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,

the Americans with Disabilities Act; it passed this Congress with overwhelming bipartisan support. The law was supported by an extensive factual record, and it was based on our Government's long-standing constitutional power to fight discrimination wherever it exists. When the Court considered the ADA in the *Garrett* case, however, it ignored the Act's broad support, cast aside the legislative record, and struck down a portion of the law. The decision was a close one, 5–4. The majority relied on a highly controversial legal theory, and the case evoked a vigorous dissent.

This is precisely my problem with *Garrett*. In such a difficult case where the Constitution does not clearly support the majority's decision, the proper response is not to strike down the law. In such a case, the Court should defer to the will of the people. In other ways, Judge, the Court's recent decisions have made life more difficult for the democratic institutions that perform the day-to-day work of our Nation, recent cases involving affirmative action and the posting of the Ten Commandments on public property, which seem to me at least to prove the point. The Court has upheld one affirmative action program at the University of Michigan, but struck down another one, and has allowed the posting of the Ten Commandments outside of a public building, but banned it on the inside in another case.

To add to the confusion, some of the Court's decisions involve multiple concurrences and dissents, making it hard, even for lawyers and judges to figure out what the law is and why.

Chief Justice Roberts mentioned this problem at his hearing. And in one of his final statements as Chief Justice, William Rehnquist noted that one of the Court's decisions had so many opinions within it that he—and I quote—"didn't know we had so many Justices on the Court."

What has emerged in certain areas, therefore, is a patchwork, a patchwork that leaves local officials, State legislators, Members of Congress and the public guessing what the law permits and what it does not. In 1937, President Franklin Roosevelt reminded us that the Constitution is, and I quote, "a layman's document, not a lawyer's contract." But that very document does little to serve people when Supreme Court decisions are written so that even high-price lawyers cannot figure them out.

I am not the first to raise these democratic concerns. Many have faulted the Court for its lack of clarity in certain cases and many have criticized its recent lack of deference to decisions made by State legislatures and Congress. In fact, some have even suggested that this recent trend has transformed our democracy from one founded on "we, the people," to one ruled by "we, the Court." To me, the criticism has some force. The Constitution empowers the people to resolve our days' most contentious issues. When judges forget this basic truth, they do a disservice to our democracy and to our Constitution. Judges are not Members of Congress. They are not State legislators, Governors, nor Presidents. Their job is not to pass laws, implement regulations, nor to make policy. To use the words of Justice Byron White, words that I quoted at our last Supreme Court hearing: the role of the judge is simply to decide cases; to decide cases, nothing more.

Judge, from what I have seen so far, you do not need much reminding on this score. Your decisions are usually brief and to the point. You write with clarity and common sense, and in most cases you defer to the decisionmaking of those closest to the problem at hand. I do not expect to agree with every case that you decide, but your modest approach to judging seems to bode well for our democracy.

Over the next several days the members of this Committee will question you to find out what kind of Justice you will be. This hearing is really our opportunity to try to answer that question. Our constitutional system is founded on democracy, a world of people, not the unchecked rule of judges. If confirmed, it will be your job to faithfully interpret our Constitution and to defend our democracy case by case. I wish you well.

Thank you.

Chairman SPECTER. Thank you, Senator DeWine.

Senator Feinstein.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Welcome, Judge Alito. I am one that believes your appointment to the Supreme Court is the pivotal appointment, and because you replace Sandra Day O'Connor and because she was the fifth vote on 148 cases, you well could be a very key and decisive vote. So during these hearings, I think it is fair for us to try to determine whether your legal reasoning is within the mainstream of American legal thought and whether you are going to follow the law regardless of your personal views about the law.

Since you have provided personal and legal opinions in the past, I very much hope that you will be straightforward with us, share your thinking, and share your legal reasoning.

I would like to use my time to discuss with you some of my concerns. I have very deep concern about the legacy of the Rehnquist Court and its efforts to restrict congressional authority to enact legislation by adopting a very narrow view of several provisions of the Constitution, including the Commerce Clause and the 14th Amendment. This trend, I believe, if continued, would restrict and could even prevent the Congress from addressing major environmental and social issues of the future.

As I see it, certain of your decisions on the Third Circuit raise questions about whether you would continue to advance the Rehnquist Court's limited view of congressional authority, and I hope to clear that up.

Let me give you one example here, and that is the *Rybar* case. Your dissent argued that Congress lacked the authority to ban the possession and transfer of machine guns based essentially on a technicality. The congressional findings from previous statutes were not explicitly incorporated in the legislation. You took this position even though the Supreme Court had made clear in 1939, the *Miller* case, that Congress did have the authority to ban the possession and transfer of firearms, and even though Congress had passed three Federal statutes that extensively documented the impact that guns and gun violence have on interstate commerce. I am