

History of the Nomination of Samuel Alito

How and why he was confirmed.

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Introduction

On 31 October 2005, President George W. Bush nominated Judge Samuel Alito to the seat on the U.S. Supreme Court occupied by the retiring Justice Sandra Day O'Connor. I prepared this essay for three reasons:

1. to comment on the contemporary confirmation process in the U.S. Senate from November 2005 to January 2006. This essay is *not* political advocacy of confirming or rejecting Judge Alito.¹
2. to memorialize some of the issues and events during the confirmation of Justice Alito by the U.S. Senate. I expect the controversy over Justice Alito's confirmation to be quickly forgotten, and I expect many of the documents discussed during his confirmation to become difficult to find. This essay preserves some of this information on the Internet, where it is easy to find. I include citations to the original source, as a guide to scholars who want to search for more details.
3. to explain *why* the opposition to Justice Alito was *ineffective*.

This essay contains long quotations from:

- some of Judge Alito's most controversial opinions, so that readers can see for themselves what he said and how he reasoned. I have added my explanations of why I believe Judge Alito was wrong in some of these cases.
- Alito's 30 May 1985 memo on *Thornburgh*, and I explain here why I believe Alito was wrong in that memo.
- the transcript of the hearings before the U.S. Senate Judiciary Committee. After I read the entire unedited, contemporary transcript, I included here what I considered the most important testimony.

Because of my interest in First Amendment law and constitutional privacy rights (including the legal right to an abortion early in pregnancy), I have focused on Alito's writings in those areas. Readers interested in other aspects of Alito's writings will find material in the links section, below at page 147.

I have also done a cut-and-paste of text at other websites, to present a more complete picture of the detailed issues and events in the confirmation process. To comply with the fair-use exemption from copyright, I have only made short quotations from newspapers, Associated Press articles, and other proprietary sources.

After page 50, this essay is organized in chronological sequence, to show the reader how the events unfolded and the mood at the time.

¹ While I disagree with Judge Alito on many issues, as well as disagree with him on judicial philosophy, I also recognize the political reality in the U.S. Senate: there are not enough pro-choice Republicans and liberal Democrats to vote down his confirmation, and probably not enough votes to sustain a filibuster. Moreover, I recognize that Judge Alito is an unusually intelligent man, and —if Alito is not confirmed — President Bush will probably nominate someone worse than Judge Alito.

Readers who are interested in this topic may also be interested in three of my other essays:

1. <http://www.rbs0.com/judact.pdf> is my terse criticism of politicians (e.g., President Bush) who demand that justices interpret the U.S. Constitution according to the original meaning, or original intent, of the authors. When President Bush condemns judges who “legislate from the bench”, he is condemning what other politicians have called “judicial activism”.
2. <http://www.rbs0.com/sctjustices.pdf> contains three items: (1) terse review of the history of mediocre appointments to the U.S. Supreme Court during the Twentieth Century, (2) terse review of the history of conservative presidents who appointed justices who later became liberals, and (3) suggests credentials for nominees to be a justice.
3. <http://www.rbs0.com/miers.pdf> is a long collection of quotations from the failed nomination of Harriet Miers in October 2005. The outrage from conservatives over the nomination of Miers is widely believed to be responsible for President Bush’s selection of a very conservative nominee in Judge Alito.

President Bush: 31 Oct 2005

Here is the entire text of President Bush’s announcement at 08:01 on Monday, 31 Oct 2005, that he would nominate Samuel Alito, and the entire text of his acceptance.

THE PRESIDENT: Good morning. I'm pleased to announce my nomination of Judge Samuel A. Alito, Jr., as Associate Justice of the Supreme Court of the United States. Judge Alito is one of the most accomplished and respected judges in America, and his long career in public service has given him an extraordinary breadth of experience.

As a Justice Department official, federal prosecutor and judge on the United States Court of Appeals, Sam Alito has shown a mastery of the law, a deep commitment of justice, and a — and he is a man of enormous character. He's scholarly, fair-minded and principled, and these qualities will serve our nation well on the highest court of the land.

Judge Alito showed great promise from the beginning in studies at Princeton and Yale Law School; as editor of the Yale Law Journal; as a clerk for a federal court of appeals judge. He served in the Army Reserves and was honorably discharged as a captain. Early in his career, Sam Alito worked as a federal prosecutor and handled criminal and civil matters for the United States. As assistant to the solicitor general, he argued 12 cases before the Supreme Court, and has argued dozens of others before the federal courts of appeals.

He served in the Justice Department's Office of Legal Counsel providing constitutional advice for the President and the executive branch. In 1987, President Ronald Reagan named him the United States Attorney for the District of New Jersey, the top prosecutor in one of the nation's largest federal districts, and he was confirmed by unanimous consent by the Senate. He moved aggressively against white-collar and

environmental crimes, and drug trafficking, and organized crime, and violation of civil rights.

In his role, Sam Alito showed a passionate commitment to the rule of law, and he gained a reputation for being both tough and fair. In 1990, President Bush nominated Sam Alito, at the age of 39, for the United States Court of Appeals for the 3rd Circuit. Judge Alito's nomination received bipartisan support and he was again confirmed by unanimous consent by the United States Senate. Judge Alito has served with distinction on that court for 15 years and now has more prior judicial experience than any Supreme Court nominee in more than 70 years.²

Judge Alito's reputation has only grown over the span of his service. He has participated in thousands of appeals and authored hundreds of opinions. This record reveals a thoughtful judge who considers the legal matter — merits carefully and applies the law in a principled fashion. He has a deep understanding of the proper role of judges in our society. He understands that judges are to interpret the laws, not to impose their preferences or priorities on the people.

In the performance of his duties, Judge Alito has gained the respect of his colleagues and attorneys for his brilliance and decency. He's won admirers across the political spectrum. I'm confident that the United States Senate will be impressed by Judge Alito's distinguished record, his measured judicial temperament, and his tremendous personal integrity. And I urge the Senate to act promptly on this important nomination so that an up or down vote is held before the end of this year.

Today, Judge Alito is joined by his wife, Martha, who was a law librarian when he first met her. Sam and I both know you can't go wrong marrying a librarian. Sam and Martha's two children, Phil and Laura, are also with us, and I know how proud you are of your dad today. I'm sure, as well, that Judge Alito is thinking of his mom, Rose, who will be 91 in December. And I know he's thinking about his late father. Samuel Alito, Sr., came to this country as an immigrant child from Italy in 1914, and his fine family has realized the great promise of our country.

Judge, thanks for agreeing to serve, and congratulations on your nomination.

² In the year 1932, President Hoover nominated Benjamin Cardozo to the U.S. Supreme Court after Cardozo had served 19 years on New York state courts.

response by Judge Alito

JUDGE ALITO: Thank you, Mr. President. Thank you very much, Mr. President. I am deeply honored to be nominated to serve on the Supreme Court, and I am very grateful for the confidence that you have shown in me.

The Supreme Court is an institution that I have long held in reverence. During my 29 years as a public servant, I've had the opportunity to view the Supreme Court from a variety of perspectives — as an attorney in the Solicitor General's Office, arguing and briefing cases before the Supreme Court, as a federal prosecutor, and most recently for the last 15 years as a judge of the Court of Appeals. During all of that time, my appreciation of the vital role that the Supreme Court plays in our constitutional system has greatly deepened.

I argued my first case before the Supreme Court in 1982, and I still vividly recall that day. I remember the sense of awe that I felt when I stepped up to the lectern. And I also remember the relief that I felt when Justice O'Connor — sensing, I think, that I was a rookie — made sure that the first question that I was asked was a kind one. I was grateful to her on that happy occasion, and I am particularly honored to be nominated for her seat.

My most recent visit to the Supreme Court building was on a very different and a very sad occasion: It was on the occasion of the funeral of Chief Justice William Rehnquist. And as I approached the Supreme Court building with a group of other federal judges, I was struck by the same sense of awe that I had felt back in 1982, not because of the imposing and beautiful building in which the Supreme Court is housed, but because of what the building, and, more importantly, the institutions stand for — our dedication as a free and open society to liberty and opportunity, and, as it says above the entrance to the Supreme Court, "equal justice under law."

Every time that I have entered the courtroom during the past 15 years, I have been mindful of the solemn responsibility that goes with service as a federal judge. Federal judges have the duty to interpret the Constitution and the laws faithfully and fairly, to protect the constitutional rights of all Americans, and to do these things with care and with restraint, always keeping in mind the limited role that the courts play in our constitutional system. And I pledge that if confirmed I will do everything within my power to fulfill that responsibility.

I owe a great deal to many people who have taught me over the years about the law and about judging, to judges before whom I have appeared, and to colleagues who have shown me with their examples what it means to be a fair and conscientious and temperate judge.

I also owe a great deal, of course, to the members of my family. I wish that my father had lived to see this day. He was an extraordinary man who came to the United States as a young child, and overcame many difficulties and made many sacrifices so that my sister and I would have opportunities that he did not enjoy.

As the President mentioned, my mother will be celebrating her 91st birthday next month. She was a pioneering and very dedicated public school teacher who inspired my sister and me with a love of learning. My wife, Martha, has been a constant source of love and support for the past 20 years. My children, Philip and Laura, are the pride of my life and they have made sure that being a judge has never gone to my head — they do that very well on a, pretty much, daily basis. And my sister, Rosemary, has always been a great friend and an inspiration as a great lawyer, and as a strong and independent person.

I look forward to working with the Senate in the confirmation process. Mr. President, thank you, once again, for the confidence that you've shown in me and for honoring me with this nomination.

Issues

The conventional wisdom (with which I agree) is that Mr. Alito is well qualified to be a Justice of the U.S. Supreme Court. In particular, he had 15 years of experience serving as a judge on the U.S. Court of Appeals for the Third Circuit, in Newark, NJ. During 1981-85, he personally argued 12 cases before the U.S. Supreme Court, as Assistant to the Solicitor General. His confirmation would have been straightforward, except for one thing. The USA is polarized over the issue of abortion and the conventional wisdom on both sides of the issue seems to be that Mr. Alito would vote to overrule *Roe v. Wade*.

Is this disagreement on a political (and legal) issue adequate grounds to reject his nomination to the U.S. Supreme Court? There is no simple answer to this question. The President nominates Justices, subject to the “advice and consent of the Senate”.³ There is no explicit constitutional criteria for acceptable qualifications. There are several reasons why the U.S. Senate might refuse to confirm Judge Alito.

1. *Gender/racial diversity*. Because Justice O'Connor was the first woman justice on that Court, her seat is now conventionally regarded as belonging to women. If Alito is confirmed, 78% of the Justices would be white men.
2. *Religious diversity*. Justices Scalia, Kennedy, Thomas, and Chief Justice Roberts are all Catholic, as is Judge Alito. If Alito is confirmed, 55% of the Justices would be Catholic. Religious diversity may be a surrogate for keeping abortion legal and other items on the liberal agenda, since Catholic religious dogma is well known to oppose contraception, abortion, and same-gender marriage.

³ U.S. Constitution, Article II, § 2, ¶ 2.

3. *Continue constitutional right to abortion.* Justices Scalia and Thomas are well known to be hostile to abortion rights. The new Chief Justice Roberts is commonly assumed to be hostile to abortion rights. As explained below, beginning at page 12 and page 58, Judge Alito is probably hostile to abortion rights. Having four anti-abortion judges on the Court poses a grave danger to abortion rights, because two of the current pro-choice justices are elderly,⁴ thus making it possible that President Bush would nominate their replacement during the years 2005-2008.
4. *Continue rigid wall of separation between church and state.* As explained below, beginning at page 25, Judge Alito apparently favors prayer in public schools.
5. *Judicial philosophy.* Judge Alito has a well developed judicial philosophy of being a strict constructionist, while liberal Democrats prefer a liberal judicial activist.

The first possible reason is basically discrimination against the majority of experts in constitutional law, who are white males. The second possible reason appears anti-Catholic, particularly in view of the fact that some Catholic Justices (e.g., Brennan and Kennedy) have voted for abortion rights on the U.S. Supreme Court. The third and fourth possible reasons are so-called “litmus tests”, that require a nominee to have certain opinions on controversial political and legal issues, instead of looking at the nominee’s ability to respond to a wide range of legal issues. On the other hand, I have no doubt that President Bush, despite his disclaimers, is selecting nominees who are anti-abortion and favoring prayer in public schools, and having other opinions desired by conservative Christians who are Bush’s base of support. If the President uses litmus tests to select nominees, then it seems reasonable for the opposition party to use litmus tests to reject nominees. The fifth possible reason is the most esoteric, but also — in my opinion — the most valid reason.

Beginning on the day that Judge Alito was nominated to the U.S. Supreme Court, there was speculation by journalists, commentators, and Senators over a possible filibuster in the U.S. Senate. There are 55 Republicans in the U.S. Senate, so — if all of those Republican vote along party lines, as they did for Chief Justice Roberts — the confirmation of Alito seems a sure bet. However, the Democrats might filibuster and attempt to prevent a vote on the floor of the Senate. To end a filibuster, there would need to be at least 60 votes (i.e., all 55 Republicans plus at least 5 Democrats). During 2003-04, Democrats in the U.S. Senate successfully filibustered several of President Bush’s nominees to the U.S. Courts of Appeals (e.g., Janice Rogers Brown, Priscilla Owen, William Pryor, Miguel Estrada). Estrada withdrew his name in Sep 2003; the others were confirmed in May/June 2005.

⁴ In the year 2005, Justice John Paul Stevens was 85 y old and Justice Ruth Bader Ginsburg was 72 y old.

Immediate Reaction

Senator Arlen Specter, chairman of the U.S. Senate Judiciary Committee met with Judge Alito on Monday, 31 Oct. At a later press conference, Senator Specter said:

I met for about an hour and a quarter this morning with Judge Samuel Alito, whom I have known for the better part of two decades. We talked about a wide variety of issues which will come before the Judiciary Committee during his hearings.

I start with his statement that he believes there is a right to privacy under the liberty clause of the United States Constitution. And he believes that the right applied to singles as well as married under the interpretation of *Griswold v. Connecticut*. And he says that he accepts *Griswold v. Connecticut* as good law.

We talked a considerable extent about the value of precedence or *stare decisis*, to let the decision stand, which is a key factor, as you all know, on evaluating *Roe*.

I raised with him a question about super precedents, which we took up in the hearings for Judge Roberts — Chief Justice Roberts — and the super-duper precedents which I added in on the basis of some 38 cases where the Supreme Court has had an opportunity to overrule *Roe* and has not done so.

There was an interesting article in the *New York Times* yesterday about where super precedents are going and super-duper precedents are going, and Judge Alito did not endorse super precedents or super-duper precedents, but did say that he viewed it as a sliding scale, and that the longer a decision was in effect and the more times that it had been reaffirmed by different courts, different justices appointed by different presidents, it had extra precedential value.

“Transcript: Sen. Specter Discusses Alito Nomination,” *Washington Post*,

<http://www.washingtonpost.com/wp-dyn/content/article/2005/10/31/AR2005103101207.html>

(31 Oct 2005 17:30 EST).

The hope that respect for precedents will save *Roe v. Wade* from being overruled is completely bogus, as I show in my technical legal essay, *Overruled: Stare Decisis in the U.S. Supreme Court* at <http://www.rbs2.com/overrule.pdf>. According to the U.S. Supreme Court’s own precedents, a constitutional law case can be overruled any time a majority of justices believe it was wrongfully decided.

The Washington Post reported on Tuesday morning, 1 Nov 2005:

Critics wasted no time disputing that. Senate Minority Leader Harry M. Reid (D-Nev.), Sen. Charles E. Schumer (D-N.Y.) and the liberal group People for the American Way rushed out statements blasting the nomination even before Bush announced it at 8 a.m. By the day's end, much of the organized left had joined the chorus, including the AFL-CIO, NARAL Pro-Choice America, the Alliance for Justice, MoveOn.org and the Leadership Conference on Civil Rights.

"After insisting that Harriet Miers shouldn't even get a hearing because she couldn't prove she was extreme enough, the far right has now forced the president to choose a nominee that they think has views as extreme as their own," said Sen. Edward M. Kennedy (D-Mass.).

Reid, who had encouraged Bush to pick Miers, said the Senate would have to investigate whether Alito "is too radical for the American people" and complained of another white male

nominee. "President Bush would leave the Supreme Court looking less like America and more like an old boys club," Reid said.

If confirmed as the nation's 110th justice, Alito would join a nine-member court that has one woman and one black justice. Alito would be the second Italian American, after Scalia, and its fifth Catholic, joining two Jews, a Protestant and an Episcopalian. Bush had considered appointing the first Hispanic justice but opted against the known candidates. And despite pleas from O'Connor and Laura Bush, he decided against putting forth a second woman after Miers failed.

Peter Baker, "Alito Nomination Sets Stage for Ideological Battle," *The Washington Post*, p. A01, <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/31/AR2005103100180.html> (1 Nov 2005).

On Thursday, 3 Nov 2005, the Senate Judiciary Committee announced it would begin the hearings on Judge Alito on 9 Jan 2005, with his testimony to begin on 10 Jan. A vote on the floor of the Senate is expected on 20 Jan. When President Bush nominated Alito on 31 Oct 2005, the President asked the Senate to confirm Alito before the end of 2005. Given the Christmas holiday season, the President's desired deadline was too soon for a thorough review of Judge Alito's approximately 300 opinions that he wrote during 15 years on the U.S. Court of Appeals.

opinion poll

On Friday, 4 Nov, just four days after President Bush nominated Judge Alito, the Associated Press released the results of their opinion poll.

Early support for Supreme Court nominee Samuel Alito is considerably weaker among such key groups as evangelicals, Republicans and the wealthy than it was for John Roberts, an AP-Ipsos poll found.

....

About four in 10 respondents — 38 percent — say they back the confirmation of Alito, a federal appeals court judge from Philadelphia. Twenty-two percent say they strongly support him.

For Roberts, now the chief justice, 47 percent said in July that they supported his confirmation, 36 percent strongly.

....

The telephone poll of 1,006 adults was conducted Oct. 31 — Nov. 2 by Ipsos, an international polling firm and has a margin of sampling error of plus or minus 3 percentage points, larger for subgroups.

Will Lester, "Poll: Early Public Support for Alito Weak," *Associated Press*, (4 Nov 2005 22:42 EST).

The overall flavor of this news story seems to be that the American people think that Judge Alito is *unqualified* to be a Justice of the U.S. Supreme Court. Personally, I think this story is totally meaningless. How many of the 1006 respondents had actually read a judicial opinion written by Judge Alito? Probably zero. What percentage of the respondents said they did not know enough

about Judge Alito to form an opinion?⁵ This news story does *not* tell us that important result, a result that may explain why only 38% of respondents supported his nomination to the Supreme Court.

This news story said that, at similar points in the nomination process, 47% supported Judge Roberts while only 38% support Judge Alito. However, the story does not suggest any explanation for this difference, which might lead readers to conclude that Alito is less qualified than Roberts. I think the obvious explanation is that the intervening one-month-long nomination of Harriet Miers caused people to distrust President Bush's nomination of judges.

During the same week, various opinion polls showed that the job approval ratings for President Bush were between 35% and 39%, not only the lowest levels of his five-year presidency, but also low compared to other presidents.

Alito on Abortion

“Of course, he's against abortion.”

The Associated Press reported:

Alito's mother, Rose, who will turn 91 in December, spent Monday fielding congratulatory telephone calls from her home in Hamilton, N.J., a Trenton suburb. "I'm so excited I can't even express myself," she said.

....

If confirmed, Alito would be the fifth Catholic on the Supreme Court. "Of course he's against abortion," his mother said, another comment supporters in Washington might wish she'd held back.

Mary Claire Dale, “Alito Strong Conservative on Liberal Court,” *Associated Press*, (31 Oct 2005 21:37 EST).

The Washington Post later reported the same story with additional detail:

Taking calls at her Hamilton home, where a small Virgin Mary statue sat on the mantle, the judge's 90-year-old mother asked [Monsignor Thomas] Gervasio [the new pastor at Our Lady of Sorrows/Saint Anthony's Parish in Hamilton, N.J., where Alito's mother Rose is a member] to "say some prayers for Sam" and declared of her son: "Of course, he's against abortion."

Rachel Zoll, “Catholics Could Get Majority on High Court,” *Associated Press*,

<http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110100128.html>

(1 Nov 2005, 02:15 EST)

⁵ A later story gives the answer: 64% “Haven't heard enough to yet have an opinion.” But when asked in another question whether they supported Alito or not, 40% said “not sure”. no author, “Results of AP-Ipsos Poll About Alito,” *Associated Press*, (5 Nov 2005 04:28 EST).

Planned Parenthood v. Casey

In October 1991, Judge Alito was one of a panel of three judges who heard the appeal in *Planned Parenthood v. Casey*, a landmark abortion rights case that was later heard by the U.S. Supreme Court. Amongst the issues in *Casey* was an amended Pennsylvania abortion statute that required a married woman to notify her husband before she obtained an abortion. Two judges of the Court of Appeals, held that this notification was an "undue burden" on the woman's rights, but Judge Alito disagreed. I quote Judge Alito's entire opinion:

I concur in the court's judgment except insofar as it holds that 18 Pa.Cons.Stat. Ann. § 3209 (Supp. 1991) (spousal notice) is unconstitutional. I also join all of the court's opinion except for the portions concerning Section 3209 and those interpreting Justice O'Connor's opinion in *Hodgson v. Minnesota*, 497 U.S. 417, 110 S.Ct. 2926, 2949-51, 111 L.Ed.2d 344 (1990), to mean that the two-parent notification requirement without judicial bypass imposed an "undue burden" and was thus required to satisfy strict scrutiny.

I.

As the court suggests, the crux of this case concerns the identification of the constitutional standard that the lower courts must now apply in cases involving laws regulating abortion. For the reasons carefully explained in the court's opinion, I agree that *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989), and *Hodgson* changed the law that we are bound to apply and that the test set out in Justice O'Connor's opinions now represents the governing legal standard.

My disagreement with the majority regarding a single provision of the Pennsylvania Abortion Control Act, 18 Pa.Cons.Stat. Ann. § 3201 *et seq.* (1983 & Supp. 1991), results from disagreement about the portion of Justice O'Connor's two-part test that must be applied to this provision. Under that test, as the majority explains, a law that imposes an "undue burden" must serve a "compelling" state interest. By contrast, a law that does not impose an "undue burden" must simply be "rationally" or "reasonably" related to a "legitimate" state interest. The majority holds that Section 3209 constitutes an undue burden. The majority therefore applies the first prong of the two-part test and strikes down Section 3209 on the ground that it does not serve a "compelling" interest. I do not believe that Section 3209 has been shown to impose an undue burden as that term is used in the relevant Supreme Court opinions; I therefore apply the second prong of the two-part test; and I conclude that Section 3209 is constitutional because it is "rationally related" to a "legitimate" state interest.

Although the majority and I apply different prongs of this two-part test, I see no indication that we disagree concerning the conclusion produced when either prong is applied to Section 3209. If the majority is correct that Section 3209 must satisfy heightened scrutiny, I agree that its constitutionality is doubtful. Similarly, I do not interpret the majority opinion to mean that Section 3209 cannot satisfy the rational relationship test. Indeed, the majority acknowledges that Section 3209 serves a "legitimate" interest. See majority opin. at 715, 716. Thus, my major disagreement with the majority concerns the question whether Section 3209 imposes an "undue burden," and I will therefore turn to that question.

II.

A.

Justice O'Connor has explained the meaning of the term "undue burden" in several abortion opinions. In *Akron v. Akron Center for Reproductive Health*, 462 U.S. at 464, 103 S.Ct. at 2510 (O'Connor, J., dissenting), she wrote that "an 'undue burden' has been found for the most part in situations involving absolute obstacles or severe limitations on the abortion

decision." She noted that laws held unconstitutional in prior cases involved statutes that "criminalized *all* abortions except those necessary to save the life of the mother," inhibited "the vast majority of abortions after the first 12 weeks," or gave the parents of a pregnant minor an absolute veto power over the abortion decision. *Id.* (emphasis in original; citations omitted). She suggested that an "undue burden" would not be created by "a state regulation [that] may 'inhibit' abortions to some degree." *Id.* She also suggested that there is no undue burden unless a measure has the effect of "*substantially* limiting access." *Id.* at 463, 103 S.Ct. at 2509, quoting *Carey v. Population Services International*, 431 U.S. 678, 688, 97 S.Ct. 2010, 2017, 52 L.Ed.2d 675 (1977) (emphasis added in Justice O'Connor's opinion).

Justice O'Connor reiterated the same analysis in *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 106 S.Ct. 2169 (1986). She wrote (*id.* at 828, 106 S.Ct. at 2214 (O'Connor, J., dissenting), quoting *Akron*, 462 U.S. at 464, 103 S.Ct. at 2510 (O'Connor, J., dissenting)):

An undue burden would generally be found "in situations involving absolute obstacles or severe limitations on the abortion decision," not wherever a state regulation "may 'inhibit' abortions to some degree."

She also criticized the majority for taking an approach under which "the mere possibility that *some women* will be less likely to choose to have an abortion by virtue of the presence of a particular state regulation suffices to invalidate it." *Id.* 476 U.S. at 829, 106 S.Ct. at 2214 (emphasis added).

Justice O'Connor's application of the undue burden test in several cases further illustrates the meaning of this test. In *Hodgson*, 110 S.Ct. at 2950-51, Justice O'Connor found that no undue burden was imposed by a law requiring notice to both parents or judicial authorization before a minor could obtain an abortion. Justice O'Connor reached this conclusion despite statistics adduced by Justice Marshall to show that mandatory parental notice may inhibit a significant percentage of minors from obtaining abortions (*id.* at 2953-54) (Marshall, J., dissenting) and despite the district court's finding, noted in Justice Marshall's dissent, that the judicial bypass option "so daunted" some minors that they felt compelled to carry to term (*id.* at 2959, quoting 648 F.Supp. at 763).

Justice O'Connor has also suggested on more than one occasion that no undue burden was created by the statute upheld in *H.L. v. Matheson*, 450 U.S. 398, 101 S.Ct. 1164, 67 L.Ed.2d 388 (1981), which required parental notice prior to any abortion on an unemancipated minor. Instead, she has stated that this statute merely inhibited abortions to "some degree." *Thornburgh*, 476 U.S. at 828, 106 S.Ct. at 2214 (O'Connor, J., dissenting); *Akron*, 462 U.S. at 464, 103 S.Ct. at 2510 (O'Connor, J., dissenting). In dissent in *Matheson*, Justice Marshall argued that the statute would result in substantial interference with abortions sought by minors. He wrote (450 U.S. at 398, 101 S.Ct. at 1164) (Marshall, J., dissenting) that "the minor may confront physical or emotional abuse, withdrawal of financial support or actual obstruction of the abortion decision." These harms are almost identical to those that the majority in this case attributes to Section 3209. See majority opin. at 711-12. See also *Planned Parenthood Association v. Ashcroft*, 462 U.S. 476, 505, 103 S.Ct. 2517, 2532, 76 L.Ed.2d 733 (1983) (O'Connor concurring and dissenting) (statute requiring parental consent or judicial authorization "imposes no undue burden").

Finally, Justice O'Connor has concluded that regulations that simply increase the cost of abortions, including regulations that may double the cost, do not create an "undue burden." See *Akron*, 462 U.S. at 434-35, 103 S.Ct. at 2494-95 (maj. op.); at 466-67, 103 S.Ct. at 2511-12 (O'Connor, J., dissenting). Justice O'Connor reached this conclusion even though it seems clear that such increased costs may well deter some women.

Taken together, Justice O'Connor's opinions reveal that an undue burden does not exist unless a law (a) prohibits abortion or gives another person the authority to veto an abortion or

(b) has the practical effect of imposing "severe limitations," rather than simply inhibiting abortions " 'to some degree' " or inhibiting "some women." *Thornburgh*, 476 U.S. at 828, 829, 106 S.Ct. at 2213, 2214 (O'Connor, J., dissenting), quoting *Akron*, 462 U.S. at 464, 103 S.Ct. at 2510 (O'Connor, J., dissenting). Furthermore, Justice O'Connor's opinions disclose that the practical effect of a law will not amount to an undue burden unless the effect is greater than the burden imposed on minors seeking abortions in *Hodgson* or *Matheson* or the burden created by the regulations in *Akron* that appreciably increased costs. Since the laws at issue in those cases had inhibiting effects that almost certainly were substantial enough to dissuade some women from obtaining abortions, it appears clear that an undue burden may not be established simply by showing that a law will have a heavy impact on a few women but that instead a broader inhibiting effect must be shown.

In this case, the plaintiffs, who made a facial attack [FN1] on Section 3209, did not prove that this provision would impose an undue burden. Section 3209 does not create an "absolute obstacle" or give a husband "veto power." Rather, this provision merely requires a married woman desiring an abortion to certify that she has notified her husband or to claim one of the statutory exceptions.

FN1. Because the plaintiffs made a facial attack on Section 3209, they could not rely on a "worst-case analysis" (*Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 110 S.Ct. 2972, 2981, 111 L.Ed.2d 405 (1990)) or on proof showing only that the provision would impose an undue burden "under some conceivable set of circumstances" (*United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987)). Thus, proof that the provision would adversely affect an unknown number of women with a particular combination of characteristics could not suffice.

The plaintiffs also failed to carry their burden [FN2] of proving that Section 3209 if enforced would have the kind of broad practical impact needed to establish an "undue burden" under the opinions discussed above. Clearly the plaintiffs did not substantiate the impact of Section 3209 with the degree of analytical rigor that should be demanded before striking down a state statute. Cf. *Akron*, 462 U.S. at 463, 103 S.Ct. at 2510 (O'Connor, J., dissenting) (citation omitted) (courts should exercise " 'deliberate restraint' " before finding an undue burden " 'in view of the respect that properly should be accorded legislative judgments' "); *id.* at 465, 103 S.Ct. at 2511.

FN2. In *Thornburgh*, Justice O'Connor made clear that a party challenging the constitutionality of a statute must bear the burden of proving that the law imposes an undue burden. After arguing strenuously that the case should be sent back to the district court for "additional factual development" (476 U.S. at 827, 106 S.Ct. at 2213 (O'Connor, J., dissenting)), Justice O'Connor repeatedly stated that the appellees, who were challenging the statute, had the burden of proving that individual statutory provisions would impose an undue burden. She discussed whether "appellees could succeed in making the threshold showing of undue burden" (*id.* at 831, 106 S.Ct. at 2215), whether "appellees [could] establish that the abortion decision [would be] unduly burdened" (*id.*), and whether the appellees "could succeed in establishing an undue burden" (*id.* at 832, 106 S.Ct. at 2216).

At the outset, it is apparent that two factors imposed a low ceiling on any showing that the plaintiffs could have made. First, as the district court found, the "vast majority" of married women voluntarily inform their husbands before seeking an abortion. *Planned Parenthood v. Casey*, 744 F.Supp. 1323, 1360 (E.D.Pa. 1990). Indeed, in the trial testimony on which the district court relied, the plaintiffs' witness stated that in her experience 95% of married women notify their husbands. App. at 701. Second, the overwhelming majority of abortions are sought by unmarried women. [FN3] Thus, it is immediately apparent that

Section 3209 cannot affect more than about 5% of married women seeking abortions or an even smaller percentage of all women desiring abortions.

FN3. Since 1973, abortions on unmarried women have consistently exceeded 70% of the national total and at times have surpassed 80%. *United States Department of Commerce, Statistical Abstract of the United States 1990* at 71.

The plaintiffs failed to show even roughly how many of the women in this small group would actually be adversely affected by Section 3209. As previously noted, Section 3209 contains four significant exceptions. These exceptions apply if a woman certifies that she has not notified her husband because she believes [FN4] that (1) he is not the father of the child, (2) he cannot be found after diligent effort, (3) the pregnancy is the result of a spousal sexual assault that has been reported to the authorities, or (4) she has reason to believe that notification is likely to result in the infliction of bodily injury upon her. If Section 3209 were allowed to take effect, it seems safe to assume that *some* percentage of the married women seeking abortions without notifying their husbands would qualify for and invoke these exceptions. The record, however, is devoid of evidence showing how many women could or could not invoke an exception.

FN4. The form prepared by the Pennsylvania Department of Health for use in implementing Section 3209 requires a woman to certify that she has not notified her husband "for the following reason(s)...." (744 F.Supp. at 1359). Moreover, a false statement is punishable (as a third degree misdemeanor) only if the woman did not "believe [the statement] to be true" (18 Pa.Cons.Stat. Ann. § 4904(b) (1983)).

Of the potentially affected women who could not invoke an exception, it seems safe to assume that *some* percentage, despite an initial inclination not to tell their husbands, would notify their husbands without suffering substantial ill effects. Again, however, the record lacks evidence showing how many women would or would not fall into this category. Thus, the plaintiffs did not even roughly substantiate how many women might be inhibited from obtaining an abortion or otherwise harmed by Section 3209. [FN5] At best, the record shows that Section 3209 would inhibit abortions " 'to some degree' " or that "some women [would] be less likely to choose to have an abortion by virtue of the presence" of Section 3209. *Thornburgh*, 476 U.S. at 828, 106 S.Ct. at 2214 (O'Connor, J., dissenting), quoting *Akron*, 462 U.S. at 464, 103 S.Ct. at 2510 (O'Connor, J., dissenting). [FN6] And even with respect to these women, the plaintiffs did not show that the impact of Section 3209 would be any greater or any different from the impact of the notice requirement upheld in *Matheson*. Consequently, the plaintiffs failed to prove that Section 3209 would impose an undue burden.

FN5. In considering whether Section 3209 would impose an undue burden, I do *not* take into account a fact that seems glaringly apparent, i.e., that Section 3209 would be difficult to enforce and easy to evade. Section 3209 does not require a woman to provide any proof of notification other than her own unnotarized statement. Thus, if a woman claimed that she had orally notified her husband in private (the mode and place of notification to be expected in most cases), it would be exceedingly difficult in most cases for the Commonwealth to prove beyond a reasonable doubt that she had not done so.

Proving that a woman violated the law due to a false statement concerning one of the exceptions would also be hard. As noted (*see* footnote 4, *supra*), the Commonwealth would have to prove that the woman did not "believe [the statement] to be true" (18 Pa.Cons.Stat. Ann. § 4904(b) (1983)). Consequently, if a woman certified that she did not notify her husband because he was not the father, the Commonwealth would have to prove that she subjectively believed that the husband was the father. Or, if a woman certified that she did not notify her husband because she had reason to believe that this would lead to the infliction of bodily injury upon her, the Commonwealth would

have to prove that the woman subjectively believed that she would not be harmed. It seems likely, therefore, that Section 3209, if allowed to take effect, would be widely evaded and infrequently enforced and would consequently be less likely to produce either the good or bad effects that the opposing parties claim.

FN6. The plaintiffs' proof may be separated into five categories. First, they offered testimony that a spousal notification requirement would sometimes delay an abortion or necessitate an extra trip to the abortion provider (*see* 744 F.Supp. at 1360). But as the majority properly concludes in rejecting identical objections to the 24-hour waiting period required by Section 3205(a) (*see* majority opin. at 706-07), these potential effects do not amount to an undue burden. *See Akron*, 462 U.S. at 472-74, 103 S.Ct. at 2515-16 (O'Connor, J., dissenting).

Second, the plaintiffs offered testimony that the exceptions in Section 3209 would not cover a case in which a woman did not want to notify her husband for fear that he would retaliate in some way other than the infliction of bodily injury upon her, such as by subjecting her to psychological abuse or abusing their children (*see* 744 F.Supp. at 1360-62). The plaintiffs, however, do not appear to have offered any evidence showing how many (or indeed that *any* actual women) would be affected by this asserted imperfection in the statute.

Third, the plaintiffs introduced general evidence about the problem of spouse abuse (*see* 744 F.Supp. at 1361). They offered widely varying statistics concerning the dimensions of the problem, as well as evidence that battering occurs in all socioeconomic groups and is sometimes fatal. This proof, while documenting the existence of a broad national problem, provides no basis for any estimate of what is relevant here — the impact of Section 3209.

Fourth, the plaintiffs offered evidence that "mere notification of pregnancy is frequently a flashpoint for battering" (*see* 744 F.Supp. at 1361). This proof indicates *when* violence is likely to occur in an abusive marriage but provides no basis for determining how many women would be adversely affected by Section 3209.

Finally, the plaintiffs offered the opinion of one of their witnesses that most battered women would be psychologically incapable of taking advantage of Section 3209's fourth exception, i.e., the exception for cases in which the woman has reason to fear that notification will lead to the infliction of bodily harm upon her (*see* 744 F.Supp. at 1363). However, the plaintiffs failed to show how many of the women potentially affected by Section 3209 (married women seeking abortions without notifying their husbands) are victims of battering. Thus, the opinion offered by their expert, even if taken at face value, merely describes the likely behavior of most of the women in a group of unknown size. Clearly, then, this evidence does not show how many women would be inhibited or otherwise harmed by Section 3209. I cannot believe that a state statute may be held facially unconstitutional simply because one expert testifies that in her opinion the provision would harm a completely unknown number of women.

Needless to say, the plight of any women, no matter how few, who may suffer physical abuse or other harm as a result of this provision is a matter of grave concern. It is apparent that the Pennsylvania legislature considered this problem and attempted to prevent Section 3209 from causing adverse effects by adopting the four exceptions noted above. Whether the legislature's approach represents sound public policy is not a question for us to decide. Our task here is simply to decide whether Section 3209 meets constitutional standards. The first step in this analysis is to determine whether Section 3209 has been shown to create an undue burden under Supreme Court precedent, and for the reasons just explained it seems clear that an undue burden has not been established.

B.

This conclusion is not undermined (and may indeed be supported) by the portion of Justice O'Connor's opinion in *Hodgson* regarding the constitutionality of the two-parent notice requirement without judicial bypass. The majority in this case interprets Justice O'Connor's opinion to mean that this requirement imposed an undue burden and did not serve a "compelling" interest. Majority opin. at 696. I interpret Justice O'Connor's opinion differently. I do not read her opinion to mean that the two-parent notice requirement without judicial bypass constituted an undue burden. Rather, I interpret her opinion to mean that this

requirement was unconstitutional because it was not reasonably related to a legitimate state interest. Thus, I do not believe that her opinion (or the Court's holding) supports the majority's conclusion in the present case that the spousal notification requirement in Section 3209 imposes an undue burden.

In *Hodgson*, Justice Stevens wrote the lead opinion discussing the unconstitutionality of the two-parent notification requirement without judicial bypass, and Justice O'Connor joined most of Justice Stevens' opinion (*see* 110 S.Ct. at 2949 (O'Connor, J., concurring)). Thus, in interpreting Justice O'Connor's position, it is helpful to begin with the relevant portions of Justice Stevens' opinion.

Two portions of Justice Stevens' opinion, Parts III and VII, are most important for present purposes. In Part III, Justice Stevens discussed the applicable constitutional standard. Nowhere in this portion of his opinion (or indeed in any portion of his opinion) did Justice Stevens make reference to "strict," "exacting," or "heightened" scrutiny or any of the terminology associated with that level of review. Instead, he concluded that the statute failed to satisfy even the least demanding standard of review. He wrote (110 S.Ct. at 2937): "Under any analysis, the ... statute cannot be sustained if the obstacles it imposes are not reasonably related to legitimate state interests."

In Part VII of his opinion, Justice Stevens explained (*id.* at 2945) why the two-parent notice requirement did not "reasonably further any legitimate state interest." Thus it seems clear that Justice Stevens' opinion concluded that the two-parent notice requirement without judicial bypass was unconstitutional because it failed some variant of the rational relationship test.

In my view, Justice O'Connor's opinion in *Hodgson* did not subject this requirement to a more exacting level of scrutiny. Although Justice O'Connor did not join Part III of Justice Stevens' opinion (in which he discussed the general constitutional standard that he applied), Justice O'Connor wrote as follows (110 S.Ct. at 2949-50 (emphasis added)):

It has been my understanding in this area that "[i]f the particular regulation does not 'unduly burde[n]' the fundamental right, ... then our evaluation of that regulation is limited to our determination that the regulation rationally relates to a legitimate state purpose." *It is with that understanding that I agree with Justice Stevens' statement "that the statute cannot be sustained if the obstacles it imposes are not reasonably related to legitimate state interests."*

I interpret this to mean that Justice O'Connor agreed with Justice Stevens that the challenged statute should be judged under the rational relationship test. I do not think that she would have expressed general agreement with Justice Stevens' statement of the governing legal standard if she believed that the statute imposed an undue burden and was thus required to satisfy an entirely different legal standard. I also do not think that she would have concluded that the statute created an undue burden without explaining the basis for that conclusion. Moreover, Justice O'Connor joined Part VII of Justice Stevens' opinion, in which, as previously noted, Justice Stevens concluded that the two-parent notice requirement without judicial bypass was not "reasonably" related to any "legitimate interest." I do not think that Justice O'Connor would have joined this portion of Justice Stevens' opinion if her position regarding the constitutionality of the provision was based on a fundamentally different analysis. Thus, I conclude that Justice O'Connor found the two-parent notice statute unconstitutional under the rational relationship test. This must mean either (a) that she did not believe that this requirement constituted an undue burden or (b) that she did not find it necessary to reach that question because she believed that the requirement could not even pass the rational relationship test. In either event, her position in no way undermines my conclusion that Section 3209 has not been shown to create an undue burden. [FN7]

FN7. In the portion of her opinion concluding that the two-parent notification requirement with judicial bypass was constitutional, Justice O'Connor wrote (110 S.Ct. at 2950 (emphasis added)): "In a series of cases, this Court has explicitly approved judicial bypass as a means of tailoring a parental *consent* provision so as to avoid unduly burdening the minor's limited right to obtain an abortion." I interpret this statement to mean that a judicial bypass option prevents a consent requirement (which would otherwise amount to an absolute veto) from creating an undue burden. This statement is therefore fully consistent with my view that Justice O'Connor did not find that an undue burden was created by the two-parent *notice* requirement without judicial bypass.

III.

Since Section 3209 has not been proven to impose an undue burden, it must serve a "legitimate" (but not necessarily a "compelling") state interest. The majority acknowledges that this provision serves a "legitimate" interest, namely, the state's interest in furthering the husband's interest in the fetus. *See* majority opin. at 715, 716. I agree with this conclusion, and I do not think that this point requires extended discussion.

The Supreme Court has held that a man has a fundamental interest in preserving his ability to father a child. *Skinner v. Oklahoma*, 316 U.S. 535, 541, 62 S.Ct. 1110, 1113, 86 L.Ed. 1655 (1942). The Court's opinions also seem to establish that a husband who is willing to participate in raising a child has a fundamental interest in the child's welfare. *Michael H. v. Gerald D.*, 491 U.S. 110, 123, 109 S.Ct. 2333, 2342, 105 L.Ed.2d 91 (1989); *Quilloin v. Walcott*, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978); *Caban v. Mohammed*, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1969); *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). It follows that a husband has a "legitimate" interest in the welfare of a fetus he has conceived with his wife.

To be sure, the Supreme Court held in *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 67-72, 96 S.Ct. 2831, 2840-43, 49 L.Ed.2d 788 (1976), that a potential father may not be given the legal authority to veto an abortion, and thus the Court apparently held that the potential father's interest was not "compelling." But the Court did not question the *legitimacy* of this interest. On the contrary, the Court wrote (*id.* at 69, 96 S.Ct. at 2841 (emphasis added)): "We are not unaware of the *deep and proper* concern and *interest* that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying." *See also id.* at 93, 96 S.Ct. at 2852 (White, J., dissenting) ("A father's interest in having a child — perhaps his only child — may be unmatched by any other interest in his life"). Since a "deep and proper ... interest" appears indistinguishable from a "legitimate" interest, it seems clear that a husband has a "legitimate" interest in the fate of the fetus.

This interest may be legitimately furthered by state legislation. "[S]tatutory regulation of domestic relations [is] an area that has long been regarded as a virtually exclusive province of the States." *Sosna v. Iowa*, 419 U.S. 393, 404, 95 S.Ct. 553, 560, 42 L.Ed.2d 532 (1975). *See also Moore v. East Cleveland*, 431 U.S. 494, 499, 97 S.Ct. 1932, 1935, 52 L.Ed.2d 531 (1977); *Scheinberg v. Smith*, 659 F.2d 476, 483-94 (5th Cir. 1981). Accordingly, Pennsylvania has a legitimate interest in furthering the husband's interest in the fate of the fetus, as the majority in this case acknowledges.

IV.

The remaining question is whether Section 3209 is "rationally" or "reasonably" related to this interest. Under the rational relationship test, which developed in equal protection cases, "legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality." *Hodel v. Indiana*, 452 U.S. 314, 331-32, 101 S.Ct. 2376, 2386-87, 69 L.Ed.2d 40 (1981). This test does not permit the invalidation of legislation simply because it is "deemed unwise or unartfully drawn." *U.S. Railroad*

Retirement Board v. Fritz, 449 U.S. 166, 175, 101 S.Ct. 453, 459, 66 L.Ed.2d 368 (1981). Legislation does not violate this test simply because it produces some adverse effects. *Id.*; *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78, 31 S.Ct. 337, 340, 55 L.Ed. 369 (1911). As the Court wrote in *Dandridge v. Williams*, 397 U.S. 471, 485-86, 90 S.Ct. 1153, 1161-62, 25 L.Ed.2d 491 (1970):

"The problems of government are practical ones and may justify, if they do not require, rough accommodations--illogical, it may be, and unscientific." *Metropolis Theatre Co. v. City of Chicago*, 228 U.S. 61, 68- 70 [33 S.Ct. 441, 443, 57 L.Ed. 730 (1913)]...

