

CONFIRMATION HEARING OF SAMUEL A. ALITO, JR.

OPENING STATEMENT OF SENATOR CHARLES E. SCHUMER JANUARY 9, 2006

Judge Alito, welcome to you, Mrs. Alito and your two children. I join my colleagues in congratulating you on your nomination to the position of Associate Justice of the United States Supreme Court.

If confirmed, you will be one of nine people who collectively hold power over everyone who lives in this country. You will define our freedom; you will affect our security; you will shape our law.

You will determine, on some days, where we pray and how we vote; you will define, on other days, when life begins and what our schools may teach; and you will decide, from time to time, who shall live and who shall die.

The decisions are final, and appeals impossible.

That is the awesome responsibility and power of a Supreme Court Justice. It is, therefore, only appropriate that everyone who aspires to that office bear a heavy burden when they come before the Senate and the American people to prove that they are worthy.

But while every Supreme Court nominee has a great burden, yours, Judge Alito, is triply high.

First, because you have been named to replace Justice Sandra Day O'Connor, the pivotal swing vote on a divided Court; second, because you have been picked to placate the extreme right wing after the hasty withdrawal of Harriet Miers; and, finally, because your record of opinions and statements on a number of critical Constitutional questions seems quite extreme.

So, first, as this Committee takes up your nomination, we cannot forget recent history, because that history increases your burden and explains why the American people want us to examine every portion of your record with great care.

Harriet Miers's nomination was blocked by a cadre of conservative critics who undermined her at every turn. She did not get to explain her judicial philosophy; she did not get to testify at a hearing; and she did not get the up-or-down vote on the Senate Floor that her critics are now demanding that you receive.

Why? For the simple reason that those critics could not be sure that her judicial philosophy squared with their extreme political agenda. They seem to be very sure with you.

The same critics who called the President on the carpet for naming Harriet Miers have

rolled out the red carpet for you, Judge Alito. We would be remiss if we did not explore why.

And there is an additional significance to the Miers precedent, which is this: Everyone now seems to agree that nominees should explain their judicial philosophy and ideology.

After so many of my friends across the aisle spoke so loudly about the obligation of nominees to testify candidly about their legal views and their judicial philosophy when the nominee was Harriet Miers, I hope we will not see a flip-flop now that the nominee is Sam Alito.

The second reason your burden is higher, of course, is that you are filling the shoes of Sandra Day O'Connor. Those are big shoes, to be sure.

But hers are also special shoes – she was the first woman Justice in the history of the High Court, is the only sitting Justice with experience as a legislator, and has been the most frequent swing vote in a quarter century of service on the Court.

While Sandra Day O'Connor has been at the fulcrum of the Court, you appear poised to add weight to one side. That alone is not necessarily cause for alarm or surprise, but it is certainly a reason for pause.

Balance is an important feature on the Court, and your nomination must be viewed in the context of the seat you are seeking, in this case one occupied for 25 years by a pragmatic and mainstream Justice – conservative to be sure, but within the broad conservative mainstream.

Are you in Justice O'Connor's mold? Or, as the President has vowed, are you in the mold of Justices Scalia and Thomas?

Most importantly, though, your burden is high because of your record.

Although I have not made up my mind, I have serious concerns about that record. There are reasons to be troubled. You are the most prolific dissenter in the Third Circuit.

This morning President Bush said Judge Alito has the intellect and judicial temperament to be on the Court. But the President left out the most important qualification – a nominee's judicial philosophy.

Judge Alito, in case after case after case, you give the impression of applying careful legal reasoning, but too many times you happen to reach most conservative result.

Judge Alito, you give the impression of being a meticulous legal navigator, but, in the end, you always seem to chart a rightward course.

Some wrongly suggest that we are being results-oriented when we question the results

you have reached. But just the opposite is true. We are trying to make sure that you are capable of being fair no matter the identity of the party before you.

Sometimes you give the Government a free pass, but refuse to give plaintiffs a fair shake.

We need to know that Presidents and paupers will receive equal justice in your courtroom.

We need to know that you will not bypass precedent when it is convenient. Or that you will apply strict rules of construction in some cases, but not in others because of the issues or parties involved.

