

I helped argue a case called *Santa Fe Independent School District v. Doe*.

The school district in that case had the temerity to permit student-led, student-initiated prayer before football games. And, of course, someone sued. I repeat, this is student-led, student-initiated, voluntary prayer. The Supreme Court held by a vote of six to three that even this was unconstitutional.

The decision led the late Chief Justice Rehnquist to remark that the Court now exhibits “hostility to all things religious in public life.” It is hard to disagree with him. Depictions or expressions of sex, violence, crime are all permitted virtually without limit, but religion, it seems, never.

Now, this is where you come in, Judge Alito. I appreciate your record on the Third Circuit respecting the importance of neutrality of government when it comes to religious expression on a voluntary basis by individual citizens. It is my sincere hope that, when confirmed, you will persuade your colleagues to reconsider their attitude toward religious expression and grant it the same freedom currently reserved for almost all other non-religious speech.

No wonder many in America seem to believe that the Supreme Court has become one more inclined to protect pornography than to protect religious expression. Most people in America don’t believe that “God” is a dirty word. But the sad fact is that some Americans are left to wonder whether the Supreme Court might have greater regard for it if it were.

Again, welcome to the Committee and thank you for your continued willingness to serve our great Nation.

Chairman SPECTER. Thank you, Senator Cornyn.
Senator Durbin?

**STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR
FROM THE STATE OF ILLINOIS**

Senator DURBIN. Thank you very much, Mr. Chairman. Judge Alito, welcome to you and your family before the Judiciary Committee. You have heard time and again from my colleagues why this seat on the Supreme Court means so much. They have quoted the statistics of 193 5–4 decisions where Sandra Day O’Connor was the deciding vote in 148 of those instances. She was a critical vote in issues of civil rights, human rights, workers’ rights, women’s rights, restraining the power of an overreaching President.

If you look at the record, the enviable record which Sandra Day O’Connor has written, you find she was the fifth and decisive vote to safeguard Americans’ right to privacy, to require courtrooms to grant access to the disabled, to allow the Federal Government to pass laws to protect the environment, to preserve the right of universities to use affirmative action, to ban the execution of children in America. And Justice O’Connor was the fifth vote to uphold the time-honored principle, which bears repeating, of separation of church and state. There was real wisdom in the decision of our forefathers in writing a Constitution that gave us an opportunity to grow as such a diverse Nation, and we should never forget it.

Justice O’Connor has been the critical decisive vote on many issues that go to the heart of who we are as a Nation. We believe, many of us, that the decision on filling this vacancy is going to tip

the scales of justice on the Supreme Court one way or the other, and that is why we are so mindful of the importance of our task.

Yesterday, the Chicago Tribune editorialized that anyone who questions your nomination has a heavy burden of proof. I disagree. I believe the burden of proof is yours, Judge Alito, the burden of demonstrating to the American people and this Committee that you or any nominee is worthy to serve on the highest Court, to succeed Sandra Day O'Connor.

My friend Illinois Senator Paul Simon once said as a member of this same Committee that the test for a Supreme Court nominee is not where he stands on any given issue. The test is this: Will you use your power on the Court to restrict freedom or expand it? In the simplest terms, I think Paul Simon got it right. That is the best test because the Supreme Court is the last refuge in America for our rights and liberties. In my lifetime, it is the Supreme Court, not Congress, that integrated public schools, that allowed people of different races to marry, and established the principle that our Government should respect the value of privacy of American families. These decisions are the legacy of Justices who chose to expand American freedom. If you are confirmed, Judge Alito, will you continue their legacy?

You and I spoke about the *Griswold* decision in my office. It is hard to imagine that 40 years ago people could be convicted of a crime, fined, and sent to prison for using the most common forms of birth control. The Supreme Court looked at that decision and said that is just wrong. We may not find the word "privacy" in the Constitution, but that is just inherent to our freedom as Americans. It seems like a given now. Who would even question it? But it has not been that long ago that up here on Capitol Hill we were involved in a bitter debate over the tragedy of Terri Schiavo. And Republican congressional leaders threatened Federal judges with impeachment if they did not agree to intervene into that family's painful personal decision. We see it in attempts on Capitol Hill to impose gag rules on doctors on what they can say to their patients about family planning. And we certainly see it now with an effort by this Government to tap our phones, invade our medical records, credit information, library records, and the most sensitive personal information in the name of national security.

Now, Justice O'Connor was the critical fifth vote to protect our right of privacy. We want to know whether you will be that vote as well. You were the only judge on your court to authorize a very intrusive search of a 10-year-old girl. You were the only judge on your court who voted to diminish the right of privacy in the case of *Planned Parenthood v. Casey*, a position that was specifically rejected by the Supreme Court. And as a Government lawyer, you wrote that you personally believed very strongly the Constitution does not protect the right to an abortion.