... [The rational-basis standard] is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.

See also *Dallas v. Stanglin*, 490 U.S. 19, 25-27, 109 S.Ct. 1591, 1595-96, 104 L.Ed.2d 18 (1989); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-40, 105 S.Ct. 3249, 3253-54, 87 L.Ed.2d 313 (1985). Rather, "those challenging the legislative judgment must convince the Court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. 93, 111, 99 S.Ct. 939, 949, 59 L.Ed.2d 171 (1979). See also *Hancock Industries v. Schaeffer*, 811 F.2d 225, 238 (3d Cir. 1987).

Even assuming that the rational relationship test is more demanding in the present context than in most equal protection cases, that test is satisfied here. The Pennsylvania legislature could have rationally believed that some married women are initially inclined to obtain an abortion without their husbands' knowledge because of perceived problems — such as economic constraints, future plans, or the husbands' previously expressed opposition — that may be obviated by discussion prior to the abortion.⁶ In addition, the legislature could have reasonably concluded that Section 3209 would lead to such discussion and thereby properly further a husband's interests in the fetus in a sufficient percentage of the affected cases to justify enactment of this measure. Although the plaintiffs and supporting amici argue that Section 3209 will do little if any good and will produce appreciable adverse effects, the Pennsylvania legislature presumably decided that the law on balance would be beneficial. We have no authority to overrule that legislative judgment even if we deem it "unwise" or worse. *U.S. Railroad Retirement Board v. Fritz*, 449 U.S. at 175, 101 S.Ct. at 459. "We should not forget that 'legislatures are ultimate guardians of the liberty and welfare of the people in quite as great a degree as the courts.'" *Akron v. Akron Center For Reproductive Health*, 462 U.S. at 465, 103 S.Ct. at 2511 (O'Connor, J., dissenting), quoting *Missouri, K. & T.R. Co. v. May*, 194 U.S. 267, 270, 24 S.Ct. 638, 639, 48 L.Ed. 971 (1904). Clearly, the plaintiffs have not shown that "the legislative facts on which [the statute] is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley*, 440 U.S. at 111, 99 S.Ct. at 949. Thus, Section 3209 is rationally related to a legitimate state interest and may not be invalidated under the Supreme Court's abortion precedents. [FN8]

FN8. The plaintiffs argue that the district court's decision may be affirmed on alternative constitutional grounds not adopted by that court, *i.e.*, that Section 3209 violates the rights to marital

⁶ This sentence quoted with approval by Chief Justice Rehnquist in his dissenting opinion. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 974-975 (1992) (Rehnquist, C.J., dissenting) ("By providing that a husband will usually know of his spouse's intent to have an abortion, the provision makes it more likely that the husband will participate in deciding the fate of his unborn child, a possibility that might otherwise have been denied him.").

and informational privacy and equal protection. Because the majority has relied solely on the abortion right in affirming the district court, I do not address these alternative grounds. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682, 719-727 (3rd Cir. 1991) (Alito, J., dissenting in part).

my comments

The U.S. Supreme Court later disagreed with Judge Alito, and held that the Pennsylvania statute was *unconstitutional* as an undue burden on the woman's rights. *Casey*, 505 U.S. 833, 887-898 (1992).

I am deeply troubled by Judge Alito's dissent in *Casey*. A woman's constitutional right to an abortion is personal to her, and the fact that she is married should impose no additional legal requirements on her. In other words, it is *not* appropriate for a state government to intrude in a woman's marriage and demand that she inform her husband of her decision to seek an abortion. If anything, the requirement that married women inform their husbands will lead to strife in some marriages and could encourage divorce, something that should be against strong public policy.

Judge Alito, in Part III of his dissent (above, beginning at page 19), argues that a father has some legal interest in his fetus. Suppose we give the father a vote in whether the mother has an abortion: then there is a possibility of a stalemate in which the mother and father disagree about an abortion. Because pregnancy affects the mother more than the father, we then give the mother *two* votes and the father *one* vote. In practice, this means that the father's vote is *irrelevant*. This logical exercise shows that the decision to have an abortion belongs solely to the pregnant woman. The U.S. Supreme Court has repeatedly held that a father has no legal right to prevent the abortion of his fetus: *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 837-38 (1992); *Doe v. Smith*, 486 U.S. 1308 (1988); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 71 (1976).

Judge Alito, in Part IIA of his dissent (above, beginning at page 16), faults plaintiffs for not providing quantitative evidence on the percentage of women who would be harmed by this Pennsylvania statute. But such evidence would be difficult to obtain, because pregnant women who avoid an abortion only because of the requirements in this statute would not publicly report their choice. And Judge Alito does *not* explain why it is important that he know the *number* of women who would be harmed by this statute. In my opinion, the likelihood that at least one woman will be harmed is enough to invalidate this statute. Moreover, Judge Alito (in his footnote 5) admits that this statute "would be difficult to enforce and easy to evade", which makes the statute somewhat of a symbolic impediment to abortion — but an effective way to discourage some women from using their legal right to an abortion, as well as harass women who are seeking an abortion.

Alexander v. Whitman

Ms. Alexander was admitted to a hospital in New Jersey on 15 July 1992 to give birth via Cesarean section. The vital signs of the fetus were “normal and healthy” 14 minutes before the surgery began. However, the fetus died prior to delivery “due to ‘cardio-vascular collapse.’ ”⁷ Ms. Alexander sued the physicians at the hospital for wrongful death of her fetus, alleging their negligence. However, that litigation ran into problems, because New Jersey law forbids wrongful death litigation over a stillborn fetus.⁸ Ms. Alexander then filed litigation in federal court against the Governor Whitman of New Jersey and various other state officials, alleging that this New Jersey statute violated the Equal Protection and Due Process clauses of the Fourteenth Amendment. The U.S. District Court dismissed Alexander’s claim and the U.S. Court of Appeals affirmed. Two key parts of the opinion of the Court of Appeals is quoted here:

However, Ms. Alexander can only establish a claim on behalf of her child under the Fourteenth Amendment if her child (and others similarly situated) fall(s) within the protections afforded "person[s]" as that term is used in the Fourteenth Amendment, and it is clear it does not. The Supreme Court has already decided that difficult question for us in *Roe v. Wade*, 410 U.S. 113, 158, 93 S.Ct. 705, 729, 35 L.Ed.2d 147 (1973). There, the Court expressly held that "the word 'person,' as used in the Fourteenth Amendment does not include the unborn." The Court held that "person" has "application only postnatally." *Id.* at 157, 93 S.Ct. at 728-29. That constitutional principle was more recently re-affirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846, 112 S.Ct. 2791, 2804, 120 L.Ed.2d 674 (1992). There, Justice Stevens, writing separately from the joint opinion of Justices O'Connor, Kennedy and Souter, wrote that, as a matter of federal constitutional law, a fetus is a "developing organism that is not yet a 'person' " and "does not have what is sometimes described as a 'right to life.' " *Id.* at 913, 112 S.Ct. at 2839 (Stevens, J., concurring in part and dissenting in part). This principle "remains a fundamental premise of our constitutional law governing reproductive autonomy." *Id.* at 914, 112 S.Ct. at 2839. Since the unborn are not persons within the meaning of the Fourteenth Amendment, no claim alleging an equal protection violation can be brought on behalf of the stillborn child. [FN9]

FN9. Because the unborn are not persons within the meaning of the Fourteenth Amendment, it follows that the unborn are not encompassed within the meaning of the term "person" or "citizen" for purposes of 42 U.S.C. 1983. See *Reed v. Gardner*, 986 F.2d 1122, 1127-28 (7th Cir. 1993).

Alexander v. Whitman, 114 F.3d 1392, 1400 (3rd Cir. 1997), *cert. den.*, 522 U.S. 949 (1997).

⁷ *Alexander v. Whitman*, 114 F.3d 1392, 1396 (3rd Cir. 1997).

⁸ New Jersey Statute 2A:31-1, interpreted by *Giardina v. Bennett*, 545 A.2d 139, 143-145 (N.J. 1988), says that a fetus must be born alive, before the fetus is considered a person. Therefore, a stillborn fetus was never a person, and so there is no recovery under the Wrongful Death Act for a stillborn fetus.

The U.S. Court of Appeals later said:

The short answer to plaintiffs' argument is that the issue is not whether the unborn are human beings, but whether the unborn are constitutional persons. [FN13] It is beyond question that medical and scientific knowledge has advanced significantly since *Roe*. However, even with those advances, the Supreme Court has consistently adhered to *Roe*'s holding that the unborn are not persons under the Fourteenth Amendment. See *Planned Parenthood of Southeastern Pennsylvania*, 505 U.S. at 855-61, 112 S.Ct. at 2808-12. Therefore, plaintiffs' argument that *Roe* was based on imperfect science is to no avail. [FN14]

FN13. The phrase "constitutional person" is Ronald Dworkin's. Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U.CHIL.REV. 381, 398.

FN14. Interestingly, Justice O'Connor, writing for the Court in *Planned Parenthood v. Casey*, clearly acknowledged the advances in medical knowledge since *Roe*. She wrote:

"We have seen how time has overtaken some of *Roe*'s factual assumptions: advances in maternal health care allow for abortions safe to the mother later in pregnancy than was true in 1973, and advances in neonatal care have advanced viability to a point somewhat earlier. But these facts go only to the scheme of time limits on the realization of competing interests, and the divergences from the factual premises of 1973 have no bearing on the validity of *Roe*'s central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions.

Planned Parenthood, 505 U.S. at 860, 112 S.Ct. at 2811 (citations omitted).
Alexander v. Whitman, 114 F.3d at 1402.

Judge Alito wrote a terse concurring opinion in *Alexander*, which is quoted here in its entirety:

I am in almost complete agreement with the court's opinion, but I write to comment briefly on two points. First, I think that the court's suggestion that there could be "human beings" who are not "constitutional persons" (Maj.Op. 1401-02) is unfortunate. I agree with the essential point that the court is making: that the Supreme Court has held that a fetus is not a "person" within the meaning of the Fourteenth Amendment. However, the reference to constitutional non-persons, taken out of context, is capable of misuse.

Second, I think that our substantive due process inquiry must be informed by history. It is therefore significant that at the time of the adoption of the Fourteenth Amendment and for many years thereafter, the right to recover for injury to a stillborn child was not recognized. See *Giardina v. Bennett*, 111 N.J. 412, 545 A.2d 139, 143 (1988); *Smith v. Brennan*, 31 N.J. 353, 157 A.2d 497, 498 (1960).

Alexander v. Whitman, 114 F.3d 1392, 1409 (3rd Cir. 1997) (Alito, J., concurring).

My interpretation of this concurring opinion is that Alito believes that the fetus — at least late in pregnancy (*Alexander* was 8½ months pregnant) — is a *person*. As a judge on the U.S. Court of Appeals, Alito recognizes that he is bound by the precedent in *Roe v. Wade*. However, as a Justice of the U.S. Supreme Court, Alito could use his belief that a fetus is a person to overrule *Roe v. Wade*. Alito is not clear what he means by "unfortunate" and "capable of misuse".

Planned Parenthood v. Farmer

Farmer received oral arguments at the U.S. Court of Appeals on 19 Nov 1999. Judge Barry of the U.S. Court of Appeals drafted the majority opinion that held unconstitutional the New Jersey Partial-Birth Abortion Ban Act of 1997. On 28 June 2000, the U.S. Supreme Court announced its opinion in *Stenberg v. Carhart*, a case from Nebraska with issues similar to *Farmer*. On 26 July 2000, the U.S. Court of Appeals issued its opinion in *Farmer*, which opinion began with the following paragraph:

The majority opinion which follows was in final form before the Supreme Court of the United States heard argument in the appeal of *Carhart v. Stenberg*, 192 F.3d 1142 (8th Cir. 1999). The Supreme Court has now issued its opinion in that case, finding Nebraska's "partial birth abortion" statute — a statute nearly identical to the one before this Court — unconstitutional. See *Stenberg v. Carhart*, 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000). Because nothing in that opinion is at odds with this Court's opinion; because, in many respects, that opinion confirms and supports this Court's conclusions and, in other respects, goes both further than and not as far as, this opinion; and, because we see no reason for further delay, we issue this opinion without change.

Planned Parenthood of Central New Jersey v. Farmer, 220 F.3d 127, 130 (3rd Cir.).

This is the only mention in the majority opinion of the U.S. Supreme Court decision in *Stenberg v. Carhart*, although *Carhart* was now the controlling law. Judge Alito, one of the three judges at the U.S. Court of Appeals, concurred in the result, but his terse dissent explained his different reasons from the majority.

I do not join Judge Barry's opinion, which was never necessary and is now obsolete. That opinion fails to discuss the one authority that dictates the result in this appeal, namely, the Supreme Court's decision in *Stenberg v. Carhart*, 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000). Our responsibility as a lower court is to follow and apply controlling Supreme Court precedent. I write briefly to explain why *Carhart* requires us to affirm the decision of the District Court in this case. This is an appeal by the New Jersey State Legislature from a decision of the United States District Court for the District of New Jersey holding the New Jersey Partial-Birth Abortion Ban Act of 1997, 2A:65A-5 *et seq.*, unconstitutional and permanently enjoining enforcement of the Act. *Planned Parenthood of Central New Jersey v. Verniero*, 41 F.Supp.2d 478 (D.N.J. 1998). The New Jersey statute closely resembles statutes enacted in recent years in many other states.

On January 14, 2000, the Supreme Court granted certiorari to review the decision in *Carhart v. Stenberg*, 192 F.3d 1142 (8th Cir. 1999), *cert. granted*, 528 U.S. 1110, 120 S.Ct. 865, 145 L.Ed.2d 725 (2000), which presented the question of the constitutionality of a similar Nebraska statute. The Supreme Court recently held that the Nebraska statute is unconstitutional. *Stenberg v. Carhart*, 530 U.S. 914, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000).

....

In conclusion, *Carhart* compels affirmance of the decision of the District Court. *Planned Parenthood of Central New Jersey v. Farmer*, 220 F.3d 127, 152-153 (3rd Cir. 26 July 2000) (Alito, J., concurring in the judgment).

This separate opinion of Judge Alito is straightforward: Courts of Appeal are obligated to apply precedents established by the U.S. Supreme Court.

C.H. v. Oliva

Judge Alito wrote a dissenting opinion in a case involving religious themes in a public school. This interesting case had the following significant history.

1. *C.H. v. Oliva*, 990 F.Supp. 341 (D.N.J. 30 Dec 1997),
2. *aff'd without opinion*, 166 F.3d 1204 (3rd Cir. 25 Sep 1998),
3. *on rehearing, aff'd with opinion*, 195 F.3d 167 (3rd Cir. 22 Oct 1999),
4. *aff'd by equally divided en banc court*, 226 F.3d 198 (3rd Cir. 28 Aug 2000),
5. *cert. den. sub nom. Hood v. Medford Township Bd. of Educ.*, 533 U.S. 915 (18 June 2001).

The trial court described the facts of this case.

The basic facts are not in dispute. Prior to February 23, 1996, Z.H. was a student at Haines Elementary School, which is one of defendant Medford Township Board of Education's public schools. While Z.H. was in kindergarten in 1994, students in his class were asked to make posters depicting things for which they were thankful. Z.H.'s poster professed his thanks for "Jesus." All the posters were then placed on display in the school hallway. Apparently, while the regular classroom teacher was absent, some unknown person removed Z.H.'s poster due to its religious theme. Upon the classroom teacher's return, the poster was returned to display, albeit in a less prominent location than it had previously occupied.

A similar incident occurred in February 1996 while Z.H. attended defendant Grace Oliva's first grade class at Haines Elementary. Ms. Oliva maintained a policy in her class which rewarded students reaching a certain level of reading proficiency by allowing them to read a book of their own choosing to the rest of the class. [FN2] On February 9, 1996, Z.H. chose to read a story called "A Big Family," an adaptation of chapters 29-33 of the Book of Genesis, from a book entitled "The Beginner's Bible." [FN3] *See Genesis 29:1-33:20*. However, because of its religious content, Ms. Oliva did not allow Z.H. to read the story to the class. Instead, although the other students were allowed to read their non-religious stories to the class, he was only allowed to read the story to Ms. Oliva.

FN2. The material was subject to review by Ms. Oliva to ensure that it would be suitable in length and complexity for first grade students. Complaint at 17.

FN3. The story "A Big Family" reads:

Jacob traveled far away to his uncle's house. He worked for his uncle, taking care of sheep. While he was there, Jacob got married. He had twelve sons. Jacob's big family lived on his uncle's land for many years. But Jacob wanted to go back home. One day, Jacob packed up all his animals and his family and everything he had. They traveled all the way back to where Esau lived. Now Jacob was afraid that Esau might still be angry at him. So he sent presents to Esau. He sent servants who said, "Please don't be angry anymore." But Esau wasn't angry. He ran to Jacob. He hugged and kissed him. He was happy to see his brother again.

After C.H., Z.H.'s mother, was notified that the story was inappropriate, she made both informal and formal demands of the various Medford defendants that Z.H. be allowed to read the story to the entire class. [FN4] These demands were not satisfied. Accordingly, on June 5, 1996, plaintiffs instituted the present action, alleging, in a two count complaint, that (1) the

actions of the Medford defendants willfully and intentionally violated Z.H.'s rights to Freedom of Expression under the First Amendment and 42 U.S.C. § 1983, and (2) the State defendants, by failing to either exercise their supervisory powers or implement a policy to allow for expression of religious beliefs in the classroom, aided in this violation. The complaint seeks both monetary and injunctive relief. The State and Medford defendants answered the complaint, and on April 9, 1997 and April 10, 1997 respectively, moved for judgment on the pleadings, [FN5] raising several independent reasons why the complaint, in its entirety, should be dismissed. These motions are presently before the court.

FN4. These demands included issuance of formal apologies to both Z.H. and C.H.

FN5. The State defendants filed a motion to dismiss the amended complaint, or, in the alternative, for summary judgment.

C.H. v. Oliva, 990 F.Supp. 341, 346-347 (D.N.J. 30 Dec 1997).

The trial court's discussion of law included the following:

Z.H. had no constitutional right to have the poster of Jesus displayed in any particular location; therefore, relocating the poster to a less conspicuous position on the wall was not a restriction on his speech. Even assuming *arguendo* that his freedom of speech was impinged, "content-based restrictions on speech need only be 'reasonable in light of the purpose served by the forum and ... viewpoint neutral.'" *Duran v. Nitsche*, 780 F.Supp. 1048, 1052 (E.D.Pa. 1991).

The plaintiffs argue that the Medford defendants were not "viewpoint neutral" because they regulated Z.H.'s poster and book on the basis of their religious origin. However, "viewpoint neutral" does not mean that any regulation that touches upon the viewpoint of the speech is prohibited, but rather that regulations must be based solely on pedagogical concerns rather than a particular point of view. *See Duran*, 780 F.Supp. at 1052 ("In the educational setting, the standard for determining the reasonableness of a content-based restriction on school sponsored expressive activity in a non-public forum is whether the restriction is 'reasonably related to legitimate pedagogical concerns.'" (quoting *Hazelwood*, 484 U.S. at 273)).

Both incidents — relocating the poster of Jesus and disallowing Z.H. to read the "Beginner's Bible" to his class — were reasonably related to legitimate pedagogical concerns. In fact, as the Medford defendants note, if the school had replaced the poster in a more prominent position because it depicted Jesus Christ, or even to counterbalance inferences of religious discrimination, the school could have run afoul of the Establishment Clause. *See Washegesic v. Bloomingdale Public Schools*, 33 F.3d 679 (6th Cir. 1994) (finding public school's display of portrait of Jesus violated Lemon test and Establishment Clause), *cert. denied*, 514 U.S. 1095, 115 S.Ct. 1822, 131 L.Ed.2d 744; *see also Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990) (holding school's removal of Bible and other religiously oriented books from library and the school's forbidding teacher from reading Bible silently during class hours did not violate Establishment Clause or free speech rights of teacher), *cert. denied*, 505 U.S. 1218, 112 S.Ct. 3025, 120 L.Ed.2d 896.

Furthermore, had the Medford defendants allowed Z.H. to read the "Beginner's Bible" to the rest of his first grade classmates, the possibility exists that they could have construed the presentation to be an endorsement of the Bible by the teacher. The plaintiffs note that the story Z.H. chose was fairly innocuous, and claim that "[h]ad Plaintiff's book had a different cover and had the characters had names like Joe and Ed, it is beyond issue that the plaintiff would have been allowed to read his story to the class." Pls.' Br. at 13-14. This is precisely

true. Z.H. was not allowed to read the book to his classmates during class time because it was *The Bible*, a religious book that constitutes the very foundation for a number of, but obviously not all, religions. [FN20] It is irrelevant that the story had no overt religious theme; the speech was the book itself. [FN21] If Z.H.'s teacher were to praise him for completing his reading assignment skillfully, (i.e. by saying something like "very good"), it is not unlikely that a child in first grade could interpret that comment as an endorsement of the story and the book. *See Medford Defs.' Br. at 21.* Therefore, allowing Z.H. to read the "Beginner's Bible" only to his teacher was a proper accommodation of Z.H.'s right of free expression and the principle of separation of church and state.

FN20. Obviously, if Z.H. was prohibited from reading the book solely because it was a Christian book while other students were allowed to read non-Christian religious books, this restriction would not have been viewpoint neutral.

FN21. In their brief, the plaintiffs respond to a statement allegedly uttered by Z.H.'s principal, where she told C.H. that the reading of the Bible story had the potential of offending Muslim, Hindu or Jewish students. The plaintiffs state that:

the characters of the story came from the Old Testament and therefore could hardly be offensive to Jewish students, Esau is considered a progenitor of the Arab race and therefore the story could hardly be considered offensive to Muslim students and since the proposed story contained no scriptural verse, reference to a deity or other religious doctrine, it could hardly be said to be offensive to Hindu or that matter even atheistic students.

Pls.' Br. at 3-4. This argument misconstrues the basic legal issue of this case. The issue is not whether the story was offensive or actually did offend, but whether the defendants acted constitutionally when they allowed Z.H. to read his "Bible" only to his teacher rather than his entire class of public school students. Even if every single student, teacher and administrator in Z.H.'s public school were strong adherents to Christianity, the Medford defendants' actions would still be appropriate.

....

The Medford defendants concede that the poster was removed and relocated because it had a religious theme. *Medford Defs.' Br. at 19.* Nonetheless, the defendants' actions neither advanced nor inhibited religion, nor did the defendants create an excessive entanglement with religion. As mentioned above, Z.H. had no constitutional right to have his religious poster displayed prominently in his public school, therefore merely relocating it had no impact on his, or anyone else's religion. Furthermore, the defendants did not create or foster any sort of government involvement with religion by the simple act of relocating the poster.

Neither did prohibiting Z.H. from reading the "Beginner's Bible" to his class violate the Establishment Clause. Z.H.'s teacher properly exercised her editorial control over the students' reading selections to ensure the material was appropriate for their educational level. This obviously concerns more than just determining whether or not the selection was grammatically correct or lewd, but deciding whether or not the themes the selection presented were suitable for a first-grade class. At this age, it is quite reasonable to assume that these children could have been easily confused whether or not Z.H.'s teacher merely let Z.H. read his book, or if she approved of its message. Presenting the book to the teacher for approval was part of the standard procedure of that class activity; consequently, the books that were allowed to be read were those approved of by the teacher. It is likely that some first-grade students would not fully understand all of the reasons why something could be unsuitable for use in a school activity and could instead believe that the books Ms. Oliva allowed to be read were those books that she liked or those with which she personally agreed.

Moreover, the plaintiffs have not shown how Z.H.'s teacher's actions advanced or inhibited religion in any sense. She never did or said anything regarding his faith. On the contrary, she let him read the "Bible" to himself during his free periods. Z.H. was merely forbidden from reading the book to his classmates during school hours, and this did not affect the practice of a tenant of his religion or his religion in general. Finally, no excessive entanglement was created by this act. Accordingly, the Medford defendants did not violate the Establishment Clause.

C.H. v. Oliva, 990 F.Supp. 341, 353-355 (D.N.J. 1997).

The trial court granted summary judgment to the defendants, which was affirmed on appeal.

On rehearing before the en banc U.S. Court of Appeals, Judge Alito wrote the only dissenting opinion, which is quoted here in its entirety:

In accordance with tradition, I will not comment on the decision of the en banc court insofar as it affirms, by an equally divided vote, the judgment of the District Court regarding Zachary Hood's [FN1] wish to read the story, "A Big Family," to his class. I must write, however, regarding the full court's decision with respect to Zachary's Thanksgiving poster. Instead of confronting the First Amendment issue that is squarely presented by that incident, the court ducks the issue and bases its decision on a spurious procedural ground never raised by the defendants — viz., that the complaint does not adequately allege facts providing a basis for holding any of the defendants responsible for the treatment of the poster. I dissent.

FN1. Although the complaint identified Zachary and his mother, Carol Hood, by initials, rather than by name, their names are used in the plaintiff's most recent brief, and I therefore use them in this opinion.

I.

The incident concerning the Thanksgiving poster occurred when Zachary was in kindergarten at the Haines Elementary School in Medford, New Jersey. As alleged in the complaint, this is what happened. With Thanksgiving approaching, Zachary's teacher told the students to make posters depicting what they were "thankful for." Zachary drew a picture of Jesus. All of the pupils' posters, including Zachary's, were initially hung in the hallway of the school, but on a day when Zachary's teacher was absent, unnamed employees of the school board removed the poster "because of its religious theme." The next day, Zachary's teacher put the picture back on the wall — but this time in a less prominent spot at the end of the hall.

The following year another, similar incident occurred while Zachary was in Grace Oliva's first-grade class at the same school. As a reward for achieving a certain degree of proficiency in reading, Ms. Oliva invited students to bring in a book to read to the class. "The only condition on the selection was that it would be reviewed first by [Ms. Oliva] to insure that its length [and] complexity were appropriate for the first grade." Zachary qualified to read a story to the class and brought to school a book entitled *The Beginner's Bible: Timeless Children's Stories*. Zachary wanted to read the following story, called "A Big Family," which represents an adaptation of the story of the reconciliation of Jacob and Esau from Genesis 29:1–33:20:

Jacob traveled far away to his uncle's house. He worked for his uncle taking care of sheep. While he was there, Jacob got married. He had twelve sons. Jacob's big family lived on his uncle's land for many years. But Jacob wanted to go back home. One day, Jacob packed up all his animals and his family and everything he had. They traveled all the way back home to where Esau lived. Now Jacob was afraid that Esau might still be angry at him. So he sent presents to Esau. He sent servants who said, "Please don't be angry anymore." But Esau wasn't angry. He ran to Jacob. He hugged and kissed him. He was happy to see his brother again.

Ms. Oliva told Zachary that he could not read this story to the class "because of its religious content." Instead, she permitted Zachary to read the story to her in private. Other students, however, were allowed to read their favorite stories to the class.

Upon learning of this incident, Zachary's mother, Carol Hood, spoke with Ms. Oliva, who informed her that Zachary could not read the story to the class "because it might influence other students." Ms. Hood next spoke with Gail Pratt, the school principal, who said that reading the story "was the equivalent of 'praying'." Noting that she had received complaints in the past, Ms. Pratt stated that the story "might upset Muslim, Hindu or Jewish students." She added that there was "no place in the public school for the reading of the Bible" and advised: "[M]aybe you should consider taking your child out of public school, since you don't appear to be public school material." Ms. Pratt noted that "her position was fully supported by various legal authorities." Ms. Hood made an appointment to speak again with Zachary's teacher, but she did not appear. Ms. Hood's lawyer then contacted Patrick Johnson, the school superintendent, and demanded that Zachary be allowed to read the story to the class and that Ms. Pratt apologize for her conduct. The superintendent did not respond.

Ms. Hood, in her individual capacity and as Zachary's guardian ad litem, filed a two-count complaint in federal district court. Count I alleged that Ms. Oliva, Ms. Pratt, Mr. Johnson, and the Medford Board of Education (hereinafter collectively "the Medford defendants") had violated Zachary's constitutional right to freedom of expression. Count II alleged that the New Jersey Commissioner of Education and the New Jersey Department of Education had aided in this violation. Count II sought an order requiring the state to implement policies to protect students who wish to engage in the expression of religious views.

The defendants moved for judgment on the pleadings. In light of the putative pleading defect on which the full court now relies in relation to the poster incident, it is important to note the basis for the Medford defendants' motion. The Medford defendants did not argue that there were any formal defects in the complaint, and they certainly did not suggest that the claim concerning the poster should be dismissed because it did not state a basis for holding them responsible for the treatment of the poster. On the contrary, the Medford defendants acknowledged that judgment on the pleadings would be proper only if "the plaintiff could prove no set of facts which would entitle [her] to relief." Brief in Support of Rule 12(c) Motion for Judgment on Pleadings on Behalf of Defendants Medford Township Board of Education, Grace Oliva, Gail Pratt and Patrick Johnson. They also acknowledged, for purposes of the motion, that they were responsible for the removal and replacement of the poster, and they argued that their conduct was fully justified. They stated:

For purposes of the instant motion only, defendants do not dispute plaintiff's contention that the temporary removal and subsequent relocation of plaintiff's poster was related to the poster's religious theme.

Id. at 19. They continued:

[D]efendants merely *relocated* the *poster* to another location in the same hallway. Plaintiff cannot reasonably contend that *defendants* inhibited religion by

temporarily removing the poster and subsequently relocating it to another location in the same hallway.

Id. at 20 (emphasis added). In their reply brief in support of their motion, the Medford defendants stated:

[*T*]he Medford Defendants' temporary removal and almost immediate return of the poster to the hallway wall supports the inescapable conclusion that no such hostility existed.

Medford Defendant's 12(c) Reply Br. at 5 (emphasis added).

In granting the defendants' motion for judgment on the pleadings, the District Court did not rely upon — or even note — any formal defect in the complaint. On the contrary, like the Medford defendants themselves, the District Court accepted the fact that the Medford defendants were responsible for the removal of the poster and its relocation to a less conspicuous spot. The District Court stated:

The Medford defendants concede that the poster was removed and relocated because it had a religious theme.

C.H. v. Oliva, 990 F.Supp. 341, 354 (D.N.J. 1997). However, the Court held that the Medford defendants did not violate Zachary's right to freedom of expression because "relocating the poster of Jesus ... [was] reasonably related to legitimate pedagogical concerns." *Id.* at 353.

On appeal, the Medford defendants took the same approach that they had in the District Court. They did not assert that there were any formal defects in the complaint, and they did not dispute, for purposes of the appeal, that they were responsible for the treatment of the poster. Rather, they argued that their removal and relocation of the poster were constitutional. The thrust of their argument was as follows:

The educators of Z.H.'s school were correctly concerned about the impact of the prominent display of Z.H.'s poster upon their young students. Students of a non-Christian faith may have felt that the prominent display of the poster constituted a comment by the school on the correctness of Christianity or an endorsement of the Christian religion. These children may also have felt the prominent display of the poster to be a negative comment on their own religious beliefs. The Medford defendants should not be liable ... for their concerns about the impact of Z.H.'s poster on his fellow classmates.

Medford Appellees' Br. at 14.

Both of the opinions issued by the panel before rehearing en banc was granted affirmed the District Court on the merits; neither was based upon — or even hinted at — any formal defects in the complaint. The first opinion was unpublished and disposed of the claims relating to "A Big Family" and the poster in less than two full typewritten pages. After the plaintiffs petitioned for rehearing en banc, the panel granted rehearing and issued a for-publication opinion. *C.H. v. Oliva*, 195 F.3d 167 (3d Cir. 1999). Like the Medford defendants' brief, this opinion did not dispute that the Medford defendants were responsible for the removal and relocation of the poster to a less prominent spot. The opinion stated that "the issue to be resolved is whether *the school's decision* to temporarily remove Z.H.'s poster was reasonably related to a legitimate pedagogical concern." *Id.* at 175. In striking contrast with the position taken in the opinion of the en banc court, the panel opinion never disputed that the Medford defendants were responsible for the treatment of the poster. Indeed, the for-publication panel opinion deferred to the professional judgment of the school officials that the temporary removal of the poster was appropriate for pedagogical reasons! The panel wrote:

Given the sensitivity of the issues raised by student religious expression, coupled with the notable immaturity of the students involved and the relatively public display of the

posters in the school hallway, *the school's temporary removal* of the poster does not violate the First Amendment rights of the student artist. As we have indicated, decisions on issues of this kind necessarily involve *fact-sensitive exercises of discretion by school authorities* and reservation of a brief period for deliberation is thus a measure reasonably related to legitimate pedagogical concerns.

Id. (emphasis added). Plainly, the panel could not have deferred to the professional judgment of the school authorities if, as the full court now believes, the complaint does not even allege that those officials had any role in the poster's removal.

The for-publication panel opinion took a similar approach with respect to the relocation of the poster to a less prominent spot. The panel observed: "We decline plaintiff's invitation to require the District Court to review and regulate *the school's placement of its students' artwork.*" *Id.* at 176 n. 3 (emphasis added).

Following the issuance of this panel decision, the court granted rehearing en banc and permitted the parties to submit supplemental briefs. Once again, the Medford defendants did *not* contend that the District Court's decision regarding the poster should be affirmed on the ground that the complaint did not adequately allege that they were responsible for the poster's treatment. On the contrary, they defended the treatment of the poster on the merits, arguing as follows:

Z.H. did not have any particular right to have his poster displayed in a prominent location and a prominent display of the poster may have the impermissible effect of conveying a message of endorsement of Christianity. The Medford Defendant's (sic) actions were thus reasonably related to legitimate pedagogical concerns, namely the concern that their young charges might have construed ... the prominent display of Z.H.'s poster as the school's approval of Z.H.'s religion.

Medford Appellees' Supplemental Br. at 9.

The en banc court heard extensive oral argument. Not one word was mentioned about the supposed failure of the complaint to plead in sufficient detail the basis for holding the Medford defendants liable for the removal and relocation of the poster.

Despite all this, the full court *sua sponte* raises the issue of the adequacy of the complaint and, without even permitting the plaintiff to comment on this new issue, the court declines to reach the merits of the appeal and instead remands the case so that the plaintiff can seek to amend the complaint.

II.

A.

Under the liberal pleading regime of the Federal Rules of Civil Procedure, the existing complaint is adequate. Under Fed.R.Civ.P. 8(a)(2), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," and under Fed.R.Civ.P. 8(f), "[a]ll pleadings shall be construed as to do substantial justice." A complaint must only give "fair notice of what the plaintiff's claim is and the grounds upon which it rests," *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 45-46, 78 S.Ct. 99; *see also Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). [FN2]

[P]leadings under the rules simply may be a general summary of the party's position that is sufficient to advise the other party of the event being sued upon, to provide some guidance as to what was decided for purposes of *res judicata*, and to indicate whether the case should be tried to the court or to a jury. No more is demanded of the pleadings than this.

5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1202 at 69-70(1969) (footnote omitted).

FN2. This same principle governs a motion under Rule 12(c). 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1368 at 494-95 & n.34 (2000 Supp.) (citing cases).

Under these standards, the complaint in this case adequately avers a basis for holding the Medford defendants responsible for the treatment of the poster, i.e., its temporary removal and subsequent relocation to a less conspicuous place in the hall. While I think that the complaint adequately asserts a claim against all of the Medford defendants, I will focus on one defendant, Gail Pratt, the school principal. I do this because the sufficiency of the complaint with respect to her is clear and because, if that is so, the court must confront the merits of the plaintiff's First Amendment claim whether or not the allegations pertaining to the other defendants are also adequate.

The complaint in this case alleges that "employees of Defendant, Township of Medford Board of Education, removed [Zachary's] poster because of its religious theme" on a day when Zachary's regular teacher was not present. The complaint also alleges that the next day Zachary's teacher put the poster back up on the wall, but in a less conspicuous spot at the end of the hall. Furthermore, the complaint avers facts from which it may be reasonably inferred that Pratt had received complaints about religious expression in the school (*see* Complaint para. 21), had consulted "legal authorities" regarding the issue (*id.*), and had developed a "position" that was not receptive to such expression. *Id.* ("'[M]aybe you [Carol Hood] should consider taking your child out of public school, since you don't appear to be public school material.'"). In view of these allegations, it cannot be said "beyond doubt that the plaintiff can prove no set of facts in support of h[er] claim which would entitle h[er] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

Pratt could be held responsible if she directed that the poster be treated as it was or if they knew about and acquiesced in the treatment. *See, e.g., Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1293 (3d Cir. 1997); *Baker v. Monroe Twp.*, 50 F.3d 1186, 1190-91 (3d Cir. 1995). Pratt is portrayed in the complaint as a person with a strong and well-developed "position" about religious expression in her school. A poster of Jesus was put up in the hall of her elementary school by one of the teachers under her supervision. On a day when this teacher was away, the poster was taken down because of its religious content by unidentified school board employees. Then the next day, the regular teacher, having regained possession of the poster, put it back on the wall, but in a less noticeable spot than the one she had initially selected. Under modern pleading rules, these allegations are surely sufficient to assert a claim that Pratt knew about and acquiesced in these sensitive events that went on over a period of days in her own school and that most likely occasioned discussion and, perhaps, controversy. Pratt's papers in the District Court and on appeal make it clear that she well understood the claim that was asserted against her, and for purposes of her motion for judgment on the pleadings, she did not dispute her involvement. Thus, the complaint adequately asserted a claim against her.

B.

But even if it did not, why should our court sitting en banc reach this pleading issue? The defendants did not move to dismiss the complaint based on a pleading defect. The District Court did not dismiss the complaint on such a ground. The defendants did not raise any pleading issue on appeal. "We do not generally consider issues not raised by the parties," *Bolden v. Southeastern Pennsylvania Transp. Auth.*, 953 F.2d 807, 812 (3d Cir. 1991) (en banc), and there is no good reason for us to raise a pleading issue sua sponte in this case. The

only result of the court's approach is likely to be delay, expense for the parties, and a waste of judicial resources.

On remand, the plaintiff will be able to cure the putative defect in the complaint simply by alleging that Pratt knew about and acquiesced in the treatment of the poster and by specifying that this allegation is "likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Fed. R. Civ. Proc. 11(b)(4). Based solely on the facts already recited in the complaint, such an allegation would unquestionably be proper.

If the plaintiff amends the complaint by adding such an allegation, the District Court will have no basis for dismissing the complaint on a pleading ground, and thus the District Court will be required once again to decide whether the complaint states a valid First Amendment claim. The District Court has already ruled on this question, and since our Court's disposition of the current appeal provides no new guidance, the District Court will presumably adhere to its prior reasoning. The plaintiff will then be able to appeal, and the precise issue that the full court now avoids will be back. I see no reason for this wasteful procedure.

The Court justifies its approach as follows. According to the Court, "[t]his is not a situation in which the complaint is merely lacking in factual detail." Maj. Op. at 202. "It is a situation in which the fair inference from the facts alleged is that the defendants did not play any role in the challenged decisions and there is no allegation, even conclusory, to the contrary." *Id.* Apparently it is the Court's belief that, on remand, the plaintiff will "very likely" be unwilling to allege that Pratt knew about and acquiesced in the treatment of the poster and that the claim regarding the poster will be dismissed. This is what I understand the Court to mean when it writes that "it is very likely that the Court is being asked to resolve an important issue of constitutional law that is a purely hypothetical one as far as these parties are concerned." *Id.* I find the Court's discussion baffling.

As previously noted, if the plaintiff and her attorneys know no more about the treatment of the poster than is already alleged in the complaint, they have a more than adequate basis for adding the allegation needed to satisfy the Court's concern. The Court seems to think, however, that Pratt in fact did not know about and acquiesce in the treatment of the poster, that the plaintiff and/or her attorneys know this, and that they will accordingly be unwilling to allege that Pratt was involved.

Nothing in the record supports the Court's apparent belief, and there is much that points in the other direction. As noted, Pratt has not claimed that she lacked responsibility for the treatment of the poster. Moreover, since the plaintiff's attorneys are presumably familiar with the legal standard for holding Pratt responsible, and since they have vigorously litigated the claim against her in the District Court and on appeal, they presumably are not aware of facts showing that Pratt had no involvement in the incident.

In support of its curious view, the Court cites a footnote in a brief submitted by the plaintiff to the District Court. The footnote states in pertinent part:

Although not specifically stated in the pleadings, Plaintiffs will be prepared to show, if this matter proceeds to trial, that the kindergarten teacher was of the view that the poster in question was an extremely appropriate response to the assignment, that in part because of how well the poster had been done, it was given a prominent location next to the door of the kindergarten room, and that the kindergarten teacher on her own initiative returned the poster to public display, but that as a compromise to *those who were against any display of the poster*, agreed to place it in a less prominent position.

Plaintiff's Brief in Opposition to Rule 12(c) Motion at 1 n.2 (emphasis added).

Nothing in this passage suggests that the plaintiff will be unwilling to allege that Pratt knew about and acquiesced in the allegedly discriminatory removal and relocation of the poster. The passage says nothing whatsoever about the removal of the poster. As for the

replacement of the poster in a less conspicuous spot, while the passage does say that the new location "was a compromise to those who were against any display of the poster," the passage does not reveal who these opponents were. Pratt might have been one of them. She might have insisted that the poster be re-hung, if at all, in a less noticeable spot. Or, faced with a dispute among her teachers, she might have brokered a compromise to that effect. In either event, if she knew about and acquiesced in the discriminatory treatment of the poster because of its religious theme, she could be held responsible.

If the Court seriously believes that the plaintiff will be unwilling on remand to make the necessary allegation, the Court could ask the plaintiff's attorneys to proffer the amendment that they would make. The Court, however, has refused to take that step. The Court simply does not want to confront Zachary's First Amendment claim. Whatever the Court thinks about the validity or importance of that claim, however, it is entitled to be treated in accordance with the same procedural rules that we apply to the claims of other litigants.

III.

A.

I will therefore address the issue that the en banc court evades: whether Zachary's constitutional right to freedom of expression was violated if, as the complaint alleges, his poster was given less favorable treatment than it would have received had its content been secular rather than religious. [FN3]

FN3. The issue here is not, as the District Court thought, whether Zachary had a "constitutional right to have the poster of Jesus displayed in any particular location" or to have it "displayed prominently" in the school. *C.H. v. Oliva*, 990 F.Supp. at 353, 355. The issue is whether he was entitled to nondiscriminatory treatment. Nor is the issue, as the panel suggested, whether the defendants were entitled to remove the poster for "a brief period of deliberation." *C.H. v. Oliva*, 195 F.3d at 175. Nowhere in the complaint — or for that matter in the answer — is it alleged that the poster was removed for this reason.

Nor, at this stage, is the question whether Zachary actually "suffered any compensable damages." Br. Amicus Curiae of the American Jewish Congress, Anti Defamation League and Americans United for Separation of Church and State ("Amicus Br.") at 2. This case never progressed beyond the pleading stage. The complaint alleged that Zachary suffered emotional distress and anguish as a result of the defendants' actions, Complaint para. 27, and for now, that allegation is enough. Nor is the issue whether injunctive relief would be appropriate if a constitutional violation is ultimately found. See Amicus Br. at 4-5. At this stage it is sufficient that the complaint states a live claim for some form of relief-and it clearly does.

Nor is the issue whether Pratt or Johnson is entitled to qualified immunity. Although this argument was asserted in the Medford defendants' supplemental appellate brief, it was not raised in the district court in their motion for judgment on the pleadings, and it was not addressed by the district court. Under these circumstances, I would not reach the issue now. Moreover, even if we were to entertain the qualified immunity argument at this time, we would still be required, as the first step of our analysis, to decide whether the complaint stated a First Amendment claim. *Siebert v. Gilley*, 500 U.S. 226, 231, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991); *Harlow v. Fitzgerald*, 457 U.S. 800, 802, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). And of course the qualified immunity defense would not apply to the school board in its official capacity. *Owen v. City of Independence*, 445 U.S. 622, 639-650, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980).

I would hold that discriminatory treatment of the poster because of its "religious theme" would violate the First Amendment. Specifically, I would hold that public school students have the right to express religious views in class discussion or in assigned work, provided that their expression falls within the scope of the discussion or the assignment and provided that the school's restriction on expression does not satisfy strict scrutiny. This conclusion follows from the following two propositions: first, even in a "closed forum," governmental

"viewpoint discrimination" must satisfy strict scrutiny and, second, disfavoring speech because of its religious nature is viewpoint discrimination.

B.

Public schools are government property, and "the Government 'no less than the private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.'" *Cornelius v. NAACP Legal Defense and Educational Fund*, 473 U.S. 788, 800, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985) (quoting *Greer v. Spock*, 424 U.S. 828, 836, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976)). The Supreme Court "has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Id.* Consequently, government's ability to regulate speech on its own property often varies depending on the particular "forum" involved. In a "nonpublic forum," government may regulate expression much more extensively than in a "public forum," whether "traditional" or "dedicated." See, e.g., *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 54, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983); *Brody v. Spang*, 957 F.2d 1108, 1117 (3d Cir. 1992). Even in a nonpublic forum, however, where the greatest restrictions are permissible, "viewpoint discrimination" is not allowed unless it passes the highest scrutiny. See, e.g., *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 394-95, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993); *Cornelius*, 473 U.S. at 800, 105 S.Ct. 3439; *Perry Education Ass'n*, 460 U.S. at 46, 103 S.Ct. 948; *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981); *Brody*, 957 F.2d at 1117. [FN4] As Justice Brennan put it in *Perry*: "Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of 'free speech.'" *Perry Education Assn*, 460 U.S. at 62, 103 S.Ct. 948 (Brennan, J., dissenting). Indeed, even when government is regulating a category of speech, such as "fighting words," that could be entirely prohibited, government may not discriminate based on viewpoint. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-96, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992).