If the record showed that an umpire repeatedly called 95 percent of pitches strikes when one team's players were up and repeatedly called 95 percent of pitches balls when the other team's players were up, one would naturally ask whether the umpire was really being impartial and fair.

In many areas, we will expect clear and straightforward answers because you have a record on these issues – for example, executive power, Congressional power, and personal autonomy, just to name a few.

The President is not a king – free to take any action he chooses, without limitation by law; the Court is not a legislature – free to substitute its own judgment for that of the elected bodies; and the people are not subjects – powerless to control their own most intimate decisions.

Will your judicial philosophy preserve these principles? Or erode them?

In each of these areas, there is cause for concern. In the area of executive power, Judge Alito, you have embraced and endorsed the theory of the “unitary executive.”

You have thus endorsed, in writing, a truly vast power for the President. Under this view of separation of powers, the Independent Counsel Act was unconstitutional, and the FTC, the SEC, and all of the regulatory agencies are unconstitutional. Even the 9/11 Commission may have been an unconstitutional encroachment upon the “unitary executive.”

Your deferential and absolutist view of separation of powers raises other questions. Under your view, the President would, for instance, also seem to have inherent authority to wiretap

American citizens without a warrant, to ignore Congressional acts at will, or to take any other action he saw fit under his inherent powers.

We need to know: When a President goes too far, will you be a check on his power, or will you issue him a blank check to exercise whatever power he alone thinks appropriate?

Right now, that is an open question given your stated views.

Similarly, on the issue of federalism, you seem to have taken an extreme view, substituting your own judgment for that of the legislature. Certainly, in one important case, you wrote in *U.S. v. Rybar* that Congress had exceeded its power by prohibiting the possession of fully automatic machine guns.

The other judges on your court all disagreed with you. And all five other circuits that had considered the issue up to that point also disagreed with you.

Do you still hold these cramped views of Congressional power? Will you engage in judicial activism to find ways to strike down laws that the American people want their elected representatives to pass and that the Constitution authorizes? Because of your stated views, right now, these are also open questions.

And, of course, you have made strident statements expressing your view that the “Constitution does not protect a right to an abortion.” In fact you said in 1985, that you “personally believe very strongly” this is true.

You also spoke, while in the Justice Department, of the “opportunity to advance the goals of bringing about the eventual overruling of *Roe v. Wade*.”

It should not be surprising that these statements will bring a searching inquiry – as many of my colleagues have already suggested.

So we will ask you: Do you still “personally believe very strongly. . . that the Constitution does not protect a right to an abortion”?

We will ask: Do you view elevation to the Supreme Court – where you will no longer be bound by High Court precedent – as the long-sought “opportunity to advance the goals of bringing about the eventual overruling of *Roe v. Wade*,” as you stated in 1985?

And there are other areas that we will have to explore. From the neutral application of the civil rights laws to the wisdom of the one-man-one-vote rule, your record has given us reason to ask questions.

I sincerely hope that you will answer our questions, Judge Alito. Most of the familiar arguments for ducking direct questions no longer apply and certainly do not apply in your case.

For example, the logic of the mantra – repeated by John Roberts at his hearing – that one could not speak on a subject because the issue was likely to come before him quickly vanishes when the nominee has a written record, as you do on so many subjects.

Even under the so-called “Ginsburg precedent” – which was endorsed by Judge Roberts, Republican Senators, and the White House – you have an obligation to answer questions

on topics that you have written about.

On the issue of choice, for example, because you have already made blanket statements about your view of the Constitution and your support for the overruling of Roe, you have already given the appearance of bias; you have already given the suggestion of pre-judgment on a question that will likely come before the Supreme Court. So, I respectfully submit, you cannot use that as a basis for not answering.

So, I hope, Judge Alito, that when we ask you about prior statements you have made about the law – some strong, some even strident – you will not simply answer, “No comment”; that you will not dismiss prior expressions of decidedly legal opinions as merely “personal beliefs.”

That will enhance neither your credibility nor your reputation for careful legal reasoning.

In the end, Judge, it is more important that you answer than what you answer. We can have a respectful disagreement on the law, after an open and honest discussion, but we will serve neither the American people nor the democratic process if we learn little about those views.

I look forward to a full and fair hearing. And I look forward to learning a good deal more about you, Judge Alito.