. And yet we do not know whether the concerns some have raised about your judicial philosophy are overstated or whether we need to have serious doubts about your nomination. I look

forward to these hearings as an opportunity to learn more and measure whether you meet our test of judicial excellence.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you, Senator Kohl.

Senator DeWine.

**STATEMENT OF HON. MIKE DEWINE, A U.S. SENATOR FROM  
THE STATE OF OHIO**

Senator DEWINE. Thank you, Mr. Chairman.

Judge Alito, I want to welcome you and your family, appreciate you being here with us today.

The Constitution gives the Senate a solemn duty, a solemn duty when it comes to the nomination of any individual to sit on the U.S. Supreme Court. While the President is to nominate that individual, we in the Senate must provide our advice and consent. This function is not well defined. The Constitution does not set down a road map. It does not require hearings. In fact, it does not even require questioning on your understanding of the Constitution or the role of the Supreme Court.

To me, however, these things are certainly important. The reason is obvious. When it comes to the Supreme Court, the American people have only two times when they have any input into how our Constitution is interpreted and who will have the privilege to do so. First, we elect a President who has the power to nominate Justices to the Supreme Court. Second, the people, acting through their representatives in the Senate, have their say on whether the President's nominee should in fact be confirmed.

Judge Alito, I want to use our time together today to make a point about democracy. When it comes to our Constitution, judges perform certainly an important role. But the people, acting through their elected representatives, should play an even more important role. After all, our Constitution was intended as a popular document. It was drafted and ratified by the people. It established democratic institutions. It entrusts the people with the power to make the tough decisions. In most cases, it prefers the will of the people to the unchecked rule of judges. If confirmed, Judge, you should always keep this in mind.

In my opinion, Chief Justice Roberts put it best during his recent confirmation hearings, when he said, and I quote, "The Framers were not the sort of people, having fought a revolution, having fought a revolution to get the right of self government, to sit down and say, well, let's take all the difficult issues before us, let's have the judges decide them. That would have been the farthest thing from their mind," end of quote.

Sometimes, Judge, however, I fear that the Supreme Court forgets this advice. In the last 15 years, in fact, the Court has struck down, in whole or in part, more than 35 acts of this Congress, and nearly 60 State and local laws. Without question, the Court does play a vital role in our constitutional system. Sometimes local, State, and Federal law so clearly run afoul of the Constitution, that the Court must step in and strike them down.

In most cases, the Court performs this admirably and with great restraint. In recent years, the Court has struck down some laws that, in my opinion, did not deserve such a fate. Take, for instance,