FN4. There is some support in Supreme Court opinions for the proposition that viewpoint-based restrictions are per se unconstitutional, see, e.g., *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984), but other cases show that strict scrutiny applies. See, e.g., *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 392-94, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) (applying strict scrutiny to a regulation banning "fighting words"); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760-761, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (plurality) (applying strict scrutiny to a restriction on religious advocacy); *Texas v. Johnson*, 491 U.S. 397, 412, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (applying strict scrutiny to a law barring flag desecration); See also Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. Pa. L.Rev. 2417, 2425 n.44 (1996).

C.

The Supreme Court has made it clear that discrimination based on the religious character of speech is viewpoint discrimination. In *Lamb's Chapel*, the Court struck down a school district policy that permitted school facilities to be used after school hours by a wide variety of groups but prohibited the use of those facilities by a group that wished to show a film series addressing various child-rearing issues from a "Christian perspective." The Court held that "it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject from a religious standpoint." 508 U.S. at 393-94, 113 S.Ct. 2141. Likewise, in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), the Court examined university guidelines that refused to allow

a student publication, "Wide Awake," to benefit from the "Student Activities Fund" because the publication reflected a religious perspective. It held that such guidelines violated the First Amendment because they discriminated against otherwise permissible speech on the basis of viewpoint. The Court wrote:

It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought. The nature of our origins and destiny and their dependence upon the existence of a divine being have been subjects of philosophic inquiry throughout human history. We conclude, nonetheless, that here, as in *Lamb's Chapel*, viewpoint discrimination is the proper way to interpret the University's objections to *Wide Awake*. 515 U.S. at 831, 115 S.Ct. 2510.

Accordingly, viewpoint discrimination is prohibited even in a nonpublic forum if strict scrutiny cannot be satisfied, and discrimination based on the religious content of speech is viewpoint discrimination. It follows that public school authorities may not discriminate against student speech based on its religious content if the discrimination cannot pass strict scrutiny.

D.

Recognition of this important principle would not interfere with the operation of the public schools or impinge upon the rights of other students. Public school teachers have the authority to specify the subjects that students may discuss in class and the subjects of assignments that students are asked to complete. See, e.g. *Cornelius*, 473 U.S. at 806, 105 S.Ct. 3439 (subject matter may be restricted in nonpublic forum); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) (same); *Brody*, 957 F.2d at 1117 (same). Thus, if a student is asked to solve a problem in mathematics or to write an essay on a great American poet, the student clearly does not have a right to speak or write about the Bible instead.

Public school teachers may also enforce viewpoint-neutral rules concerning such matters as the length of an oral presentation or written assignment. See *Brody*, 957 F.2d at 1117 (reasonable time, place, and manner restrictions allowed in nonpublic forum). If a paper is limited to 20 pages, the school obviously may insist that all students, including any who wish to express a religious viewpoint, adhere to that rule.

In the public schools, low-value speech, such as vulgar and offensive language, may be restricted to a greater extent than would otherwise be permissible. As the Court observed in *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986), "[s]urely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." "[T]he First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket." *Id.* at 682, 106 S.Ct. 3159 (citation omitted).

Finally, a public school may even restrict speech based on viewpoint if it can show a compelling interest for doing so. In *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), the Court stated: "Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." 393 U.S. at 511, 89 S.Ct. 733. Later, the Court observed that "conduct by the student, in class or out of it, which for any reason ... materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Id.* at 513, 89 S.Ct. 733. Therefore, if the expression of a particular religious viewpoint, such as one espousing racial hatred, creates a sufficient threat, school authorities may intervene.

Taken together, these constitutionally permissible ways of regulating student speech provide ample means of ensuring that student expression does not interfere with the effective operation of the schools or cause harm to other students. School authorities are not permitted to discriminate against student expression simply because of its religious character.

E.

When these principles are applied to the present case, it is clear that the judgment of the District Court must be reversed. Taking down Zachary's Thanksgiving poster and replacing it in a less conspicuous location because of its religious content was plainly viewpoint, not subject matter, discrimination. The subject matter of the poster was specified by Zachary's teacher: something for which he was thankful as the Thanksgiving holiday approached. His poster fell within the specified subject matter, and it is not alleged that the poster was subjected to discriminatory treatment because of that subject. Rather, the poster was allegedly given discriminatory treatment because of the viewpoint that it expressed, because it expressed thanks for Jesus, rather than for some secular thing. This was quintessential viewpoint discrimination, and it was proscribed by the First Amendment unless the Medford defendants can show that allowing Zachary's poster to be displayed with his classmates' on a non-discriminatory basis would have "materially disrupt[ed] classwork or involve[d] substantial disorder or invasion of the rights of other [] [students]." *Tinker*, 393 U.S. at 513, 89 S.Ct. 733.

No such showing is evident from the pleadings, and nothing asserted in the Medford defendants' briefs suggests that they could make such a showing on remand. The Medford defendants contend that the treatment of Zachary's poster furthered the compelling interest of avoiding an Establishment Clause violation. See Medford Defendants' Supplemental Br. at 27-31. It is clear, however, that displaying Zachary's poster would not have violated the Establishment Clause. The Establishment Clause is not violated when the government treats religious speech and other speech equally and a reasonable observer would not view the government practice as endorsing religion. *Capitol Square*, 515 U.S. at 763-70, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (plurality); *id.* at 777, 115 S.Ct. 2440 (O'Connor, J., concurring in part and concurring in the judgment). See also *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000).

Here, a reasonable observer would not have viewed the exhibition of Zachary's Thanksgiving poster along with the secular posters of his classmates as an effort by the school to endorse religion in general or Christianity in particular. An art display that includes works of religious art is not generally interpreted as an expression of religious belief by the entity responsible for the display. Even the amici supporting the defendants acknowledge that "[d]isplay of student artwork with religious themes is understood to be the personal expression of the student and not that of the school." Brief Amicus Curiae of the American Jewish Congress, Anti Defamation League and Americans United for Separation of Church and State at 1. Furthermore, if there had been any danger that anyone might have reasonably interpreted the display of Zachary's poster in the hall as an effort by the school to endorse Christianity or religion, the school could have posted a sign explaining that the children themselves had decided what to draw. See *Capitol Square Review*, 515 U.S. at 793-94, 115 S.Ct. 2440 (Souter, J., concurring in the judgment).

For these reasons, I see no indication in the briefs that the Medford defendants had a compelling reason for treating Zachary's Poster in the manner alleged. Zachary's teacher in effect asked him a question: What are you thankful for as Thanksgiving approaches? Zachary was entitled to give what *he* thought was the best answer. He was entitled to be free from pressure to give an answer thought by the Medford educators to be suitable for a boy who is "public school material." Complaint para. 21.

F.

In affirming the judgment of the district court, the panel took the position that a public school is free to practice viewpoint discrimination in regulating student speech in class and in assignments, provided only that the discrimination is "reasonably related to a legitimate pedagogical concern." 195 F.3d at 170-72. Moreover, the panel held that avoiding the possibility of "resentment" by parents is a legitimate pedagogical concern. *Id.* at 175. According to the panel, then, if public school authorities could reasonably think that a student's expression of a particular viewpoint in a class discussion or assignment could cause "resentment" on the part of other students or parents, the school may censor the student's speech.

The panel's view is radically at odds with fundamental First Amendment principles. As previously discussed, viewpoint discrimination strikes at the heart of the freedom of expression. And in order to restrict core First Amendment speech, much more is needed than the possibility that the speech may cause resentment. *See Texas v. Johnson*, 491 U.S. at 407-10, 109 S.Ct. 2533. This principle applies to speech in public schools. As the Supreme Court wrote in *Tinker*, "[a]ny word spoken in class ... that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says that we must take this risk." *Tinker*, 393 U.S. at 507, 89 S.Ct. 733. Thus, "[i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509, 89 S.Ct. 733.

The panel's understanding of the First Amendment principles applicable in this case was based on one case — *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988). *See* 195 F.3d at 171-74. The panel viewed *Hazelwood* as providing the governing standard for "student expression that is part of a school curriculum," *see* 195 F.3d at 171, including things that students say (or express by other means, such as artwork) when they are called upon by their teachers to express their own thoughts or views. This is an incorrect interpretation of *Hazelwood*. *Hazelwood* involved a high school principal's censorship of articles in the school newspaper. The Court described the issue before it as concerning "educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." 484 U.S. at 271, 108 S.Ct. 562. The Court held that educators may regulate such activities "so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273, 108 S.Ct. 562. While *Hazelwood* certainly applies to many things that occur in the classroom — such as work on the school newspaper at issue in that case (*see* 484 U.S. at 268, 108 S.Ct. 562) — nothing in *Hazelwood* suggests that its standard applies when a student is called upon to express his or her personal views in class or in an assignment.

On the contrary, *Hazelwood* governs only those expressive activities that might reasonably be perceived "to bear the imprimatur of the school." 484 U.S. at 271, 108 S.Ct. 562. This understanding of *Hazelwood* is fortified by *Rosenberger*, where the Court wrote: A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict *the University's own speech*, which is controlled by different principles. *See e.g., ... Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 270-272, 108 S.Ct. 562. 515 U.S. at 834, 115 S.Ct. 2510 (emphasis added).

Things that students express in class or in assignments when called upon to express their own views do not "bear the imprimatur of the school" *Hazelwood*, 484 U.S. at 271, 108 S.Ct. 562, and do not represent "the [school's] own speech." *Rosenberger*, 515 U.S. at 834, 115

S.Ct. 2510. "The proposition that schools do not endorse everything that they fail to censor is not complicated." *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 250, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (opinion of O'Connor, J.).

In the present case, for reasons already discussed, reasonable students, parents, and members of the public would not have perceived Zachary's poster as bearing the imprimatur of the school or as an expression of the school's own viewpoint. Thus, it is abundantly clear that *Hazelwood* has no application here.

If the panel's understanding of *Hazelwood* were correct, it would lead to disturbing results. Public school students — including high school students, since *Hazelwood* was a high school case — when called upon in class to express their views on important subjects, could be prevented from expressing any views that school officials could reasonably believe would cause "resentment" by other students or their parents. If this represented a correct interpretation of the First Amendment, the school officials in *Tinker* could have permitted students, as part of a class discussion, to express views in favor of, but not against, the war in Vietnam because some students plainly resented the expression of antiwar views. *See* 393 U.S. at 509 n. 3, 89 S.Ct. 733. Today, school officials could permit students to express views on only one side of other currently controversial issues if the banned expression would cause resentment by some in the school, as it very likely would. Such a regime is antithetical to the First Amendment and the form of self-government that it was intended to foster.

IV.

In sum, I would hold that the District Court erred in granting judgment for the defendants. I would reverse and remand for a determination whether the Medford defendants did in fact treat Zachary's poster in a discriminatory fashion because of its religious content. And if discriminatory treatment is shown, I would give the Medford defendants the opportunity to show that their actions were supported by a compelling reason and were narrowly tailored to serve that end.

C.H. v. Oliva, 226 F.3d 198, 203-214 (3rd Cir. 2000) (Alito, J., dissenting).

my comments

First of all, this is an example of litigation run amok. The first incident that caused this litigation occurred in Nov 1994, and the case was still being litigated more than six years later. Not only does it appear that there was a small injury to Zachary (as explained in the following paragraphs), but also he would have forgotten about the injury, except for the continuing litigation.

In my view, the kindergarten teacher did the right thing by posting Zachary's picture of Jesus, and by restoring the picture to a less prominent position after an unnamed member of the school board objected. The only injury to Zachary here is that his picture was temporarily removed for approximately one day.

In my view, Ms. Oliva, his first-grade teacher, *may* have erred in not allowing Zachary to read an innocuous⁹ paragraph from the Bible to his class. However, her allowing Zachary to read the paragraph to her in private cured most of any injury. Furthermore, Ms. Oliva's reaction was apparently motivated by her wanting a public school to avoid endorsing the Bible to impressionable young minds, which is a commendable reason.

Of all the facts in this case, I am most bothered by Ms. Pratt, the principal, allegedly telling Zachary's mother that "... maybe you should consider taking your child out of public school, since you don't appear to be public school material."¹⁰ Taken out of context, this remark seems to indicate discrimination against Zachary Hood because of his mainstream religion.

I agree with Judge Alito that the Complaint was adequate and the en banc Court of Appeals should *not* have dismissed the Complaint. My search of the Westlaw federal court databases on 3 Nov 2005 shows no further opinions on this case, so apparently the Plaintiffs did not amend their Complaint.

However, I disagree with Judge Alito's analysis of the merits of this case, mostly because the cases he cites (e.g., *Tinker*, 393 U.S. 503 and *Hazelwood*, 484 U.S. 260) involve high-school pupils. It is well recognized in education law that teachers and school can provide more regulation of young pupils than for high-school pupils, who are almost adults.¹¹ And there is general agreement that teachers and schools can provide more regulation of young pupils than for college

⁹ *C.H. v. Oliva*, 990 F.Supp. at 353 (D.N.J. 1997) ("The plaintiffs note that the story Z.H. chose was fairly innocuous, and claim that '[h]ad Plaintiff's book had a different cover and had the characters had names like Joe and Ed, it is beyond issue that the plaintiff would have been allowed to read his story to the class.' Plaintiffs' Brief at 13-14. This is precisely true."). See the quotations from the story, above, at pages 25 and 29.

¹⁰ *C.H. v. Oliva*, 226 F.3d at 204, 207 (3rd Cir. 2000) (Alito, J., dissenting).

¹¹ *Muller by Muller v. Jefferson Lighthouse School*, 98 F.3d 1530, 1538 (7th Cir. 1996) ("... it follows that a public elementary school can shield its five through thirteen-year-olds from topics and viewpoints that could harm their emotional, moral, social, and intellectual development. The 'marketplace of ideas,' an important theme in the high school student expression cases, is a less appropriate description of an elementary school, where children are just beginning to acquire the means of expression."), *cert. den.*, 520 U.S. 1156 (1997); *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274, 287, n. * (4th Cir. 1998) ("In elementary schools, the concerns animating the coercion principle are at their strongest because of the impressionability of young elementary-age children. Moreover, because children of these ages may be unable to fully recognize and appreciate the difference between government and private speech — a difference that lies at the heart of the neutrality principle — the County's policy could more easily be (mis)perceived as endorsement rather than as neutrality."); *Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412, 416-417 (3rd Cir. 2003) ("There can be little doubt that speech appropriate for eighteen-year-old high school students is not necessarily acceptable for seven-year-old grammar school students.").

students, who are adults.¹² There are only a few reported cases involving First Amendment rights of young pupils, but courts are consistently deferential to decisions of teachers and principals in cases involving pupils below high school.

Finally, this dissenting opinion by Judge Alito is presented here to indicate his reasoning on religion in schools. It is not clear from reading his dissent in *C.H. v. Oliva* whether Judge Alito has either (1) enthusiasm for freedom of speech of first graders or (2) enthusiasm for the display of the Christian religion in public schools. There is another case in which Judge Alito participated that clarifies his position. In *American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471 (3rd Cir. 1996), the en banc Court of Appeals for the Third Circuit considered whether high school pupils could vote on whether to have a student-led prayer at their graduation ceremony. The majority (9 of 13 judges on the Court of Appeals) said that the vote was *unconstitutional*, and this majority decision correctly anticipated the U.S. Supreme Court's later ruling on this issue in *Doe v. Santa Fe Independent School Dist.*, 530 U.S. 290 (2000).¹³ Unfortunately, Judge Alito was one of three judges who joined a dissenting opinion by Judge Mansmann in *ACLU v. Black Horse Pike*. Because of his dissenting opinion in *Oliva* and his joining the dissenters in *Black Horse Pike*, I think it likely that Judge Alito does *not* believe in a rigid wall of separation between religion and government, including public schools.

¹² *Lansdale v. Tyler Junior College*, 470 F.2d 659, 663 (5th Cir. 1972), *cert. den.*, 411 U.S. 986 (1973) (High schools may regulate the length of pupils hair, but colleges may *not* regulate the length of student's hair.); *Mabey v. Reagan*, 537 F.2d 1036, 1046-1048 (9th Cir. 1976) (A court distinguished *Pickering* and *Tinker*, two U.S. Supreme Court cases on freedom of speech in schools, as not obviously applicable to a university environment.); *Bradshaw v. Rawlings*, 612 F.2d 135, 140 (3d Cir. 1979), *cert. den.*, 446 U.S. 909 (1980) ("It could be argued, although we need not decide here, that an educational institution possesses a different pattern of rights and responsibilities and retains more of the traditional custodial responsibilities when its students are all minors, as in an elementary school, or mostly minors, as in a high school.")

¹³ For a detailed explanation of why we do not allow votes on protection of constitutional rights of minorities, see my separate essay, *Freedom from the Majority in the USA*, <http://www.rbs2.com/majority.pdf> (Nov 2005).

Doe v. Groody

On 6 March 1998 law enforcement officers of Schuylkill County, Pennsylvania entered the home of John Doe, pursuant to a search warrant for illicit drugs (e.g., methamphetamine) in the home. The search warrant did *not* mention the names of either John's wife, Jane, or their ten-year old daughter, Mary. An attached affidavit does request "permission to search all occupants" of the house, but the search warrant did *not* specifically incorporate that affidavit.

As the officers approached the house, they met John Doe, and brought him into the house. Once inside, however, the officers found no visitors, but only John Doe's wife, Jane, and their ten year old daughter, Mary.

The officers decided to search Jane and Mary Doe for contraband, and sent for the meter patrol officer. When she arrived, the female officer removed both Jane and Mary Doe to an upstairs bathroom. They were instructed to empty their pockets and lift their shirts. The female officer patted their pockets. She then told Jane and Mary Doe to drop their pants and turn around. No contraband was found. With the search completed, both Jane and Mary Doe were returned to the ground floor to await the end of the search.

John and Jane Doe filed a complaint under 42 U.S.C. § 1983 on their own behalf, and on behalf of Mary Doe, against the searching officers and their superiors, and against various government entities. The Does alleged, among other things, that the officers illegally strip searched Jane and Mary Doe.

Doe v. Groody, 361 F.3d 232, 236-237 (3rd Cir. 2004).

The U.S. District Court, in an unpublished opinion, held that four policemen were *not* entitled to qualified immunity, because they had violated "clearly established" constitutional rights of the plaintiffs. The policemen made an interlocutory appeal. Two of the three judges¹⁴ on the U.S. Court of Appeals affirmed the District Court:

Finally, we consider whether the search of Jane and Mary Doe can be justified on some basis other than the warrant. The officers have not seriously pressed this argument, but the District Court did consider whether the officers had probable cause to search Jane and Mary Doe under an exception to the warrant requirement.

None appears. A search warrant for a premises does not constitute a license to search everyone inside. *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979). The record does not disclose any independent basis to suspect Jane Doe — let alone 10-year old Mary Doe — of drug activity. While the officers justified their decision to conduct the personal searches because of the ease with which contraband could be concealed on those present in the searched premises, that is precisely the justification for a personal search that has been rejected by the Supreme Court. *Id.* at 94-96, 100 S.Ct. 338. Simply put, there is none of the kind of "particularized" probable cause required for a search in circumstances such as these. *Id.* at 91, 100 S.Ct. 338.

Doe v. Groody, 361 F.3d 232, 243 (3rd Cir. 2004).

The U.S. Supreme Court denied a certiorari petition from the policemen. 125 S.Ct. 111 (4 Oct 2004).

¹⁴ The majority opinion was written by Judge Chertoff and published on 19 March 2004. Judge Chertoff later became the Secretary for Homeland Security.

Before considering Judge Alito's dissenting opinion, there are a few paragraphs of the majority opinion that need to be understood.

The face of the search warrant here, however, does not grant authority to search either Jane or Mary Doe. The block designated for a description of the person or place to be searched specifically names John Doe, and identifies and describes his residence. Nothing in that portion of the printed warrant refers to any other individual, named or unnamed, to be searched. Seeking to remedy this omission, the officers argue that the warrant should be read in light of the accompanying affidavit which requested permission to search "all occupants" of the residence. They conclude that the warrant should be read in "common sense" fashion, as supplemented by the affidavit. If that contention is correct, then police had legal authority to search anybody that they encountered inside the house when they came to execute the warrant.

To be sure, a warrant must be read in a common sense, non-technical fashion. But it may not be read in a way that violates its fundamental purposes. As the text of the Fourth Amendment itself denotes, a particular description is the touchstone of a warrant. The requirement of a particular description in writing accomplishes three things. First, it memorializes precisely what search or seizure the issuing magistrate intended to permit. Second, it confines the discretion of the officers who are executing the warrant. Third, it inform[s] the subject of the search what can be seized. For these reasons, although a warrant should be interpreted practically, it must be sufficiently definite and clear so that the magistrate, police, and search subjects can objectively ascertain its scope. *Doe v. Groody*, 361 F.3d 232, 239 (3rd Cir. 2004) [citations and quotation marks omitted in second paragraph]. The majority opinion then emphasizes that the search warrant itself, not the supporting documentation, is the critical item.

The warrant provides the license to search, not the affidavit. Cases such as *Bianco*, *Towne* and *Carlisle* may allow us to rescue an overbroad warrant if the police forbear from exercising the full measure of its excessive scope. It does not follow that we can rescue an overbroad search if the police exceed the full measure of the warrant. Bluntly, it is one thing if officers use *less* than the authority erroneously granted by a judge. It is quite another if officers go *beyond* the authority granted by the judge. Were we to adopt the officers' approach to warrant interpretation, and allow an unincorporated affidavit to expand the authorization of the warrant, we would come dangerously close to displacing the critical role of the independent magistrate. *Doe v. Groody*, 361 F.3d 232, 241 (3rd Cir. 2004).

Furthermore, despite the arguments by the policemen's attorney, the attached affidavit did not cure the defective search warrant.

Moreover, this case would be a particularly bad instance in which to allow a broad affidavit to overwhelm a narrow warrant. For when we examine the affidavit on which the officers rely, it is doubtful that probable cause exists to support a search of John Doe's wife and minor daughter. Paragraphs 17 and 20 — which are the provisions seeking to justify an "all occupants" search — quite specifically argue that visitors may be present purchasing drugs and that dealers often give contraband to non-residents of a house in the hopes they will not be searched. We look in vain for any assertion that narcotics dealers often hide drugs on family members and young children. Perhaps they do; but the judge reviewing this affidavit would not know it. So, if anything, these paragraphs of the affidavit appear to undermine the probable cause to search Jane and Mary Doe. That is all the more reason to doubt that the Magistrate's failure to include these two family members in the warrant was an oversight.

And that also makes it all the less reasonable to read permission to search them into the text of the warrant.

Doe v. Groody, 361 F.3d 232, 242 (3rd Cir. 2004).

The omission of Jane Doe, Mary Doe, or "all occupants" from the warrant in this case cannot be viewed as the sort of ambiguity or misidentification error that can be clarified by inspecting the affidavit. This warrant has no ambiguous or contradictory terms on its face. Rather, the language of the warrant is inconsistent with the language of the affidavit, because the former does not grant what the latter sought—permission to search "all occupants" of the house. That is not a discrepancy as to form; it is a difference as to scope. And it is a difference of significance. A state magistrate reviewing a search warrant affidavit might well draw the line at including unnamed "all occupants" in the affidavit because Pennsylvania law disfavors "all occupant" warrants. See *Commonwealth v. Gilliam*, 522 Pa. 138, 560 A.2d 140, 142 (1989). Thus, the circumstances of this warrant are a far cry from those in the category of warrants which can be "clarified" by a separate affidavit.

Doe v. Groody, 361 F.3d 232, 240 (3rd Cir. 2004).

In summary, I believe the majority opinion is not only the correct result, but also has good reasoning and is supported by precedents.¹⁵ This case was settled confidentially in December 2004, after this interlocutory appeal to the U.S. Court of Appeals, but before a trial on the merits.

Judge Alito dissented. His entire dissenting opinion is quoted here:

I would reverse the order of the District Court and direct that summary judgment be entered in favor of the defendants. First, the best reading of the warrant is that it authorized the search of any persons found on the premises. Second, even if the warrant did not contain such authorization, a reasonable police officer could certainly have read the warrant as doing so, and therefore the appellants are entitled to qualified immunity.

I.

Search warrants are "normally drafted by nonlawyers in the midst and haste of a criminal investigation." *United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965). Consequently, they are to be read "in a commonsense and realistic fashion." *Id.* Here, the "commonsense and realistic" reading is that the issuing magistrate intended to authorize a search of all the occupants of the premises and that the warrant did so. Five points are important to keep in mind.

First, there is no doubt that the search warrant application sought permission to search all occupants of the premises. Indeed, the affidavit made this request in three separate paragraphs. Paragraph 17, after asking for authorization to search John Doe's home and car, added:

¹⁵ "What is significant is that the officers can point to no precedent that allowed an unincorporated affidavit to *expand* a search warrant. Although there are decisions that allow unincorporated affidavits to *clarify* or *narrow* overbroad warrants, we have explained at considerable length why these are a totally different matter. This is not an arcane or legalistic distinction, but a difference that goes to the heart of the constitutional requirement that judges, and not police, authorize warrants." *Doe v. Groody*, 361 F.3d at 244.

The search should also include all occupants of the residence as the information developed shows that [John Doe] has frequent visitors that purchase methamphetamine. These persons may be on the premises at the time of the execution of the search warrant and may attempt to conceal controlled substances on their persons.

App. 498a (emphasis added).

Paragraph 20 reiterated that request:

This application seeks permission to search all occupants of the residence and their belongings to prevent the removal, concealment, or destruction of any evidence requested in this warrant.

And paragraph 21 repeated the request a third time:

As a result of the information developed, your affiant requests that a search warrant for methamphetamine and other controlled substances, drug paraphernalia, drug records, monies, proof of residence/ownership, documents, photographs, and weapons be issued for 618 Center St. Ashland, Pa., the residence of [John Doe] *and all occupants therein*.

App. 498a (emphasis added).

Second, the affidavit also clearly attempted to establish probable cause to search all occupants of the premises. The two affiants, who had background and training in drug cases, stated that, in their experience, drug dealers, when faced with "impending apprehension," often give evidence to other persons present on the premises in the hope that "said persons will not be subject to search when police arrive" and that this will "prevent the discovery of said items." *See* App. 494a.

Third, the warrant as drafted was intended to authorize a search of all persons on the premises. The warrant was drafted by the officers who applied for the warrant and was typed by one of those officers. App. 348a. Since the officers were seeking permission to search all occupants of the premises, they obviously intended for the draft warrant that they submitted to the magistrate to authorize the search of such persons.

Fourth, the warrant expressly incorporated the affidavit with respect to the issue that was most critical to the request to search all occupants, *viz.*, the issue of probable cause. While probable cause to search premises does not necessarily provide probable cause to search every person who is found on the premises, *see Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979), *if* there is probable cause to believe that all of the persons found on the premises possess on their persons either contraband or evidence of a crime, there is no reason why a warrant authorizing a search of all such persons should not be issued. In this case, as noted, the affidavit submitted in support of the warrant application claimed that there was probable cause to search all such persons, and the warrant expressly incorporated that claim.

Fifth, after the warrant and affidavit were reviewed by the District Attorney's office and presented to a magistrate, the magistrate carefully reviewed these documents and signed the warrant without alteration.

Under these circumstances, the "commonsense and realistic" reading of the warrant is that it authorized a search of all occupants of the premises. It seems quite clear that the magistrate intended to authorize a search of all occupants of the premises. As noted, the application repeatedly requested such authorization and set out facts that the officers (and presumably the District Attorney's office) regarded as establishing probable cause. The warrant indisputably incorporated the affidavit with respect to the issue of probable cause, and the magistrate signed the warrant without alteration. The only reasonable inference is that the magistrate agreed with the affidavit that there was probable cause to search all occupants of the premises and that the magistrate intended to authorize such a search. The magistrate must have understood that the officers, who had drafted the warrant, believed that the warrant, if signed, would give them authorization to carry out a search of the scope specified in the

application, *viz.*, a search of "all occupants." As a result, the magistrate surely would not have signed the warrant without modification if the magistrate had not wished to confer that authority.

The majority, however, raises a formal objection to the warrant. The majority contends that the warrant unambiguously limits the persons to be searched to John Doe alone. In reaching this conclusion, the majority relies on the entry that the officers placed in the box entitled "specific description of premises and/or persons to be searched." App. 493a. In that box, the officers placed the name of John Doe, followed by his race, sex, date of birth, hair and eye color, and Social Security number. *Id.* The officers also included the address and a fairly detailed description of the premises. *Id.* This information more than filled the space allotted. *Id.*

At their depositions, both of the officers who signed the affidavit explained why they did not note in the box in question that the warrant authorized a search of all occupants of the premises. They stated that there simply was not room in that box¹⁶ and that the incorporation of the affidavit into the warrant (which was noted in the box entitled "probable cause belief is based on the following facts and circumstances" [FN10]) was meant to provide a full description of the persons to be searched. [FN11]

FN10. The affidavit is also cross-referenced in the box entitled DATE OF VIOLATIONS." App. 498a.

FN11. Officer Schaeffer testified that John Doe was mentioned in the box at issue because he "was the target," but Officer Schaeffer added: "As you can see, that box is filled. You can't include everything there." App. 402a. *See also id.* at 403. He stated that the affidavit was "part of the search warrant and we include everything that we want in that affidavit of probable cause.... It's impossible to fit everything we want in these little boxes they give us." *Id.* at 402a-03.

Officer Phillips gave a similar explanation:

Q. Okay. You'll agree with me, sir, that on the face of the warrant it calls, under the heading "Specific Description of Premises and/or Persons to be Searched" the only individual named there is [John Doe], is that correct?

A. That is correct. And the reason for that is there's not enough room in that block to indicate every possible name of individuals who might be in the residence to be searched. That's why we extended into the probable cause affidavit, just as the rest of the information is in the probable cause affidavit. It would not fit on the face sheet of this warrant.

Q. So it's your testimony that the only reason that the words and other, "and other occupants of the residence" do not appear on the face of the search warrant is there's no room?

A. There's no room to list all of the occupants who may have been in the residence at the time with, along with an explanation of what "other occupants" are, include visitors, family members. App. at 353a.

For present purposes, however, the majority attaches no significance to the entry in the box concerning probable cause. The majority takes the position that the only relevant entry is the one in the box entitled "specific description of premises and/or persons to be searched." Because that entry does not refer to all occupants of the premises and does not state that the affidavit is incorporated for the purpose of specifying the persons to be searched, the majority concludes that the warrant does not authorize a search of all such persons. The majority states that the "warrant has no ambiguous ... terms on its face" and that it is therefore improper to look beyond the face of the warrant. *Maj. Op.* at 240.

¹⁶ The government designed the forms with boxes that are too small. The bad design of the government's forms is *not* an acceptable excuse for the government to violate the constitutional rights of people.

I believe that the majority's analysis is flawed. First and most important, the majority employs a technical and legalistic method of interpretation that is the antithesis of the "commonsense and realistic" approach that is appropriate. [FN12] Second, the face of the warrant here does not unambiguously restrict the persons to be searched to John Doe alone. As previously noted, the question whether occupants other than John Doe should be searched was closely tied (if not identical) to the question whether there was probable cause to search such persons, and the face of the warrant incorporated the affidavit with respect to the issue of probable cause. This incorporation, at the very least, creates a sufficient ambiguity to permit consideration of the affidavit and the circumstances surrounding the application.

FN12. The majority's mistaken approach is further exemplified by its suggestion that the affidavit does not actually state that, in the experience of the affiants, drug dealers "often hide drugs on family members and young children." Maj. Op. at 242. The pertinent paragraph of the affidavit states:

This application seeks permission to search all occupants of the residence and their belongings to prevent the removal, concealment, or destruction of any evidence requested in this warrant. It is the experience of your co-affiants that drug dealers often attempt to do so when faced with impending apprehension and may give such evidence to persons who do not actually reside or own/rent the premises. This is done to prevent the discovery of said items in hopes that said persons will not be subject to search when police arrive.

The commonsense reading of this paragraph is that, in the experience of the affiants, drug dealers, when they are about to be arrested, often give contraband or incriminating evidence to other persons who are on the premises ("occupants") in the hope that these persons will not be searched. The majority notes that this passage does not literally state that "narcotics dealers often hide drugs on family members and young children," but this is precisely the sort of technical, legalistic reading that is out of place in interpreting a search warrant or supporting affidavit.

For these reasons, I would hold that the warrant did in fact authorize a search of all persons on the premises, including Jane and Mary Doe.

The majority strives to justify its decision by invoking the Supreme Court's recent decision in *Groh v. Ramirez*, 540 U.S. 551, 124 S.Ct. 1284, 157 L.Ed.2d 1068 (Sup.Ct. Feb. 24, 2004), but *Groh* simply does not speak to the question that divides this panel, i.e., the degree of technical precision that should be demanded in determining whether a warrant adequately incorporates an attached application or affidavit.

In *Groh*, law enforcement officers submitted an application for a warrant to search a ranch for firearms, explosives, and records and later carried out a search for these items, but the warrant did not state that a search for such items was authorized *and did not incorporate the application*. *Id.* at ----, 124 S.Ct. at 1288. In addition, when the search was completed, the officers gave one of the owners of the ranch a copy of the warrant, "*but not a copy of the application, which had been sealed.*" *Id.* at ----, 124 S.Ct. at 1288 (emphasis added). The Court held that the warrant was defective because it did not particularly describe the type of evidence sought. *Id.* at ----, 124 S.Ct. at 1289. However, the Court was careful to distinguish the case before it from a case in which a warrant incorporates another document that contains such a specification. *Id.* at ----, 124 S.Ct. at 1289. The Court wrote:

We do not say that the Fourth Amendment forbids a warrant from cross-referencing other documents. Indeed, most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant But in this case the warrant did not incorporate other documents by reference, nor did either the affidavit or the application (which had been placed under seal) accompany the warrant. Hence, we need not further explore the matter of incorporation. *Id.* at ----, 124 S.Ct. at 1290.

My disagreement with the majority concerns the question whether the mode of incorporation in this case was adequate, and *Groh* does not speak to this question. *Groh* merely refers without elaboration to "appropriate words of incorporation." 540 U.S. at ----, 124 S.Ct. at 1290. In my view, the appropriateness of "words of incorporation" is to be judged by the "commonsense and realistic" standard that is generally to be used in interpreting warrants. The majority, however, reads the warrant in this case almost as if it were a contract subject to the doctrine of *contra proferentum*. *Groh* does not justify such an approach.

II.

Even if the warrant did not confer such authorization, a reasonable officer certainly could have believed that it did, and therefore the defendants' motion for summary judgment based on qualified immunity should have been granted. See *Anderson v. Creighton*, 483 U.S. 635, 640-41, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986). See also, e.g., *Saucier v. Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). The appellants in this case did not exhibit incompetence or a willingness to flout the law. Instead, they reasonably concluded that the magistrate had authorized a search of all occupants of the premises where: (1) that is what the application sought; (2) the affidavit asserted that there was probable cause for such a search; (3) the warrant expressly incorporated the affidavit on the issue of probable cause, (4) the language of the warrant was drafted to confer authorization to search all occupants, and (5) the magistrate signed the warrant without modification. In light of the discussion of these points in part I of this opinion, it is unnecessary to address them further here. [FN13]

FN13. The plaintiffs argue that there was no probable cause to search them, but whether or not there was probable cause, when a warrant is issued, officers who execute the warrant are entitled to qualified immunity unless "the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable." *Malley v. Briggs*, 475 U.S. at 344-45, 106 S.Ct. 1092. That high standard is not met here.

In sum, the District Court erred in denying the defendants' motion for summary judgment. I share the majority's visceral dislike of the intrusive search of John Doe's young daughter, but it is a sad fact that drug dealers sometimes use children to carry out their business and to avoid prosecution.¹⁷ I know of no legal principle that bars an officer from searching a child (in a proper manner) if a warrant has been issued and the warrant is not illegal on its face. Because the warrant in this case authorized the searches that are challenged — and because a reasonable officer, in any event, certainly could have thought that the warrant conferred such authority — I would reverse.

Doe v. Groody, 361 F.3d 232, 244-249 (3rd Cir. 2004) (Alito, J., dissenting).

¹⁷ This fact is irrelevant in the *Doe* case, because the police apprehended John Doe in his front yard, prior to entering the house. Because John Doe was already detained by the police when the police entered the Doe's house, John did *not* have the opportunity to conceal illicit drugs on Mary Doe. Judges are supposed to decide cases on the facts of each case, without concern about hypothetical situations.

I leave it to the reader to decide whether strip searching a 10-year-old girl without probable cause is so abhorrent that Judge Alito's dissent raises doubts about his personal commitment to preserving constitutional rights of individuals against encroachment by government. The majority opinion warns that allowing the affidavit to broaden the search warrant "might indeed transform the judicial officer into little more than the cliché 'rubber stamp.'"¹⁸

President Bush: 5 Nov 2005

President Bush's Saturday morning radio address on 5 Nov 2005 was devoted to his nomination of Judge Alito.

THE PRESIDENT: Good morning. This week I was proud to nominate Judge Sam Alito to be an Associate Justice on the Supreme Court of the United States. Judge Alito is one of America's most accomplished and respected judges. During his long career in public service, he has demonstrated all the qualities that the American people expect in a Supreme Court Justice: mastery of the law, a deep commitment to justice, and great personal character. He is scholarly, fair-minded, and principled, and these traits will serve our nation well on our highest court.

Judge Alito now serves on the U.S. Court of Appeals for the Third Circuit. When he was nominated to his current seat in 1990, Judge Alito received strong bipartisan support, and the United States Senate confirmed him by unanimous consent. He has served on that court with distinction for 15 years, and now has more prior judicial experience than any Supreme Court nominee in more than 70 years.

During his career on the bench, Judge Alito has participated in thousands of appeals and authored hundreds of opinions. He has demonstrated that he understands the proper role of a judge: to interpret the Constitution and laws, not to impose the judge's own preferences or priorities on the people. And in the performance of his duties, Judge Alito's brilliance, his modesty, and his even demeanor have gained him the respect of his colleagues and of the attorneys appearing before him.

Prior to becoming a judge, Sam Alito served for three years as the United States Attorney for the District of New Jersey. When President Reagan nominated him to this position in 1987, the Senate confirmed him by unanimous consent. As the top prosecutor in one of the nation's largest federal districts, Sam Alito moved aggressively against white-collar and environmental crimes, drug trafficking, organized crime, and violations of civil rights. He showed a passionate commitment to the rule of law, and he gained a reputation for being both tough and fair.

Before becoming U.S. Attorney, Sam Alito served in other critical positions in the Department of Justice. In the Office of Legal Counsel, he provided constitutional advice for the President and the executive

¹⁸ *Doe v. Groody*, 361 F.3d at 243 (majority opinion).

branch. As Assistant to the Solicitor General, he argued 12 cases before the Supreme Court. As an Assistant U.S. Attorney, he argued dozens of cases before the federal courts of appeals.

The son of an Italian immigrant who came to America in 1914, Sam Alito is a product of New Jersey public schools. He was valedictorian and student council president at Hamilton East-Steinert High School in Hamilton, New Jersey. He went on to become a Phi Beta Kappa graduate of Princeton University. He attended Yale Law School and was editor of the Yale Law Journal. After graduating from law school, he was a law clerk for a federal court of appeals judge. He has served in the Army Reserves, where he achieved the rank of captain. Sam Alito's life has been marked by consistent excellence and achievement, combined with personal decency and a commitment to public service.

The United States Senate will now exercise its constitutional responsibility to advise and consent on Judge Alito's nomination. The process is off to a good start. Since I announced his nomination, Judge Alito has met with many senators, and they are learning more about his great character, accomplishments, and ability.

Our nation is fortunate to have a man of Judge Alito's intellect and integrity willing to serve. I look forward to the Senate voting to confirm Judge Alito as the 110th Justice of the Supreme Court of the United States.

Thank you for listening.

Second Week

7 - 13 Nov 2005

Judge Alito visited a few Senators each day, for approximately one hour each. The public remarks of Senators after each visit showed that Alito favorably impressed them. Judge Alito's performance was a strong contrast from Harriet Miers, the nominee in the previous month, who often emerged from a courtesy visit with a worse reputation.

There was an interesting contrast between Alito and Miers in another way. With Miers there was something newsworthy, and generally unfavorable to Miers, every few days. But with Alito, the lack of news was boring. Then, on Wednesday, 9 Nov, *The Washington Post* newspaper reported that Alito might vote to preserve *Roe v. Wade*:

Supreme Court nominee Samuel A. Alito Jr. has signaled he would be highly reluctant to overturn long-standing precedents such as the 1973 *Roe v. Wade* abortion rights ruling, a move that has helped to silence some of his critics and may resolve a key problem early in the Senate confirmation process, several senators said yesterday.

In private meetings with senators who support abortion rights, Alito has said the Supreme Court should be quite wary of reversing decisions that have been repeatedly upheld, according to the senators who said it was clear that the context was abortion.

"He basically said . . . that *Roe* was precedent on which people — a lot of people — relied, and been precedent now for decades and therefore deserved great respect," Sen. Joseph I. Lieberman (D-Conn.) told reporters after meeting with Alito yesterday. Sen. Susan Collins

(R-Maine) said she had a similar conversation about an hour later with Alito, who has made clear that he personally opposes abortion.

....

Charles Babington and Michael A. Fletcher, "Alito Signals Reluctance to Overturn *Roe v. Wade*," *Washington Post*, page A01 (9 Nov 2005)

<http://media3.washingtonpost.com/wp-dyn/content/article/2005/11/08/AR2005110801938.html> .

Similar news was reported by the *Los Angeles Times*.¹⁹ Two days later, an article in the *Los Angeles Times* indicated that some pro-life groups were concerned about Alito's commitment to their cause of overruling *Roe v. Wade*.

Some antiabortion groups are starting to wonder whether Supreme Court nominee Samuel A. Alito Jr. is as strong an ally of their cause as opponents have depicted him.

Although he has been wholeheartedly embraced by most major conservative groups, those whose sole mission is to restrict and prohibit abortion have reservations about the latest Supreme Court nominee as they learn more about his record on the divisive issue.

"I don't know what his personal views are, but I know that he has ruled on pro-life cases four times and he has ruled against pro-life positions three times. And the fourth was a split decision," said Richard Collier, president of the Legal Center for the Defense of Life, based in Morristown, N.J. "If you look at the paper trail, it is all negative."

Another group from New Jersey — Alito's home state and the jurisdiction where many of his rulings as an appeals court judge have had a direct effect — is also concerned.

"There's a big question mark about what he would do" on the Supreme Court, said Marie Tasy, executive director of New Jersey Right to Life.

"We certainly hope that Judge Alito is all the things that our opponents claim he is, but we don't know that yet."

A leading antiabortion group, the National Right to Life Committee, has not taken a formal position on Alito's nomination, but the organization's website suggests that the group considers his record on abortion to be mixed at best.

"In examining his record, there are four principal abortion-related cases," the group's website states. "Judge Alito voted in favor of the pro-life side once and against it three times."

....

"I perceive excessive hiding behind abortion precedents, unlike his boldness in other areas," said Collier of the Legal Center for the Defense of Life.

"He's sort of perceived as a radical conservative. If that's true, why isn't that true in the abortion area?"

Collier said other federal judges had been less docile in applying precedents they disagreed with, making clear in their rulings their disagreement with higher courts even when applying their rulings.

"I have never heard a peep of protest on precedents from Judge Alito," Collier said.

"He has not advanced the ball intellectually on how to overturn *Roe* and *Casey*."

Maura Reynolds, "Some Abortion Foes Unsure About Alito," *Los Angeles Times*, (11 Nov 2005)

<http://www.latimes.com/news/nationworld/nation/la-na-alito11nov11,1,1874383.story>

¹⁹ Maura Reynolds, "Senators Feel Assured on Abortion After Alito Visit," *Los Angeles Times*, (9 Nov 2005) <http://www.latimes.com/news/printedition/asection/la-na-alito9nov09,1,796006.story> .

Some of these pro-life groups are focusing solely on the *result* of a case — whether or not the result of the case made it more difficult to obtain an abortion — and ignoring the reasons *why* Judge Alito took his position. As a judge on the U.S. Court of Appeals, Alito is obligated to apply precedents written by the U.S. Supreme Court, even if Alito personally disagrees with those precedents. Liberals are afraid that Alito will vote to overrule *Roe v. Wade* and conservative Christians are afraid that Alito might not overrule *Roe v. Wade*. The ethical requirements for an impartial judiciary mean that neither side will be certain of Alito's position on this important issue to both liberals and conservatives.