Like many, I have thought about this issue of abortion time and again. It is not an easy issue for most people. I have thought about the law and the impact of my personal religious beliefs and feelings. I have thought about the real lives of people and the tragic experiences of the women that I have met. And I have come to believe over the years that a woman should be able to make this agonizing decision with her doctor and her family and her conscience

and that we should be very careful that we don't make that decision a crime except in the most extreme circumstances.

There is also the issue of personal privacy when it comes to the Executive power. Throughout our Nation's history, during times of war, whether it was habeas corpus in the Civil War, the Alien and Sedition Acts in World War I, or Japanese internment camps in World War II, Presidents have gone too far. And in going too far, they have taken away the individual rights of American citizens. The last stop to protect those rights and liberties is the Supreme Court. That is why we want to make certain that when it comes to the checks and balances of the Constitution, you will stand with our Founding Fathers in protecting us from a Government or a President determined to seize too much power in the name of national security.

As a Government lawyer, you pushed a policy of legislative construction designed to make congressional intent secondary to Presidential intent. You wrote, and I quote, "The President will get the last word on questions of interpretation." In speeches to the Federalist Society, you have identified yourself as a strong proponent of the so-called unitary Executive theory. That is a marginal theory at best, and yet it is one that you have said you believe in.

This is not an abstract debate. The Bush administration has repeatedly cited this theory to justify its most controversial policies in the war on terrorism. Under this theory, the Bush administration has claimed the right to seize American citizens in the United States and imprison them indefinitely without charge. They have claimed the right to engage in torture, even though American law makes torture a crime. Less than 2 weeks ago, the White House claimed the right to set aside the McCain torture amendment that passed the Senate 90-9. What was the rationale? The unitary Executive theory, which you have supported.

In the *Hamdi* case, Justice O'Connor wrote for the plurality, and it has been quoted many times: "A state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." If you are confirmed, Judge Alito, who will inspire your thinking if this President or any President threatens our fundamental constitutional rights? Will it be the Federalist Society or will it be Sandra Day O'Connor?

Two months ago, Rosa Parks was laid to rest. Her body laid in state in the Capitol Rotunda, a fitting tribute to the mother of our modern civil rights movement. Her courage is well known. The courage of Federal Judge Frank Johnson, whom we talked about, is well known as well. He was the one who gave the legal authority for the right to march from Selma to Montgomery, and he suffered dearly for it. He was ostracized and rejected. His life was threatened as a result of it.

When we met in my office, Judge Alito, you told me about how your father as a college student was almost expelled for standing up to the college president who decided that the school basketball team should not use its African-American players against an all-white opponent. That university president did not want to offend their all-white opponent, but your dad stood up, and you were so proud of that moment in your family history. I admire your father's courage as well. But just as we do not hold the son responsible for

the sins of the father, neither can we credit the son for the courage of the father. As Supreme Court Justice, would you have the courage to stand up for civil rights even if it is unpopular?

We want to understand what you meant in 1985 when you said from the heart that you disagreed with the Warren Court on reapportionment, the one man/one vote principle. That was a civil rights decision. We want you to explain your membership in an organization that you highlighted at Princeton University that tried to challenge the admission of women and minorities. And I think we want to make certain of one thing. We want to make certain that every American who stood in silent tribute to Rosa Parks hopes that you will break your silence and speak out clearly for the civil rights that define our unity as a Nation.

There have been many controversial cases alluded to here. Some people have questioned, What is the difference? What difference in my life does it make if Sam Alito is on the bench or if he isn't? Why would I care if it is a narrow interpretation or a broad interpretation of the law? How does it affect my life? We know it affects everyone's life. We were reminded just very recently with the tragedy that was in the headlines. In one of your dissents, you would have allowed a Pennsylvania coal mine to escape worker safety and health requirements required by Federal law. Last week's tragedy at the Sago mine reminds us that such a decision could have life and death consequences.

Judge Alito, millions of Americans are concerned about your nomination. They are worried that you would be a judicial activist who would restrict our rights and freedoms. During your hearing, you will have a chance to respond, and I hope you do. More than any recent nominee, your speeches, your writings, your judicial opinions make it clear that you have the burden to prove to the American people that you would not come to the Supreme Court with any political agenda. Clear and candid answers are all that we ask.

I sincerely hope you can convince the U.S. Senate and the American people that you will be a fifth vote on the Supreme Court that the American people can trust to protect our most basic important freedoms and preserve our time-honored values.

Thank you very much.

Chairman SPECTER. Thank you, Senator Durbin.
Senator Brownback?

**STATEMENT OF HON. SAM BROWNBACK, A U.S. SENATOR
FROM THE STATE OF KANSAS**

Senator BROWNBACK. Thank you, Mr. Chairman.

Welcome, Judge Alito, your wife and family. Delighted to have you here. You only have two more pitchers, and then you get a bat. So I am sure people will be happy to hear from you.

Mr. Chairman, before I go forward with my statement, I would like to enter into the record a summary of four cases that Judge Alito has ruled on where he backed employees claiming racial discrimination. It has been entered a couple of times here that he has not ruled in favor of people claiming racial discrimination, and I have a summary of four cases where he has, and I want to enter that into the record.