

in this process because this is the nature of our system of Government, but I do not like to see facts twisted, untruths fabricated to give the nominee a black eye even before he comes before our Committee.

So, Judge Alito, now you have that opportunity to set everyone straight on your record and your approach to deciding cases. These hearings are also an opportunity, a very good opportunity to remind the public about the proper role of a judge in our system of checks and balances limited Government. Judges are required by our democratic system not to overstep their positions to become policymakers or super legislators. Supreme Court nominees should know, without any doubt, that their job is not to impose their own personal opinions of what is right and wrong, but to say what the law is, rather than what they personally think the law ought to be. Supreme Court nominees should know that this exercise of judicial restraint is a key ingredient of being a good judge, as the Constitution constrains judges every bit as it constrains we legislators, executives and citizens in their actions.

Moreover, Supreme Court nominees should be individuals who not only understand but truly respect the equal roles and responsibilities of different branches of Government and our State Governments. As Alexander Hamilton said in Federalist No. 78, "The courts must decide the sense of the law, and if they should be disposed to exercise will instead of judgment, the consequences would be the substitution of their pleasure to that of the legislative body." Our Framers expected the judicial branch to be the least dangerous branch of Government.

At our meeting in my office in November, I heard Judge Alito place emphasis on the limited role of the courts in our democratic society. He also reiterated this belief in a questionnaire he submitted to this Committee. So I have some idea of how Judge Alito approaches the law and views the role of a judge. I am hopeful that his commitment to judicial restraint and to confining decisions to the law and the Constitution will shine through in this hearing, and I believe it will, and I am hopeful that my colleagues will give Judge Alito a civil, a fair and a dignified process, as well as an up or down vote, because as always, the Constitution sets the standard: the President nominates, the Senate deliberates, and then we are obligated to give our advice and consent in an up or down vote.

Judge Alito, I congratulate you.

Chairman SPECTER. Thank you very much, Senator Grassley.
Senator Biden.

**STATEMENT OF HON. JOSEPH R. BIDEN, JR., A U.S. SENATOR
FROM THE STATE OF DELAWARE**

Senator BIDEN. Thank you, Mr. Chairman.

Judge, welcome. Mrs. Alito and your family, welcome. It is an incredible honor to be nominated by a President of the United States to be an Associate Justice of the Supreme Court, and you are to be congratulated.

Judge, this may be one of the most significant, consequential nominations that the Senate will vote on since I have been here in the last three decades. I think history has delivered you, fortunately or unfortunately, to a moment where Supreme Court histo-

rians far into the future are going to look back on this nomination and make a judgment whether or not with your nomination, and if you are confirmed, whether the jurisprudence of the Supreme Court begin to change from the consensus that existed the last 70 years, or whether it continued on the same path it has over the past six or seven decades, and that moment is right now.

Lest we think it is kind of like we all go through this process—and I like the phrase “minuet” that the Chairman used—we all act like there is not an elephant in the room. The truth of the matter is, there is significant debate among judicial scholars today as to whether or not we have gone off on the wrong path with regard to Supreme Court decisions. There is a very significant dispute that has existed in 5–4 decisions over the past two decades in a Court that is very closely divided on the critical, central issues of the day.

Just to make it clear, I am puzzled by some of the things you have said, and I am sure you are going to get a chance to tell me what you meant by some of the things you wrote and said, but when in your job application you talked about being proud, as you should be, to be proud of your subscription to and adhering to notions put forward in the *National Review* that you are a proud member of the Federalist Society, the National Conservative Political Action Committee, the *American Spectator* is something you look to, et cetera. These are all really very bright folks. They all have a very decided opinion on the issues of the day—very decided. And those very organizations I have named think, for example, we misread the Fifth Amendment and have been misreading it for the past three decades. Those same groups argue that, in fact, there is no right of privacy in the Constitution, et cetera. So people are not making this up. In a sense, it is not about you. You find yourself in the middle of one of the most significant national debates in modern constitutional history because you have been nominated to replace a woman, in addition, who has been the deciding vote on a significant number of these cases. Since 1995 there have been 193 5–4 decisions, and Justice O’Connor 77 percent of the time has been the deciding vote. And for 70 years, there has been a consensus among scholars and the American people on a reading of the Constitution that protects the right of privacy, the autonomy of individuals, while at the same time empowering the Federal Government to protect the less powerful. Only recently has the debate come that States rights are being trumped in a fundamental way, a reading of the 10th Amendment and 11th Amendment. That is a legitimate debate. Totally legitimate. But anybody who pretends that how you read the 10th and 11th Amendment does not have a fundamental impact on the things we care about is kidding themselves. They are either uninformed or they are kidding themselves.