Third Week

14 - 20 Nov 2005

Alito's 15 Nov 1985 job application

On Monday, 14 Nov 2005, *The Washington Times*²⁰ reported Alito's application for a promotion in the Reagan presidential administration, submitted on 15 Nov 1985. This story was picked up by *The Washington Post* and the Associated Press, and was major news nationwide on Monday. Because journalists were showing their readers only isolated quotations, sometimes taken out of context, I searched for the original document. I printed a graphic image of his document, scanned it, used optical character recognition to produce the following text of Alito's entire statement:

I am and always have been a conservative and an adherent to the same philosophical views that I believe are central to this Administration. It is obviously very difficult to summarize a set of political views in a sentence but, in capsule form, I believe very strongly in limited government, federalism, free enterprise, the supremacy of the elected branches of government, the need for a strong defense and effective law enforcement, and the legitimacy of a government role in protecting traditional values. In the field of law, I disagree strenuously with the usurpation by the judiciary of decisionmaking authority that should be exercised by the branches of government responsible to the electorate. The Administration has already made major strides toward reversing this trend through its judicial appointments, litigation, and public debate, and it is my hope that even greater advances can be achieved during the second term, especially with Attorney General Meese's leadership at the Department of Justice.

When I first became interested in government and politics during the 1960s, the greatest influences on my views were the writings of William F. Buckley, Jr., the *National Review*, and Barry Goldwater's 1964 campaign. In college, I developed a deep interest in constitutional law, motivated in large part by disagreement with Warren Court decisions, particularly in the areas of criminal procedure, the Establishment Clause, and reapportionment. I discovered the writings of Alexander Bickel advocating judicial restraint, and it was largely for this reason that I decided to go to Yale Law School.

²⁰ Bill Sammon, "Alito rejected abortion as a right," *The Washington Times*, (14 Nov 2005) <http://washingtontimes.com/national/20051114-015136-2101r.htm> .

After graduation from law school, completion of my ROTC military commitment, and a judicial clerkship, I joined the U.S. Attorneys office in New Jersey, principally because of my strong views regarding law enforcement.

Most recently, it has been an honor and source of personal satisfaction for me to serve in the office of the Solicitor General during President Reagan's administration and to help to advance legal positions in which I personally believe very strongly. I am particularly proud of my contributions in recent cases in which the government has argued in the Supreme Court that racial and ethnic quotas should not be allowed and that the Constitution does not protect a right to an abortion.

As a federal employee subject to the Match Act for nearly a decade, I have been unable to take a role in partisan politics. However, I am a life-long registered Republican and have made the sort of modest political contributions that a federal employee can afford to Republican candidates and conservative causes, including the National Republican Congressional Committee, the National Conservative Political Action Committee, Rep. Christopher Smith (4th Dist. N.J.), Rep. James Courter (12th Dist. N.J.), Governor Thomas Mean of N.J., and Jeff Bell's 1982 Senate primary campaign in N.J. I am a member of the Federalist Society for Law and Public Policy and a regular participant at its luncheon meetings and a member of the Concerned Alumni of Princeton University, a conservative alumni group. During the past year, I have submitted articles for publication in the *National Review* and the *American Spectator*.

Taken from a PDF file at <http://news.findlaw.com/wp/docs/alito/111585stmnt2.html>

The entire file is available at <http://www.reagan.utexas.edu/alito/8105.pdf>

my comments on Alito's job application

Here are my comments on the most important parts of Alito's job application:

I believe very strongly in ... the supremacy of the elected branches of government, ... and the legitimacy of a government role in protecting traditional values. In the field of law, I disagree strenuously with the usurpation by the judiciary of decisionmaking authority that should be exercised by the branches of government responsible to the electorate.

“Supremacy of the elected branches of government” means that Alito believes the judiciary is less powerful than the legislative and executive branches of government. His sentence about “usurpation by the judiciary” reiterates his view that the judiciary should be less powerful.

In other words, Alito is opposed to judicial activism, even in support of a conservative political agenda. It is not clear from Alito's terse statement what “traditional values” are, but such values probably include permitting organized prayer in public schools. My own opinions about why judicial activism — either liberal activism or conservative activism — is desirable are given in my essay at <http://www.rbs0.com/judact.pdf>.

I developed a deep interest in constitutional law, motivated in large part by disagreement with Warren Court decisions, particularly in the areas of ... the Establishment Clause,

Alito's personal opinion is consistent with his rulings in favor of religion in public schools, which was discussed above, beginning at page 25.

I am particularly proud of my contributions in recent cases in which the government has argued in the Supreme Court ... that the Constitution does not protect a right to an abortion.

It was no secret that Alito is personally opposed to abortion (see the discussion above, beginning at page 12), but now we have his opinion in writing.

Alito had a duty to be honest in his job application, to avoid fraud in the inducement. Therefore, I interpret his words literally and I believe he is being candid and honest. I am very concerned that Alito believes "the Constitution does not protect a right to an abortion." If the right to an abortion is truly *unprotected* by the Constitution, it would seem that *Roe v. Wade* was wrongfully decided and should be overruled.

Alito backpedals

The day after the above-quoted job application became public, Judge Alito met with Senator Dianne Feinstein. The Associated Press reported:

Supreme Court nominee Samuel Alito distanced himself Tuesday from his 1985 comments that there was no constitutional right to abortion, telling a senator in private that he had been "an advocate seeking a job."

Sen. Dianne Feinstein, D-Calif., an abortion rights supporter and the only woman on the Senate Judiciary Committee, said she asked the conservative judge about a document released Monday showing Alito in 1985 telling the Reagan administration he was particularly proud to help argue that "the Constitution does not protect a right to an abortion."

"He said first of all it was different then," she said. "He said, 'I was an advocate seeking a job, it was a political job and that was 1985. I'm now a judge, I've been on the circuit court for 15 years and it's very different. I'm not an advocate, I don't give heed to my personal views, what I do is interpret the law.'"

When asked whether she found his answer satisfactory, Feinstein said: "The question is, Did I believe he was being absolutely truthful, and I did."

....
Jesse J. Holland, "Alito Downplays 1985 Abortion Statement," *Associated Press*, (15 Nov 2005 12:05 EST). Later on Tuesday, 15 Nov 2005, the Associated Press reported that Judge Alito also met with Senator Edward Kennedy on Tuesday:

The Samuel Alito who argued against abortion rights in 1985 was "an advocate seeking a job" with the conservative Reagan administration, the Alito who is now a Supreme Court nominee told Democrats on Tuesday.

The current version "thinks he's a wiser person" with "a better grasp and understanding about constitutional rights and liberties," senators said as Alito tried to downplay a 20-year-old document in which he asserted "the Constitution does not protect a right to an abortion."

At the same time, some anti-abortion groups warned Alito not to go too far if he hopes to retain their support.

"A nominee who is willing to take the seemingly mandated Roe oath, whereby they testify that it is settled law, never to be overturned, is not the type of justice worthy of pro-life support," said Stephen G. Peroutka, chairman of the National Pro-Life Action Center.

....

"He did indicate that he's an older person, that he's learned more, that he thinks he's a wiser person and he has a better grasp and understanding about constitutional rights and liberties," said [Senator

Edward] Kennedy, a senior member of the Judiciary Committee that will question Alito at his confirmation hearing beginning Jan. 9.

....
Jesse J. Holland, "Alito Downplays 1985 Abortion Statement," *Associated Press*, (15 Nov 2005 22:51 EST).

my comments

Regardless of what Judge Alito says about the difference between being an advocate and being a judge, his personal views on morality surely must affect his decisions about permissible legal rights. Alito's job application declared Alito's *personal* views (he actually said: "I personally believe very strongly"), *not* merely a willingness to advocate positions of the Reagan presidency. As Judge Alito said on 15 Nov 2005, his job as a judge is to "interpret the law", but he also believes that "the Constitution does not protect a right to an abortion." It seems inevitable that his personal view that abortion is wrong will shape his view of what the law should be. In his current position as a Judge on the U.S. Court of Appeals, Alito must follow the precedents of the Supreme Court. However, as a Justice on the U.S. Supreme Court, Alito would have the power to overrule those precedents, or to change the law in other ways.

Alito now sometimes seems to characterize his 1985 job application as exuberance in an attempt to get a job that he wanted, instead of a sincere expression of his views. I find Alito's current characterization — backpedaling — to be even more troubling than the content of his 1985 job application, as Alito now seems to posture himself as someone who will say anything to get a job that he wants. Alito's current characterization takes him out of the frying pan and into the fire — as he changes from a right-wing conservative with integrity, to a man without integrity. I hope that Judge Alito's current characterization of his 1985 job application is just a public relations mistake, and *not* the Truth.²¹

more

An opinion-editorial published in *The Washington Post* cut through the propaganda that seeks to reinterpret what Alito sincerely wrote in his twenty-year-old job application.

Now, maybe I'm cockeyed here, but I don't read Alito's abortion assertion as either personal or political. A personal view would say, "I'm opposed to abortion." A political declaration would say, "Abortion is a bad public policy." But those aren't the sentiments that Alito voiced. What he said, if you'll pardon the strict construction here, is that there is no constitutional right to an abortion. Which is a viewpoint, if agreed to by five Supreme Court justices, that can change the law, and social fabric, of the land.

²¹ A similar view was publicly expressed by an opinion-editorial by E. J. Dionne Jr., "Dodging Debate On Alito," *The Washington Post*, page A29, (6 Dec 2005)
<http://www.washingtonpost.com/wp-dyn/content/article/2005/12/05/AR2005120501547.html>

....

Alito's champions would have us believe, however, that he will defer even to precedents that he regards as unconstitutional — despite the fact that the job of a justice is precisely to determine what is and isn't constitutional. That's asking us to believe a lot.

Clearly, the senators charged with questioning Alito will ask him if he still believes what he wrote 20 years ago. In this instance, since his assertion to Meese was so unequivocal, not answering has to be taken as a de facto yes. He could argue, I suppose, that *Roe* is a more settled point of law now, 32 years after the decision, than it was in 1985. But do time and repeated citation really validate a ruling that Alito viewed — and unless he tells us otherwise, still views — as unconstitutional to begin with? Do Alito's constitutional views count for nothing? Did George W. Bush appoint him simply to leave everything as is?

Harold Meyerson, "Alito's Smoking Gun," *The Washington Post*, page A19 (16 Nov 2005)
<http://www.washingtonpost.com/wp-dyn/content/article/2005/11/15/AR2005111501309.html>

television adverts

A conservative group, Progress for America, sponsored adverts on television extolling Judge Alito's credentials and urging his confirmation. The initial adverts were rather bland.

On Thursday, 17 Nov 2005, the first television adverts opposing Judge Alito appeared. These adverts showed a picture of the White House, with the text "The right wing has taken over the West Wing." and the showed a screen with the text "Don't let them take over your Supreme Court."

Also on Thursday, 17 Nov 2005, a television advert by the Committee for Justice, supporters of Judge Alito, characterized Alito's opponents with the following words:

They want to take God out of the Pledge of Allegiance and are fighting to redefine traditional marriage. They support partial birth abortion, sanction the burning of the American flag, and even oppose pornography filters on public library computers.²²

There was *one* case²³ recently, in which Dr. Michael Newdow, an atheist in California, sued because the Pledge of Allegiance in public schools was allegedly a state endorsement of religion. While some opponents of Judge Alito may agree with Dr. Newdow's litigation, I suspect that most of the opponents of Judge Alito are focused on Alito's position against a constitutional right to abortion. This advert also postures opponents of Judge Alito as supporting equal rights for homosexuals (i.e., "fighting to redefine traditional marriage"), supporting the legal right to an abortion, being unpatriotic (i.e., approving of "burning of the American flag"), and supporting pornography. It is probably true that most liberals do share these values, although liberals express

²² David Espo, "Alito Supporters, Foes Start Ad Campaigns," *Associated Press*, (17 Nov 2005 19:00 EST).

²³ *Newdow v. U.S. Congress*, 328 F.3d 466 (9th Cir. 28 Feb 2003), *rev'd sub nom. Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (14 June 2004).

these values in more positive terms (e.g., upholding freedom of speech, instead of supporting pornography).

I expect these television adverts to have no influence on the outcome of Judge Alito's confirmation. The issues in the confirmation of Judge Alito to the U.S. Supreme Court are too complicated for a thirty-second television advert.

Fourth and Fifth Weeks

The fourth week, 21 - 27 Nov 2005, was Thanksgiving and essentially nothing happened with the Alito nomination. However, on Friday, 25 Nov, a columnist with Hearst newspapers wrote a good summary of the arguments against Judge Alito:

Applying for a political job in the Reagan administration in 1985, Samuel Alito was eager to please by portraying himself as the perfect right-wing puppet.

He flatly declared that the Constitution does not protect a woman's right to choose an abortion and that he was "particularly proud" of opposing racial and ethnic quotas. He said he disagreed with rulings of the U.S. Supreme Court under Chief Justice Earl Warren in the 1950s and '60s that desegregated schools and expanded voting rights.

Now that the Supreme Court nominee has a different, bipartisan constituency to please as he seeks Senate confirmation, he presents himself as far less dogmatic in his judicial reasoning.

Alito's excuses for this supposed 15-year ideological shift are not persuasive.

Argument 1: He was only 35 at the time of the Reagan job application, and he is a wiser person now. Sen. Joseph Biden, D-Del., quickly demolished that one, pointing out that by the time he had attained the age of 35, he had served in the Senate for five years, and nobody ever gave him a pass for youthful voting mistakes. At 35, some maturity should have set in.

Argument 2: Alito was an advocate seeking a job and therefore the document should not be considered definitive. Sen. Edward Kennedy, D-Mass., wasn't impressed by that dodge. "Why shouldn't we consider the answers that you're giving today an application for another job?" Kennedy inquired. Kennedy suggested that if Alito would sacrifice principle to pander to a prospective employer back then, why wouldn't he do so now?

Argument 3: President Bush never asked Alito his views on abortion and can't imagine what he would do on the bench. This is ridiculous. Bush doesn't have to ask, because he looked at Alito's record. He already knows.

Argument 4: Alito respects precedent. Phooey. As a lower court judge, he had no choice but to do so. But on the Supreme Court, he has the power to fiddle with precedents all he wants. It's been done before.

It mostly comes down to whether he believes in a universal right to privacy, the principle upon which abortion is based. And Alito has been very circumspect about his views on that subject.

Moderates are increasingly suspicious that despite all the bobbing and weaving, Alito means to vote at the first opportunity to wipe abortion rights off the law books. If this

impression hardens during his Senate nomination hearing, Democrats and other pro-choice senators have an unpalatable decision to face: Should they filibuster the nomination to try to talk it to death?

....

Marianne Means, "The fur will continue to fly in D.C.," *Seattle Post-Intelligencer*, (25 Nov 2005) http://seattlepi.nwsourc.com/opinion/249545_means25.html

Alito's Memo in *Thornburgh*

On Monday, 28 Nov 2005, the National Archives released approximately 470 pages of documents written by Alito during his employment in the U.S. Department of Justice during the Reagan presidency.

On Wednesday, 30 Nov 2005, the National Archive released a memorandum by Alito that urged the Solicitor General to file an amicus brief in *Thornburgh v. American College of Obstetricians and Gynecologists*, a case before the U.S. Supreme Court in May 1985. Because this 17 page memorandum is too long to quote in its entirety here, I have posted an HTML version at my website, <http://www.rbs0.com/alito85.html>, which has a link to the PDF version at the National Archives. Journalists²⁴ immediately remarked on the anti-abortion statements in this memorandum. Senator Schumer, a pro-choice Democrat on the U.S. Senate Judiciary Committee, commented that: "These latest revelations cast serious doubt on whether Judge Alito can be at all objective on the right to privacy and a woman's right to choose."²⁵

The following quotations from Alito's memorandum show his opposition to abortion and I explain why I consider Alito's position to be objectionable, if not wrong.

Thus, by taking these cases, the Court may be signalling an inclination to cut back [on the validity of *Roe*]. What can be made of this opportunity to advance the goals of bringing about the eventual overruling of *Roe v. Wade* and, in the meantime, of mitigating its effects?

Civil is obviously correct (memo at 6) that we cannot repeat our approach in *Akron*. In *Akron* we did not expressly acknowledge our position on *Roe v. Wade*. We decided not to discuss the specific provisions before the Court (See Br. 1) but rather argued in broad terms that the courts should review state and local legislation regulating abortion with greater deference. The Court rejected our argument, reaffirmed *Roe v. Wade*, and

²⁴ See, e.g., Fred Barbash, "Memo: Alito Urged Government to Challenge *Roe v. Wade*," *The Washington Post*, (30 Nov 2005 14:45 EST), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/30/AR2005113000723.html> and David Espo, "Alito Pushed Abortion Fight Under Reagan," *Associated Press*, (30 Nov 2005 17:00 EST).

²⁵ Stephen Henderson and Howard Mintz, "'85 Alito memo outlines stealth strategy against *Roe*," *Knight-Ridder Newspapers*, (30 Nov 2005); Maeve Reston, "Alito crafted plan in '85 to weaken *Roe*," *Pittsburgh Post-Gazette*, (1 Dec 2005) ("The document is arguably Judge Alito's most explicit and detailed writing on abortion before he became a judge on the 3rd Circuit Court of Appeals.").

proceeded to slash – I am tempted to say reflexively – at the particular regulations before it.

Memo, page 8 (30 May 1985).

Accordingly, and in view of the lessons of Akron, I make the following recommendation. We should file a brief as amicus curiae supporting appellants in both cases. In the course of the brief, we should make clear that we disagree with *Roe v. Wade* and would welcome the opportunity to brief the issue of whether, and if so to what extent, that decision should be overruled.

Memo, page 9 (30 May 1985).

Alito's supporters characterized this memorandum as the product of an attorney working in the Solicitor General's office during President Reagan's administration. They claim that Alito was simply advocating the pro-life position of the Reagan administration. While it is true that Alito was serving his client by writing this memo in 1985, it is also true that, in Alito's job application (see page 52, above), Alito indicated that he *personally* agreed with the Reagan agenda and he was "particularly proud of my contributions in recent cases in which the government has argued ... that the Constitution does not protect a right to an abortion." Here, Alito is enthusiastically helping the Reagan administration get *Roe v. Wade* overruled by the U.S. Supreme Court. A physician who believes that abortion is murder should refuse, on moral grounds, to participate in elective (i.e., nontherapeutic) abortions. Similarly, an attorney who believes in a woman's constitutional right to choose an abortion should refuse to assist in the overruling of *Roe v. Wade*, even if a client wants to pay the lawyer for such services. In short, the personal moral beliefs of professionals can be just as relevant as their technical skills. In my opinion, the fact that Alito enthusiastically volunteered to write this memo on *Thornburgh* indicates that Alito is personally full of zeal about overruling *Roe v. Wade*.

The *Thornburgh* case involves a Pennsylvania statute that requires pregnant women to be informed of eight specific items of information *before* she can receive an abortion. Naturally, Alito seizes on the opportunity to argue that this statute *protects* women, by making their abortion decision a well informed decision.

If abortion is a woman's choice, as the Court has held, then surely the choice should be informed. It goes without saying that the woman is entitled to full information about what will be done to her and about the possible effects on her health. If only the woman is considered, abortion is like other surgery, and the states' power to enact detailed informed consent legislation regarding general surgical procedures can hardly be questioned.

Memo, page 10 (30 May 1985).

While abortion involves essentially the same medical choice as other surgery, it involves in addition a moral choice, because the woman contemplating a first trimester abortion is given absolute and nonreviewable authority over the future of the fetus. Should not then the woman be given relevant and objective information bearing on this choice? *Roe* took from state lawmakers the authority to make this ice and gave it to the pregnant woman. Does it not follow that the woman contemplating abortion have at her disposal at least some of the same sort of information that we would want lawmakers to consider?

Doctors may voluntarily provide this information. But they may also fail to do so in a large number of cases. A benevolent doctor may have a narrow idea about his patient's well-being. He may wish to spare his

patient from having to confront an uncomfortable moral choice. Furthermore, many physicians, including those operating high-volume abortion clinics, have a financial interest in encouraging women to have abortions. Must the state entrust to them the sole responsibility to provide a woman with the relevant information bearing on her choice?

Memo, page 11 (30 May 1985).

I find Alito's position to be objectionable for several reasons:

1. The government forces information on women who have already decided they want an abortion. Not all women go to abortion clinics in a state of ignorance or ambivalence: some women know they have an *undesired* pregnancy and they intend to use their legal right to terminate their pregnancy.
2. The Pennsylvania statute forces women "to confront an uncomfortable moral choice", in the obvious attempt to discourage abortions. Even if the attempt to discourage abortions fails, the legislature has at least inflicted some emotional distress on women who are using their legal right to an abortion. I believe such a statute should be *unconstitutional*, because the statute is an attempt to discourage people from using their constitutional rights.
3. The Pennsylvania statute creates *more* informed consent for abortion, an outpatient procedure, than for thoracic surgery that involves a week-long hospitalization.
4. Alito's remark about "many physicians ... have a financial interest in encouraging women to have abortions" also applies to many other professional situations. For example, attorneys make more money from litigation than from simpler forms of dispute resolution, but legislatures don't enact statutes to protect clients from biased advice from their lawyers. This lack of broad consistency in protecting consumers from exploitation hints that the alleged protection of pregnant women from exploitation by unethical physicians is just a pretext to discourage abortions.
5. Alito asks "Must the state entrust to [physicians] the sole responsibility to provide a woman with the relevant information bearing on her choice?" This view *assumes* that the physician performing the abortion is the woman's *only* source of information. I would expect that, in most cases, the woman already knows — *before* visiting an abortion clinic — that abortion is an inexpensive, simple, and safe (i.e., less risky than childbirth) way to end the woman's *unwanted* pregnancy.

Alito asks rhetorically:

Does this mean that women have a right to make an uninformed choice — even though that choice involves something more than their own well-being?

Memo, page 12 (30 May 1985).

As explained above, I find it highly offensive that the government would insist on making every woman who seeks an abortion confront the moral choice about abortion, so that those who oppose abortion are satisfied. The very essence of freedom is that individuals can make their own choices, and can even make choices that other people consider bad choices. I believe the proper role of

government is not only to stay out of people's personal lives, but also to prevent people with specific religious or moral values from imposing those values on everyone by using the power of government (e.g., statutes and regulations). To answer, Alito's question, women do have a legal right to make an *uninformed* choice. That is what liberty and freedom gives to *all* Americans.

Alito's final paragraph offers the Solicitor General some advice on legal strategy.

I find this approach preferable to a frontal assault on *Roe v. Wade*. [FN10] It has most of the advantages of a brief devoted to the overruling of *Roe v. Wade*: it makes our position clear, does not even tacitly concede *Roe's* legitimacy, and signals that we regard the question as live and open. At the same time, it is free of many of the disadvantages that would accompany a major effort to overturn *Roe*. When the Court hands down its decision and *Roe* is not overruled, the decision will not be portrayed as a stinging rebuke. We also will not forfeit the opportunity to address – and we will not prod the Court into summarily rejecting – the important secondary arguments outlined above.

FN10 The case against *Roe v. Wade* has been fully and publicly made. See, e.g., A. Bickel, *The Morality of Consent* 27-29 (1975); A. Cox, *The Role of the Supreme Court in American Government* 112-114 (1976); Epstein, *Substantive Due Process by Any Other Name*, 1973 Sup. Ct. Rev. 167-155; Ely, *The Wages of Crying Wolf: A Comment on Roe v Wade*, 82 Yale L.J. 920 (1973). In *Akron* the Court's response was *stare decisis* and the "rule of law."

Memo, page 12 (30 May 1985).

I think this is very good advice, *if* one is opposed to *Roe v. Wade*. The Solicitor General rejected Alito's advice here, and the subsequent majority opinion of the U.S. Supreme Court explicitly reaffirmed both *Roe* and *Akron*.²⁶ Alito's footnote ten indicates that Alito seems unsatisfied that the Supreme Court reaffirmed *Roe* on the basis of respect for precedent.

On Friday, 2 Dec 2005, Senator Specter, chairman of the Senate Judiciary Committee, met with Judge Alito for approximately one hour, in response to Alito's 30 May 1985 memorandum. Afterwards, Senator Specter told journalists:

Specter, referring to notes as he briefed reporters, said Alito discussed both memos "and raised a sharp distinction, as he put it, between his role as an advocate and his role as a judge." Especially concerning the second memo, Specter said, Alito "said he was writing it as an advocate; that his role as a judge would be different."

As for the earlier memo, the senator said, "I asked him about the line here, 'The Constitution does not protect a right to an abortion.' And he identifies that as a personal opinion . . . and he said that his personal opinion would not be a factor in his judicial decision."

Asked whether Alito's explanations satisfied him, Specter said, "I'm here to report on his answers. . . . I am not satisfied; I am not dissatisfied."

Specter, who supports abortion rights, said Alito appeared sympathetic to the argument that *Roe* should be treated with great respect because it has been the law for 32 years. "Judge Alito says that when a matter is embedded in the culture, it's a considerable factor in the application of *stare decisis*," Latin for "to stand by that which is decided," Specter said.

²⁶ *Thornburgh*, 476 U.S. 747, 759 (1986).

Asked for details, Specter said: "I'm not going to interpret his words. I think those words are very meaningful as to jurisprudence and as to weight." He added: "I did not ask him whether he would push to overturn *Roe v. Wade*."

Charles Babington, "Alito Distances Himself From 1985 Memos: Senator Says Nominee Drew Divide Between Expressed Views and Potential Rulings," *The Washington Post* (3 Dec 2005)

<http://www.washingtonpost.com/wp-dyn/content/article/2005/12/02/AR2005120200962.html> .

The Associated Press reported similar words:

Supreme Court nominee Samuel Alito, who expressed strong opposition to abortion rights two decades ago, pledged Friday that his personal views on the subject "would not be a factor" in his rulings, the chairman of the Senate Judiciary Committee said.

Sen. Arlen Specter, R-Pa., said Alito had told him in a private meeting that "with respect to his personal views on a woman's right to choose ... that is not a matter to be considered in the deliberation on a constitutional issue of a woman's right to choose. The judicial role is entirely different."

David Espo, "Alito Assures Specter on Abortion Views," *Associated Press*, (2 Dec 2005 13:13 EST).

In my opinion, one would need to be very naive to believe that Judge Alito will keep his personal moral opinion separate from his judicial function, when making public policy decisions, such as considering the overruling of *Roe*. In fact, Alito apparently used his personal distaste for abortion in his judicial opinion in *Planned Parenthood v. Casey*, discussed above, beginning at page 13.

As for the second point by Senator Specter — that *Roe v. Wade* is entitled to great respect as precedent, because it is 32 years old and "embedded in the culture" — this view has little support in the U.S. Supreme Court's opinions that discuss *stare decisis*.²⁷ In fact, the U.S. Supreme Court has overruled cases that it decided wrongfully more than 50 years earlier, and sometimes more than 100 years earlier. Furthermore, the U.S. Supreme Court ruled segregation *unconstitutional* in *Brown v. Board of Education*, although segregation was certainly "embedded in the culture" in the southeastern USA. And there was a long history of Comstock-era statutes that prohibited elective abortions (which means that legal hostility to abortions was "embedded in the culture") when *Roe v. Wade* declared those statutes *unconstitutional*. I want people to understand that respect for precedent is *not* a dependable way to prohibit the overruling of *Roe*. In my opinion, the only reliable way to keep *Roe* as valid law is to appoint only pro-choice justices to the U.S. Supreme Court, but a pro-life president (i.e., President Bush) would be loath to do that.

²⁷ Standler, *Overruled: Stare Decisis in the U.S. Supreme Court*, (Nov 2005) <http://www.rbs2.com/overrule.pdf> . This essay shows that, since 1960, the Court has overruled their own cases an average of once or twice per year. According to U.S. Supreme Court opinions, decisions of constitutional law (e.g. *Roe*) have *weaker* respect for precedent than cases that either (1) involve statutory construction or (2) interpret property or contract rights, on which people rely.

Further, when Alito says his personal views will not affect his judicial decisions, it is important to notice there are two different kinds of “personal” views:

1. Alito’s personal views on the desirability or appropriateness of an abortion for his wife or his daughter.
2. Alito’s personal views on the public policy of maintaining a woman’s legal right to choose an elective abortion prior the viability of the fetus. For example, *if* Alito follows the Catholic church’s teaching that life begins at conception, then abortion is killing a human being, and therefore abortion is immoral public policy.

I agree that the first kind of personal view should not influence his judicial decisions, because a personal choice not to use a legal right does not mean that the legal right should not be available to other people to use. However, the second kind of personal view is very much relevant to his judicial decisions.

Alito’s Confirmation Questionnaire

On Wednesday, 30 Nov 2005, Judge Alito submitted his responses to the Questionnaire from the U.S. Senate Judiciary Committee. An Adobe PDF version of his responses is posted at the Committee’s website: http://judiciary.senate.gov/pdf/Alito_Questionnaire.pdf

The Washington Post uploaded an HTML version at:

<http://www.washingtonpost.com/wp-dyn/content/article/2005/11/30/AR2005113001237.html>

The first thing that many opponents of Alito’s nomination noticed about his responses to the Questionnaire is that his 30 May 1985 memorandum on *Thornburgh* was *not* mentioned. Some opponents of Alito (e.g., Senators Schumer and Kennedy) characterized this omission as indicating a lack of credibility of Judge Alito.²⁸ It seems to me that there is a more innocuous explanation for the omission: Alito *volunteered* to write the 30 May 1985 memo, it was *not* part of his official assignment.²⁹ Consequently, Alito’s name does *not* appear on the amicus curiae brief that the Solicitor’s General’s office submitted to the Court in *Thornburgh*. While this 30 May 1985 memo is very important to critics of Alito, he apparently does not consider it as part of his significant lifetime accomplishments. While I disagree with Alito on both matters of constitutional privacy law (including abortion) and judicial philosophy, such disagreements are *not* a good reason to question Alito’s integrity. Alito surely knows that he can *not* conceal his past job application and 30 May 1985 memo, after they have been front-page news in *The Washington Post* and many other newspapers.

²⁸ Charles Babington, “Newly Released Papers Energize Alito’s Critics,” *The Washington Post*, page A02 (2 Dec 2005); Susan Milligan, “Top Democrats question Alito’s credibility: Say his responses on abortion, funds show lack of candor,” *Boston Globe*, (2 Dec 2005).

²⁹ Michael Kranish, “A coauthor says Alito was instrumental in Roe v. Wade brief,” *Boston Globe*, (16 Nov 2005); David Espo, “Schumer Asks Alito for More Abortion Info,” *Associated Press*, (1 Dec 2005 21:11 EST).

I have quickly reviewed the 62 pages of Alito's responses to the Questionnaire from the Judiciary Committee and the only remarkable item that I see is his response to their question about judicial activism. Here is their question (in small typeface) and Alito's entire response:

29. Judicial Activism: Please discuss your views on the following criticism involving "judicial activism."

The role of the Federal judiciary within the Federal government, and within society, generally, has become the subject of increasing controversy in recent years. It has become the target of both popular and academic criticism that alleges that the judicial branch has usurped many of the prerogatives of other branches and levels of government.

Some of the characteristics of this "judicial activism" have been said to include:

- a. a tendency by the judiciary toward problem-solution rather than grievance-resolution;
- b. a tendency by the judiciary to employ the individual plaintiff as a vehicle for the imposition of far-reaching orders extending to broad classes of individuals;
- c. a tendency by the judiciary to impose broad, affirmative duties upon governments and society;
- d. a tendency by the judiciary toward loosening jurisdictional requirements such as standing and ripeness; and
- e. a tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities.

Answer:

¶1 The Constitution sets forth a limited role for the judicial branch. As the question notes, in recent years there have been charges that the federal judiciary has exceeded the proper bounds of judicial authority through court decisions. My experience has taught me that any such criticism should be informed by a balanced understanding of the role that the federal courts should play.

¶2 The Constitution charges the federal courts with the duty to exercise "[t]he judicial Power of the United States," Art. III, sec.1, and as Alexander Hamilton aptly put it in Federalist 78, the courts should carry out that role with "firmness and independence." "Without this," he observed, "all the reservations of particular rights or privileges [in the Constitution] would amount to nothing." But while the federal courts should act firmly and independently within their proper sphere, they must always keep in mind that their proper sphere is circumscribed. The "judicial Power" is distinct from the "legislative Powers" given to Congress and from "the executive Power," and the federal courts must engage in a constant process of self-discipline to ensure that they respect the limits of their authority.

¶3 Judicial self-discipline is especially important when federal courts are interpreting the Constitution. In non-constitutional cases, the political branches can check what they perceive to be erroneous judicial decisions by enacting corrective legislation. Decisions based on an interpretation of the Constitution, by contrast, cannot be checked in this manner, and a thoughtful appreciation of the nature and essential limits of the judicial function is therefore acutely necessary to protect the democratic values that underlie our Constitution.

¶4 Article III of the Constitution, which is the source of the federal courts' power, simultaneously limits that power. Most importantly, Article III, section 2 restricts the jurisdiction of the federal courts to actual "Cases" and "Controversies," and this limitation necessarily means that the federal courts lack jurisdiction unless the constitutional elements of "standing" and "ripeness" are met. These elements serve to ensure that the federal courts stay within the role that courts have traditionally performed and that they are trained and equipped to perform – entertaining and adjudicating real disputes that are brought before them by real parties. By restraining the courts from reaching out to decide abstract issues and nascent

disputes that may not need judicial resolution, these doctrines promote better decision making, serve democratic values, and work to prevent clashes with the authority of Congress and the Executive by reserving to the political process issues that rightly belong there. In recent decades, Supreme Court decisions have stressed the importance of these constitutional restrictions on the power of the federal courts, and as a judge of the court of appeals I have applied these precedents.

¶5 Other valuable statutory and judge-made limitations on the exercise of judicial power serve similar purposes. These limitations include prudential standing and ripeness requirements, statutory and non-statutory limitations on the scope of review that courts may properly exercise in particular contexts, and the doctrine of stare decisis, which supplies essential stability to the law and is a fundamental feature of our legal system. My experience as a court of appeals judge for the past 15 years has fortified my appreciation of the value of these important limitations.

¶6 A criticism of the federal courts cited in the question concerns the overreaching in crafting and implementing remedies, an area that highlights the tension between the federal courts' obligation to discharge their proper role firmly and independently and the need to avoid inappropriate encroachment on the authority of other government institutions. When a constitutional or statutory violation has been proven, a court should not hesitate to impose a strong and lawful remedy if that is what is needed to provide full redress. Some of the finest chapters in the history of the federal courts have been written when federal judges, despite resistance, have steadfastly enforced remedies for deeply rooted constitutional violations. At the same time, however, judges must always be sensitive to the need to avoid unnecessary interference with the authority and competence of the political branches. In addition, courts should recognize that their legitimacy is tested when they undertake in the remedial context to perform functions that are ordinarily the province of the political branches.

¶7 A paradox is inherent in our constitutional structure. The framers of the Constitution generally did not think that government institutions and actors could be trusted to refrain from unduly extending their own powers, but our constitutional system relies heavily on the judiciary to restrain itself. To do this, judges must engage in a continual process of self-questioning about the way in which they are performing the responsibilities of their offices. Judges must also have faith that the cause of justice in the long run is best served if they scrupulously heed the limits of their role rather than transgressing those limits in an effort to achieve a desired result in a particular case. Judges must maintain a deep respect for the authority of the other branches of government — based on their democratic legitimacy — and a keen appreciation of the comparative advantages that other government institutions and actors have in making empirical judgments, devising comprehensive solutions for social problems, and administering complex programs and institutions. In addition, judges must be appropriately modest in their estimation of their own abilities; they must respect the judgments reached by predecessors; and they must be sensibly cautious about the scope of their decisions. And judges should do all these things without shirking their duty to say what the law is and to carry out their proper role with energy and independence.

Samuel Alito, Responses to Questionnaire, pages 60-62 (30 Nov 2005).

I added the paragraph numbers in the left margin of his answer, for ease of reference.

The first thing that strikes me about his answer is that it only cites material³⁰ from more than 200 years ago, as if nothing significant has happened to the role of the judiciary in U.S. Government since then.

In the last sentence of ¶3, he says that decisions of constitutional law must be made with “a thoughtful appreciation of the nature and essential limits of the judicial function” in order “to protect the democratic values that underlie our Constitution.” It is not clear exactly what those impressive words mean. Does protection of “democratic values” mean the majority can impose their values on an unwilling minority? Alito does not say, but — in my opinion — protection of minorities is one of the justifications for judicial activism.

In the last two sentences of ¶6, he says:

... judges must always be sensitive to the need to avoid unnecessary interference with the authority and competence of the political branches. In addition, courts should recognize that their legitimacy is tested when they undertake in the remedial context to perform functions that are ordinarily the province of the political branches.

I disagree. I believe that when one or both of the political branches of a government is infringing a constitutional right of a minority, the courts should stop that infringement. Such a role of the courts has been widely criticized in the contexts of ending racial segregation, giving equal rights to homosexuals, and preventing fundamentalist Christians from using government to impose their religion on others through prayers in public schools, displays of the Ten Commandments in public schools and government buildings, etc. I believe this is a proper use of the courts’ powers, because the two elected branches of government are sometimes unwilling to protect minorities. Indeed, the elected branches are sometimes responsible for infringing constitutional rights of minorities — and one would not expect the source of the problem (i.e., the legislature and executive) to correct problems that they created, when the problems have widespread popular support.

I do not see the paradox that Alito mentions in his ¶7, because I do not believe the judiciary needs to “restrain itself”. Instead, I view the judiciary as an independent branch of government with powers equal to the other two branches. In his 1985 job application (see page 52, above), Alito said:

I believe very strongly in ... the supremacy of the elected branches of government, In the field of law, I disagree strenuously with the usurpation by the judiciary of decisionmaking authority that should be exercised by the branches of government responsible to the electorate.

I do not see anything in the U.S. Constitution that supports Alito’s view that the judiciary is a weaker branch of government than the two political branches. My personal views about judicial activism are given in my separate essay at <http://www.rbs0.com/judact.pdf> .

³⁰ Hamilton’s *Federalist 78* was cited in ¶2. His final sentence in ¶7 includes the famous phrase “to say what the law is” from *Marbury v. Madison*, 1 Cranch 137, 177, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

Knight-Ridder Newspaper Article

On 1 Dec, two reporters in the Knight-Ridder Newspaper's Washington Bureau published a review of 311 opinions written by Judge Alito, and characterized him in the following words.

During his 15 years on the federal bench, Supreme Court nominee Samuel Alito has worked quietly but resolutely to weave a conservative legal agenda into the fabric of the nation's laws.

A Knight Ridder review of Alito's 311 published opinions on the 3rd Circuit Court of Appeals — each of singular legal or public policy importance — found a clear pattern. Although Alito's opinions are rarely written with obvious ideology, he's seldom sided with a criminal defendant, a foreign national facing deportation, an employee alleging discrimination or consumers suing big businesses.

....

... Knight Ridder's review of Alito's record reveals decisions so consistent that it appears results do matter to him.

"Alito is more conservative than O'Connor; this isn't a hard question," said Rory Little, a Hastings College of the Law professor in San Francisco and a former Supreme Court clerk who praised Alito's credentials. "This isn't a guy who is going to vote in a way that will make anybody on the left happy."

A review of Alito's work on dozens of cases that raised important social issues found that he rarely supports individual rights claims.

The primary exception has been his opinions about First Amendment protections. Alito has been a near free-speech absolutist in his writings, and he's been equally strong on protecting religious freedoms.

But even some of his First Amendment opinions underscore the bent in the rest of his work. He hasn't strictly enforced church-state separation, and his love of the First Amendment seems to stop at the prison walls. He has written opinions that would deny prisoners access to reading materials and curtail their rights to practice their religious beliefs.

In other areas, Alito often goes out of his way to narrow the scope of individual rights, sometimes reaching out to undo lower-court rulings that affirmed those rights.

....

Alito's deference to law enforcement is most evident when he has addressed allegations that police and prosecutors overstepped their constitutional bounds.

....

In one highly publicized case,³¹ Alito upheld a police strip search of a 10-year-old girl by arguing that a warrant that didn't mention the girl should be read "broadly." The ruling is a rare instance of a conservative jurist arguing for a departure from strict textual interpretation in favor of government intrusion.

³¹ *Doe v. Groody*, see page 42, above.

....

Stephen Henderson and Howard Mintz, "Review of cases shows Alito to be staunch conservative," *Knight-Ridder Washington Bureau*, (1 Dec 2005)

<http://www.realcities.com/mld/krwashington/13305409.htm> .

This article was published in various newspapers with different titles. In my opinion, Henderson and Mintz offer a better explanation for Judge Alito's decision in *Groody* than Alito's own written opinion.

In response to this article, a former law clerk for Judge Alito wrote a rebuttal:

As a former clerk for Judge Samuel Alito, I can tell you he is not the conservative ideologue portrayed in a recent article by Knight Ridder reporters Stephen Henderson and Howard Mintz ("Alito Opinions Reveal Pattern of Conservatism").

I am a registered Democrat who supports progressive causes. (To my wife's consternation, I still can't bring myself to take my "Kerry for President" bumper sticker off of my car.) I clerked for Judge Alito from 1997 to 1998. Notwithstanding my close work with Judge Alito, until I read his 1985 Reagan job application statement, I could not tell you what his politics were. When we worked on cases, we reached the same result about 95 percent of the time. When we disagreed, it was largely due to the fact that he is a lot smarter than I am (indeed, than most people) and is far more experienced.

It was my experience that Judge Alito was (and is) capable of setting aside any personal biases he may have when he judges. He is the consummate professional.

....

Jeffrey N. Wasserstein, "Judge Alito is no ideologue," *Salt Lake City Tribune*, (7 Dec 2005).

Also published in other newspapers, such as *The Ft. Worth Star-Telegram* (8 Dec 2005).

The president's staff was apparently actively involved in rebutting this article by Henderson and Mintz.

The Bush administration is mounting an aggressive effort to counter a Knight Ridder story that described U.S. Supreme Court nominee Samuel Alito as a committed judicial conservative.

The administration's response — delivered separately Tuesday by the White House and the Department of Justice — reflects its determination to defend Alito and its sensitivity to the "conservative" label for him.

The attack came after Senate Democrats circulated Knight Ridder's assessment of Alito's judicial record for possible use against him at his confirmation hearings next month.

....

The response to the Knight Ridder analysis was the latest in a series of administration efforts to counter any suggestion that Alito would be a conservative activist on the Supreme Court.

Administration officials scrambled last week to counter speculation that Alito would seek to ban abortions after the release of a 1985 memo he wrote in which he outlined a long-term strategy to overturn *Roe v. Wade*, the 1973 ruling that made abortions legal nationwide.

Ron Hutcheson, "Administration objects to story describing Alito as conservative," *Knight-Ridder Washington Bureau*, (6 Dec 2005) <http://www.realcities.com/mld/kriwashington/13343347.htm>
Parts published as "Bush trying to fend off Alito article," *Contra Costa Times*, (7 Dec 2005);
"White House criticizes analysis of Alito record," *Columbia Daily Tribune*, (8 Dec 2005).

I searched the transcripts of White House Press Briefings from 1 Dec to 8 Dec, but found no mentions of the word "Alito". In a quick search of Google News, I was unable to find any transcripts of remarks by Bush administration officials about the article by Henderson and Mintz.

I find it bizarre that a conservative president would nominate a conservative judge, and then attempt to pretend that the judge is not conservative. Earlier examples of this kind of avoidance of admitting that Alito holds conservative opinions occurred when Alito backpedaled about his 1985 job application (see page 54, above) and, later, his reaction to his 30 May 1985 memo in *Thornburgh*.

Sixth and Seventh Weeks

5 to 11 Dec 2005

On Wednesday, 7 Dec 2005, Democrats on the U.S. Senate Judiciary Committee asked Alito to supply more documents.³² In my view, the Democrats have crafted a neat political ploy with no downside for the Democrats:

1. If the White House refuses the documents on grounds of executive privilege or attorney-client privilege, the Democrats can allege a cover up of some unfavorable information about Alito.
2. If the White House releases the documents:
 - a. If the documents contain a smoking gun, like his 1985 job application or his May 1985 memo on *Thornburgh*, the Democrats have more evidence to use against Alito.
 - b. If the documents do not contain anything useful, the Democrats can ignore the documents.

In my opinion, this is a silly game. The real problem in stopping Alito's confirmation is that the Democrats have too few votes in the U.S. Senate, *not* that the Democrats lack good reasons to vote against Alito's confirmation. So, in this silly game, the Democrats demand more evidence, and the executive branch refuses to provide the evidence, while pretending to acknowledge the existence of the Democrats.

³² no author, "Senate Democrats press for papers on Alito," *Reuters*, (7 Dec 2005 19:22 EST);
Jessie J. Holland, "Senate Democrats Request More Alito Info," *Associated Press*, (8 Dec 2005 21:35 EST).

A related issue is the question of how much evidence must someone have before they can stop having an “open mind” and make a decision. Several groups decided that Alito’s judicial opinions, together with his 1985 job application and his 30 May 1985 memo on *Thornburgh*, are already enough evidence to justify *not* confirming Alito.³³

However, the official view is that Senators should wait until after the hearings in the U.S. Senate Judiciary Committee have concluded, before they make a decision on the confirmation of Judge Alito. The Judiciary Committee is composed mostly of former trial lawyers,³⁴ who have a dogmatic belief that questioning under penalty of perjury is somehow better than other kinds of evidence. In practice, nominees to judiciary will refuse to answer questions about how they would rule on future cases, in order to preserve an independent, impartial, and unbiased judiciary. Even when they do not refuse to answer questions, their answers are often evasive or vague. Personally, I am more impressed by what people write in carefully written scholarly essays, memoranda, judicial opinions, etc. than in what they say in extemporaneous answers to questions during a hearing.

