

over. If she came over in this atmosphere, she wouldn't get 96 votes. Judge Scalia wouldn't get 98 votes, and that is sad to me.

I hope we will use this opportunity not only to treat you fairly, but not use a double standard. I hope we will understand that this is bigger than you, this is bigger than us, and the way we conduct ourselves and what we expect of you we had better be willing to expect when we are not in power.

Thank you.

Chairman SPECTER. Thank you, Senator Graham.

Senator SCHUMER.

**STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR
FROM THE STATE OF NEW YORK**

Senator SCHUMER. Thank you, Mr. Chairman.

Judge Alito, welcome to you, Mrs. Alito, your two children, the rest of your family. I join my colleagues in congratulating you on your nomination. 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, and 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. These decisions are final and appeals impossible.

That is the awesome responsibility and power of a Supreme Court Justice, and 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 Sandra Day O'Connor, the pivotal swing vote on a divided Court; second, because you seem to have been picked to placate the extreme right wing after the hasty withdrawal of Harriet Miers; and finally, and most importantly, 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 can't 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 didn't get to explain her judicial philosophy, she didn't get to testify at the 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 couldn't be sure that her judicial philosophy squared with their extreme political agenda. They seem to be very sure of 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 didn't 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 in the history of the Supreme 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.

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 is certainly a reason for pause. 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 haven't 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, you give the impression of applying careful legal reasoning, but too many times you happen to reach the 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 right-ward course.

Some wrongly suggest that we are being results-oriented when we question the results you have reached. But the opposite is true. We are trying to make sure 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.

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 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 elected bodies, and the people are not subjects, powerless to control their own most intimate decisions. Will your judicial philosophy preserve these principles or will it 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. Your deferential and absolutist view of separation of powers raises questions.

Under this view, in times of war the President would, for instance, 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 to far, will you be a check on his power or will you issue him a blank check to exercise whatever power alone he 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 a legislature. Certainly, one important case you wrote, in *Rybar v. U.S.*, that Congress exceeded its power by prohibiting the possession of fully automatic machine guns. 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?

And, of course, you have made statements expressing your view that the, quote, "Constitution does not protect the right to an abortion," unquote. In fact, you said in 1985 that you personally believe very strongly this is true. You also spoke while in the Justice Department of, quote, "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?

Judge Alito, I sincerely hope you will answer our questions. Most of the familiar arguments for ducking direct questions no longer apply and certainly don't 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 overruling *Roe*, you have already given the suggestion of pre-judgment on a question that will likely come before the 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 simply not answer, in effect, no comment. That will not dismiss prior expressions of decidedly legal opinions as merely

personal beliefs, and that will enhance neither your credibility nor your reputation for careful legal reasoning.

I look forward, Judge, to a full and fair hearing.

Chairman SPECTER. Thank you, Senator Schumer.

Senator Cornyn.

**STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM
THE STATE OF TEXAS**

Senator CORNYN. Thank you, Mr. Chairman.

Judge Alito, welcome to the Committee, and to your family as well. I am a little surprised to learn that you have a triply high burden for confirmation here. I guess we will get a chance to explore that and the fairness of that, or whether all nominees ought to have the same burden before the Committee.

What I want to also make sure of is that we don't hold you to a double standard, that we don't expect of you answers to questions that Justice Ginsburg and others declined to answer in the interests of the independence of the judiciary and in the interests of observing the canons of judicial ethics.

Nevertheless, we have already heard a great deal about you and your credentials for the Supreme Court. As has been noted, you served with distinction on the court of appeals. You have served as a United States Attorney, and indeed you have served your entire adult life in public service.

We have also heard a bit today—and we will hear more as these proceedings unfold—about the testimonials from people who have worked with you, people who know you best, whether liberal, moderate or conservative. The judges on your court have praised you as a thoughtful and open-minded jurist, and we will hear more from them later in the week.

The same can be said of the dozens of law clerks who have worked with you over the last 15 years. As you know, law clerks are those who advise appellate judges on the cases they hear, and you have had law clerks from all political persuasions, from members of the Green Party, to Democrat clerks, even a clerk that went on to serve as counsel of record for John Kerry's campaign for President. And every single one of them says that you will make a terrific Supreme Court Justice, that you apply the law in a fair and even-handed manner, and that you bring no agenda to your job as a judge.

If fairness, integrity, qualifications and an open mind were all that mattered in this process, you would be confirmed unanimously. But we know that is not how the process works, or at least how it works today. We know that 22 Senators, including 5 on this committee, voted against Chief Justice Roberts's confirmation just a few short months ago. And my suspicion is that you do not come here with a total level playing field.

I am reluctantly inclined to the view that you and other nominees of this President to the Supreme Court start with no more than 13 votes on this Committee and only 78 votes in the full Senate, with a solid, immovable, and unpersuadable block of at least 22 votes against you, no matter what you say and no matter what you do. Now, that is unfortunate for you, but it is even worse for