So, Judge, there is a genuine struggle going on well beyond you, well beyond the Congress, in America about how to read the Constitution. And I believe at its core we have a Constitution, as our Supreme Court’s first great Justice Marshall said in 1819, and I quote, “intended to endure for the ages to come and consequently to be adapted to the various crises of human affairs.” That is the crux of the debate we are having now, whether it is an adaptable Constitution. A lot of my friends make very powerful and con-

vincing arguments—and they may be right—that, no, no, no, no, no, it is not adaptable, it is not adaptable. And since our country's founding, we have tried to keep Government's heavy hand out of our personal lives while ensuring that we do the most important thing, which is to protect those who cannot protect themselves. And the debate raging today is about whether we will continue along that path and whether our courts will continue to be one of the places where society puts the little guy—and I know this is not something you are supposed to say—the little guy on the same footing with the big guy. The one place David is equal to Goliath is in the Supreme Court.

It is also important to note that you are slated to replace the first woman ever nominated to the Supreme Court. We can pretend that is not the fact, but it is. And through no fault of your own, we are cutting the number of women in half on the Court. And now, as I said, that is not your fault, but I think it means that we have to take, at least speaking for myself, a closer look at your stands on issues that are important to women. And, moreover, Justice O'Connor brought critical qualities to the High Court that not everybody thinks are qualities—I happen to think they are—her pragmatism and her statecraft. Not that I have always agreed with what she said, far from it, but Justice O'Connor has been properly lauded in my view as a judge who approached her duties with open-mindedness and with a sensitivity to the effects her decisions would have on everyday, ordinary people. She, unlike Judge Bork, did not think that being on the Court would be “an intellectual feast,” to quote Judge Bork. Justice O'Connor also brought balance to our highest Court. Most recently, as has been repeated many times, she cautioned about war does not give a blank check. Her decisions reflect, in my view, that our societies work very hard to improve the workaday world, to open doors to workers confronted by powerful employers and for women facing harassment and stereotypes.

Now, I acknowledge this is a very tough job a judge has in determining whether or not there is an openness that is required under the Constitution. But I also acknowledge that prejudice runs very deep in our society, and in the real world, discrimination rears its ugly head in the shadows where it is very difficult to root it out. But Justice O'Connor was not afraid to go into the shadows.

The Constitution provides for one democratic moment, Judge, before a lifetime of judicial independence when the people of the United States are entitled to know as much as we can about the person that we are about to entrust with safeguarding our future and the future of our kids. And, Judge, simply put, that is this moment, the one democratic moment in a lifetime of absolute judicial independence. And that is what these hearings are about, in my view.

In the coming days, we want to know about what you believe, Judge, how you view the Constitution, how you envision the role of the Federal courts, what kind of Justice you would seek to become. As I said, this one democratic moment when the people, through their elected representatives, get to ask questions of a President's choice for the highest Court. And I hope you will be forthcoming.

I cannot imagine, notwithstanding what many of my colleagues, whom I have great respect for, believe, I can't imagine the Founders, when they sat down and wrote the document and got to the Appointments Clause and said, You know what? The American people are entitled to know before we make him President, before we make her Senator, before we make him Congressman, what they believe on the major issues of the day. But judges, Supreme Court nominees, as long as they are smart and honest and decent, it really does not matter what they think. We do not have to know. I can't fathom—can't fathom—that that was the intent of the Founders. They intended the American people to know what their nominees thought.

And I might add—and I will end with this—we just had two Supreme Court Justices before our caucus just as they were before, I think, the Republican Caucus. They ventured opinions on everything. On everything, things that are going to come before the Court. It did not in any way jeopardize their judicial independence.

So, Judge, I really hope that this does not turn out to be a minuet. I hope it turns out to be a conversation. I believe we—you and I and this Committee—owe it to the American people in this one democratic moment to have a conversation about the issues that will affect their lives profoundly. They are entitled to know what you think.

And I remind my colleagues, many of whom are on this Committee, they sure wanted to know what Harriet Miers thought about everything. They sure wanted to know in great detail. They were about ready to administer blood tests. The good news is no blood test here. The good news is no blood test, just a conversation, and I hope you will engage in it with us because I am anxious to get a sense of how you are going to approach these big issues.

I thank you very much, Judge.

Chairman SPECTER. Thank you, Senator Biden.

Senator Kyl?

**STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE
STATE OF ARIZONA**

Senator KYL. Thank you, Mr. Chairman.

Welcome, Judge Alito, to your confirmation hearing. At the outset, I am pleased to note that you have more judicial experience than any Supreme Court nominee in more than 70 years. Indeed, only one Supreme Court Justice in history, one Horace Lurton, nominated by President Taft, had more Federal appeals court experience. Moreover, you have devoted virtually your entire professional life to public service, and the Nation owes you gratitude for that service. I look forward to a dignified hearing followed by a fair up or down vote on the Senate floor.

Before discussing your nomination, I would like to take a moment to express my respect and admiration for the Justice whom you are nominated to replace, my fellow Arizonan Sandra Day O'Connor, whom I have known for more than 30 years. Justice O'Connor has served with great distinction during her career in the Arizona Legislature, on the Arizona Court of Appeals, and for what has been a quarter of a century on the U.S. Supreme Court. Arizonans are deeply proud of Justice O'Connor's service to this country.