Frist on Filibuster

On Sunday, 11 Dec 2005, Dr. Bill Frist, majority leader in the U.S. Senate, was interviewed by journalist Chris Wallace on the Fox News cable television network.

WALLACE: All right. Here's a yes or no question. This is an easy one. If, and I repeat if, Democrats decide to filibuster the nomination of Samuel Alito to the Supreme Court, will you move to impose the nuclear option to change the Senate's rules and make it easier to cut off a filibuster?

FRIST: Yes. I mean, really, it's pretty straightforward that Sam Alito, who has modest judicial temperament, who has written opinions in 200 cases to 300 cases, who's been involved in 3,000 cases, who's been confirmed by the United States Senate twice already, is somebody who deserves — vote how you want — I'll tell you how I'd like to vote, but vote how you want, but that deserves advice and consent by the Senate, meaning an up or down vote.

So I think it would be unconscionable — I think it would be wrong — I think it would be against the intent of the founding fathers and our Constitution to deny Sam Alito an up or down vote on the floor of the United States Senate.

I have stood from day one on principle that these Supreme Court justices — nominees deserve an up or down vote, and it would be absolutely wrong to deny

³³ On 7 Dec 2005, all 42 black members of the U.S. House of Representatives voted to oppose Judge Alito, although under the U.S. Constitution the opinions of Representatives are *irrelevant* to the confirmation of federal judges. Also, on 8 Dec 2005 the National Women’s Law Center announced its opposition to Judge Alito.

³⁴ There are 18 members of the Committee. The four nonlawyers on the Committee are two Democrats: Dianne Feinstein of California and Herbert Kohl of Wisconsin, and two Republicans: Charles Grassley of Iowa and Tom Coburn of Oklahoma.

him that. And that's what the constitutional option is. You used the words nuclear option, and that — you can use that

WALLACE: We have a flair for the dramatic.

FRIST: That's exactly right.

WALLACE: All right.

FRIST: The answer is yes.

Fox News Sunday, (11 Dec 2005) <http://www.foxnews.com/story/0,2933,178358,00.html> .

Dr. Frist's statement is significant, because — on 11 Dec 2005 — it appears that the *only* way that liberals could prevent the confirmation of Judge Alito is by way of filibuster, and it is by no means certain that liberals could maintain at least 41 Senators in their filibuster. By threatening a rules change to make filibusters rarer, Dr. Frist increases the stakes in the game to both (1) preventing Judge Alito from joining the Supreme Court *and* (2) maintaining the traditional rules of the Senate that respects the right of a small minority who really cares about some issue. Ironically, the Republicans have often postured themselves as the party of “law and order”, supporting the “rule of law”. It's a shallow commitment to law that retaliates for the use of rights by changing the rules to deny those rights in the future.

12 - 18 Dec 2005

On 13 Dec 2005, The Judicial Confirmation Network, a conservative organization that supports Judge Alito, began putting advertisements on the Internet with the following text:

Left wing extremists opposing Judge Alito's nomination to the Supreme Court may have found new allies ...³⁵ drug dealers who hide drugs on children.

These extremist groups have even run TV ads attacking Judge Alito — ads siding with a convicted drug offender who sued police for searching his child during a raid at the suspected drug dealer's house.

These liberal extremists oppose the search.

They oppose Judge Alito.

And they oppose his tough on crime positions.

In THEIR America, drug dealers could freely use children to hide drugs.

In THEIR America, honest police officers could be sued ...³⁶ for doing their job.

That is not the real America.

Contact your Senators.

Ask them to support Judge Alito.

Ask them...³⁷ Whose side are they on?

“Real America,” The Judicial Confirmation Network, 13 Dec 2005,

http://www.judicialnetwork.com/contents/alito/jcn_ad.shtml .

³⁵ Ellipses in original text.

³⁶ Ellipses in original text.

³⁷ Ellipses in original text.

my opinion of this advert

This advert refers to Alito's dissenting opinion in *Doe v. Groody*, which was discussed above, beginning at page 42. As I pointed out in my analysis of Alito's dissent, there were *no* drugs on the 10 y old girl who was strip searched in her home without probable cause. The issue in *Groody* is whether police need a written search warrant before they can enter a home and strip search a wife and daughter who were *neither* suspected of distributing illicit drugs *nor* named in the search warrant. The Judicial Confirmation Network has mischaracterized *Groody* as deciding whether to support (1) police or (2) evil distributors of illicit drugs. I am *not* opposing Alito's "tough on crime positions", I am only trying to advocate Fourth Amendment protections for individual people against abuse by big government. The end does *not* justify the means: just because the police are generally deserving of support does not mean that blatantly *unconstitutional* searches should be condoned.

The Judicial Confirmation Network says that people like me are "left wing extremists" who "have found new allies[:] drug dealers who hide their drugs on children." I am not happy about being called a "left wing extremist" just because I disagree with The Judicial Confirmation Network — in fact, I agree with many of Judge Alito's conservative opinions.

Another objectionable feature of this advert is its use of the propaganda technique of insisting on a binary choice. According to this advert, we must make a choice to live in either

1. an America run by "liberal extremists", where "drug dealers could freely use children to hide drugs" and where "honest police officers could be sued...for doing their job."
2. "the real America", where judges like Alito eviscerate the Fourth Amendment to the U.S. Constitution, because it inconveniences the police.

It is true that the Senate must eventually make a binary choice to either confirm or not confirm Judge Alito. But the issues involved in his confirmation do *not* fall neatly into binary classifications of either liberal extremism or conservative politics, with no hope of consensus. Both liberals and conservatives — indeed, *all* americans who understand law — should unite to defend civil liberties.

It is worth noting that Judge Alito probably had no advance knowledge of this advert and he probably did not approve this advert. It would be inappropriate to blame Judge Alito for the propaganda of his supporters.

U.S. Senate

During the past month and a half, when information about Judge Alito's anti-abortion views appeared, a few pro-choice Senators who are members of Judiciary Committee held press conferences and promised to ask Judge Alito "tough questions" at his confirmation hearings. Similarly, commentators are predicting that Judge Alito will encounter much more hostile questioning than Chief Justice Roberts encountered in September 2005. I find such posturing *unsatisfying*. The issue here is not whether Judge Alito should have an *unpleasant* three-day interrogation by the Senate Judiciary Committee, but whether Judge Alito will be confirmed and then presumedly vote against civil liberties — perhaps for the next thirty years — as a Justice of the U.S. Supreme Court.

Thursday night, 15 Dec 2005, it was publicly revealed that President Bush in the year 2002 had authorized the National Security Agency to intercept communications from people inside the USA, without obtaining a warrant from a court. That revelation impressed on Senators the need to have strong laws protecting the privacy of individuals from intrusion by government. The following morning, 16 Dec 2005, a filibuster of the renewal of the Patriot Act³⁸ succeeded when four Republicans broke ranks and voted for continuing the filibuster while two Democrats voted to end the filibuster, bringing the total against the filibuster to 53, seven votes fewer than needed to end the filibuster.³⁹ I mention this vote to show that it is *possible* that Judge Alito's confirmation by the entire Senate *might* be prevented by a filibuster. In my view, having wiretaps without first obtaining a warrant from a court is analogous to Judge Alito's dissenting opinion in *Groody*, in which he argues that police can strip search residents of a home who were *not* named in a search warrant.

Monday, 19 Dec 2005, Senators Specter and Leahy wrote to Judge Alito, putting Alito on notice that he would be asked questions about the president's authority to conduct surveillance inside the USA without a court order.

Senate Judiciary Chairman Arlen Specter, R-Pa., and ranking Judiciary Democrat Patrick Leahy of Vermont sent separate letters to Alito telling him they would ask about the president's authority to order warrantless spying at Alito's Jan. 9 confirmation hearings.

"Recent revelations that the president authorized domestic eavesdropping without following the statute that requires approval of the Foreign Intelligence Surveillance Court is but one of several areas where the court's role as a check on overreaching by the executive may soon prove crucial," Leahy said in his letter.

³⁸ The so-called Patriot Act was initially enacted a few months after the terrorist attack on 11 Sep 2001, and Senator Feingold cast the only vote against the initial Patriot Act. Because of the controversial nature of some provisions, the initial Patriot Act was set to expire on 31 Dec 2005, giving opponents an automatic opportunity to revise or renew the statute.

³⁹ Charles Babington, "Renewal of Patriot Act Is Blocked in Senate," *The Washington Post*, page A01 (17 Dec 2005).

Bush said Monday that warrantless spying, conducted by the National Security Agency, was an essential element in the war on terror. The president said the Constitution gives him the authority to order the warrantless monitoring of phone calls and e-mails of individuals in this country believed to be plotting with terrorists overseas.

....

"What jurisprudential approach would you use to determine whether this resolution gives the president the power to issue an executive order permitting the National Security Agency to conduct domestic surveillance on international communications without first obtaining a search warrant?" said Specter in his letter outlining a list of questions for Alito.

Specter and Leahy said they were listing questions for Alito so he would be prepared when they asked them at the hearings, which begin Jan. 9 and could take several days.

....

Jesse J. Holland, "Lawmakers to Ask Alito About Spy Views," *Associated Press*, (19 Dec 2005 20:06 EST).

Eighth and Ninth Weeks

19 to 25 Dec 2005

opinion poll

On Thursday, 22 Dec, results of a new Washington Post - ABC News poll on Alito was released.

The survey found that 54 percent say the Senate should confirm Alito, while 28 percent say he should not be approved. That marks a modest increase in public support for Alito since November, when 49 percent said he should be confirmed and 29 percent said he should not. In both surveys, about one in five Americans said they did not know enough about the nominee to have an opinion.

....

The new poll found some evidence that the abortion issue plays an important but not decisive role in shaping public perceptions of Alito. Although his current views on abortion are not publicly known, memos that he wrote two decades ago, while he was a lawyer in the Reagan administration's Justice Department, indicated that he opposed *Roe v. Wade*, the 1973 Supreme Court ruling that legalized abortion nationwide.

Six in 10 in the survey said they hope Alito would vote to uphold *Roe*, while more than a third said they want him to vote to overturn it. But a majority of the respondents — 55 percent — said Alito's stand on abortion was only of limited importance to them. Seventeen percent said it was "extremely important," while 26 percent said it was "very important."

A total of 1,003 randomly selected adults were interviewed Dec. 15 to 18. The margin of sampling error for the overall results is plus or minus three percentage points.

Richard Morin, "In Poll, 54% Back Alito's Confirmation," *The Washington Post*, page A03 (22 Dec 2005)

<http://www.washingtonpost.com/wp-dyn/content/article/2005/12/21/AR2005122100354.html> .

The interpretation of this poll in the newspapers is that support for Alito is increasing. But it is possible that the change in approval numbers is actually the result of statistical fluctuations in sampling. The “margin of sampling error” is $\pm 3\%$. Suppose a 3% sampling error in the previous poll reduced the indicated approval rating to 49%, so that the true approval rating in the previous poll was actually 52%. And suppose a 2% sampling error in the current poll increased the indicated approval rating to 54%, so the true approval rating in the current poll was also actually 52%. This hypothetical example supports a different interpretation than given by the newspaper. My interpretation of no change in opinion is supported by the results in *both* polls that show about 20% of respondents had no opinion.

But a bigger problem with these polls is that few, if any, of the people polled had a good reason for either supporting or opposing Judge Alito’s nomination. Judge Alito has rarely been front-page news in the approximately 50 days since he was nominated, so even people who avidly follow current events would be exposed to little substantial information about Alito’s opinions and values.⁴⁰ People are probably forming their opinions on the basis of either editorials in the news media, statements by politicians, or propaganda in television advertisements, instead of forming their opinions after critically reading and understanding Alito’s words.

domestic wiretaps

As mentioned above at page 73, it was revealed that President Bush in the year 2002 had authorized the National Security Agency to intercept communications from people inside the USA, without obtaining a warrant from a court. Although such intercepts of *international* communications are arguably legal under the federal government’s broad powers to conduct foreign policy, international commerce, and military policy, the conventional wisdom amongst U.S. senators is that such wiretaps without court orders are blatantly illegal. On 16 Dec 2005, I immediately saw an analogy to Judge Alito’s dissenting opinion in *Groody*, in which Alito argues that police can strip search residents of a home who were *not* named in a search warrant. Politicians and commentators did not mention this analogy to *Groody*, possibly because they had not personally read and analyzed *Groody*.

⁴⁰ As evidence of the public’s lack of interest in Alito, consider the number of hits on this essay about the history of Alito’s confirmation. On 21 Dec 2005, this essay had a meager total of 189 hits, despite being in the Google search engine since 5 Nov 2005. Many essays at my websites get more than 200 hits/week, a few of my essay get more than 1000 hits/week, while this essay on Alito has averaged a mere 27 hits/week.

On 23 Dec 2005, journalists⁴¹ began to report that Alito had written memoranda in 1984, and co-authored a brief to the U.S. Supreme Court, arguing that the federal government did have broad wiretap authority that was used by president Nixon's attorney general. The Supreme Court case is *Mitchell v. Forsyth*, 472 U.S. 511 (1985). As of Christmas, approximately one month before the schedule vote by the U.S. Senate on Alito's nomination to the U.S. Supreme Court, it appears that the intense distaste for government wiretaps *might* doom Alito's confirmation by the Senate. I find this reasoning ironic, because, in my opinion, his views supporting wiretaps is just a small piece of his apparent overall hostility to legal rights for individual people.

Because the U.S. Congress on 22 Dec 2005 extended the Patriot Act for only one month before fleeing from Washington, DC for the Christmas holiday, the Senate might have debated the renewal of the Patriot Act simultaneously with the consideration of Judge Alito's confirmation. (In fact, the renewal of the Patriot Act was scheduled in the U.S. Senate for the week following the confirmation of Alito.) The concerns over individual freedom and privacy in the Patriot Act are related to concerns about Judge Alito's strong support for law enforcement, to the detriment of individual rights.

26 Dec 2005 to 1 Jan 2006

During the week between Christmas Day and New Year's Day, there were only two news stories about Alito that I consider significant, although I checked the Google News search engine and *The Washington Post* website every day.

On 26 Dec, a blog at *The Washington Post* criticized the misleading headlines in other newspapers about Alito's memo in *Mitchell v. Forsyth*. That case was about immunity (or limited immunity) for government officials who authorized wiretaps, while the newspapers were presenting it as a case about the validity of wiretaps.

Here is a sampling of headlines various news outlets chose to place on the story about a 1984 memo in which Alito urges the Solicitor General to support qualified immunity for the attorney general in a wiretap case. The headlines are wildly inaccurate. At no time in the memo did Alito express approval or disapproval of wiretaps. Nor was that relevant to the case.

"Alito Backed wiretaps of Americans," [Arizona Daily Sun](#)

"Alito favored broad wiretap powers," [Bradenton Herald](#)

"Alito backed wiretaps of Americans," [Arizona Daily Sun](#)

⁴¹ Donna Cassata, "Alito Defended Officials From Wiretap Suits," *Associated Press*, (23 Dec 2005 13:37 EST); Jo Becker and Christopher Lee, "Alito Urged Wiretap Immunity: Memo Offers Look at Nominee on Privacy," *The Washington Post*, page A01, (24 Dec 2005); Donna Cassata, "Alito Defended Use of Domestic Wiretaps," *Associated Press*, (24 Dec 2005 11:32 EST).

"Alito supported wiretaps in memo," [The Buffalo News](#)

"Alito backed spying," [Cape Cod Times](#)

"Alito supported wiretaps without warrants in memo," [Newark Star-Ledger](#)

Most of these headlines were derived from an equally inaccurate Associated Press lead paragraph: "Supreme Court nominee Samuel Alito defended the right of government officials to order domestic wiretaps for national security when he worked at the Reagan Justice Department, an echo of President Bush's rationale for spying on U.S. residents in the war on terror."

Fred Barbash, "Really Rotten Headlines," *The Washington Post*, (26 Dec 2005 16:41 EST) http://blogs.washingtonpost.com/campaignforthecourt/2005/12/really_bad_head.html .

As I sit here on 31 Dec 2005, trying to think of a comment on Mr. Barbash's observation, all that comes to my mind is that, in a democracy, what matters is what people *believe*, not what is actually true. Yes, my opinion is cynical, but this is not the first time that journalists, politicians, or civic leaders have misunderstood opinions of the U.S. Supreme Court. Constitutional law seems to be out of the intellectual grasp of most Americans, even those with a college education.⁴²

In a parallel to the Knight-Ridder analysis of Judge Alito's opinions mentioned above, beginning at page 67, two reporters for *The Washington Post* undertook their own analysis. A list of the cases they analyzed is given at <http://projects.washingtonpost.com/2006/alito/cases/> , arranged alphabetically by the name of the plaintiff. A detailed explanation of their methodology is given at <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/31/AR2005123100344.html> . And their conclusions include:

During 15 years as an appeals court judge, Supreme Court nominee Samuel A. Alito Jr. has been highly sympathetic to prosecutors, skeptical of immigrants trying to avoid deportation, and supportive of a lower wall between church and state, according to an analysis of his record by *The Washington Post*.

Alito has taken a harder line on criminal and immigration cases than most federal appellate judges nationwide, including those who, like him, were selected by Republican presidents, the analysis found.

In civil rights cases, Alito has sided against three of every four people who claimed to have been victims of discrimination, based on the lawsuits in the analysis. Such a record is typical of Republican appointees on federal appeals courts in discrimination cases, the area of the law in which national studies show GOP-appointed judges differ most from their Democratic-appointed counterparts.

Still, in a few areas of the law, Alito's record resembles that of the average U.S. appellate judge. His decisions on First Amendment cases have been mixed. And when workers have sued for pay or benefits, he has agreed with them about half the time.

⁴² Data from my personal website seems to suggest that few people bother to read the original documents by Alito. For example, my HTML version of Alito's 30 May 1985 memo received a total of 67 hits during its first 30 days at my website, and this essay on Alito's confirmation received a total of 214 hits during its first two months at my website. In contrast, I posted a little essay on judicial activism on 3 Oct 2005 that received 566 hits in its first four weeks, and 1662 hits in its first eight weeks.

....

Overall, the analysis shows, Alito does not disagree with majority opinions more frequently than most federal appeals judges do in similar cases. Yet a closer look finds that he dissents most often in areas where his views are least typical of the average judge: cases in which he has favored religion and largely sided against immigrants and one group of convicted criminals: prisoners facing the death penalty.

....

Overall, the opinions Alito wrote are largely devoid of impassioned rhetoric or broad philosophical assertions. He grounds his views in close readings of legal precedents, statutes and government regulations. Of the cases The Post examined, Alito upheld the rulings of a lower court about half the time, which is typical of appeals judges nationally.

Routinely, he defers to government officials and others in positions of authority. He sometimes chastises his fellow judges for what he regards as overstepping their authority by imposing their own judgments, rather than merely assessing the legality of actions by prison guards, defense lawyers and immigration officials being challenged — actions he often upholds.

....

The Prosecutors' View

....

Of 33 such cases in the analysis, he sided with criminal defendants only three times, aligning with prosecutors more often than the average GOP-appointed judge in divided cases.

....

... Alito voted in two-thirds of the criminal cases to uphold the rulings of a lower-court judge. His votes in one small group of those criminal cases — four appeals from inmates facing death sentences — were even more consistent. Every time, he voted against sparing the prisoner from execution. Nationally, federal appeals judges in disputed cases vote to give relief to prisoners sentenced to death about a third of the time.

....

Larger Role for Religion

Alito has agreed consistently with people who are trying to expand the role of religion in public life, the analysis shows.

Three cases in the analysis deal with the boundaries between church and state, and Alito's decisions parallel about a dozen other — unanimous — cases he has heard that were not examined by The Post, said Ira C. Lupu, a constitutional scholar at George Washington University Law School.

Alito's views differ from those of most appellate judges and all the current members of the Supreme Court, Lupu said, because "he is on the side of whoever is trying to include or

advance a religious message." Alito has taken a narrow view of the First Amendment's establishment clause, which forbids the government to sponsor any religion, and an expansive view of its free-exercise clause, which protects people's rights to worship as they want.

....

Alito has greater sympathy for First Amendment rights when it comes to religion than other free-speech issues. Of six First Amendment cases in the analysis that did not involve religion, he voted to uphold such rights once.

....

Amy Goldstein and Sarah Cohen, "Alito, In and Out of the Mainstream: Nominee's Record Defies Stereotyping," *The Washington Post*, (1 Jan 2006)

<http://www.washingtonpost.com/wp-dyn/content/article/2005/12/31/AR2005123100328.html> .

Tenth Week

2-8 Jan 2006

I think an editorial in the Palm Beach, Florida *Post* was right on the mark when it said:

It is difficult to imagine that conservatives can feel good about Supreme Court nominee Samuel Alito Jr. His opinions, revealed in new documents released by the National Archives, show a desire to give government the kind of power most conservatives abhor.

Just as Americans face the revelation that President Bush has been eavesdropping on citizens for the past four years without getting warrants, documents reveal Judge Alito's belief that officials who order warrantless wiretaps should be immune from lawsuits.

The president's questionable use of executive power could wind up before the Supreme Court in the future. Judge Alito's opinions indicate he would not use the high court to protect the rights of citizens.

....

Judge Alito's confirmation hearings in the Senate Judiciary Committee start next Monday, and Republican leaders are pushing for a Jan. 20 confirmation vote in the full Senate. But Americans must question Judge Alito's extreme views. Like his hope of overturning *Roe vs. Wade*, the abortion-rights ruling that most citizens support, his view of government power is far from the mainstream.

anonymous, "Alito and Big Brother," *Palm Beach Post*, (2 Jan 2006).

Above, at page 70, I asked in this essay how much information people needed before they could make a decision about Judge Alito. There, I indicated that there was already enough information on 7-8 Dec 2005 to enable a decision that Judge Alito would *not* support civil liberties, including his strong opposition to abortion.

On 4 Jan 2006, the American Bar Association (ABA) 14-member Standing Committee on the Federal Judiciary gave Judge Alito a “well qualified” (i.e., the highest of three possible ratings) by a unanimous vote with one unexplained abstention.

<http://www.abanet.org/scfedjud/alito.html> (result without explanation)

From what I have read, even opponents of Judge Alito’s confirmation concede that he is a very intelligent man with a deep understanding of the law. The opposition to Alito comes not from his legal competence, but from his political views against abortion, and his political views upholding the power and authority of government and large corporations against individuals. Constitutional law is partly political, which is why conservative, liberals, and other groups repeatedly disagree with some decisions of the U.S. Supreme Court. So, in my opinion, the ABA rating is irrelevant to the central issues in the confirmation of Alito — the central issues are his political views, *not* his undisputed legal competence.

On a lighter note — and this long essay on a candidate for the U.S. Supreme Court and the history of his confirmation process needs a lighter note sometimes — *The Washington Post* published a column on Friday, 6 Jan 2006, just three days before the confirmation hearings begin:

Do not be surprised if, at some point during next week's confirmation hearings for Supreme Court nominee Samuel Alito, a trumpet blast is sounded in the hearing room, winged angels descend, and Democrats on the Judiciary Committee turn into pillars of salt.

This undoubtedly would be the wish of the Rev. Rob Schenck, president of the National Clergy Council. He held a news conference outside the Hart Office Building yesterday to announce that he would "consecrate Room 216 Hart" — the hearing room — in hopes of having, in the sacred words of Fox News, "a fair and balanced hearing."

"By dedicating it to God, we look to God to orchestrate and direct the activities that take place at that location," Schenck, who provided similar blessings for John G. Roberts's confirmation, explained to the television cameras. It's unclear if this would violate Senate rules, which give Judiciary Committee Chairman Arlen Specter (R-Pa.) sole authority to direct activities in the hearing room.

....

Dana Milbank, “Even Before Alito Hearings, the Verdicts Are In,” *The Washington Post*, page A04, (6 Jan 2006)

<http://www.washingtonpost.com/wp-dyn/content/article/2006/01/05/AR2006010501950.html>

I’d rather expect the Reverend to pray to turn the Democrats into toads, instead of pillars of salt. <giggle> Seriously, it is offensive for a representative of the Christian faith to “consecrate” a public room, in a government building that was financed by taxpayers from many religions, including non-Christian faiths, atheists, and agnostics. One of the many things about Alito’s confirmation that trouble me, is that I expect to see *more* successful attempts to put sectarian religion into government buildings after Alito is confirmed.

On 9 Jan 2006, the American Civil Liberties Union (ACLU) announced that it would oppose the confirmation of Judge Alito, the third time in the ACLU's 86-year history that it had opposed a candidate for the U.S. Supreme Court. <http://www.aclu.org/scotus/2005/23387res20060109.html> Because the ACLU's announcement came the same day as the beginning of the hearings, most news sources ignored the ACLU and focused on reporting the hearings.

On 8 Jan 2006, the Associated Press announced the schedule for Alito's confirmation hearings. On Tuesday and Wednesday, 10-11 Jan, the interrogation of Alito is scheduled to begin at 09:30 and continue into the night, with a dinner break from 18:00 to 19:00. I consider such a lengthy interrogation to be a barbaric trial by ordeal. In the year 2000, the Federal Rules of Civil Procedure were amended to limit depositions to a seven-hour day, excluding breaks.⁴³ The quality of Judge Alito's answers will surely deteriorate as he is interrogated by 18 different Senators. Each Senator gets to ask questions for only 20 to 30 minutes, with each Senator getting to rest for 94% of the time, and ask questions for 6% of the time, but with poor Judge Alito on the hot seat for 100% of the time. Thankfully, the committee actually recessed at 19:00 on Tuesday and at 18:30 on Wednesday, instead of continuing at night.

Hearings in U.S. Senate Judiciary Committee

9-13 Jan 2006

While the official view is that the hearings in the U.S. Senate Judiciary Committee are the *beginning* of the evaluation of Alito, my own view (given above at page 70) is that Alito's carefully crafted judicial opinions and memoranda are much more important than his extemporaneous answers during the hearings. So these hearings are anti-climactic for me. Frankly, I think the hearings are mostly a public relations stunt by some Senators who want to make speeches disguised as questions.

On Monday, during the ten-minute introductory remarks by each of the 18 Senators on the Committee, three Republican Senators (Lindsey Graham, Sam Brownback, and Tom Coburn) have emphasized their personal hostility to legalized abortion. Coburn went so far as to say "The real debate is about *Roe*." I find this narrow view shocking. Constitutional law is about far more than the legal right to abortion. I'd be surprised if reproductive rights cases were more than 2% of the cases decided by the U.S. Supreme Court during Alito's career as a Justice there. But the explicit statements by these three pro-life Republicans make it clear that Alito was nominated with one goal in mind: to overrule *Roe v. Wade*. And both his 30 May 1985 memorandum in *Thornburgh* and his 1985 job application make it clear that Alito is a dependable vote against the continuing validity of *Roe v. Wade*. In contrast, the Democrats stressed a broad variety of issues: limits of executive power, civil rights, affirmative action, the death penalty, privacy, racial and

⁴³ Rule 30(d)(2).

gender discrimination in employment, criminal procedure, separation of church and state, voting (i.e., principle of “one-man, one-vote”), etc.

Specter on 10 Jan

On Tuesday, 10 Jan, Senator Specter began his questioning of Judge Alito with some questions about cases that lay the foundation for the U.S. Supreme Court’s decision in *Roe v. Wade*. Senator Specter then again stated his view that *Roe v. Wade* had been reaffirmed 38 times, so that *Roe* was now super precedent that would be nearly impossible to overrule. The following quotation from an *unedited* transcript of the hearing gives the actual exchange:

SPECTER: Starting with the woman's right to choose, Judge Alito, do you accept the legal principles articulated in *Griswold v. Connecticut* that the liberty clause in the Constitution carries with it the right to privacy?

ALITO: Senator, I do agree that the Constitution protects a right to privacy. And it protects the right to privacy in a number of ways. The Fourth Amendment certainly speaks to the right of privacy. People have a right to privacy in their homes and in their papers and in their persons. And the standard for whether something is a search is whether there's an invasion of a right to privacy, a legitimate expectation of privacy.

SPECTER: Well, *Griswold* dealt with the right to privacy on contraception for married women. You agree with that.

ALITO: I agree that *Griswold* is now, I think, understood by the Supreme Court as based on liberty clauses of the due process clause of the Fifth Amendment and 14th Amendment.

SPECTER: Would you agree, also with *Eisenstat*, which carried forward *Griswold* to single people?

ALITO: I do agree also with the result in *Eisenstat*.

SPECTER: Let me move now directly into *Casey v. Planned Parenthood*, and picking up the gravamen of *Casey* as it has applied *Roe* on the woman's right to choose, originating from the privacy clause, with *Griswold* being its antecedent. And I want to take you through some of the specific language of *Casey* to see what your views are and what weight you would ascribe to this rationale as you would view the woman's right to choose.

In *Casey*, the joint opinion said, quote, "People have ordered their thinking and lives around *Roe*. To eliminate the issue of reliance would be detrimental. For two decades of economic and social development, people have organized intimate relationships in reliance on the availability of abortion in the event contraception should fail." Pretty earthy language, but that's the Supreme Court's language.

And the court went on to say, quote, "The ability of women to participate equally in the economic and social life of the nation has become facilitated by their ability to control their reproductive lives."

Now, that states, in specific terms, the principle of reliance, which is one of the mainstays, if not the mainstay, of *stare decisis* precedent to follow tradition.

How would you weigh that consideration on the woman's right to choose?

ALITO: Well, I think the doctrine of *stare decisis* is a very important doctrine. It's a fundamental part of our legal system.

And it's the principle that courts in general should follow their past precedents. And it's important for a variety of reasons. It's important because it limits the power of the judiciary. It's important because it protects reliance interests. And it's important because it reflects the view that courts should respect the judgments and the wisdom that are embodied in prior judicial decisions.

It's not an exorable command,⁴⁴ but it is a general presumption that courts are going to follow prior precedents.

SPECTER: How do you come to grips with the specifics where the court in the joint opinion spoke of reliance on the availability of abortion in the event contraception should fail — on that specific concept of reliance?

ALITO: Well, reliance is, as you mentioned, Mr. Chairman, one of the important foundations of the doctrine of stare decisis. It is intended to protect reliance interests.

And people can rely on judicial decisions in a variety of ways. There can be concrete economic reliance. Government institutions can be built up in reliance on prior decisions. Practices of agencies and government officials can be molded based on reliance. People can rely on decisions in a variety of ways.

In my view

SPECTER: Let me move on to another important quotation out of Casey.

Quote: "A terrible price would be paid for overruling Casey — or overruling Roe. It would seriously weaken the court's capacity to exercise the judicial power and to function as the Supreme Court of a nation dedicated to the rule of law. And to overrule Roe under fire would subvert the court's legitimacy."

Do you see the legitimacy of the court being involved in the precedent of Casey?

ALITO: Well, I think that the court and all the courts — the Supreme Court, my court, all of the federal courts — should be insulated from public opinion. They should do what the law requires in all instances.

That's why the members of the judiciary are not elected. We have a basically democratic form of government, but the judiciary is not elected. And that's the reason: so that they don't do anything under fire. They do what the law requires.

SPECTER: But do you think there is as fundamental a concern as legitimacy of the court would be involved if Roe were to be overturned?

ALITO: Well, Mr. Chairman, I think that the legitimacy of the court would be undermined in any case if the court made a decision based on its perception of public opinion. It should make its decisions based on the Constitution and the law. It should not sway in the wind of public opinion at any time.

SPECTER: Let me move to just a final quotation that I intend to raise from Casey.

SPECTER: And it is, quote, "After nearly 20 years of litigation in Roe's wake, we are satisfied that the immediate question is not the soundness of Roe's resolution of the issue but the precedential force that must be accorded to its holding."

That separates out the original soundness of Roe which has been criticized and then lays emphasis on the precedential value.

How would you weigh that consideration were this issue to come before you, if confirmed?

ALITO: Well, I agree that, in every case in which there is a prior precedent, the first issue is the issue of stare decisis. And the presumption is that the court will follow its prior precedents. There needs to be a special justification for overruling a prior precedent.

[SPECTER ?]:

Let me turn to an analogous situation. And that is Chief Justice Rehnquist's change of heart on the Miranda ruling.

In 1974, in the case of *Michigan v. Tucker*, he was then Justice Rehnquist, who wrote an opinion severely limiting Miranda. He, in effect, said he didn't like it.

Then, in the year 2000, in the case of the *United States v. Dickerson*, Chief Justice Rehnquist wrote an opinion upholding Miranda. And he did that because, quote, "Miranda was embedded in the routine police practices to a point where the warnings have become a part of our national culture," close quote.

Now, there has been an analogy made from what Chief Justice Rehnquist said on the Miranda issue to the Roe issue.

⁴⁴ The reference is to *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting) ("Stare decisis is not, like the rule of res judicata, a universal inexorable command.").

How would you evaluate the consideration of Roe's being embedded in the culture of our society?

ALITO: I think that Chief Justice Rehnquist there was getting at a very important point.

SPECTER: Do you think he was right?

ALITO: I think he getting at — he was right in saying that reliance can take many forms. It can take a very specific and concrete form, and there can be reliance in the sense that he was talking about there.

I think what he's talking about is that a great many people — and, in that instance, police departments around the country over a long period of time — had adapted to the Miranda rule, had internalized it. I think that all the branches of government had become familiar with it and comfortable with it and had come to regard it as a good way, after a considerable breaking in period, a good way of dealing with a difficult problem, and the problem was how to deal with interrogations leading to confessions...

SPECTER: Judge Alito, let me move to the dissenting opinion by Justice Harlan in *Poe v. Ullman* where he discusses the constitutional concept of liberty and says, quote, "The traditions from which liberty developed, that tradition is a living thing."

SPECTER: Would you agree with Justice Harlan that the Constitution embodies the concept of a living thing?

ALITO: I think the Constitution is a living thing in the sense that matters, and that is that it is — it sets up a framework of government and a protection of fundamental rights that we have lived under very successfully for 200 years. And the genius of it is that it is not terribly specific on certain things. It sets out — some things are very specific, but it sets out some general principles and then leaves it for each generation to apply those to the particular factual situations that come up.

SPECTER: Would you agree with Cardozo in *Palco* that it represents the values of a changing society?

ALITO: The liberty component of the Fifth Amendment and the 14th Amendment, which I was talking about earlier, embody the deeply-rooted traditions of a country. And it's up to each — those traditions and those rights apply to new factual situations that come up. As times change, new factual situations come up, and the principles have to be applied to those situations.

The principles don't change. The Constitution itself doesn't change. But the factual situations change. And, as new situations come up, the principles and the rights have to be applied to them.

[Specter on "super precedent"]

SPECTER: Judge Alito, the commentators have characterized *Casey* as a super-precedent.

SPECTER: Judge Luttig, in the case of *Richmond Medical Center*, called the *Casey* decision "super stare decisis."

And, in quoting from *Casey*, Judge Luttig pointed out the essential holding of *Roe v. Wade* should be retained and, once again, reaffirmed.

And then, in support of Judge Luttig's conclusion that *Casey* was super stare decisis, he refers to *Stenberg v. Carhart* and quotes the Supreme Court, saying, "We shall not revisit these legal principles."

Now, that's a pretty strong statement for the court to make that we shall not revisit the principles upon which *Roe* was founded.

And the concept of super stare decisis or super-precedent arises, as the commentators have characterized it, by a number of different justices appointed by a number of different judges over a considerable period of time.

Do you agree that *Casey* is a super-precedent or a super stare decisis, as Judge Luttig said?

ALITO: Well, I personally would not get into categorizing precedents as super-precedents or super-duper precedents or any

SPECTER: Did you say super-duper?

ALITO: Right. (LAUGHTER)

SPECTER: Good. I like that. (LAUGHTER)

ALITO: Any sort of categorization like that sort of reminds me of the size of the laundry detergent in the supermarket. (LAUGHTER)

I agree with the underlying thought that when a precedent is reaffirmed, that strengthens the precedent. And when the Supreme Court says that we are not going...

SPECTER: How about being reaffirmed 38 times?

ALITO: Well, I think that when a precedent is reaffirmed, each time it's reaffirmed that is a factor that should be taken into account in making the judgment about stare decisis.

And when a precedent is reaffirmed on the ground that stare decisis precludes or counsels against reexamination of the merits of the precedent, then I agree that that is a precedent on precedent.

Now, I don't want to leave the impression that stare decisis is an inexorable command⁴⁵ because the Supreme Court has said that it is not. But it is a judgment that has to be based — taking into account all the factors that are relevant and that are set out in the Supreme Court's cases.

SPECTER: Judge Alito, during the confirmation hearing of Chief Justice Roberts, I displayed a chart. I don't ordinarily like charts but this one I think has a lot of weight because it lists all 38 cases which have been decided since Roe where the Supreme Court of the United States had the opportunity to —

Well, I think the point of it is that there have been so many cases, so many cases: 15 after your statement in 1985 that I'm about to come to, and eight after Casey v. Planned Parenthood, which is why it has a special significance.

And I'm not going to press the point about super- precedent. I'm glad I didn't have to mention super-duper; that you did. (LAUGHTER)

Thank you very much.

[Alito's Position on Abortion]

SPECTER: Let me come now to the statement you made in 1985 that the Constitution does not provide a basis for a woman's right to an abortion. Do you agree with that statement today, Judge Alito?

ALITO: Well, that was a correct statement of what I thought in 1985 from my vantage point in 1985, and that was as a line attorney in the Department of Justice in the Reagan administration.

Today, if the issue were to come before me, if I am fortunate enough to be confirmed and the issue were to come before me, the first question would be the question that we've been discussing, and that's the issue of stare decisis.

And if the analysis were to get beyond that point, then I would approach the question with an open mind and I would listen to the arguments that were made.

SPECTER: So you would approach it with an open mind notwithstanding your 1985 statement?

ALITO: Absolutely, Senator. That was a statement that I made at a prior period of time when I was performing a different role.

And as I said yesterday, when someone becomes a judge, you really have to put aside the things that you did as a lawyer at prior points in your legal career and think about legal issues the way a judge thinks about legal issues.

⁴⁵ The reference is to *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting) (“Stare decisis is not, like the rule of res judicata, a universal inexorable command.”).

SPECTER: Well, Judge Alito, coming to the role you had in the solicitor general's office where you wrote the memorandum in the Thornburg case urging restriction and ultimate appeal of Roe, that was in your capacity as an advocate. And I have seen your other statements that the role of an advocate is different from the role of a judge.

But when you made the statement that the Constitution did not provide for the right to an abortion, that was in a statement you made where you were looking to get a job, a promotion, within the federal government. So there's a little difference between the 1985 statement and your advocacy role in the Thornburg memorandum, isn't there?

ALITO: Well, there is, Senator. And what I said was that that was a true expression of my views at the time, the statement in the 1985 appointment form that I filled out. It was a statement that I made at a time when I was a line attorney in the Department of Justice.

I'm not saying that I made the statement simply because I was advocating the administration's position. But that was the position that I held at the time. And that was the position of the administration.

SPECTER: And would you state your views, the difference, as you see it, between what you did as an advocate in the Solicitor General's Office to what your responsibilities are on the 3rd Circuit or what they would be on court if confirmed in a judicial capacity?

ALITO: Well, an advocate has the goal of achieving the result that the client wants within the bounds of professional responsibility.

That's what an advocate is supposed to do. And that's what I attempted to do during my years as an advocate for the federal government.

Now, a judge doesn't have a client, as I said yesterday. And a judge doesn't have an agenda. And a judge has to follow the law. An important part of the law in this area, as we look at it in 2006, is the law of stare decisis.

FDCH e-Media, "U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court," *The Washington Post*, (10 Jan 2006 12:49 EST)

<http://www.washingtonpost.com/wp-dyn/content/article/2006/01/10/AR2006011000781.html>

my opinion

In my opinion, Alito correctly⁴⁶ rejected Specter's mischaracterization of the U.S. Supreme Court's view of precedent.

I find it astounding that Judge Alito promised to keep an "open mind" on abortion. In my view, anyone who belongs on the U.S. Supreme Court *should* have an opinion on the big constitutional issues of the day, such as whether *Roe v. Wade* was wrongfully decided, instead of promising to have an "open mind" and then — surprise! — later overruling *Roe v. Wade*. He repeated his earlier excuse that in 1985 he was a lawyer serving an anti-abortion client, while since 1990 he is a judge who was applying the law. But Alito omitted that, as a Supreme Court Justice, he will routinely have the opportunity to make new law, and he can finally use his personal moral values that abortion is a sin to overrule *Roe*. Briefly during questioning by Senator Schumer on 11 Jan 2006, Alito admitted that he did not know any candidate for the judiciary who would come before the committee and testify that he had a closed mind. So the promise to keep

⁴⁶ See, e.g., Standler, *Overruled: Stare Decisis in the U.S. Supreme Court*, <http://www.rbs2.com/overrule.pdf> (Nov 2005).

an “open mind” is pretty much meaningless, because everyone with conventional values alleges that they have an open mind.

Fifteen days later, at the beginning of the debate in the full U.S. Senate, Senator Specter characterized Judge Alito’s views of precedent in regard to abortion rights in the *Congressional Record*, page S41 (25 Jan 2006).

Schumer on 10 Jan

Also on Tuesday, Senator Schumer asked a series of good questions about Alito’s statement in his 1985 job application that the U.S. Constitution does not protect a woman’s legal right to an abortion, and later asked Alito about the effect of precedent. The following is an *unedited* transcript of the exchange between Senator Schumer and Judge Alito, in which Schumer made a rather aggressive interrogation of Alito:

SCHUMER: Thank you, Senator Specter.

And I want to thank you, Judge Alito. It has been a long day.

Judge Alito, in 1985, you wrote that the Constitution — these are your words — does not protect a right to an abortion. You said to Senator Specter a long time ago, I think it was about 9:30 this morning, 9:45, that those words accurately reflected your view at the time.

Now let me ask you: Do they accurately reflect your view today? Do you stand by that statement? Do you disavow it? Do you embrace it?

It's OK if you distance yourself from it, and it's fine if you embrace it. We just want to know your view.

ALITO: Senator, it was an accurate statement of my views at the time. That was in 1985.

And I made it from my vantage point as an attorney in the Solicitor General's Office, but it was an expression of what I thought at that time.

If the issue were to come before me as a judge, if I'm confirmed and if this issue were to come up, the first question that would have to be addressed is the question of stare decisis, which I've discussed earlier and it's a very important doctrine. And that was the starting point and the ending point of the joint opinion in Casey.

And then if I were to get beyond that, if the court were to get beyond the issue of stare decisis, then I would have to go through the whole judicial decision-making process before reaching a conclusion.

SCHUMER: But, sir, I am not asking you about stare decisis. I'm not asking you about cases.

I'm asking you about this: the United States Constitution. As far as I know, it's the same as it was in 1985 with the exception of the 27th Amendment, which has nothing to do with what we're talking about.

Regardless of case law, in 1985, you stated — you stated it proudly, unequivocally, without exception — that the Constitution does not protect a right to an abortion.

Do you believe that now?

ALITO: Senator

SCHUMER: I'm not asking about case law. I'm not asking about stare decisis. I'm asking your view about this document and whether what you stated in 1985 you believe today; you changed your view; you've distanced your view?

You can give me a direct answer. It doesn't matter which way you answer, but I think it's important that you answer that question.

ALITO: Answer to the question is that I would address that issue in accordance with the judicial process as I understand it and as I have practiced it.

That's the only way I can answer that question.

SCHUMER: Sir, I'm not asking for the process. Obviously, you'd use a judicial mindframe. You've been a judge for 15 years.

I'm asking you — you stated what you believe the Constitution contained. You didn't say the Constitution as interpreted by this or that. You didn't say the constitution with this exception or that exception.

It was a statement you made directly. You made it proudly. You said you're particularly proud of that personal belief that you had. You still believe it.

ALITO: And, Senator, I would make up my mind on that question if I got to it, if I got past the issue of stare decisis after going through the whole process that I have described.

I would need to know the case that is before me and I would have to consider the arguments and they might be different arguments from the arguments that were available in 1985.

SCHUMER: But, sir, I'm not asking you about case law. Now, maybe you read a case and it changed your view of the Constitution.

I'm asking you — and not about the process you've used — I'm asking you about your view of the Constitution because, as we all know, and we're going to talk about stare decisis in a few minutes, that if somebody believes, a judge, especially a Supreme Court justice, that something is unconstitutional, even though stare decisis is on the books, governs the way you are and there's precedent on the books for decades, it's still important to know your view of what the Constitution contains.

And let me just say, a few hours ago, in this same memo — I can't remember who asked the question — but you backed off one of the statements you had written. You said it was inapt, which taught me something. I didn't know that there was a word that was inapt.

But you said that it was inapt to have written that the elected branches are supreme. So, you discussed your view on that issue without reference to case law because there was no reference to case law when you wrote it. There was no reference to case law when you wrote this.

Can you tell us your view just one more time, your view about the Constitution not protecting the right to an abortion, which you have talked about before? And you said you personally, proudly held that view. Can you?

ALITO: The question about the statement about the supremacy of the elected branches of government went to my understanding of the constitutional structure of our country.

And so certainly that's a subject that it is proper for me to talk about.

But the only way you are asking me how I would decide an issue

SCHUMER: No, I'm not. I'm asking you what you believes in the Constitution.

ALITO: Well, you're asking me my view of a question that

SCHUMER: I'm not asking about a question. I'm asking about the Constitution, in all due respect, and something you wrote about

ALITO: The Constitution contains the due process clause of the Fifth Amendment and the 14th Amendment. It provides protection for liberty. It provides substantive protection. And the Supreme Court has told us what the standard is for determining whether something falls within the scope of those protections.

SCHUMER: Does the Constitution protect the right to free speech?

ALITO: Certainly it does. That's in the First Amendment.

SCHUMER: So why can't you answer the question of: Does the Constitution protect the right to an abortion the same way without talking about stare decisis, without talking about cases, et cetera?

ALITO: Because answering the question of whether the Constitution provides a right to free speech is simply responding to whether there is language in the First Amendment that says that the freedom of speech and freedom of the press can't be abridged. Asking about the issue of abortion has to do with the interpretation of certain provisions of the Constitution.

SCHUMER: Well, OK. I know you're not going to answer the question. I didn't expect really that you would, although I think it would be important that you would. I think it's part of your obligation to us that you do, particularly that you stated it once before so any idea that you're approaching this totally fresh without any inclination or bias goes by the way side.

[allegedly humorous digression about Alito's mother-in-law omitted here]

[stare decisis]

SCHUMER: Let me go now to stare decisis, because what you've said is you start out stare decisis, although I think a lot of people would argue you start out with the Constitution, upon which stare decisis is built.

SCHUMER: OK.

Now you've tried to reassure us that stare decisis means a great deal to you. You point out that prior Supreme Court precedents, like Roe, will stand because of the principle.

While you're on the 3rd Circuit, of course, you can't overrule precedents of the Supreme Court, but when you're on the Supreme Court, you have a little bit more flexibility.

I just want to ask you this. Stare decisis is not an immutable principle, right? You said that before in reference to Senator Feinstein. When Judge Roberts was here, he said it was discretionary. So it's not immutable. Is that right? You've told us it's not an inexorable command. It doesn't require you to follow the precedent.

ALITO: It is a strong principle. And in general courts follow precedence. The Supreme Court needs a special justification for overruling a prior case.

SCHUMER: But they have found them. I think you went over this. I can't recall if it was Senator Kohl or Senator Feinstein, but you went through some cases.

In recent years the court has overruled various cases in a rather short amount of time.

You mentioned I think it was National League of Cities about fair labor standards, and it was overruled just nine years later by Garcia. Stanford v. Kentucky was overruled by Roper v. Simmons. Bowers v. Hardwick was overruled by Lawrence v. Texas. And of course, Brown v. Board was over ruled by Plessy.

So the bottom line, let's just — I mean, we can go through this — I mean Plessy was overruled by Brown. I apologize.

So the only point I'm making is that despite stare decisis, it doesn't mean a Supreme Court justice who strongly believes in stare decisis won't ever overrule a case. Is that correct? You can give me a yes or no.

ALITO: Yes.

SCHUMER: Now let's try this another way.

SCHUMER: Here's a quote: "Stare decisis provides continuity to our system. It provides predictability. And in our process of case- by-case decision-making, I think it's a very important and critical concept." Statement sounds reasonable to me. It sounds to me like it's something you said to Senator Specter and others, right?

ALITO: I agree with the statement, yes.

SCHUMER: Let me show you who said that statement. It was Justice Thomas. Justice Thomas came before us and stated that, and yet when he got on the Supreme Court he voted to overrule or expressed a desire to overrule a whole lot of cases, including some very important ones on the court.

Here are some quotes. "Casey must be overruled." "Buckley v. Valeo should be overruled." "Bachus (ph)" — just last year — "should be overruled."

And as you can see, it's a very large number of cases. And these aren't all of them. In fact, Justice Thomas said that a 1789 unanimous case by the Supreme Court, Calder v. Bull, which no one talked about for centuries, should be overruled.

So what do you think of Justice Thomas' theory of stare decisis and how he applies it?

ALITO: Senator, I've explained my understanding of the doctrine of stare decisis, and it is important to me. I think it's an important part of our legal system. It is

SCHUMER: But how about what Justice Thomas, what do you think of what he's doing?

ALITO: Well, I don't think I should comment on all of those cases.

SCHUMER: OK. Let me just say this. You may not want to comment, but his fellow justice, Justice Scalia, did. Here's what Justice Scalia said about Justice Thomas and stare decisis. And remember what he said when he was sitting in the same chair you're sitting in. He pledged fealty to stare decisis.

Justice Scalia said Justice Thomas, quote, "doesn't believe in stare decisis, period. If a constitutional line of authority is wrong, he would say, 'Let's get it right.' "

SCHUMER: Then Justice Scalia said, "I wouldn't" — speaking of himself — "I wouldn't do that."

And it's particularly relevant, because if you believe something is not in the Constitution, at least the way Justice Thomas talks about stare decisis, he'd let the Constitution overrule it and stare decisis would go by the wayside.

And I'm not saying Justice Thomas was disingenuous with the committee when he was here. I'm just saying that stare decisis is something of an elastic concept that different judges apply in different ways.

So let me go to another one here. I think I've covered everything I want to do with Justice Thomas.

Yes, here's another quote: "There is a need for stability and continuity in the law. There's a need for predictability in legal doctrine. And it's important that the law not be considered as shifting every time the personnel of the Supreme Court changes."

That, again, sounds reasonable to me, quite a lot like what you said.

You don't have any dispute with that statement, do you?

ALITO: No, I don't.

SCHUMER: OK, well, let's see who said that one. It was Robert Bork, when he came before this committee to be nominated.

Now, here's what Judge Bork wrote in the National Review Online just a few weeks ago. He wrote, quote, "Overturning Roe v. Wade should be the sine qua non of a respectable jurisprudence. Many justices have made the point that what controls is the Constitution itself, not what the court has said about it in the past."

And even before his hearing, by the way, he sort of cut back on what he said at the hearing, I guess. It may have been in different context.

But here's a quote that he said, a year, I think, before he came before us. He said, "I don't think that in the field of constitutional law precedent is all that important."

He said, in effect, that a justice's view of the Constitution trumps stare decisis. That's not an unrespectable view. It's probably not the majority view of justices, but it's there.

So, for example, it was his view, similar to Justice Thomas, that the Constitution does not protect a right — that if the Constitution does not protect the right to an abortion — as you wrote in 1985; we're not talking about how you feel today — it would be overruled; it should be overruled despite stare decisis.

And one of the things I'm concerned about here is that, what you wrote — and I think Senator Kohl went over it a little bit — is what you wrote about Judge Bork in 1988.

And, by the way, this was not when you were working for someone or applying for a job.

As I understand it, you were the U.S. attorney in New Jersey, well-ensconced, a very good U.S. attorney, and it was with some New Jersey news outlet. I saw the site, but I didn't know what it was.

And you said that — about Justice Bork: "I think he was one of the most outstanding nominees of this century. He's a man of unequalled ability" — and here's the key point — "understanding of constitutional history," and then, "someone who has thought deeply throughout his entire life."

SCHUMER: Now, first, one of the most outstanding of the 20th century with Oliver Wendell Holmes and Benjamin Cardozo, and people you've expressed admiration for, Frankfurter and Brennan and Harlan?

I find it, you know, disconcerting that you would say that he is a great nominee of the 20th century in his understanding of constitutional law and yet he so abjectly rejects stare decisis.

ALITO: Well, I certainly was not aware of what he had said about stare decisis when I made those comments.

I've explained those comments. They were made when I was an appointee of President Reagan, and Judge Bork was President Reagan's

SCHUMER: But you weren't — excuse me.

You weren't working in the White House. You were a U.S. attorney prosecuting cases. There was no obligation for you to say what you said, right?

ALITO: No, but I had been in the Department of Justice at the time.

SCHUMER: I know.

But it was a voluntary interview with some New Jersey news outlet — is that correct?

ALITO: And I was asked a question about Judge Bork and I had been in the department at the time of his nomination, and I was an appointee of President Reagan and I was a supporter of the nomination.

SCHUMER: OK.

Let's go to the next line of questioning here.

But again, the point being judges, justices overrule cases despite stare decisis, particularly when they think the Constitution dictates otherwise.

And now I want to turn to your own record in the 3rd Circuit, something you mentioned yesterday and today. And when you've been on the 3rd Circuit, of course, you had to follow Supreme Court precedent and you professed a whole lot of times your desire to do that, and I'm not disputing that here.

But it's also true that when you were on the 3rd Circuit, the more apt analogy in terms of stare decisis would be about 3rd Circuit precedents. Because if you should get on the Supreme Court, stare decisis will apply to Supreme Court decisions the way stare decisis to a 3rd Circuit judge applies to 3rd Circuit decisions. That's pretty fair, right?

ALITO: Yes, and I've tried to follow 3rd Circuit precedents.

SCHUMER: Right. OK.

Although, you have dissented more than most of your fellow judges, but we'll leave that aside.

What I want to show here is how many times when you were on the 3rd Circuit your fellow judges on the 3rd Circuit, whom I'm sure have high respect for you — I know a lot of them are coming here in a few days and I think that's nice.

I don't have any problem with that. (LAUGHTER)

Well, there's been some criticism about it, not by me.

But I just want to show you what they have said when it comes to their view of your respect for 3rd Circuit precedent, stare decisis, as relevant as we can find it for you.

So I'm going to read a few. There are a whole bunch. But in *Dia v. Ashcroft* — they're all on this chart, I guess. There are too many, so the print isn't large enough for most people to see. I wish there were fewer.

In *Dia v. Ashcroft*, the majority of your court said that your opinion, quote, "guts the statutory standard and ignores our precedent. In *LePage's Incorporated v. 3M*, your opinion was criticized as, quote, "being contrary to our precedent and that of the Supreme Court."

In *RNS Services v. Secretary of Labor*, you again dissented. And the majority, again, argued that, quote, "Your dissent overlooks our holding in the instant case and prior cases."

In *Riley v. Taylor*, the on-bank majority argued that your view ignored case after case relied by the majority and, quote, "accords little weight to those authorities."

In *Texas Eastern Transmission Corp.*, a panel criticized your opinion because, quote, "it does not comport with our reading of the relevant case law."

In *Bray v. Marriott Hotels*, the majority noted that binding circuit precedent made your analysis improper in a discrimination case. And the list goes on and on.

I don't have to -- but other cases that are mentioned are *United Artists*, the *Warrington Beauty Time*, the *Vuskin (ph) Systems*. Here's a final one, *Rappa v. Newcastle County*. Judge Garth, the man I think you clerked for and is regarded as a mentor to you wrote that your majority opinion was, quote, "unprecedented in its, quote, "disregard of established principles of stare decisis."

"Nothing," Judge Garth wrote, "in the jurisprudence of the Supreme Court or in ours suggests that a three-judge panel of a court of appeals is free to substitute its own judgment for that of a four-justice plurality opinion, let alone that of the entire court."

So those are just some of the cases in which your own colleagues said you didn't follow stare decisis.

Now there may have been good reason — you're much more expert on these cases than I am. There may have been good reason for you to do it. But I think it shows something. And that is you.

If we have to project as to what kind of a Supreme Court justice you will be (inaudible) not going to be as reluctant as some to overturn precedent even by the rules of stare decisis.

And so you wonder, if you are as willing as you are to depart from precedent on the 3rd Circuit, what's going to happen if you should get on the Supreme Court.

Your response because I mentioned a whole lot of cases here.

ALITO: You did, Senator. And I think that you need to examine each of the cases to see whether what I did was justified.

Let me just take one that struck me when you read from it, and that was the United Artists case.

What I said there that a Supreme Court decision that had come up, that had been handed down after the most recent 3rd Circuit decision relating to the issue, superseded what our court had said.

So I was following an aspect of stare decisis there. I was following what we call vertical stare decisis, following the Supreme Court. And I don't think there's any dispute. When the Supreme Court hands down a decision that's in conflict with one of our earlier cases, we have to follow the Supreme Court.

SCHUMER: Yes, but there's no question that in that situation, Judge Cohen said your opinion was, quote, "wrong to revisit an issue that has already been decided and failed to give respect and deference to the circuit's well-established jurisprudence employing the improper motive test in the substantive due process land use context."

It's rather complicated, but he's sure saying, in his view, you didn't follow court precedent.

ALITO: And, Senator, there was this body of 3rd Circuit precedent, and it said that it's proper for a federal court to get involved in a zoning dispute, which is traditionally a local matter, if there is simply an improper motive, whatever that might be.

And after that, the Supreme Court, in an opinion by Justice Souter, emphasized that the test under substantive due process in an area like this, an area that the other judge in the majority and I thought was like this, is whether what was done shocks the conscience.

And so you had a Supreme Court decision intervening. And in that situation, I thought was our obligation — and I wrote the majority opinion there — to follow what the Supreme Court had said.

SCHUMER: But my only point being here is one judge's view of what stare decisis requires and another judge's view of what stare decisis requires are not always the same. The concept has some degree of elasticity.

And when, in reference to questions by people, you say: Well, how do you feel about this case, and particularly Roe, which has been where we started off here, I believe in stare decisis, it means that you're going to take precedent into account, but it certainly doesn't necessarily mean where you'd come out.

And let me tell you where I conclude where you'd come out, just sort of summarizing this argument. First, again, greatly disturbing I think to many Americans would be that you won't distance yourself from your 1985 view that the Constitution does not protect a right to a woman's right to choose; that that view has not changed; that you have refused to say, unlike you did in another part of that 1985 memo, that you think it's wrong now — which would lead one to think that, you know, that you probably believe in it.

Second, you've told us you respect precedent and stare decisis, but we have seen that the stated respect for stare decisis hardly determines whether a Supreme Court justice will vote to uphold precedents — not because when they come here they're being disingenuous with us.

I don't think that at all. But because the concept is somewhat elastic, because it doesn't guarantee that you will uphold precedent, and particularly doesn't guarantee it when the Constitution conflicts with stare decisis, with the precedents of the court.

And finally, to top it off, we have seen that your 3rd Circuit record can hardly provide a great deal of comfort in this area either, that many of your fellow judges criticized you for ignoring, abandoning or overruling precedent.

Taken together, these pieces are very disturbing to me. Your blanket 1985 statement, not distanced from, that the Constitution doesn't protect the right to an abortion, the fact that respect for precedent and stability doesn't prevent overruling of a past decision, and your own record of reversing or ignoring precedent on the 3rd Circuit lead to one inevitable conclusion: We can only conclude that if the question came before you it is very likely that you would vote to overrule Roe v. Wade.

Yield back my time.

ALITO: Senator, could I just respond to that question?

SCHUMER: Please. Time is yours.

ALITO: My 3rd Circuit record in looking at abortion cases provides the best indication of my belief that it is my obligation to follow the law in this area and in all other areas. If I have had an agenda to uphold any abortion regulation that came along, I would not have voted as I did in my 3rd Circuit cases.

I have testified here today about what I think about stare decisis. I do think it's a very important legal doctrine. And I've explained the factors that figure into it. It would be the first question that I would consider if an issue like this came before me.

SCHUMER: Let me just say, though, you have ruled on certain cases, many of them were on technicalities, and in all of them, as a 3rd Circuit judge, you were bound by Supreme Court precedent.

You never in the 3rd Circuit were squarely presented with the question that I asked, which is a decisive question, which is whether the Constitution protects a woman's right to choose.

You were never asked in the court. You were never asked to overturn *Roe v. Wade*. And even if you were in the 3rd Circuit, you couldn't, because you were bound by the precedent of the court.

I do not think your 3rd Circuit rulings are dispositive on what you would do should you become a U.S. Supreme Court justice.

Thank you, Mr. Chairman.

ALITO: If the matter were to come up before me on the Supreme Court, I would consider the issue of stare decisis. And if the case got beyond that, I would go through that entire judicial decision-making process that I described.

That's not a formality to me, that's the way in which I think a judge or a justice has to address legal issues.

And I think that is very important. And I don't know a way to answer a question about how I would decide a constitutional question that might come up in the future, other than to say I would go through that whole process. I don't agree with the idea that the Constitution always trumps stare decisis.

SCHUMER: It doesn't always, but sometimes

SPECTER: Let him finish his answer, Senator Schumer.

ALITO: I don't agree with the theory that the Constitution always trumps stare decisis. There would be no room for the doctrine of stare decisis in constitutional law if that were the case.

SCHUMER: But, sir, it can trump stare decisis. It doesn't always, but can. Is that correct?

ALITO: It certainly can. And I think that's a good thing, because otherwise *Plessy v. Ferguson* would still be on the books.

FDCH e-Media, "U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court, (Part 3)" *The Washington Post*, (10 Jan 2006 19:11 EST)

<http://www.washingtonpost.com/wp-dyn/content/article/2006/01/10/AR2006011001418.html>

Durbin on 11 Jan

On Wednesday morning, the hearings resumed with Senator Durbin asking a series of good questions about Alito's willingness to declare several cases (e.g., *Griswold* and *Brown v. Board of Education* and more⁴⁷) as "settled law", while Alito had refused to characterize *Roe v. Wade* as "settled law". The following is an *unedited* transcript of the exchange between Senator Durbin and Judge Alito:

DURBIN: Thank you, very much, Mr. Chairman.

Judge Alito, thank you for coming for the second day and not quite the end of the first round. I thank your family for their patience, listening to all of our questions. And I hope at the end of the day, we'll feel that we've really added something to the process of choosing a person to serve in a lifetime appointment to the highest court in our land.

I listened to you carefully yesterday address an issue⁴⁸ which is very important to me, the *Griswold* case, because I think that it's a starting point for me when it comes to appointments to the Supreme Court.

If I had any doubt in my mind that a Supreme Court nominee recognized the basic right of privacy of American citizens, as articulated in *Griswold*, I couldn't support the nominee.

And I listened as you explained that you supported that right of privacy and that you found the *Griswold* decision grounded in the Fifth Amendment as well as the 11th Amendment. I'd ask you, at this point, you obviously support *Brown v. Board of Education* — do you, and the finding of the court?

ALITO: Certainly, Senator.

DURBIN: And do you believe that the Constitution protects the right of children in America to be educated in schools that are not segregated?

ALITO: Absolutely, Senator. That was one of the greatest, if not the single greatest thing, that the Supreme Court of the United States has ever done.

DURBIN: And as you read that Supreme Court decision, that historic decision, they find the basis for that decision the equal protection clause of our Constitution.

ALITO: Yes, they did. That was I think — of course, we fought a Civil War to get the 14th Amendment and to adopt the constitutional principle of equality for people of all races.

DURBIN: The reason I asked you about those two cases is that neither of those cases referred to explicit language in the Constitution. Those cases were based on concepts of equality and liberty within our Constitution.

And the *Griswold* case took that concept of liberty and said it means privacy, though the word is not in our Constitution. And the *Brown v. Board of Education* took the concept of equality, equal protection, and said that means public education will not be segregated.

⁴⁷ Furthermore, during questioning by Senator Kennedy on 10 Jan 2006 on executive power and independent government agencies, Judge Alito said "The status of independent agencies I think is now settled in the case law. I think that *Humphrey's Executor* is a well-settled precedent." And during questioning by Senator Kohl on 10 Jan about "one-person, one-vote," Judge Alito said: "So I think that is very well settled now in the constitutional law of our country." Furthermore, during questioning by Senator Feinstein on 10 Jan about the commerce clause, Judge Alito said the cases "... that come to my mind, I think, are well-settled precedents."

⁴⁸ See above, beginning at page 82.

I raise that because I listened carefully as Senator Schumer asked you yesterday about *Roe v. Wade*. And I couldn't understand your conclusion.

You conceded the fact that we have free speech because it's explicit in our Constitution, protected constitutional right. And yet, when Senator Schumer asked you repeatedly, "Do you find that *Roe v. Wade* established and recognized a constitutional protection for a woman to make this most private decision?" you wouldn't answer. You wouldn't give a direct answer.

On two Supreme Court cases, *Griswold* and *Brown* now, you have said, just right as we started this hearing, that you believe there is a constitutional basis for this protection and for this right. And yet, when it came to *Roe v. Wade*, you would not.

Most of us are troubled by this 1985 memo. You said yesterday, you would have an open mind when it came to this issue.

I'm sorry to report that your memo seeking a job in the Reagan administration does not evidence an open mind. It evidences a mind that sadly is closed in some areas.

Yesterday, when you were asked about one man, one vote, you clarified it. You said those were my views then, they're not my views now.

When Senator Kohl asked you about the power and authority of elected branches as opposed to others, no; you said I want to clarify that's not my view now.

And yet, when we have tried to press you on this critical statement that you made in that application, a statement which was made by you that said the Constitution does not protect a right to an abortion, you've been unwilling to distance yourself and to say that you disagree with that.

I think this is critically important, because as far as I am concerned, Judge Alito, we have to rely on the Supreme Court to protect our rights and freedom, especially our right to privacy. And for you to say that you're for *Griswold*, you accept the constitutional basis for *Griswold*, but you can't bring yourself to say there's a constitutional basis for the right of a woman's privacy when she is deciding — making a tragic, painful decision about continuing a pregnancy that may risk her health or her life, I'm troubled by that.

Why can you say unequivocally that you find constitutional support for *Griswold*, unequivocally you find constitutional support for *Brown*, but cannot bring yourself to say that you find constitutional support for a woman's right to choose?

ALITO: *Brown v. Board of Education*, as you pointed out, is based on the equal protection clause of the 14th Amendment. And the 14th Amendment, of course, was adopted and ratified after the Civil War. It talks about equality. It talks about equal protection of the law.

And the principle that was finally recognized in *Brown v. Board of Education*, after nearly a century of misapplication of the 14th Amendment, is that denying people of a particular race the opportunity to attend schools or, for that matter, to make use of other public facilities that are open to people of a different race denies them equality. They're not treated the same way — an African-American is not treated the same way as a black (sic) person when they're treated that way, so they're denied equality.

And that is based squarely on the language of the equal protection clause and the principle, the heart of the principle that was — the magnificent principle that emerged from this great struggle that is embodied in the equal protection clause.

Griswold concerned the marital right to privacy. And when the decision was handed down, it was written by Justice Douglas. And he based that on his theories of his theory of emanations and penumbras from various constitutional provisions: the Ninth Amendment and the Fourth Amendment and a variety of others.

But it has been understood in later cases, as based on the due process clause of the Fourteenth Amendment, which says that no persons shall be denied due process — shall be denied liberty without due process of law.

And that's my understanding of it. And the issue that was involved in *Griswold*, the possession of contraceptives by married people, is not an issue that is likely to come before the courts again.

It's not likely to come before the 3rd Circuit; it's not likely to come before the Supreme Court. So, I feel an ability to comment — a greater ability to comment on that than I do on an issue that is involved in litigation.

What I have said about *Roe* is that if it were — if the issue were to come before me, if I'm confirmed and I'm on the Supreme Court and the issue comes up, the first step in the analysis for me would be the issue of *stare decisis*. And that would be very important.

The things that I said in the 1985 memo were a true expression of my views at the time from my vantage point as an attorney in the Solicitor General's office. But that was 20 years ago and a great deal has happened in the case law since then.

Thornburg was decided and Webster and then Casey and a number of other decisions. So the stare decisis analysis would have to take account of that entire line of case law.

And then if I got beyond that, I would approach the question. And of course, in Casey, that was that was the beginning and the ending point of the analysis in the joint opinion.

If I were to get beyond that, I would approach that question the way I approach every legal issue that I approach as a judge, and that is to approach it with an open mind and to go through the whole judicial process, which is designed, and I believe strongly in it, to achieve good results, to achieve good decision-making.

DURBIN: Well, this is what troubles me: that you do not see Roe as a natural extension of Griswold; that you do not see the privacy rights of Griswold extended by the decision in Roe; that you decided to create categories of cases that have been decided by the court that you will concede have constitutional protection, but you have left in question the future of Roe v. Wade.

Yesterday, Senator Specter asked you, as he asked John Roberts before you, a series of questions about whether or not you accept the concept that this is somehow a precedent, that we can rely on; that is embedded in our experience; that if it were changed, it would call into question the legitimacy of the court.

And time and time again, he brought you to the edge, hoping that you would agree. And rarely, if ever, did you acknowledge that you would agree.

You made a most general statement that you believed reliance was part of stare decisis.

But let me just ask you this: John Roberts said that Roe v. Wade is the settled law of the land. Do you believe it is the settled law of the land?

ALITO: Roe v. Wade is an important precedent of the Supreme Court. It was decided in 1973. So it's been on the books for a long time. It has been challenged on a number of occasions. And I discussed those yesterday.

And it is my — and the Supreme Court has reaffirmed the decision; sometimes on the merits; sometimes — in Casey — based on stare decisis.

And I think that when a decision is challenged and it is reaffirmed, that strengthens its value as stare decisis for at least two reasons.

First of all, the more often a decision is reaffirmed, the more people tend to rely on it. Secondly, I think stare decisis reflects the view that there is wisdom embedded in decisions that have been made by prior justices who take the same oath and are scholars and are conscientious.

And when they examine a question and they reach a conclusion, I think that's entitled to considerable respect.

And, of course, the more times that happens, the more respect the decision is entitled to. And that's my view of that.

So it's a very important precedent

DURBIN: Is it the settled law of the land?

ALITO: If "settled" means that it can't be reexamined, then that's one thing. If "settled" means that it is a precedent that is entitled to respect as stare decisis and all of the factors that I've mentioned come into play, including the reaffirmation and all of that, then it is a precedent that is protected, entitled to respect under the doctrine of stare decisis in that way.

DURBIN: How do you see it?

ALITO: I have explained, Senator, as best I can how I see it.

It a precedent that has now been on the books for several decades. It has been challenged. It has been reaffirmed.

But it is an issue that is involved in litigation now at all levels. There is an abortion case before the Supreme Court this term. There are abortion cases in the lower courts. I've sat on three of them on the Court of Appeals for the 3rd Circuit. I'm sure there are others in other courts of appeals or working their way toward the courts of appeals right now.

So it's an issue that is involved in a considerable amount of litigation that is going on.

DURBIN: I would say, Judge Alito, that is a painful issue for most of us. It is a difficult issue for most of us. The act of abortion itself is many times a hard decision, a sad decision, a tragic decision.

I believe that, for 30 years, we have tried to strike a balance in this country to say it is a legal procedure but it should be discouraged, it should be legal but rare, and try to find ways to reduce the incidence of abortion.

But as I listen to the way that you've answered this question this morning and yesterday, and the fact that you have refused to refute that statement in the 1985 job application, I'm concerned.

I'm concerned that many people will leave this hearing with a question as to whether or not you could be the deciding vote that would eliminate the legality of abortion, that would make it illegal in this country, would criminalize the conduct of women who are seeking to terminate pregnancies for fear of their lives and the doctors who help them.

That is very troubling, particularly — and because you have stated that you are committed to this right of privacy.

[Senator Durbin then changed the subject to Alito's membership in Concerned Alumni of Princeton.] ...

CQ Transcriptions, "U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court, (Part 1)" *The Washington Post*, (11 Jan 2006 12:46 EST) <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/11/AR2006011101148.html>

On 11 Jan, Senator Brownback, an anti-abortion advocate on the U.S. Senate Judiciary Committee, made the point that many legal scholars — including liberals such as Prof. Tribe at Harvard Law School and Justice Ruth Bader Ginsburg — had criticized the legal basis for the U.S. Supreme Court decision in *Roe v. Wade*. Brownback then made the point that *Roe* is **not** settled law, because it continues to be criticized and challenged. What Brownback did *not* say is that the liberal scholars agree with the **result** in *Roe*, while not necessarily agreeing with the reasons for that result. So the **result** in *Roe* — that a woman should have legal access to abortion early during pregnancy — has been settled law since 1973, despite opposition from some religions.

Why not say *Roe* is settled law?

On 11 Jan, during questioning by Senator Kohl, Judge Alito gave a brief explanation of why he was willing to describe some cases as "settled law" but *not* describe the legal right to abortion as "settled law".

KOHL: Even though these are cases where the principles are raised and their application is debated on the margins, or even more fundamentally, I believe you have said and you're willing to say that you will not question the underlying principle involved on these issues.

And I commend you for that. We are assured, and I believe that you clearly do stand by those principles.

And yet when you are asked about *Roe v. Wade* and the following case of *Casey*, cases that say the government should not place an undue burden on a woman's right to choose, when we asked about principles of that sort, you are unwilling to make the same statement of support.

Now, I understand that there will be cases where plaintiffs argue on the margins about *Roe* and *Casey*, where there are efforts to narrow or broaden these principles, just as there are cases that narrow or broaden the principles of one man, one vote, or the issue enunciated in *Brown v. Board of Education*, or *Griswold*.

But you are willing to stand by those other legal principles, and yet you're not taking the same position with regard to the principles embodied in *Roe* and *Casey*. Could you explain that, please?

ALITO: Senator, I think it's important to draw a distinction between issues that could realistically come up before the courts and issues that are still very much in play, which is to say is subject of litigation in the courts.

And I felt comfortable about commenting on one person, one vote and, of course, *Brown v. Board of Education*, because those are not issues that are any longer the subject of litigation in our country, not the fundamental principles that are embodied in those decisions.

And the *Griswold* case, likewise, concerns an issue that is not realistically likely to come before the courts.

Roe, on the other hand, involves an issue that is involved in a considerable amount of litigation before the courts, and so that's where I feel that I must draw the line.

Because on issues that could realistically come up, it would be improper for me to express a view and I would not reach a conclusion regarding any issue like that before going through the whole judicial process that I described.

KOHL: I think there's strength to what you say. But I also believe it's not inaccurate to say that these other issues on the margins, just as *Roe* on the margins, are still coming up and may yet come up before the court.

And I still feel that while you are prepared to take a position on these other issues, which is almost, bottom line, clearly bottom line, you're not prepared to take that same position, which you could if you wished. You could take that position if you wished.

And I think what that does suggest is that what you are saying is that it is possible, if a case comes before you, that you would take a look at the principles underlying *Roe* and *Casey* and see them in a way that would overturn *Roe* and *Casey*.

Now, you may say, "Well, obviously, the answer is yes," but I just want to get that clarified for the record.

ALITO: Well, what I would do if a case like that were to come before me, if I'm confirmed, is to follow the two-step process that I've talked about; which is first to consider the issue of *stare decisis*.

And there's been a considerable body of case law now on this issue going back to *Roe* and, in particular, over the last 20 years. And in the *Casey* opinion, that was where the joint opinion began and where the joint opinion ended.

And then only if I got beyond that issue would I consider the underlying issue.

And that's what I would do if the issue were to come up. And I don't believe that it would be appropriate, and it wouldn't even be realistic for me to go further than that.

KOHL: That is correct.

And in your mind, you're not prepared to say that the principle embodied in *Roe* and *Wade* or the principle embodied in *Casey* is clearly established law that is not subject, in your mind, to review.

ALITO: Well, in light

KOHL: I mean, that is not your position, which I think you have said. But I think, at least for me, a clarification of that would be of some importance.

ALITO: Well, in light of the current state of litigation relating to the issue of abortion -- and as I said, there's an abortion case before the Supreme Court this term and there are undoubtedly abortion cases before the lower federal courts; I know there are -- I don't believe that it's appropriate for me to go further than that in relation to that issue.

KOHL: All right.

CQ Transcriptions, "U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court, (Part 2)" *The Washington Post*, (11 Jan 2006 13:43 EST) <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/11/AR2006011101335.html>

Feinstein on 11 Jan

Despite the fact that she never attended law school, Senator Feinstein asked a good series of questions. The following in an *unedited* transcript of the exchange between Senator Feinstein and Judge Alito:

FEINSTEIN: Thank you very much, Mr. Chairman. I want to try one more time.

First of all, let me just say this. Senator Durbin said that Justice Roberts retired the trophy on performance. If that's true, you've retired it on equanimity. I really think you're to be congratulated.

This is this morning's Washington Post: "Alito says he will keep an open mind." But what concerns me — and obviously this is on Roe — is that despite 38 tests, despite 33 years, despite the support of a majority of America, you also said yesterday that, "precedent is not an inexorable command." And those are the words that Justice Rehnquist used arguing for the overturning of *Roe*.⁴⁹

So my question is, did you mean it that way?

ALITO: The statement that precedent is not an inexorable command is a statement that has been in the Supreme Court case law for a long period of time. And sitting here, I can't remember what the origin of it is,⁵⁰ but I would bet that it certainly has been used in cases in which the court has invoked the doctrine of *stare decisis* and refused to go ahead and overrule.

FEINSTEIN: I always believe everything I read in The Washington Post. (LAUGHTER)

ALITO: Well, that is an important principle. (LAUGHTER)

FEINSTEIN: I don't know about that one, but ...

ALITO: And I — not the principle of believing everything in The Washington Post, but the principle that *stare decisis* is not an inexorable command, because then we would be stuck with decisions like *Plessy* and they couldn't be overruled except through a constitutional amendment.

But when an issue is one that could realistically come up, the people who would be making the arguments on both sides of the issue have a right to have a judiciary of people with open minds. And that means people who haven't announced in advance what they think about the issue and, more importantly, people who are not going to reach a conclusion until they have gone through the judicial process.

And it's not a facade, it's not a meaningless exercise. It's a very important one.

FEINSTEIN: Let me try this: I'd like to read a line of questioning, of questions, that Senator Specter asked now-Chief Justice Roberts. And then I would like to ask this question: How do you disagree with this?

Here's the questions: Specter: "Judge Roberts, in your confirmation hearing for the circuit court your testimony read to this effect, and it's been widely quoted. Quote, 'Roe is the settled law of the land,' end quote. Do you mean settled for you, settled only for your capacity as a circuit judge, or settled beyond that?"

⁴⁹ The reference is to *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 954 (1992) ("In our view, authentic principles of *stare decisis* do not require that any portion of the reasoning in *Roe* be kept intact. '*Stare decisis* is not ... a universal, inexorable command,' especially in cases involving the interpretation of the Federal Constitution. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405, 52 S.Ct. 443, 446, 76 L.Ed. 815 (1932) (Brandeis, J., dissenting).") (Rehnquist, C.J., joined by JJ. White, Scalia, and Thomas, dissenting in part).

⁵⁰ As I mentioned above, in the section on the questioning by Senator Specter, the original source is *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405 (1932) (Brandeis, J., dissenting) ("*Stare decisis* is not, like the rule of *res judicata*, a universal inexorable command.").

Roberts: "Well, beyond that. It's settled as a precedent of the court, entitled to respect under principles of stare decisis. And those principles, applied in the Casey case, explain when cases should be revisited and when they should not. And it is settled as a precedent of the court, yes."

Specter: "You went on to say then, quote, 'It's a little more than settled. It was reaffirmed in the face of a challenge that it should be overruled in the Casey decision, so it has added precedential value.'"

Roberts: "I think the initial question for the judge confronting an issue in this area, you don't go straight to the Roe decision. You begin with Casey, which modified the Roe framework and reaffirmed its central holding."

And Specter says: "And you went on to say accordingly, 'It's the settled law of the land,' using the term 'settled' again."

And then your final statement as to this quotation: "There's nothing in my personal views that would prevent me from fully and faithfully applying the precedent as well as Casey."

Where do you differ? Since Justice Roberts made that statement in a confirmation hearing— he not only got confirmed, he's the chief justice — it seems appropriate for to you comment on it and say where you might differ with it.

ALITO: Well, the statement covers a lot of ground. And let me try to remember the major points. I certainly agree with the point

FEINSTEIN: I can give it to you if you'd like?

ALITO: Certainly. I'd be happy to.

FEINSTEIN: Would that be helpful? Would somebody take it down to him? Show him the place.

[Aide takes page to Judge Alito.; Alito quickly reads page.]

(CROSSTALK)

(UNKNOWN): Be on the front page tomorrow?

(LAUGHTER)

ALITO: Well, Senator, I certainly agree with the point that the chief justice made about separating any personal views he has from anything that he would do as a member of the Supreme Court. I emphatically agree with that. That's the essence of what a judge has to do.

I certainly agree that Roe and Casey and all of the other decisions in this line are precedents of the Supreme Court. And they are entitled to respect under the doctrine of stare decisis. To the extent that some of the earlier decisions have been modified, then obviously the most recent ones are the relevant provisions of the Supreme Court.

I've agreed, I think, numerous times during these hearings that when a decision is reaffirmed, that strengthens its value as stare decisis. I agree that when the Supreme Court entertains a challenge to a prior decision and says, "We're not getting to a re-examination of the merits of the issue, we think stare decisis counsels against our going to that point," then that is a precedent on precedent. That seems to me to be entirely logical.

And we have a long line of precedents now relating to this issue. I have said that stare decisis is a very important legal doctrine and that there is a general presumption that decisions of the court will not be overruled. There needs to be a special justification for doing it, but it is not an inexorable command.

FEINSTEIN: But you do not agree that it is well settled in court?

ALITO: I think that depends on what one means by the term "well settled."

FEINSTEIN: I actually agree with you because others have said that and then gone out and voted to overthrow it. So it's like, "I have no quarrel with it."

ALITO: Well, let me just say this: As a judge on the court of appeals or if I'm confirmed as a justice on the Supreme Court, it would be wrong for me to say to anybody who might be bringing any case before my court, "If you bring your case before my court, I'm not even going to listen to you; I've made up my mind on this

issue; I'm not going to read your brief; I'm not going to listen to your argument; I'm not going to discuss the issue with my colleagues. Go away. I've made up my mind."

That's the antithesis of what the courts are supposed to do. And, if that's what "settled" means, then I think that's not what judges are supposed to do. We are

FEINSTEIN: Let me interrupt you for a moment, if I may.

You were willing to give your view on one man, one vote. And yet there are four cases pending in the court right now on one man, one vote.

And that's where I have a hard time. The cases are LULAC v. Perry, Travis County v. Perry, Jackson v. Perry and G.I. Forum of Texas v. Perry.

That's where I have a hard time. If you're willing to say that you believe one man, one vote is well settled and you agree with it, I have a hard time understanding how you separate out Roe.

I understand why. If you say one thing, you upset my friends and colleagues on that side. If you say the other, you upset those of us on this side. But the people are entitled to know.

ALITO: I don't think it's appropriate for me to speak about issues that could realistically come up.

And my view of Brown v. Board of Education, for example, which was one of the cases that was cited in connection with this issue about where someone in my position should draw the line, seems to me to embody a principle that is now not subject to challenge, not realistically subject to being challenged, not within the legitimate scope of constitutional debate any longer that there should be facilities that are segregated on the basis of race.

And that's where I've tried to draw the line. If an issue involves something that is in litigation, then I think it's not appropriate for me to go further than to say that I would be very respectful of the doctrine of stare decisis and I would not reach a decision on the underlying issue if one were to get to it without going through the whole decision-making process.

FEINSTEIN: OK, I'll let you off the hook on that one.

[Feinstein then begins questions about the commerce clause.]

[right-to-die]

FEINSTEIN: If I can, let me just switch to another topic. And a year ago, all of us became very concerned and involved and some horrified with the Terry Schiavo case.

As I recall the case, the local courts held that her life support could be turned off, the state supreme court held the same thing, and then there was an effort, and I think a federal district court held it to bring it up to the Supreme Court.

What do you believe the role of the federal courts should be in the arena of end-of-life decisions?

ALITO: There's a constitutional issue, certainly, at the bottom of that, and there are issues of jurisdiction. There are statutory issues. And Congress specifies the jurisdiction of the lower courts. And so Congress can give us a role in decisions of this nature or Congress can keep the federal courts out of it and leave it to the state courts where, for the most part, issues in this area have been adjudicated.

But if there is a federal constitutional right involved then, of course, the federal courts have traditionally been a forum for the adjudication of federal constitutional rights.

The underlying statutory, I'm sorry — the constitutional issue is the one that the Supreme Court addressed in the Cruzan case and in the case of Washington v. Glucksberg.

And this is obviously one of the most sensitive issues that comes up in our legal system. It involves something that a lot of people have had to face and a lot more people are going to have to face, decisions involving the end of life.

And with the advances in medical technology, this is going to be a very tough issue for an awful lot of people.

In Cruzan, the court proceeded on — they said: We assume that there is a constitutional right to refuse medical treatment that a person doesn't want. And there certainly has long been a common law right to refuse medical treatment that a person doesn't want.

If somebody gives you medical treatment and you say I don't want it, and they perform an operation on you or do something like that, that's a battery under the common law and you can be sued.

And the Supreme Court assumed that that was a fundamental right under due process, but said that there wasn't a violation of the right under the circumstances in Cruzan, where the state of Missouri had imposed certain regulations that had to be complied with before a person who was comatose could be taken off life support.

And then in *Washington v. Glucksberg*, they addressed the issue of whether there was a constitutional right to assisted suicide, and they concluded that there was not but there were — and they applied the standard to be applied under the due process clause for its substantive component, whether a right is firmly rooted in the traditions of our country and implicit in the concept of ordered liberty.

But there were some concurring opinions that recognized that these were issues that were on the cutting edge of medical technology — let me put it that way — or that they were issues on which more empirical evidence might become relevant in the future.

FEINSTEIN: Thank you very much. I notice I just have 40 seconds left. Will we have another round, Mr. Chairman?

SPECTER: Well, that's something that we'll talk about. I would very much like to finish today. CQ Transcriptions, "U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court, (Part 2)" *The Washington Post*, (11 Jan 2006 13:43 EST) <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/11/AR2006011101335.html>

my opinion

Judge Alito may be right to call the principle of "one-person, one-vote" settled law, even though the courts continue to hear cases involving the *application* of that settled principle to contemporary, practical cases of arranging voting districts for the U.S. House of Representative and state legislatures.

While Judge Alito gives a principled reason for refusing to call *Roe* "settled law" during questioning by Senators Durbin, Kohl, and Feinstein, I think there is a much more practical reason. Judge Alito has no intention of returning to racial segregation (i.e., overruling *Brown v. Board of Education*) and he probably has no intention of making use of contraceptives illegal (i.e., overruling *Griswold*). But — based on his statements in his 1985 memo on *Thornburgh*, and also statements in his 1985 job application — I think it is obvious that Judge Alito believes that *Roe* was wrongly decided, and that Alito wants to overrule *Roe*. And that desire to overrule *Roe* is the real reason that Alito refuses to characterize *Roe* as "settled law". I am certainly not the only person who reached this conclusion. The headline on the front page of Thursday's *The Washington Post*, said "Alito Leaves Door Open to Reversing *Roe*":

Alito edged closer to suggesting that he might be willing to reconsider *Roe* if he is confirmed to the high court, refusing, under persistent questioning by Democrats, to say that he regards the 1973 decision as "settled law" that "can't be reexamined." In this way, his answers departed notably from those that Chief Justice John G. Roberts Jr. gave when asked similar questions during his confirmation hearings four months ago.

Yesterday, Alito said that *Roe* must be treated with respect because it has been reaffirmed by the high court several times in the past three decades.

But when Sen. Richard J. Durbin (D-Ill.) peppered Alito with questions about whether the ruling is "the settled law of the land," the nominee responded: "If 'settled' means that it can't be reexamined, then that's one thing. If 'settled' means that it is a precedent that is entitled to respect . . . then it is a precedent that is protected, entitled to respect under the doctrine of

stare decisis." *Stare decisis* is a legal principle that, in Latin, means "to stand by that which is decided."

....

After his exchange with Alito yesterday, Durbin told reporters: "Sam Alito would not use those same words. It really, I'm afraid, leaves open the possibility that we are considering the nomination of a justice who will change 30 years of law in this country, a dramatic change to the American society."

Amy Goldstein and Charles Babington, "Alito Leaves Door Open to Reversing 'Roe' ", *The Washington Post*, page A01, (12 Jan 2006).

<http://www.washingtonpost.com/wp-dyn/content/article/2006/01/11/AR2006011101120.html>

Leahy on 12 Jan

Senator Leahy, the ranking Democrat on the U.S. Senate Judiciary Committee, briefly asked about right-to-die cases. The following is an *unedited* transcript of the exchange between Senator Feinstein and Judge Alito:

LEAHY: About a decade ago in *Washington v. Glucksberg*, the Supreme Court declined to find a terminally ill patients had a generalized constitutional right to a physician's aid in dying, preferring the matter be left to the states.

The court noted: "Throughout the nation, Americans are engaged an earnest and profound debate about the morality, legality and practicality of physician-assisted suicide."

Chief Justice Rehnquist wrote: "The court's holding permits the debate to continue, as it should in a democratic society."

I remember reading that. I thought it very practical, aside from the legal, a very practical response.

Last spring, we witnessed a fierce legal battle over the medical treatment of Terri Schiavo. She was in a persistent vegetative state for more than a decade.

And ultimately, after she died, the autopsy showed that.

But we found politicians rushing to the cameras, engaging in extraordinary measures to override what the state courts determined to be her own wishes, state courts that heard countless cases on this.

Suddenly, this became the thing — politicians all over the place, rushing forward.

The power of the federal government was wielded by some to determine, in my view, what were deeply personal choices. The president even came back to Washington in the middle of one of his vacations to sign special legislation on this.

Do you agree with the idea advanced in the Cruzan case that the wishes of an unconscious patient, to the degree they can be known, should govern decisions regarding life-sustaining therapies?

Let's assume that the wishes are clearly known. Should they be followed?

ALITO: Well, the Cruzan case proceeded — assume, for the sake of argument, which is something that judges often do, that there is a constitutional right to say — that each of us has a constitutional right to say: I don't want medical treatment.

And the Cruzan decision recognized that this was a right that everybody had at common law. At common law, if someone is subjected to a medical procedure that the person doesn't want, that's a battery and it's a tort. And the person can sue for it. It is illegal. The court did not

LEAHY: One of those cases where we got something from that foreign law — in this case, English common law. Is that correct?

ALITO: Well, that's correct. And I think that our whole legal system is an outgrowth of English common law, and I don't

LEAHY: Just thinking of somebody — why that popped in my mind. I was thinking of some of the people talk about paying attention to foreign law and most of our law is based on foreign law.

But go ahead.

ALITO: Most of our law

LEAHY: Common law, common law.

ALITO: ... is an outgrowth of English common law. And I think it helps to understand that background often in analyzing issues that come up.

LEAHY: But you agree with Cruzan? I mean, I'm thinking if somebody has a "do not resuscitate" order, do you agree with that?

ALITO: That's a fundamental principle of common law. And Cruzan assumed for the sake of argument that that would be a fundamental constitutional right.

But that is a right that people have had under our legal system for a long time, to make that decision for themselves.

LEAHY: My wife was — or is a nurse. And she was working on a medical surgical floor and she had mentioned about people with these DNR, do not resuscitate.

Would you agree that a patient would have a right — for example, if you have a living will, you have a right to designate somebody who can speak for you in a case of terrible injury or unconscious, speak for you on a "do not resuscitate" or "do not use heroic measures," all the rest? Do you agree with that?

ALITO: Yes, Senator.

That's, I think, an extension of the traditional right that I was talking about that existed under common law. And it's been developed by state legislatures, and in some instances by state courts, to deal with the living will situation and with advances in — which I think is, in large measure, a response to advances in medical technology, which create new issues in this area.

[Senator Leahy then changed the subject.]

CQ Transcriptions, "U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court, (Part 1)" *The Washington Post*, (12 Jan 2006 12:49 EST) <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/12/AR2006011201031.html>

I mention Senator Feinstein's questions on the right-to-die (above, beginning at page 101) and Senator Leahy's questions on the same topic, because I expect right-to-die to be the next area of constitutional privacy rights recognized by the U.S. Supreme Court. I have written essays on right-to-die and physician-assisted suicide cases.⁵¹

⁵¹ Standler, *Annotated Legal Cases on Physician-Assisted Suicide in the USA*, <http://www.rbs2.com/pas.pdf>, 89 pp. (May 2005); Standler, *Annotated Legal Cases Involving Right-to-Die in the USA*, <http://www.rbs2.com/rtd.pdf>, 153 pp. (April 2005).

Prof. Chemerinsky on 13 Jan

Following the interrogation on Tuesday, Wednesday, and Thursday by the members of the Seante Judiciary Committee, there was a series of five-minute presentations on Thursday afternoon and Friday morning by 31 different witnesses, most of whom were attorneys, judges, or law professors. The following testimony by Prof. Erwin Chemerinsky of the Duke University Law School is worth quoting here.

CHEMERINSKY: Thank you, Mr. Chairman, Senator Leahy, distinguished senators.

It's truly an honor and a privilege to testify at these historic hearings. It's impossible to overstate the importance of this nomination for the future of constitutional law.

In recent years, the Supreme Court is often referred to as the O'Connor court, because Sandra Day O'Connor so often has been in the majority in 5-4 decisions in crucial areas: protecting reproductive freedom, enforcing the separation of church and state, limiting presidential power and advancing racial justice. Replacing her has the possibility of dramatic changes in so many areas of constitutional law.

A crucial question for this committee is, what will be the effect of Samuel Alito on the Supreme Court?

I want to focus on one area: executive power. I choose this area, because no area of constitutional law is likely more important in the years ahead than this.

As you know, in recent years, the Bush administration has made unprecedented claims, expansive presidential power, such as the claim of authority to detain American citizens as enemy combatants without even the Constitution's requirements for warrant, grand jury indictment or trial by jury; the claim of authority to torture human beings in violation of international law; the claim of authority to eavesdrop on conversations of Americans without complying with the Fourth Amendment or the Foreign Intelligence Surveillance Act; the claim of authority to hold American citizens indefinitely, and citizens of other countries indefinitely, as enemy combatants.

My goal here isn't to discuss the merits of any of these issues; instead, to point to the fact that separation of powers is likely to be an enormously important issue in the years ahead. And, of course, there's no need to remind this body of the crucial role the checks and balance separation of powers play in our Constitution's structure.

Some of the most important Supreme Court cases in history have been those where the court has said no to assertions of presidential power, such as *Youngstown Sheet and Tube v. Sawyer*, in striking down President Truman's seizure of the steel mills, and *United States v. Nixon*, in stating that President Nixon had revealed the Watergate tapes.

A key question for this committee is whether Samuel Alito will continue this tradition of enforcing checks and balances, or whether he'll be a rubber stamp for presidential power.

I have carefully read the writings, the speeches and the decisions of Samuel Alito in this area, and they all point in one direction: a very troubling pattern of great deference to executive authority. I have closely followed the hearings this week, and I know you're familiar with the examples.

To mention just a few, in 1984, while in the Solicitor General's Office, Samuel Alito wrote a memo saying that he believed that the Attorney General should have absolute immunity to civil suits or money damages of engaging in illegal wiretapping, a position the Supreme Court rejected, in language that seems so appropriate now, in saying there was too great a danger of violation of rights from (ph) executive officials, when the zeal to protect national security would go too far.

The next year, he said there should be increased use of presidential signing statements. He said, quote, the president should have the last word as to the meaning of statutes, which would be an increase in executive power.

As you know, in a number of writings and speeches, he said he believed in the unitary executive theory. There's a good deal of discussion this week as to what that means.

But if you look at the literature of constitutional law, those who believe in a unitary executive truly want a radical change in American government. They believe that independent regulatory agencies, like the Securities and Exchange Commission or the Federal Communications Commission, are unconstitutional. They believe the Special Prosecutor is unconstitutional. They reject the ability of Congress to limit the executive.

As a judge on the Third Circuit, Judge Alito has not had the opportunity to review resurgence of presidential power. But there have been many cases which considered assertions of law enforcement authority.

Over and again he comes down on the side of law enforcement. I think his dissenting opinions are particularly revealing, because as Judge Becker said, he rarely dissents.

One case, I think, shows Judge Alito's overall philosophy. There's one discussed yesterday at the end of the day, *Doe v. Groody*. This, of course, was the case where the police strip searched a mother and her 10-year-old daughter, who were suspected of no crime. As Carter Phillips said yesterday, this was an issue of qualified immunity. That means, did the officers violate clearly established law that a reasonable law (ph) should know? Should the officer have known that it violates the Constitution?

Senators, any police officer, any judge should know that strip searching a 10-year-old girl, who was suspected of nothing, violated the Constitution. Senators, this is one of so many cases where Judge Alito deferred to law enforcement.

I am here for a simple reason. I believe that at this point in time, it's too dangerous to have a person like Samuel Alito, with his writings and records on executive power, on the United States Supreme Court.

Thank you.

SPECTER: Thank you very much, professor.

CQ Transcriptions, "U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court" *The Washington Post*, (13 Jan 2006 11:48 EST)
<http://www.washingtonpost.com/wp-dyn/content/article/2006/01/13/AR2006011300802.html>

Later there were some questions for Prof. Chemerinsky:

SPECTER: Professor Chemerinsky, do you think -- you commented that the issue as to Judge Alito as to whether he'd be a rubber stamp or not for executive power. Do you think he'd be a rubber stamp?

CHEMERINSKY: Everything that I could find in his record points to tremendous deference to executive authority.

SPECTER: Well, tremendous deference is a little different from being a rubber stamp.

CHEMERINSKY: I think the key question that this committee has to face is, will this be a justice when these issues that we're talking about come before the court is he willing to enforce checks and balances? In light of his entire career before going to the bench, being in the executive branch, in light of his writings when he was in the solicitor general's office, the speeches that he's given, the opinions he's written on the third circuit, I don't find anything to indicate that he will be enforcing checks and balances.

SPECTER: So you think he'd be a rubber stamp?

CHEMERINSKY: I think the record here does speak for itself. I think if we can't find anything that points to his willingness to enforce checks and balances ...

SPECTER: I have to interrupt you. I want to ask a question of Professor Kronman and Professor Demleitner. There's been a lot of talk about Judge Alito, whether he is deferential to the powerful and to the government.

....

LEAHY: Thank you, Mr. Chairman.

I'm curious, and I listened very carefully, Professor Chemerinsky — did I pronounce that correctly?

CHEMERINSKY: Yes, you did. Thank you.

LEAHY: Thank you. In 2004, in the *Hamdi* case — and I'm sure you're very familiar with that — the Supreme Court considered whether due process required that a citizen of this country who was being held as an enemy combatant but a citizen of this country should be forwarded a meaningful opportunity to challenge the factual basis for the detention.

Justice O'Connor's decision for the court upheld the fundamental principle of judicial review over the executive authority. She said in effect that in war, whether declared war, war on terror, whatever, it's not a blank check for the president when it comes to the rights of a nation's citizens.

Now, the unitary executive theory, which Judge Alito espoused remarks just as recently as five years ago, was championed in dissent by Justice Thomas in Hamdi and saying that the war powers of the president couldn't be swayed by the court.

Well, I'm going to ask you this and then I'll ask Ms. Nolan then the same question. What are the implications for the rights of Americans to be free from governmental intrusions, for Justice Thomas' views to prevail rather than Justice O'Connor's?

CHEMERINSKY: It's an enormously important question. Hamdi was a tremendous victory for all American citizens, because, as you say, the Supreme Court said that before an American citizen can be held as a combatant, there must be due process — notice of the charges and opportunity be heard, representation by counsel.

There was only one dissent directly to that, and that was Justice Thomas who advances the unitary executive theory, which is the reason why the president should be able to hold individuals without due process.

You asked, what might be the implications of this. Well, the question will be, can the president can engage in electronic eavesdropping in violation of the Foreign Intelligence Surveillance Act, which it's clear what the unitary executive theory would say about that.

Can the president hold an American citizen as an enemy combatant without a warrant for arrest, a grand jury indictment or a jury trial? I can think of nothing more anesthetic over the Constitution but the unitary executive theory would seem to say yes.

[Senator Leahy then asked Ms. Nolan the same question.]

CQ Transcriptions, "U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court" *The Washington Post*, (revised 17 Jan 2006)

<http://www.washingtonpost.com/wp-dyn/content/article/2006/01/13/AR2006011300802.html>

Kate Michelman on 13 Jan

Ms. Michelman, the former president of the National Abortion and Reproductive Rights Action League (NARAL) Pro-Choice America, was the *only* representative of either feminist groups or pro-choice groups permitted to appear before the U.S. Senate Judiciary Committee during their consideration of the nomination of Judge Alito. Here is her entire testimony:

KATE MICHELMAN: Mr. Chairman and Senator Leahy, who is not here, and members of the committee, it is my pleasure to talk with you today, and I must say I am deeply honored to be sitting next to this great man, Mr. Gray.

Certainly, for many days we have heard many legal experts and constitutional law theorists, but I think the voices of real people whose lives will be affected by the potential confirmation of Judge Alito have been absent from this discussion, and I am here as one woman among millions whose lives could be indelibly shaped by the confirmation of this judge.

In 1969, I was a young stay-at-home mother of three little girls, a practicing Catholic who had accepted the church's teachings about birth control and abortion. The notion that abortion might be an issue I would face in any own life never ever occurred to me until the day my husband suddenly abandoned me and our family.

In time, with nothing to live on, we were forced onto welfare. Soon after he left I discovered I was pregnant. After a very long period of soul searching, of balancing my morals and religious values about the newly developing life with my responsibility to my three young daughters, I decided to have an abortion.

I might add, Mr. Chairman, that of the countless women I have encountered throughout my life, not one has made a decision about abortion without first contemplating the gravity of that choice. Not one needed the tutelage or supervision of the state to understand her own ethical values, much less to be reminded to consult them. And every single one of them deserves the respect and protection afforded by *Roe v. Wade*.

Now, because all of this occurred prior to Roe, I was legally prevented from acting privately on my decision. I was compelled to submit to two interrogations before an all-male panel of doctors who probed every aspect of my private life, from my sex life with my husband to whether I was capable of dressing my children.

Eventually they gave me their permission. I was awaiting the procedure when a nurse arrived to tell me that state law imposed yet another humiliating burden: The government required me to obtain my husband's consent. I was forced to leave the hospital, find where he was living and ask him to give me his permission.

Now, this was incredibly humiliating and an experience that awakened me to a lifetime of activism. And I tell you this story not to get your sympathy. I tell you this story because this nomination poses a real threat that women will once again face the dreadful choice between the degradation of the review board and the danger of the back alley. And this is neither hyperbole nor hype. It is the simple demonstrable reality of the situation.

Predicting how any given judge will decide any given case is a Washington parlor game, in my view, that distracts from the central issue. That issue is whether we any longer will recognize limits on the government's authority to reach into the most intimate areas of our private lives.

There is nothing in Judge Alito's lengthy public record to suggest that he recognizes such limits for anyone and even less so for women. And there is much in his record that indicates, I think clearly and beyond the boundaries of reasonable dispute, that he rejects the idea of privacy, personal privacy as a fundamental American ideal.

A women's right to choose is a powerful manifestation of privacy, but it is one right among many, and all of them should concern us.

There is no sense in Judge Alito's writings or rulings that privacy is a fundamental constitutional right. In his record, not only are individuals often powerless against the prerogatives of the state, individuals are more often than not simply absent all together. In many ways, what Judge Alito has written is less disturbing than what he omits: Any sense of how his legal rulings bear on real people whose lives are shaped by his decisions.

When he ruled that a Pennsylvania law requiring women to notify their husbands before obtaining an abortion was not, quote, "an undue burden," there was no sense that a woman like me ever existed or even mattered. When he wrote that commonly used methods of birth control could be classified as methods of abortion, there was no indication he considered the women who would be forced into unwanted pregnancies.

His writings contain ample veneration for the state but I think place little value on the individuals whom government exists to serve, protect and respect.

I have been involved in many Supreme Court nominations but frankly none more important than this one, nor as dangerous, for the contrast between Judge Alito and the justice he would replace is quite stark. As the first woman to serve on the court, Justice O'Connor brought a very unique perspective to the law that is evident in her opinions: Upholding a woman's right to choice, protecting women from discrimination and defending affirmative action.

Quite often, you have talked about this a lot, she has been the decisive vote in five to four cases whose balance Judge Alito would now tip the other way.

And here, Mr. Chairman, it is important to note that Justice O'Connor is a judicial conservative who has not always fully protected constitutional rights and liberties, but she crafted opinions that retained meaningful protections for rights that other justices sought to deny completely.

But the most disturbing difference between these two jurists is not simply the conclusions they reach but also how they reach them. Justice O'Connor considered each case with careful attention to what the law means and who it affects for she knows that that is the essence of justice. In Judge Alito's approach to the law, there is neither justice nor regard for women's human dignity.

Judge Alito has parried challenges to his record by promising an open mind and a respect for precedent. We must ask whether this assurance offered only now can be allowed to outweigh the totality of this man's record. Millions of American women whose lives, privacy and dignity have a place in this debate would have to conclude, no.

Thank you.

[Later there were some questions for Ms. Michelman]

SPECTER: Ms. Michelman, on the Roe issue, which is a matter of enormous importance — I started my questioning of Judge Alito with that subject as I did with Chief Justice Roberts — and you have the examples of Justice O'Connor who was against abortion rights before she came to the court and Justice Kennedy against abortion rights and a lot of worry about Justice Souter, and you have the political process where the judicial appointments are part of the process, and you heard Judge Alito talk about the precedence and the culture of

the country and being embedded and a living document, which is very different from what some others have testified to in recent times.

You watch this situation very closely and you've noted who some of the other prospective nominees, at least reported. If Judge Alito is rejected, what do you think the prospects are of getting a nominee whom you like better?

MICHELMAN: Well, Senator, it is true that the president won the election and he has the right to nominate justices who share his values and his views, who made it very clear that his model justices were Scalia and Thomas, whose views about women's constitutional legal rights, including the right to choose, are a danger to American women and to their lives and their health and their dignity. So he has the right, but you share a coequal responsibility and the American public, the individuals in this nation, have only a voice in this process through you.

And I would answer you by saying that I think every nominee has to be evaluated on his or her merits, on his or her record, on his or her views, judicial and philosophical views included, and we have to take one at a time. And if that nominee's record is clearly a danger to the constitutional and fundamental right of the American people, then I think that nominee should be defeated and we'll take on the next one.

But I think the president has made his case on this nomination. I think Judge Alito's record — and if you look at the totality of his record, his service in the Justice Department, his service on the court, it is very clear that he will move the court in a very different and dangerous direction for women's legal rights.

SPECTER: I want to ask you one more question, but my time is almost up. You have commented about the other issues philosophically. You haven't enumerated them but we've been over legislative power, we've been over congressional power, affirmative action, many items. Do you think that a nominee ought to be rejected on the basis of a single issue?

MICHELMAN: I don't consider the right to privacy, personal privacy, the right to dignity and autonomy and control over one's life as a single issue. I do think it is profound and will have enormously important implications for women, for men, for families in this nation, and I do indeed think it is so serious and profound that he should be rejected on those grounds, even if there were no others and I would describe there are other grounds.

SPECTER: Well, thank you very much ...

MICHELMAN: You're welcome.

SPECTER: ... for your testimony, Ms. Michelman, and for your service. You have been in the forefront of this issue for a long time, and I know how deeply you feel about it, and I thank you for sharing with us your personal experiences. They're not easy to testify about.

Senator Leahy?

LEAHY: I would concur with that. I thought of that prior to your testimony in reading the article about you yesterday in the Post — a story I was familiar with, and you're one of the reasons I came back. I'm at a friend's memorial service and will return to that right after my questioning.

But you're absolutely right that there's an awesome responsibility in the Senate in the choice, first with the 18 of us here who are the only 18 people in America who got to question Judge Alito if you don't count the first vetting they had by Vice President Cheney, Karl Rove and Scooter Libby a day or two before he was nominated by the president. That, of course, we're not privy to what was said or what assurances were made, nor was he about to share that with us.

[Discussion omitted here by Senator Leahy and Mr. Gray, a civil rights attorney, who represented Rosa Parks and Dr. Martin Luther King, Jr., in the Montgomery bus boycott, followed by more than fifty years of civil rights litigation experience.]

LEAHY: And, Ms. Michelman, you know about the job application of Judge Alito at the Justice Department. He said he personally believed very strongly the Constitution does not protect right to an abortion. In your reading of Judge Alito's writing but especially your observations in the past few days in these hearings, have you seen or heard anything to reassure you that Judge Alito's personal beliefs about constitutional privacy will not affect his issues as a judge?

MICHELMAN: No, I haven't. In fact, I don't think there's — again, if you go back to his — you're referencing the work he did in the Justice Department and his record on the court. His decisions on the court I think reveal very clearly that he does not believe deeply in a fundamental right of privacy and applies that belief that the Constitution protects that fundamental right of privacy to individuals.

So, no, I'm not. I am deeply concerned that Judge Alito not only was proud and discussed very openly how proud he was to be a part of an administration that repeatedly sought the court to overrule Roe and overrule other privacy cases but that he actually laid out a strategy for the administration to pursue the overruling of Roe in an incremental strategy, to pursue taking away the right of women to decide for themselves, keep the government out of these very private decisions. He laid out a strategy that you could keep Roe in place as a shell, not overturn it directly, but incrementally dismantle those rights.

And the states, by the way, have — the anti-choice movement in this country has pursued that strategy very effectively, and there are now hundreds of laws that really burden women, both financially and emotionally, when they're trying to make responsible choices. No, I have no confidence at all that Judge Alito when faced with the question of whether women should decide or whether the government, state and federal, has the right to interfere in these intimate decisions that women make, that he will come down on the side of the government.

LEAHY: My time is up. I just want to thank all

MICHELMAN: Thank you.

LEAHY: ... five of you for being here. I know that it is not easy to come and very publicly oppose somebody who has the backing of the president of the United States and backing of so many powerful senators to be on the U.S. Supreme Court, but it goes to tradition and speaking truth to power, and I thank you all.

CQ Transcriptions, "U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court" *The Washington Post*, (revised 17 Jan 2006)

<http://www.washingtonpost.com/wp-dyn/content/article/2006/01/13/AR2006011300802.html>

Later, Senator Kennedy asked a few questions of Ms. Michelman:

KENNEDY: Ms. Michelman, I want to first of all thank you. That was a splendid performance on "Meet the Press" a week ago.

MICHELMAN: Oh, thank you.

KENNEDY: I think in response to the questions, just to pick up on the chairman's thought where you talked about the dignity of women, you touched on it here now, I'd just like you to use up whatever time I have in talking about what you think the implications would be by this nominee, just on women's issue just generally.

I think you've spoken very, very eloquently on the choice issue. Obviously, you refer that if you would too, but I'm very, very interested in this broad view of yours about both the dignity of women, women in the family, women in our society, women, the role that they're playing, and a bit about what kind of country we'd be if we didn't have justices that protected that.

MICHELMAN: Right.

KENNEDY: And what kind of country we can become if they do. Please.

MICHELMAN: Thank you, Senator, also for your generous comment about my "Meet the Press" performance.

We should not forget that women have had a long and hard journey to full equality in this nation. It's only been 84 years since we've had the right to vote. So it's been a long and difficult journey and one that has taken great effort. And both as a political movement but also through the law to have recognized that we could vote, we could own property, we could get charge accounts, which I was denied the right to have a charge account, because I wasn't married in 1969. It was shocking.

So there has been a very long and arduous journey and women's equality and full capacity to be partners, equal partners with men in the socioeconomic, political life of this nation is dependent on our right to

determine the course of our lives, our right to education, our right to employment, our right to equal pay, all of these things are determined by our right to control our lives.

And we absolutely need a legal system that recognizes, respects women's dignity on autonomy, including our right to determine when to become mothers and under what circumstances and even whether. And it's hard to find the words to adequately express how important that is.

KENNEDY: My time is up. Thank you, Mr. Chairman.

CQ Transcriptions, "U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito's Nomination to the Supreme Court (Part 2)" *The Washington Post*, (revised 17 Jan 2006)
<http://www.washingtonpost.com/wp-dyn/content/article/2006/01/17/AR2006011700609.html>

my opinion

As I sit here on 13 Jan 2006, having read the entire hearing transcript during the past four days, I find nothing in these hearings to change my opinion of Judge Alito. I am still deeply concerned that he will impose his conservative philosophy and Catholic religious view on all Americans and vote to overrule *Roe v. Wade*. And I am still troubled by Alito's deference to government, as exemplified by Alito writing a lengthy justification for the abhorrent strip search of a ten-year old girl in her home (*Groody*, above, beginning at page 42), when the girl was *not* named in the search warrant and she was not suspected of criminal conduct.

In my view, we need judges who will not only apply the law (including principles of equity), but also honor philosophical considerations of preserving liberty and freedom, preventing the majority in legislatures from imposing its values on everyone, preventing the powerful from abusing isolated individuals who dare dissent or complain, and other moral values. The rules of law were developed over centuries to effectuate justice, *not* to provide abhorrent results. One of the features that I miss about the current U.S. Supreme Court is the absence of people like Justices Douglas, Brennan, and Thurgood Marshall who were *passionate* about doing justice.

After the Hearings

The Senate Judiciary Committee Hearings finished around noon on Friday, 13 Jan 2006. By midnight that day, Alito's name was already gone from the front page of *The Washington Post*.⁵² The immediate conventional wisdom in the news media was that Alito would be confirmed as a Justice of the U.S. Supreme Court. See, e.g.,

- Charles Babington and Jo Becker, "Alito Likely To Become A Justice: Liberals See Slim Chance Of Blocking Confirmation," *The Washington Post*, page A01, (13 Jan 2006);
- Charlie Savage, "Little ammunition for filibuster as hearing nears end," *The Boston Globe*, (13 Jan 2006) ("All week, Democrats on the Senate Judiciary Committee tried to provoke Judge Samuel A. Alito Jr. into an extreme statement or a display of temper that might justify a filibuster against his Supreme Court confirmation. But by the end of Alito's questioning yesterday, Democrats had probably failed, political analysts said.");
- Laurie Kellman, "Democrats May Delay Alito Nomination Vote," *Associated Press*, (13 Jan 2006 19:53 EST) ("But Democrats' chances of stopping Alito seem to get slimmer each day. The only way they can block his nomination is through a filibuster, and they would need Republican help to keep Senate Majority Leader Bill Frist, R-Tenn., from banning the tactic.");
- Amy Goldstein and Jo Becker, "Alito Hearings Conclude," *The Washington Post*, page A03, (14 Jan 2006) ("As Senate Republicans appear to have mustered ample votes to place Samuel A. Alito Jr. on the Supreme Court, his confirmation hearings ended yesterday");
- Carolyn Lochhead, "Shuffling nominees, Bush may hit jackpot," *San Francisco Chronicle*, (15 Jan 2006) ("... it appears likely that President Bush will succeed in naming a conservative — and a white male at that — to the seat of retiring Justice Sandra Day O'Connor. With the O'Connor seat, Bush will have seized the grand prize of the decades-long struggle over the ideological balance of the Supreme Court.").

Washington Post editorial

An editorial in the Sunday, 15 Jan 2006 *The Washington Post* summarized the reasons why Alito would make an *undesirable* Supreme Court justice, and then concluded — to my horror — that Alito should be confirmed:

- "His replacement of Justice Sandra Day O'Connor could alter — for the worse, from our point of view — the Supreme Court's delicate balance in important areas of constitutional law. He would not have been our pick for the high court."
- "... Judge Alito's record is troubling in areas. His generally laudable tendency to defer to elected representatives at the state and federal levels sometimes goes too far — giving rise to

⁵² As an alternative indication of the public's decline in interest in Alito, this essay on Alito had an average of 47 hits/day during 6-12 Jan 2006, an average of 11 hits/day on 13-15 Jan, and then an average of 7 hits/day on 16-23 Jan.

concerns that he will prove too tolerant of claims of executive power in the war on terror. He has tended at times to read civil rights statutes and precedents too narrowly. He has shown excessive tolerance for aggressive police and prosecutorial tactics. There is reason to worry that he would curtail abortion rights. And his approach to the balance of power between the federal government and the states, while murky, seems unpromising.”

- “... he is undeniably a conservative whose presence on the Supreme Court is likely to produce more conservative results than we would like to see.
“Which is, of course, just what President Bush promised concerning his judicial appointments. A Supreme Court nomination isn't a forum to refight a presidential election. The president's choice is due deference — the same deference that Democratic senators would expect a Republican Senate to accord the well-qualified nominee of a Democratic president.”

and then the *Washington Post* concluded:

While we harbor some anxiety about the direction he may push the court, we would be more alarmed at the long-term implications of denying him a seat. No president should be denied the prerogative of putting a person as qualified as Judge Alito on the Supreme Court.
anonymous, “Confirm Samuel Alito”, *The Washington Post*, page B06, (15 Jan 2006),
<http://www.washingtonpost.com/wp-dyn/content/article/2006/01/14/AR2006011400858.html>

my opinion of the *Washington Post* editorial

What I find most horrifying about this editorial is its lack of idealism. The political reality is that the Republicans in the U.S. Senate have a sufficient majority to confirm any candidate who President Bush nominates, provided that at least 51 of the 55 Republicans vote for the President's nominee. But this political reality does *not* imply that it is a good result to appoint someone to the U.S. Supreme Court who will vote to overrule *Roe v. Wade*, who will show excessive deference to government and big businesses who abuse individuals (e.g., vote to permit a strip search of a 10-y old girl who was not suspected of criminal activity⁵³), and who will probably vote to tear down the “wall of separation” between religion and government. The *Post* suggests that people voted for President Bush because he would nominate conservative judges, but there were many reasons to vote for Bush (or vote against John Kerry) and not every voter was focused on judicial nominations. Moreover, nominating judges is *not* the same thing as appointing those judges — the U.S. Senate must independently confirm those nominations. In my view, this struggle is *not* about liberal vs. conservative. It is about the effort of fundamentalist Christians who have hijacked the Republican party⁵⁴ to use law to impose their moral values on everyone in America. Doesn't anyone want to fight for freedom and liberty anymore? A number of liberal or feminist

⁵³ See *Doe v. Groody*, above, beginning at page 42.

⁵⁴ A view rarely publicly expressed, but commonly known. Back on 26 Oct 2005, John Danforth, a former U.S. Senator from Missouri and an ordained priest in the Episcopal Church, publicly criticized the political power of fundamentalist and evangelical Christians. Earlier, he wrote an op-ed piece in *The New York Times* on the same topic: John C. Danforth, “In the Name of Politics,” *The New York Times*, 30 March 2005, <http://www.nytimes.com/2005/03/30/opinion/30danforth.html> .

organizations⁵⁵ (including the ACLU) have carefully explained why Judge Alito is a bad choice for civil liberties. But the people in America seem apathetic about civil liberties: people are not demanding that Republican senators vote against Judge Alito.

two more editorials

An editorial in the Sunday *Los Angeles Times* concluded:

Alito would not have been our choice to replace Sandra Day O'Connor on the court. It is understandable that, unlike now-Chief Justice John G. Roberts Jr., he may not win many Democratic votes. Conversely, there are no legitimate grounds to entertain a filibuster of this nominee, or to be overly shocked that he is the sort of justice Bush would select.

Bush never made any secret of his desire to put conservative jurists on the highest court, and he was elected to the presidency twice. One of the perks of the presidency, besides not having to sit through confirmation hearings, is shaping the Supreme Court. And one of the obligations of senators in the minority, after forcing a nominee to listen to them, is allowing the president's nominee an up-or-down vote.

anonymous, "All about Alito (or not)", *Los Angeles Times*, (15 Jan 2006),

<http://www.latimes.com/news/opinion/editorials/la-ed-alito15jan15,0,2390669.story?coll=la-news-comment-editorials>

Given the political reality that the Republicans have enough votes to confirm Alito, his confirmation is certain. Nonetheless, appointing Justices to the U.S. Supreme Court is *not* "one of the perks of the presidency" — the U.S. Senate should make an independent evaluation of those nominees before confirming them.

An editorial in the Tuesday edition of the *San Francisco Chronicle* was more idealistic when it concluded:

Alito left no doubt about his impressive command of the Constitution and various milestone cases.

But Americans deserved more. They deserved greater assurances that Alito's history as an ideologue did not presage an activist justice who would roll back the clock on rights and policies that have made this nation freer and more equitable.

Alito failed to satisfy such concerns. Senators should reject this nomination.

anonymous, "Why Alito is the wrong choice", *San Francisco Chronicle*, page B6, (17 Jan 2006),

<http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/01/17/EDGIAGNDL01.DTL>

⁵⁵ See the links section, below, beginning at page 147, for some of these organizations.

news

There were two important news items on Tuesday, 17 Jan 2006. First, the Democrats on the U.S. Senate Judiciary Committee delayed the vote on Alito in that Committee by one week, so that the Committee would vote on 24 Jan. It is not clear whether the Democrats acted either (a) to obnoxiously delay President Bush's victory, (b) to give liberal groups another week in which to attempt to build a consensus against the confirmation of Alito.⁵⁶ Second, the U.S. Supreme Court announced its decision in *Gonzales v. Oregon*, a right-to-die case, in which the new Chief Justice Roberts dissented for the first time, joining conservative justices Scalia and Thomas. If Alito were on the Court, I would expect Alito to join Scalia, Thomas, and Roberts in opposing individual autonomy (i.e., constitutional privacy rights) and upholding the power of government to regulate lives and personal choices of individuals. In this way, the confirmation of Alito would strengthen the power of the pro-life fundamentalist Christians to impose their values on *all* Americans. Strangely, there was little public commentary about the possible effect of Alito on future decisions like *Gonzales v. Oregon*.

There was remarkably little news reported in the mainstream media about the confirmation of Judge Alito after the hearings concluded but before the Judiciary Committee voted on 24 Jan 2006. As evidence of the dearth of news, I examined the online Kaiser Network Daily Women's Health Policy Reports.⁵⁷ They did not publish on Monday, 16 Jan 2006, because that was a federal holiday. During 17-23 Jan 2006, they published a total of 30 articles, of which *only two* concerned Alito. On Tuesday, 17 Jan, they reported that the Democrats had delayed for one week the vote in the Senate Judiciary Committee. On Thursday, 19 Jan, they published an article titled "Alito Likely To Be Confirmed; Democrats Unlikely To Filibuster".

On Friday night, 20 Jan 2006, Reuters reported that "Senate Majority Leader Bill Frist told Republican Party activists on Friday night that U.S. Supreme Court nominee Samuel Alito was the

⁵⁶ Amy Goldstein, "Senate Panel's Vote on Alito Delayed Until Next Week," *The Washington Post*, page A03, (17 Jan 2006) (Recognizing "a coalition of left-leaning advocacy groups that are continuing to air advertisements in an aggressive — and, so far, relatively ineffective — campaign to build broad public opposition to the nominee,"); Combined news services, *Newsday*, (17 Jan 2006) ("Democrats said they wanted to give senators time to observe a three-day [Martin Luther King] holiday weekend without coming back to face an immediate vote. At the same time, they came under pressure from outside interest groups that want as much time as possible to try to rally public opposition to the nomination.").

⁵⁷ The most recent Report is available at http://www.kaisernetwork.org/daily_reports/rep_women.cfm .

‘worst nightmare of liberal Democrats.’ ”⁵⁸ This quotation shows how petty American politics has become: it is about revenge and retaliation.

On Sunday, 22 Jan 2006, the *Los Angeles Times* says at least four states are considering statutes making abortion illegal to force the U.S. Supreme Court to revisit *Roe v. Wade*.⁵⁹ My comment: the pro-lifers sure did not waste any time in celebrating the probable confirmation of Alito.

announcement of votes

At the conclusion of the hearings on Friday, 13 Jan 2006, Senator Specter announced that he would vote for confirmation of Alito. Because Senator Specter is one of a few pro-choice Republican Senators and Alito is strongly pro-life, I interpret Specter’s vote to indicate that Specter wants to retain the chairmanship of the Senate Judiciary Committee by first being a loyal Republican, and secondarily being pro-choice.

On Tuesday, 17 Jan 2006, Senator Ben Nelson from Nebraska became the first Democrat to announce that he would vote for confirmation of Alito.⁶⁰

On Thursday morning, 26 Jan 2006, two more Democrats, Robert Byrd of West Virginia and Tim Johnson of South Dakota, announced they would vote for Alito.

On Monday morning, 30 Jan 2006, Senator Lincoln Chafee of Rhode Island became the first Republican to announce that he would vote against Alito. Chafee is one of a few pro-choice Republicans in the U.S. Senate. However, Chafee declined to support the filibuster of Alito’s confirmation.

On Monday afternoon, 30 Jan 2006, Senator Kent Conrad of North Dakota became the fourth Democrat to announce he would vote for Alito.

⁵⁸ Richard Cowan, “Frist calls Alito Democrats’ ‘nightmare’ ”, *Reuters*, (20 Jan 2006 20:32 EST).

⁵⁹ P.J. Huffstutter and Stephanie Simon, “States Step Up Fight on Abortion,” *Los Angeles Times*, (22 Jan 2006).

⁶⁰ anonymous, “Senate Democrat backs Alito,” *Reuters*, (17 Jan 2006 18:14 EST); anonymous, “Democrat Nelson Says He’ll Back Alito,” *Associated Press*, (18 Jan 2006 07:13 EST).

announcement of filibuster

On Thursday morning, 26 Jan 2006, Senators were continuing to give speeches about Alito to a nearly empty Senate chamber. It appeared that a final vote on Alito's confirmation might be taken on Friday, 27 Jan. At that moment, 52 Republicans and 3 Democrats had announced their support of Alito, so his confirmation was certain.⁶¹ Then, on Thursday afternoon, Senator John Kerry publicly announced that he and Senator Kennedy would lead a filibuster of the Alito confirmation.⁶² A few hours later, the filibuster had public support from three additional Democrats: "Dick Durbin of Illinois, the second-ranking Senate Democrat, as well as Paul Sarbanes of Maryland and Debbie Stabenow of Michigan."⁶³

The Majority Leader in the U.S. Senate, Bill Frist, scheduled a cloture motion in the Senate on Monday, 30 Jan, at 16:30 EST. If the cloture motion receives at least 60 votes, "debate" (i.e., long speeches by filibustering Senators) will end and there would be a final vote on Alito on Tuesday, 31 Jan, at 11:00 EST. Assuming the cloture motion passes, the *only* effect of the Democrats would be to delay the confirmation of Alito by 11 days after the originally scheduled date of 20 Jan. A news report in *The Washington Post* for Friday morning, 27 Jan, clearly showed the futility, and possible harmfulness, of the filibuster:

The filibuster's supporters — including Sens. John F. Kerry and Edward M. Kennedy of Massachusetts — acknowledged that the bid is likely to fail and that Alito is virtually certain to be confirmed Tuesday.

....

Liberal groups such as People for the American Way have implored Democratic senators to filibuster Alito's nomination, even if it means nothing more than staking their principles and showing that Democrats will fight against a party that controls the House, Senate and White House. But many Republicans have relished the idea of a Democratic-led filibuster, saying it helps them portray the minority party as obstructionist and beholden to left-leaning groups.

....

⁶¹ Actually, with a total of at least 55 votes, Alito would have at least four votes that he doesn't need. In 1991, Justice Clarence Thomas was confirmed by a 52 to 48 vote in the Senate, when 11 Democrats and 41 Republicans voted to confirm Thomas.

⁶² The first public announcement of the filibuster seems to have come from a CNN reporter who was covering the World Economic Forum in Switzerland, which Senator Kerry was attending. I did not save the bibliographic citation of the first CNN report that I saw, which was dated 26 Jan 2006 at 16:23 EST.

⁶³ Jessie J. Holland, "Senate GOP Seeks to Force Vote on Alito," *Associated Press*, (26 Jan 2006 18:27 EST).

Party sources said [Senate Democratic leader] Reid and others worry that a filibuster, while likely to fail, will nonetheless detract voters' attention from issues that Democratic leaders consider more promising. They include Bush's controversial domestic surveillance program, the indictments of a top White House official and a congressional leader, and the unfolding scandal centered on former lobbyist Jack Abramoff.

Party leaders especially worry about forcing a filibuster decision on Democrats seeking reelection this fall in GOP-leaning states, including Nelson and Kent Conrad (N.D.).

While Reid hoped to avoid a filibuster, Democratic Whip Richard J. Durbin (Ill.) supports it. But at a midday session with reporters, Durbin acknowledged the likely futility.

"Having made a count," he said, "I have come to the conclusion it is highly unlikely that a filibuster would succeed."

Charles Babington, "Democrats Split Over Filibuster On Alito," *The Washington Post*, page A01 (27 Jan 2006) <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/26/AR2006012601955.html> .

Notice that the *Post* included no feminist groups in its list of "liberal groups" who were urging a filibuster, another indication that both journalists and Democratic politicians were ignoring feminists and pro-choice groups.

On Friday afternoon, both the Reuters and Associated Press news services reported the futility of the filibuster.

Senate Minority Leader Harry Reid said on Friday he and fellow Democrats lack the votes to block President George W. Bush's nomination of conservative appeals judge Samuel Alito to the U.S. Supreme Court.

The concession reinforced the virtual certainty that Alito will be confirmed next week by the full Republican-led Senate on a largely party-line vote. Alito joining the nation's highest court could move it to the right on abortion and other social issues.

"Everyone knows there is not enough votes to support a filibuster," Reid said, referring to the procedural roadblock that some Democrats wanted to use to put off a vote on Alito.

The Nevada Democrat said, however, he would vote for such a measure to at least send a message. That vote will come on Monday with a Senate confirmation vote expected on Tuesday.

....

Thomas Ferraro, "Senate Democrat says can't block Alito," *Reuters*, (27 Jan 2006 15:22 EST).

Supreme Court nominee Samuel Alito enjoys sufficient bipartisan support to surmount any Senate filibuster attempt by minority Democrats, Senate leaders said Friday.

....

Democrats and Republicans alike said the 55-year-old conservative jurist will get more than the 60 votes need to cut off debate on the Senate floor Monday.

"Everyone knows there are not enough votes to support a filibuster," Senate Democratic leader Harry Reid of Nevada said Friday. Senate Majority Leader Bill Frist, R-Tenn., said the same thing on Thursday. "A bipartisan majority will vote to confirm Judge Alito as Justice Alito," Frist said.

....

Jessie J. Holland, "Republicans Clear the Way for Alito Vote," *Associated Press*, (27 Jan 2006 16:35 EST)

why filibuster will fail

News articles were not reporting the details of the votes for and against cloture, but an estimate is easy to make. The positions of the Senators as of Friday evening, 27 Jan 2006, were 53 Republicans had announced they would vote for Alito, and zero Republicans had announced opposition to Alito. There are 44 Democrats in the Senate, 3 of whom had announced they would vote for Alito. Assuming that all 55 Republicans and those 3 Democrats oppose a filibuster, that is a total of 58 votes for cloture, without even considering the remaining 41 Democrats.

There was a gang of 14 Senators formed to oppose filibusters of judicial nominees, except in “extraordinary circumstances”. Of the 7 Democrats in this gang, none had indicated support for a filibuster of Alito. Adding those 7 Democrats to the 58 votes for cloture in the previous paragraph brings the total to 65. It is likely that other Democrats would vote for cloture, and push the total higher than 65. Because at least 60 votes are needed to end a filibuster, the filibuster will surely fail.

Another way to analyze the situation is to assume that *all* 55 Republicans will vote for cloture, which means that the 41 votes to sustain a filibuster must come from 44 Democrats and 1 Independent. Already 3 Democrats had announced their support for Alito’s confirmation, which leaves 42 possible votes to sustain a filibuster. If just two of those 42 possible vote go the other way, the filibuster fails.

more developments

Senators Barbara Boxer of California⁶⁴ and Hillary Clinton of New York⁶⁵ announced they would support the filibuster. But what really gave me some hope of a very narrow chance of success for the filibuster of Alito’s nomination was that the National Organization for Women *finally* posted, on Friday evening, a very effective advertisement on their homepage, see below at page 137. Encouraging large numbers of voters to contact their Senators is the one way to get Senators to change their position.

⁶⁴ Maura Reynolds, “Key Democrats Try to Mount Filibuster Against Alito,” *Los Angeles Times*, (27 Jan 2006).

⁶⁵ Glenn Thrush, “Clinton to support Alito filibuster,” *Newsday*, (27 Jan 2006 21:41 EST).

Several prominent Democratic Senators (e.g., Minority Leader Reid, Charles Schumer, Barbara Mikulski) initially revealed their public irritation at the filibuster.⁶⁶ Later, Senator Barack Obama said a filibuster was the wrong way to oppose Alito.⁶⁷ There are a variety of reasons for this irritation:

1. It was clear at the beginning that the cloture vote would be successful, so that the filibuster was futile. The *only* result of the filibuster would be delay of the eventual confirmation of Alito by a few days. In this view, the filibuster is obstructionist and a publicity stunt.
2. Given the inability of Democrats to prevent the confirmation of Alito, many Democrats wanted to change the public focus to other issues (e.g., domestic wiretaps without a warrant, corruption of legislators by lobbyists) where the Democrats might have some bipartisan chance of success. In contrast to this positive spin for Democrats on other issues, continuing to focus on Alito portrayed the Democrats as a bunch of losers.
3. The filibuster forced each Democratic senator to make a choice on the cloture vote, dividing Democrats into two groups: (a) idealists who would fight for hopeless causes and (b) pragmatic senators who wanted to consider other issues, where they might have some beneficial effect. The Republican opposition might portray the idealists as ultra-liberals, beholden to feminists, abortionists, flag-burners, pornographers, illicit drug users, and the ACLU⁶⁸ —making it easy for the Republicans to use propaganda to marginalize those idealist Democrats as “extremists” who are “out of the mainstream”.

One-third of the Senate seats will be contested in an election in November 2006, about nine months in the future, and some Democrats were worried about the effect of not only votes on Alito, but also votes on the filibuster, on success for Democrats in those elections.

While I understand that winning the next election is the most important consideration for a career politician, history shows that *both* political parties spew propaganda in large amounts. Therefore, voting against a filibuster will *not* protect Democrats from propaganda attacks.

⁶⁶ David Espo, “Democrats Squabble Over Alito Filibuster,” *Associated Press*, (27 Jan 2006 22:24 EST) (“Two of the party's Senate leaders, Harry Reid of Nevada and Charles Schumer of New York, privately made clear their unhappiness with the strategy, even though they, too, oppose Alito's confirmation.”); Glenn Thrush, “Clinton to support Alito filibuster,” *Newsday*, (27 Jan 2006 21:41 EST) (“Several other Democrats, including Barbara Mikulski (D-Md.) and Kent Conrad (D-N.D.), agree with Schumer that a filibuster could alienate middle-of-the-road Democrats in this year's midterm elections.”).

⁶⁷ Hope Yen, “Sen. Obama Criticizes Filibuster Tactic,” *Associated Press*, (29 Jan 2006 12:57 EST).

⁶⁸ This kind of wild advertisement was actually used by supporters of Alito on 17 Nov and 13 Dec 2005, see above, at pages 56 and 71.

I was astounded that on Saturday and Sunday, 28-29 Jan 2006, there was almost no mention in the mainstream news media of the battle over the confirmation of Alito.⁶⁹ Given the harsh words in the speeches on the Senate floor during 25-27 Jan, and the sense of a crisis, the silence on the weekend was really remarkable. Even the Daily News Wire at the Feminist Majority website was silent on the weekend. The one-week delay in the vote in the Senate Judiciary Committee (above, at page 115), which allegedly gave liberals and feminists another week to organize public opposition to Alito, produced no significant results.

The Votes

On Tuesday, 24 Jan 2006, the U.S. Senate Judiciary Committee voted 10 to 8 to recommend that the Senate confirm Alito's nomination. All 10 Republicans on the Committee voted for Alito and all 8 Democrats voted against Alito. This was no surprise, in fact this result had been predicted in the news media during the week before the vote.

On Monday evening, 30 Jan 2006, the full U.S. Senate voted for cloture, 72 to 25, killing the filibuster, on the same day the symbolic filibuster began. The votes for cloture included 53 Republicans (no surprise, there) and 19 Democrats (43% of the total Democrats). The votes for the filibuster included zero Republicans, 24 Democrats, and 1 Independent. Democrat Harkin of Iowa and 2 Republicans chose not to vote. Just for the record, the 25 Senators in favor of the filibuster were:

Bayh, Indiana;	Biden, Del.;	Boxer, Calif.;
Clinton, N.Y.;	Dayton, Minn.;	Dodd, Conn.;
Durbin, Ill.;	Feingold, Wis.;	Feinstein, Calif.;
Kennedy, Mass.;	Kerry, Mass.;	Lautenberg, N.J.;
Leahy, Vermont	Levin, Mich.;	Menendez, N.J.;
Mikulski, Md.;	Murray, Wash.;	Obama, Ill.;
Reed, R.I.;	Reid, Nev.;	Sarbanes, Md.;
Schumer, N.Y.;	Stabenow, Mich.;	Wyden, Ore.

and 1 Independent: Jeffords of Vermont

On Tuesday morning, 31 Jan 2006, the full U.S. Senate voted to confirm Alito as a Justice of the U.S. Supreme Court, 58 to 42. The vote was along strict party lines, with the exceptions of four Democrats and one Republican senators who were mentioned above, at page 116. Just for the record, the 42 Senators opposed to Alito were:

Akaka, Hawaii;	Baucus, Mont.;	Bayh, Ind.;
Biden, Del.;	Bingaman, N.M.;	Boxer, Calif.;
Cantwell, Wash.;	Carper, Del.;	Chafee, R-RI;
Clinton, N.Y.;	Dayton, Minn.;	Dodd, Conn.;

⁶⁹ Similarly, the number of hits on this essay plummeted from an average of 6/day during 24-26 Jan 2006 to zero/day during 27-29 Jan 2006.

Dorgan, N.D.;	Durbin, Ill.;	Feingold, Wis.;
Feinstein, Calif.;	Harkin, Iowa;	Inouye, Hawaii;
Jeffords, I-Vermont;	Kennedy, Mass.;	Kerry, Mass.;
Kohl, Wis.;	Landrieu, La.;	Lautenberg, N.J.;
Leahy, Vermont;	Levin, Mich.;	Lieberman, Conn.;
Lincoln, Ark.;	Menendez, N.J.;	Mikulski, Md.;
Murray, Wash.;	Bill Nelson, Fla.;	Obama, Ill.;
Pryor, Ark.;	Reed, R.I.;	Reid, Nev.;
Rockefeller, W.Va.;	Salazar, Colo.;	Sarbanes, Md.;
Schumer, N.Y.;	Stabenow, Mich.;	Wyden, Ore.

There are eight Republican senators who are publicly pro-choice on abortion. Seven of them (Olympia Snowe and Susan Collins of Maine, Arlen Specter of Pennsylvania, Lisa Murkowski and Ted Stevens of Alaska, Gordon Smith of Oregon, John Warner of Virginia) voted for Alito, while Chafee voted against Alito.

I note that if the 42 senators who voted against Alito on Tuesday had also voted for the filibuster on Monday, then Alito's confirmation would have been blocked. Is an obstructionist parliamentary maneuver like a filibuster really the right way to stop judicial confirmations? When essentially all of the majority party votes as one bloc,⁷⁰ then the *only* way the minority party can influence the result is to use a filibuster. A filibuster effectively redefines a majority as 60% of the Senate, instead of the original 51%. While the majority party will whine about the filibuster being obstructionist, the filibuster would not be necessary if every individual senator voted his/her conscience, instead of rigidly being in lock-step with his/her party line.

Justice Alito took the constitutional and judicial oaths at 12:40 EST on 31 Jan 2006 in a private ceremony at the U.S. Supreme Court building.

President Bush's reaction

Immediately after the Senate voted on 31 Jan 2006 to confirm Justice Alito, President Bush issued the following statement:

I am pleased that the Senate has voted to confirm Judge Sam Alito as the 110th Justice of the Supreme Court. Sam Alito is a brilliant and fair-minded judge who strictly interprets the Constitution and laws and does not legislate from the bench. He is a man of deep character and integrity, and he will make all Americans proud as a Justice on our highest court. The son of an Italian immigrant, Judge Alito's appointment to the Supreme Court is the realization of the American dream for this good man and his family. I congratulate Judge Alito, his wife Martha, the Alito children, and Judge Alito's mother Rose on this historic achievement and momentous day in the life of our country.

The phrase "does not legislate from the bench" has become a cliché. The fact that Justice Alito's father was an Italian immigrant is surely irrelevant to Alito's qualifications to be a Justice of the

⁷⁰ At this moment in time, Republicans have 55 votes, which makes the 44 Democrats and 1 Independent irrelevant when the Republicans vote as one bloc.

Supreme Court, but is part of propaganda to convince people that Alito, an intellectual judge who attended two elite universities, is just an ordinary person. The President probably chose Alito to overrule *Roe v. Wade*, but Bush can not say that in public.

Democratic Party Opposition to Alito

My conclusion to this essay begins below, on page 145. The following sections contain some remarks about the *ineffective* opposition to Alito from Democrats and feminists.

On 31 Oct 2005, the same day that President Bush nominated Judge Alito, the chairman of the Democratic Party National Committee, Howard Dean, issued the following statement:

President Bush shouldn't try to use the nomination of an extreme conservative to distract from the ethical problems his White House is facing. Three days after a top White House official was indicted, President Bush continued his troubling pattern of playing to his right-wing political base in times of political trouble. In an indication of his weakened political position, Bush has nominated Samuel Alito, a conservative activist judge, to replace Justice O'Connor, who has been a voice of moderation on the Court for a generation.

A lifetime appointment to the Supreme Court of the United States is too important to be sacrificed on the altar of short-term political gain. President Bush's nomination of Alito is not leadership, it is capitulation.

Alito's record suggests an activist judicial philosophy bent on rolling back the rights and freedoms that all Americans value.⁷¹ Alito has sought to limit the rights of women and people with disabilities in discrimination cases, demonstrated an open hostility to women's privacy rights even in basic reproductive health matters, has a record of hostility toward immigrants, and tried to immunize employers from employment discrimination cases. It is particularly troubling that President Bush would nominate a judge who would reverse American progress and make the Supreme Court look less like America on the same day that most Americans are honoring the life and legacy of Rosa Parks.

Now, as Alito goes before the Senate Judiciary Committee, he must demonstrate that he will be a Supreme Court Justice who uses his position on the highest court in the land to protect and advance the fundamental rights and personal freedoms of all Americans. Alito must prove that he is not a captive of the radical right-wing, and the White House must provide the Senate with all the information it needs to thoroughly evaluate Alito's nomination. Howard Dean, "Howard Dean on the Nomination of Samuel Alito to the Supreme Court," (31 Oct 2005 12:51 EST) <http://releases.usnewswire.com/GetRelease.asp?id=55907>

This is partisan political propaganda that sees the issues as a binary choice between (1) "extreme conservative" or "radical right-wing" and (2) Democrats who believe in diversity and "personal freedoms". The truth is more complicated than this simplistic view. After you read Howard Dean's press release, you really don't know more about Judge Alito than before.

⁷¹ Obviously, the pro-life groups do not value the legal right to an abortion, and those groups are definitely Americans. Furthermore, those Christians who want organized prayers in public schools do not value some aspects of separation of church and state, although those Christians are definitely Americans. Pretending that Alito (and other conservative Christians) personally favor ending rights and freedoms valued by *all* Americans is simply wrong. Americans do not speak with one voice on these issues.

Hearings in Senate Judiciary Committee

Several Democratic Senators berated Judge Alito during the hearings in the Senate Judiciary Committee for two incidents that allegedly showed a lack of either integrity or ethics by Judge Alito. Basically, there was no substance for either of these two scurrilous attacks on Alito, and I think these attacks undermined the credibility of the Democratic party's opposition to Alito.

During the 1980s, Alito was a member of Concerned Alumni of Princeton (CAP) University, an organization of conservatives who were distressed by some recent changes at the University. The magazine published by CAP contained one article that suggested that admitting women and blacks to Princeton would lower academic standards there. There was *never* any evidence that Alito was aware of this bigoted article, or that Alito agreed with that bigoted article. Despite the lack of evidence, several Democratic Senators made an effort to tar Alito with guilt by association.

During the 1990s, Judge Alito heard one case involving ownership of shares in a Vanguard mutual fund. At the time, Judge Alito owned more than \$100,000 in Vanguard mutual funds. Several Democratic Senators made a big deal of Judge Alito's failing to recuse himself from this case. However, there was *never* any showing that Judge Alito could personally benefit (or suffer) in any way, regardless of his ruling on this case. Hence, there was no conflict of interest. During 3-4 November 2005, three experts on legal ethics⁷² had examined the detailed facts and came to the conclusion that there was no need for recusal.

In my opinion, these two *unjustified* attacks on Alito's character were outrageously inappropriate. These attacks not only reflected badly on the Democratic Senators (notably Edward Kennedy) who made these scurrilous attacks, but also these attacks avoided focusing on what should have been the real issues — Judge Alito's views on privacy law, abortion, individual autonomy, etc.

Because these two attacks by Democrats were baseless, I am not wasting my time to provide citations for each scurrilous attack and its refutation. One can read the hearing transcript and see for oneself that no evidence was introduced to prove each accusation, and that there was evidence of Alito's innocence.

Finally, at the end of the hearings in the Senate Judiciary Committee, various senators congratulated themselves on how "dignified" their hearings had been. Maybe they were "dignified" by the standards of partisan bickering by uncivil demagogues in Washington, DC. But by standards of conduct in mainstream professional life, these hearings were often rude, disrespectful, abrasive, and argumentative.

⁷² Profs. Ronald Rotunda, Geoffrey C. Hazard, and Thomas D. Morgan each wrote a letter to Senator Specter.

Feminist Opposition to Alito

The same day President Bush nominated Judge Alito, various feminist and pro-choice groups immediately denounced Alito in harsh terms. I quote from a few of these press releases to show the opposition to Judge Alito, so that people can see *why* the opposition was *ineffective*. I have added footnotes to explain some of the misleading statements or identify some propaganda.

The Feminist Majority opposes the nomination of Samuel Alito to replace Sandra Day O'Connor on the Supreme Court. Alito is no O'Connor. Instead of reaching out to women and/or people of color to make the Supreme Court more diverse and representative, Bush has slammed the door in the face of women and minorities. He has appointed a man who would turn back the clock on women's rights and civil rights. Not only is the Court not representative in terms of race and gender, but also in terms of religion — with Alito, the majority of the Court would be Roman Catholics, which would underrepresent other religions, not to mention nonbelievers.

Alito is no conservative; rather, he is a reactionary. Dubbed "Scalito,"⁷³ he is to the far-right of the current Court — even to the right of Justices Scalia and Thomas. He was the only⁷⁴ judge on the Third Circuit Court of Appeals to require women to notify their husbands — even husbands who batter women⁷⁵ — to obtain an abortion. He voted against the Family and Medical Leave Act — this time not permitting state employees to sue for damages under the Act. He dissented solo again on a decision upholding a conviction under the federal law prohibiting the transfer or possession of machine guns — questioning whether Congress had the power under the Commerce Clause to enact such a law. Alito was the lone dissenter on a sex discrimination in employment case — he wanted "smoking gun" type evidence making nearly impossible an effort to prove sex discrimination.

In case after case, Alito has demonstrated hostility to women's rights, civil rights, worker's rights, separation of church and state, and privacy rights. He would vote to reverse *Roe v. Wade*⁷⁶ and would not recognize lesbian and gay rights.

Needless to say, Alito has the strong support of numerous right-wing groups. Bush bowed to right-wing pressure in selecting Alito. He moved from a position of weakness and threw down the gauntlet for a fight from a whole host of women's rights, civil rights, civil liberties, worker's rights, environmental, and progressive groups. Bush is hoping to change the national debate from his administration's

⁷³ I find this reference to "Scalito" offensive, as it reduces Judge Alito from a scholarly professional with his own opinions to a mere clone of Justice Scalia.

⁷⁴ The "only" in this sentence is misleading. There are 13 judges on the Third Circuit, so the Feminist Majority implies that Alito was in a minority of 1/13. But *Casey* was decided by a three-judge panel, which makes Alito in a minority of 1/3. If *Casey* had been reheard en banc, it is possible that some other judges would have agreed with Alito.

⁷⁵ This inflammatory statement is false. The Pennsylvania statute at issue in *Casey* had an explicit exception for women who have "reason to believe that notification is likely to result in the infliction of bodily injury upon her." See above, at page 16.

⁷⁶ Ms. Smeal offers no evidence for this conclusion, and I am aware of no publicly known evidence on 31 Oct 2005, when she wrote this sentence. Conclusions without reasons are *not* persuasive writing.

troubles with Iraq, Katrina, and indictments. In a difficult time for the nation, Bush chose to solidify his far-right base and ignore the mainstream and the dreams and struggles of women and people of color. He chose to divide, not unify, the nation.⁷⁷

If Bush wants a fight, he will get one that will finally show the people of this nation how two-faced and reactionary he has been on both women's rights and civil rights.⁷⁸ Eleanor Smeal, Statement: "Feminist Majority Opposes Samuel Alito: Alito's Confirmation Would Drive Women's Rights Back Decades,"

<http://www.feminist.org/news/presstory.asp?id=9357> (31 Oct 2005).

The National Organization for Women (NOW) had a similar statement opposing Judge Alito:

On Halloween George W. Bush handed ultra-conservatives a treat with his nomination of Samuel Alito to the Supreme Court, but he won't trick women and girls with a nominee who opposes our rights. While NOW is disappointed that Bush proposes to replace Justice Sandra Day O'Connor with yet another white male conservative, we are most concerned by Alito's position on the far right of the judicial spectrum, distinctly outside the mainstream. If Alito is confirmed by the U.S. Senate, many of our fundamental rights will be at great risk.

NOW is strongly opposed to the elevation of Judge Alito and will activate our members in communities nationwide to defeat his nomination to the High Court. Since Bush caved to the extremists' vicious campaign against Harriet Miers, women's rights supporters have been anticipating that he would bend to their will and appoint a judicial extremist of their choosing. He has done exactly that, and we are ready for the fight.

Referred to as "Scalito" for his philosophical resemblance to Justice Antonin Scalia, federal appeals court Judge Alito is a clear opponent of reproductive freedom, protections for workers, and other individual rights. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Alito authored a solo 1991 dissent supporting a state law that required women to inform their husbands before being permitted to obtain an abortion. In his opinion, Alito brushed aside the concern that battered women could face serious consequences if forced to discuss abortion with a violent spouse, saying that the evidence "provides no basis for determining how many women would be adversely affected." The Supreme Court rejected his position in 1992.

Alito's decisions in a number of other cases demonstrate a rigid adherence to "states rights" at the expense of those facing sex and race discrimination and other civil rights violations. In one opinion, *Chittister v. Department of Community & Economic Development*, Alito said Congress has no authority to penalize state governments for failing to comply with the Family and Medical Leave Act. Even the late Chief Justice William Rehnquist disagreed with this opinion and the Supreme Court reversed Alito's ruling by a 6 to 3 vote.

Judge Alito's lone dissent in *Sheridan v. E.I. Dupont de Nemours & Company* indicated that he would add difficult evidentiary hurdles for women who sue for sex discrimination in the workplace under Title VII. His dissent in *Bray v. Marriott Hotels*

⁷⁷ It is not possible to compromise between those who wish to uphold *Roe v. Wade* and those who wish to overrule that case. Naturally, President Bush — who is himself pro-life — selected a pro-life nominee. This was *not* a malicious choice "to divide, not unify, the nation", but simply fulfilling his promise to the pro-life people who elected him.

⁷⁸ That is a very belligerent statement. I am afraid the "fight" will show that the Democrats in the U.S. Senate are powerless to stop Bush's agenda.

was described by the majority opinion as an attempt to “eviscerate” use of Title VII in race discrimination cases by imposing almost impossible evidentiary burdens on plaintiffs. Sadly these are just a few of Judge Alito's many opinions which confirm our conclusion that if Judge Alito ascends to the Supreme Court, civil rights and women's rights will be in peril. Alito's record is also replete with decisions attacking the separation of church and state, and permitting discrimination against people with disabilities, seniors and immigrants.

NOW activists will be calling on their U.S. senators, across party lines, to protect the rights and liberties of all their constituents. Women's rights, and indeed our very lives, are at stake. Will senators stand up for women, or will they, too, bend to the will of right-wing extremists?

Kim Gandy, “NOW to Activate Members Nationwide to Oppose Alito for Supreme Court,” <http://now.org/press/10-05/10-31.html> (31 Oct 2005).

While this press release is unusually good in that it cites names of cases, the flippant remarks about Halloween at the beginning gives the wrong tone to this serious topic.

On Monday, 31 Oct 2005, Kate Michelman, the president of NARAL during 1985-2004, issued the following public statement:

With the appointment of Judge Alito to the Supreme Court President Bush has set the stage for the greatest threat to women's fundamental rights and liberties in more than three decades. As a replacement for Justice Sandra Day O'Connor Judge Alito's deeply conservative views and philosophy would solidify an arch-conservative majority that will set back for generations the hard won progress of women to full equality. The past four and a half years have witnessed a concerted and deliberate attempt by those outside the mainstream to reverse decades of progress on women's rights and individual liberties. To date, an already conservative Supreme Court has cut back on many of these rights and liberties and upheld others only by the thinnest of margins. If George Bush is successful in confirming Judge Alito, *Roe v. Wade* and a woman's right to choose as well as the right to privacy from government could be lost for future generations of Americans.

More than thirty years ago — as a young Pennsylvania mother of three daughters who discovered I was pregnant after being abandoned by my husband — I made the difficult personal decision to have an abortion. In order to avoid the back alley I underwent the degrading and humiliating process of soliciting permission from a hospital review board for a “therapeutic” abortion. After finally receiving permission to proceed with the abortion, I was informed of the worst humiliation of all: in order to make one of the most personal and important decisions of my life, I would be required to obtain the permission of the man who had deserted me and my family.⁷⁹

Roe v. Wade emancipated women from the humiliation I endured. Judge Samuel Alito voted to return us to it.

....

The Senate owes it to the American people to judge not simply Judge Alito's credentials, but also the impact of his long record of far-right opinions on the lives of

⁷⁹ Kate Michelman's statement is misleading in that it compares (1) her personal experience under a pre-1975 Pennsylvania policy with (2) the 1988-89 Pennsylvania statute at issue in *Casey*, which contains an explicit exception when “a woman certifies that she has not notified her husband because ... he cannot be found after diligent effort,” Also note that the statute in *Casey* does not require the women to get the permission of the father of her fetus, but only to notify him.

real people. That duty is elevated by the sad fact that President Bush has chosen to submit himself entirely to the demands of the far-right wing of his party. They demanded, the President was chastened, and now he has complied with a deliberately provocative choice whose nomination will plunge the country into a needlessly divisive debate. Rather than leading the nation, the President is being led by the most extreme element of his party. It is now left to the Senate to provide the independent leadership that the President has abdicated and that will mean — in all likelihood — a filibuster to protect the individual rights and liberties of women and all Americans.

Kate Michelman, Press Release, (31 Oct 2005 13:44 EST) posted at numerous Internet sites, including <http://biz.yahoo.com/prnews/051031/sfm103.html?.v=25> .

On 2 Nov, just two days after President Bush nominated Judge Alito, the Feminist Majority website reported:

Opposition to Alito is growing. In addition to the Feminist Majority, at least ten major progressive groups are opposing Alito: Alliance for Justice, Moveon.org, National Abortion Federation, NARAL Pro Choice America, National Council of Jewish Women, National Family Planning and Reproductive Health Association, National Latina Institute for Reproductive Health, National Organization for Women (NOW), People for the American Way, and Planned Parenthood Federation of America.

Feminist Daily News Wire (2 Nov 2005)

<http://www.feminist.org/news/newsbyte/uswirestory.asp?id=9362> .

This paragraph is a good example of “bandwagon” propaganda technique: they suggest that everyone is opposing Alito, so you should too. The truth is that many conservative groups are supporting Alito, so the issue is *not* one-sided. This kind of propaganda adds nothing significant to the debate about Judge Alito.

In conclusion, by making occasional misleading statements, and by engaging in propaganda and ad hominem attacks (e.g., calling Alito a far-right-wing extremist), the opposition to Judge Alito is rationally seen as not credible, and easy to dismiss as a stereotypical bunch of hysterical women. The feminists’ threats of “fight” and filibuster were *not* credible, given the small number of pro-choice Senators who are probably willing to vote against Alito. Given the combination of an *ineffective* campaign against Judge Alito’s confirmation and the lack of political power of pro-choice Senators, the confirmation of Judge Alito was almost certain, just one week after his nomination.

Two and four weeks *after* these feminists statements, some real evidence of Alito’s personal opinions became available:

1. on 14 Nov, his job application from the year 1985 (see page 52, above) and
2. on 30 Nov, his memo on *Thornburgh* (see page 58, above).

By making inflammatory statements about Alito *before* the supporting evidence was available, feminists weakened their credibility.

Princetonian

On 8 Nov 2005, the Princeton University newspaper ran a story that initially said that Prof. Walter Murphy, who was Alito's senior thesis adviser in 1972, had discussed *Roe v. Wade* with Alito and both of them agreed that *Roe* was "wrongfully decided".⁸⁰ Immediately, *The Washington Post* contacted Prof. Murphy, and Prof. Murphy responded by e-mail:

I haven't seen the story in The Prince, but I did NOT say that Sam & I agreed that *Roe* was wrongly decided. I think it was, but he and I have never discussed it; thus I can't report his views. He graduated from PU a year before *Roe*. The point I was trying to make was that, even if Sam thought that *Roe* was wrong, he would not necessarily vote to overturn it. Fred Barbash, "Princetonian Article," *Washington Post* (8 Nov 2005 08:12 EST)

http://blogs.washingtonpost.com/campaignforthecourt/2005/11/report_alito_be.html

Subsequently, *The Princetonian* revised the article at its website to include the following correction:

The original article mistakenly reported that Walter Murphy said he and Alito agreed that *Roe v. Wade*, the landmark 1973 abortion-rights case, was wrongly decided. The error was a result of a misinterpretation of a statement Murphy made about his personal beliefs on *Roe*. In an interview Tuesday morning, Murphy said: "Sam and I have never talked about *Roe v. Wade*, that I recall."

Chanakya Sethi, "Nominee's missing thesis recovered," *The Daily Princetonian*, (8 Nov 2005) <http://www.dailyprincetonian.com/archives/2005/11/08/news/13693.shtml> .

Up to this point, there was little significance to this error in a student newspaper. But then the Feminist Majority website used this known erroneous information as the basis for their press release:

Samuel Alito's senior thesis advisor at Princeton University shed new light on Alito's judicial philosophy concerning the right to a safe, legal abortion. In an interview with the *Daily Princetonian*, Professor Walter Murphy said that Alito agrees with him in such issues as "finding no constitutional barrier to bans on late-term abortions and requiring spousal and parental notification of impending abortions," the *Princetonian* reports.

The *Princetonian* originally reported today that Professor Murphy said that Alito believed *Roe v. Wade* was wrongly decided, but then posted a correction early this afternoon stating that "[t]he error was a result of a misinterpretation of a statement Murphy made about his personal beliefs on *Roe*. In an interview Tuesday morning, Murphy said: "Sam and I have never talked about *Roe v. Wade*, that I recall." The article notes that Professor Murphy and Judge Alito have remained in touch over the years.

"There is no doubt in my mind that Judge Alito would be the fifth vote against abortion on the Supreme Court," said Eleanor Smeal. "We must not go backwards to the days when women risked injury and even death by resorting to unsafe, illegal back-alley abortions."

no author, "Alito's Senior Thesis Advisor Discusses Alito's Views on Abortion," *Feminist Daily News Wire*, (8 Nov 2005) <http://www.feminist.org/news/newsbyte/uswirestory.asp?id=9374>

⁸⁰ Chanakya Sethi, "Nominee's missing thesis recovered," *The Daily Princetonian*, (8 Nov 2005) <http://www.dailyprincetonian.com/archives/2005/11/08/news/13693.shtml> .

The copy quoted above was cut-and-pasted from the Feminist Majority website at noon Eastern Time on 9 Nov 2005.

In my opinion, it is simply astounding that feminists would use information that they openly acknowledge is false as the basis for their conclusion that Alito would vote to overrule *Roe v. Wade*. The truth is that no one knows what Alito will do after he is confirmed as a Justice of the U.S. Supreme Court. The feminists' final sentence about "unsafe, illegal back-alley abortions" is hyperbole — if *Roe v. Wade* is overruled, the legality of abortions would be a matter for state legislatures to decide. This kind of press release continues to erode the credibility of opponents of Alito's confirmation to the Supreme Court.

entitlement to a replacement similar to Justice O'Connor?

The more thoughtful statements from feminists⁸¹ make an assertion that the replacement for Justice O'Connor should have the same values as Justice O'Connor. The feminists give no reason why this continuity in values is required, except that such continuity would preserve the current state of reproductive rights and other issues important to feminists. Desiring continuity in values in order to obtain a specific result is, in principle, not different from a president's desire to pack the Court with justices who will deliver specific result(s) desired by the president.

A continuity in values on the Supreme Court is not necessarily desirable. The feminists would not protest if a president were to nominate a replacement for Justice O'Connor who was considerably more liberal than O'Connor.

In looking at the history of the U.S. Supreme Court, the liberal Court during the 1960s and 1970s (with Justices Douglas, Brennan, Marshall, all of whom were passionate about civil liberties) was an aberration. While I personally would be delighted with a continuation of such a liberal Court, one can not realistically expect conservative presidents to intentionally nominate liberal justices. The reliable way to get liberal justices on the U.S. Supreme Court is to elect liberals as presidents, and also to elect liberals to the U.S. Senate. But waiting to begin to elect a liberal president when a conservative president has nominated a conservative to become a justice is like deciding to fix the defective brakes and steering on a car while the car is plowing uncontrollably through a schoolyard, flattening children.

⁸¹ See, e.g., NARAL, *Liberty at Risk: The Vulnerability of Reproductive Rights Under Alito*, 24 pp., (14 Dec 2005), http://www.prochoiceamerica.org/publications/liberty_risk_alito.cfm ; National Women's Law Center, *The Nomination of Samuel Alito: A Watershed Moment for Women*, 36 pp., (15 Dec 2005), <http://www.nwlc.org/pdf/NWLCAlitoReport12-15-05.pdf> .

4 Jan 2006

On 4 Jan 2006, less than one week before the U.S. Senate Judiciary Committee began its hearings on the confirmation of Judge Alito, The Feminist Majority Foundation (Eleanor Smeal, president), the National Organization for Women (Kim Gandy, president), and the National Congress of Black Women (E. Faye Williams, president) held a press conference to announce their joint effort to defeat the confirmation of Alito.⁸² This press conference was ignored by most major news media.⁸³ One journalist reported:

A number of liberal groups have lined up against Alito. But they admit the odds and history are on Alito's side despite concerns about him by many Senate Democrats.

"It's always an uphill battle to defeat a Supreme Court nominee, but this is a fight worth having," Kim Gandy, president of the National Organization for Women, told a news conference.

"Replacing Sandra Day O'Connor with Samuel Alito would set women back decades — and unravel O'Connor's legacy of moderation on the court," Gandy said.

Thomas Ferraro, "Law group gives Alito top rating," *Reuters*, (4 Jan 2006 16:01 EST)

This is typical of the few journalists who chose to report this press conference: the reporting of the feminists' press conference was four sentences in a story that began with allegedly more important news about Alito's confirmation process. In the case of the *Reuters* report, the more important news was the American Bar Association's rating of Alito, which, as I observed above at page 80, was irrelevant to the central issues in Alito's confirmation.

Alito was nominated on 31 Oct 2005. Why did the feminists wait 65 days before beginning a coalition to oppose Alito? Why didn't the Feminist Majority and National Organization for Women include Planned Parenthood, NARAL, the National Abortion Federation, and other abortion organizations, who — like the feminists — have a good reasons to oppose the confirmation of Alito?

I listened to some of this feminists' press conference on C-SPAN cable television. Kim Gandy and Eleanor Smeal spewed a lot of hysterical rhetoric about how the confirmation of Alito would set women's rights back forty years. I agree that Alito is a real threat to reproductive rights and equal rights for women. But the real question for the feminists is "What can feminists *do* to prevent Alito from being confirmed?" There are two ways to stop Alito: (1) persuade at least 51 senators (e.g., *all* 44 Democrats in the U.S. Senate and *at least* 7 Republicans in the U.S. Senate) to vote against Alito or (2) liberal Democrats could try to find at least 41 senators to

⁸² <http://www.feminist.org/news/newsbyte/uswirestory.asp?id=9445> (4 Jan 2005); <http://www.now.org/issues/judicial/supreme/010506alito.html> (5 Jan 2006).

⁸³ For example, *The Washington Post* blog on Supreme Court nominations did not mention the feminists' press conference, although there were nine entries in this blog for 3-5 Jan 2006. This blog regularly covers news articles and opinions in both *The Washington Post*, and *The New York Times*, statements by politicians, and announcements by major conservative and liberal organizations.

support a filibuster of Alito nomination and concurrently invite a change in the Senate rules to prohibit filibusters of judicial nominees. What amazed me about the feminists' press conference was that *nothing* was said about *how* women were going to convince at least 51 senators to vote against Alito or convince at least 41 senators to filibuster. I admit that I don't know either, but I am no expert on politics and I am not a political lobbyist, unlike the feminist leaders who are paid to get results in the political process.

The National Organization for Women (NOW) website had a webpage titled: "Enraged & Engaged: Women's Campaign to Defeat Alito." Their list of things to do included:
in Washington, DC:

- "Help activate⁸⁴ other supporters of women's rights"
- "Focus attention on key senators"
- "Work together with activists from around the country to plan actions and raise awareness"

locally:

- "Be a constant presence at your Senators' district offices"⁸⁵
 - "Plan local 'Defeat Alito' actions"
 - "Activate supporters in your community in the Women's Campaign to Defeat Alito"
- slogan:

"Make history as we mobilize to defeat Alito."

NOW, "Enraged & Engaged: Women's Campaign to Defeat Alito", 13 Dec 2005

(visited 15 Jan 2006), <http://www.now.org/issues/judicial/supreme/defeatalito.html>

I do not see how any of these six activities will convince Republican senators to vote against Judge Alito. The Republican party has been striving for more than 25 years to pack the U.S. Supreme Court with conservative justices who will vote to overrule *Roe v. Wade*, who will vote to allow prayer in public schools, who will allow the Ten Commandments to be displayed in schoolrooms and courtrooms, who will punish homosexual sodomy, Now that the Republicans sit on the threshold of victory with Justices Scalia, Thomas, Roberts, and Alito on the Court, they are not going to be easily convinced that their fundamentalist religious teachings are wrong or that their political philosophy is wrong.

There were 31 other witnesses (not counting Judge Alito) at the hearings of the U.S. Senate Judiciary Committee, *only one* of whom represented a feminist group or abortion provider. On 13 Jan 2006, Kate Michelman, the Former President of the National Abortion and Reproductive Rights Action League (NARAL) Pro-Choice America testified under a ten-minute

⁸⁴ Sounds like adding powdered dry yeast to warm water with sugar. Can't they find a better word than "activate"?

⁸⁵ Sounds like an invitation to get arrested for trespassing or interfering with a government office.

time limit.⁸⁶ I think this single witness shows that Senators, both Democrat and Republican, did not take either feminist groups or abortion providers seriously, although I expect Justice Alito to vote to overrule *Roe v. Wade* and make an adverse impact on many women's lives. Indeed, this hasty parade of approximately thirty outside witnesses in less than eight hours added little to the information available to the Senate.

The National Organization for Women (NOW) was particularly clueless: 110 days *after* Chief Justice Roberts had been confirmed and took the oath of office, a box in the upper-left corner of the NOW website homepage continued to urge women to call their senators and oppose the nomination of Roberts!⁸⁷ During these 110 days, the nomination of Harriet Miers to the U.S. Supreme Court came and went, then Alito was nominated, investigated, and his hearings concluded — none of which motivated NOW to revise its homepage. Finally, on the evening of 17 Jan 2006, NOW removed its opposition to Roberts from its homepage. However, in its place, NOW posted an inflammatory advertisement that superficially appeared to suggest that only four women had died in the USA from illegal abortions since the 1920s. This is *not* the “fight” that feminists promised in November 2005, when Alito was nominated.

The Feminist Majority has another website at <http://www.million4roe.com/> . On 31 Jan 2006, *after* both Roberts and Alito had taken the oath of office as Justices of the U.S. Supreme Court, the homepage at this website continued to speak hypothetically: “the possible retirement of 2 Justices could allow anti-abortion President Bush to pack the Court with anti-abortion Justices who would vote to overturn *Roe v. Wade*, relegating women to back alley abortions.” This badly out-of-date homepage gives the impression that Feminist Majority is totally clueless about what has happened in the USA during the seven months since Justice O'Connor announced her retirement on 1 July 2005. This is *not* the “fight” that feminists promised in November 2005, when Alito was nominated.

⁸⁶ See Ms. Michelman's testimony quoted above, beginning at page 107.

⁸⁷ “**We need your urgent action right away.** Despite strong evidence that John Roberts is an opponent of women's rights, far too many senators are sitting on the fence about this nomination, and they must clearly hear that women want them to reject this nominee. PLEASE take a minute to **call your senators' offices** — regardless of party — and URGE them in the strongest possible terms to vote NO on this nomination.” <http://www.now.org/> (viewed 14 Jan 2006).

last gasp

On Tuesday, 17 Jan 2006 Feminist Majority issued a terse press release, which is quoted here in its entirety:

Senate Judiciary Committee Democrats won a victory⁸⁸ in delaying the committee vote on Supreme Court nominee Samuel Alito to January 24. Women's rights and civil rights leaders are extremely concerned about press reports and statements made by Senate Democrats over the weekend indicating that the filibuster option is highly unlikely.

"Women must refuse to take no for an answer," said Eleanor Smeal, president of the Feminist Majority. "Too much is at stake for women's rights and civil rights to give up on stopping Alito. The Feminist Majority and other groups committed to preserving the past 40 years of progress for women and people of color will intensify our efforts to block Alito and save the Supreme Court."

Feminist Daily News Wire, "Alito Committee Vote Scheduled for January 24," (17 Jan 2006)

<http://www.feminist.org/news/newsbyte/uswirestory.asp?id=9469>

On Thursday, 19 Jan 2006, Feminist Majority issued another press release, which is quoted here in its entirety:

The momentum to stop the confirmation of Samuel Alito to the Supreme Court is growing. Several Democratic Senators have already announced their intention to oppose Alito. These Senators include Patrick Leahy (VT), Ranking Democrat on the Senate Judiciary Committee; Judiciary Committee member Ted Kennedy (MA); Barbara Mikulski (MD); and Max Baucus (MT). Senators Leahy and Baucus had voted to confirm John Roberts in September. The option for a filibuster to block Alito is still on the table.

Feminist Daily News Wire, "No on Alito Momentum Building," (19 Jan 2006)

<http://www.feminist.org/news/newsbyte/uswirestory.asp?id=9474>

I wish this press release were true, but the Truth is that these feminists are delusional. Having *four* Democrats announce they will vote against Alito is *not* evidence that Alito will be denied a seat on the U.S. Supreme Court. The likelihood is that Alito will be confirmed by *at least* a six-vote margin.⁸⁹ Even if *all* the Democratic Senators vote against Alito, I would still expect Alito to be confirmed — therefore, the only strategy that makes sense is for the feminists to convince Republican Senators to vote against Alito. Because, as of 19 Jan 2006, *zero* Republicans have announced they will vote against Alito, it is delusional to say that "momentum is growing" against Alito.

⁸⁸ This was *not* a victory. Under the U.S. Senate rules, any Senator is entitled to a one-week delay in any committee vote, as a matter of right.

⁸⁹ There are 55 Republicans, 44 Democrats, and 1 Independent in the U.S. Senate. One Democrat — Ben Nelson of Nebraska — has, as of 19 Jan 2006, already announced he will vote to confirm Alito. The one Independent senator usually votes with Democrats. Assuming that all 55 Republicans vote for Alito, and at least one Democrat votes for Alito, then Alito will receive at least 56 votes.

While the filibuster option is technically “still on the table”, there is no public indication that Democrats will choose to filibuster.⁹⁰ Moreover, during 13-18 Jan 2006, several Democrats (notably Feinstein) have been publicly recommending against a filibuster.

Sunday, 22 Jan 2006, was the 33rd anniversary of *Roe v. Wade*. On Saturday night, and again early Sunday morning, I searched Google News for "Roe v. Wade" demonstration and I was dismayed to find that most of the top results were for pro-life demonstrations.⁹¹ On Monday, 23 Jan, at least 70,000 people attended a pro-life demonstration in Washington, DC, while a few dozen pro-choice demonstrators stood outside the U.S. Supreme Court building.⁹² Apparently, the pro-life movement was superior to the pro-choice movement in publicizing demonstrations, which gives the false impression that pro-lifers are the majority. This is just another example of how the feminists and pro-choice organizations have *failed* to present their message in an effective way. This is *not* the “fight” that feminists promised in November 2005, when Alito was nominated.

As an indication of how hopelessly ineffective the feminist and pro-choice organizations were, Hillary Clinton — arguably the most prominent feminist in the U.S. Congress — during Nov/Dec 2005 and during most of January 2006 avoided mentioning in public either abortion or Alito. My searches of Google News show no speech by Hillary Clinton on the 33rd anniversary of *Roe v. Wade*. My interpretation of her silence is that Hillary Clinton recognized a losing fight when she saw it, and she refused to waste her time on a hopeless battle.⁹³ Senator Clinton broke her public silence on Wednesday, 25 Jan 2006, during a speech on the Senate floor in which she

⁹⁰ See, e.g., Rick Klein, “Democrats doubt they can stop Alito,” *The Boston Globe*, (19 Jan 2006); Maura Reynolds, “Democrats Poised Against Alito,” *Los Angeles Times*, (19 Jan 2006) (“... unlikely to mount a filibuster to halt his confirmation.”); Maura Reynolds, “Democrats unlikely to filibuster Alito,” *Baltimore Sun*, (19 Jan 2006) (“... few expressed enthusiasm for a filibuster.”); Dan Balz, “More Democrats Say They Will Oppose Alito, But Filibuster Less Likely, Strategists Note,” *The Washington Post*, page A04 (20 Jan 2006).

⁹¹ Even in San Francisco, which has a reputation of being dominated by liberals, the pro-life demonstration was larger than the pro-choice demonstration. Henry K. Lee, Wyatt Buchanan, Michael Cabanatuan, “SAN FRANCISCO ABORTION SHOWDOWN,” *San Francisco Chronicle*, page B1, (22 Jan 2006) (“Although they [Abortion rights advocates] were easily outnumbered by the [pro-life] marchers, the pro-choice supporters were loud and confrontational.”).

⁹² Michelle Boorstein, “Protesters See Mood Shift Against ‘Roe’,” *The Washington Post*, page A03, (24 Jan 2006).

⁹³ If large numbers of women had become vigorously involved in supporting legal rights to an abortion (including mailing letters to their Senators, urging opposition to Alito), the fight would *not* have been hopeless.

said she would vote against Alito.⁹⁴ The following day, Hillary Clinton again ignored the problem of Alito.⁹⁵ This is *not* the “fight” that feminists promised in November 2005, when Alito was nominated.

On Thursday, 26 Jan 2006 — when the full Senate was debating the Alito confirmation — the Feminist Majority website had only two daily news stories: (1) sexual harassment on college campuses and (2) how Ambrea Phillips, a female high school pupil in Tennessee, was allowed to return to an otherwise all-male weightlifting class. Twenty years from now, no one will care about women's rights to participate in high school weightlifting classes, but I expect at least tens of millions of American women to wonder why *Roe v. Wade* was overruled by Alito and four other Supreme Court Justices. This is *not* the “fight” that feminists promised in November 2005, when Alito was nominated.

On Thursday afternoon, 26 Jan 2006, a small group of Democratic Senators announced that they would filibuster the confirmation of Alito (see above, beginning at page 117). Various feminist groups, including the National Organization for Women (NOW) and Feminist Majority, had been demanding a filibuster. About 26 hours after the announcement of the filibuster, the NOW website offered no indication that NOW was aware of the plans for a filibuster.⁹⁶ The Feminist Majority website was more current, as they posted a terse news release on Friday afternoon, which is quoted here in its entirety:

A group of Democratic Senators, led by Massachusetts Senators Ted Kennedy and John Kerry, has launched a filibuster to block the confirmation of Samuel Alito to the Supreme Court. Senate Majority Leader Bill Frist (R-TN) has called for a cloture vote on Monday at 4:30 p.m. to end debate and move to a vote on Alito. To win a cloture vote, Frist has to muster 60 votes in favor of ending debate.

“Millions of people have called and emailed their Senators, urging them to save the Supreme Court for women’s rights, civil rights, environment protections, civil liberties, separation of church and state, disability rights, and to stop a Bush power grab.

The Democrats have heard this message loud and clear,” said Eleanor Smeal, president of the Feminist Majority. “This filibuster is historically important because it is sending a message to the President — people will not tolerate his packing of the Supreme Court.”

Feminist Daily News Wire, “Group of Senate Democrats Launch Filibuster on Alito,” (27 Jan 2006) <http://www.feminist.org/news/newsbyte/uswirestory.asp?id=9489>

⁹⁴ *Congressional Record*, pages S67-S69 (25 Jan 2006).

⁹⁵ Marc Humbert, “Now Sen. Clinton Battles Over Health Care,” *Associated Press*, (26 Jan 2006 19:34 EST).

⁹⁶ On 29 Jan, the NOW webpage titled “Enraged & Engaged” expressed the intention “to bring grassroots activists to DC between January 3 and January 20.” The original scheduled date for a full vote on the floor of the Senate was 20 Jan, which had been postponed twice, and was currently 31 Jan. This particular webpage had not been revised since it was created on 13 Dec 2005 and, according to the W3C validator, it had 66 mistakes in HTML syntax.

Later in the evening of Friday, 27 Jan, NOW redeemed themselves with a splendid pop-up window on their homepage that said:

Support the Filibuster! Defeat Alito!

They said a filibuster would never happen.

You proved them wrong.

Now they say we don't have enough votes.

Let's prove them wrong again.

We have until Monday at 4:30 pm to convince other senators to join Kerry and Kennedy's filibuster of Samuel Alito.

The clock is ticking ...

Call the Senate NOW!

NOW homepage (27 Jan 2006, viewed at 19:40 EST) <http://www.now.org/> .

This excellent advertisement appeared less than three days before the cloture vote, probably too late to be effective, but it is nonetheless an excellent exhortation. A clock shows the number of days, hours, minutes, and second remaining until the scheduled cloture vote (less than 3 days), which clearly shows the urgency of acting immediately. This advert is a *big* improvement over the previous advert in this space that shows photos of four women who died from illegal abortions, and the earlier advert in this space that urged women to call their senators to oppose Chief Justice Roberts *after* he had been confirmed.

On Saturday and Sunday, 28-29 Jan 2006, the Feminist Majority website posted zero news stories. I remarked above, at page 121, on this silence during a crisis. This is *not* the “fight” that feminists promised in November 2005, when Alito was nominated.

On Monday, 30 Jan 2006, the day the filibuster began and ended, the Feminist Majority website posted the following three paragraph news story, of which the last two paragraphs are quoted here:

The filibuster against Alito is being led by Massachusetts Democratic Senators Ted Kennedy and John Kerry. “This filibuster is historically important because it is sending a message to the President — people will not tolerate his packing of the Supreme Court,” said Eleanor Smeal, president of the Feminist Majority.

“It's no secret that Judge Alito was chosen to please the extreme right wing of the Republican party after that same faction opposed the nomination of the President's own White House counsel [Harriet Miers],” said Senator Kennedy. “President Bush knew when he chose Judge Alito that he would be a polarizing figure. He selected him for that reason.

For the same reason, the Senate must stand on principle and oppose his confirmation.”

Feminist Daily News Wire, “Cloture Vote to be Held Today on Alito Nomination,” (30 Jan 2006) <http://www.feminist.org/news/newsbyte/uswirestory.asp?id=9492>

I hate to say this, but the people do “tolerate his packing of the Supreme Court”. Opinion polls show the public is in favor of confirming Alito, although I doubt that those polled were well informed about Alito's views. I think an accurate description of the public's attitude toward the

confirmation process is *apathetic*. And, since the end of the hearings in the Judiciary Committee on 13 Jan 2006, the news media has been predicting the confirmation of Alito by the Senate, but there has been little public opposition reported in the news media.

As for Senator Kennedy calling Alito a “polarizing figure”, the most polarizing figure in America today seems to be Hillary Clinton — people either admire her or hate her, with few people without a strong opinion about her. If Alito is a bad person because he is a “polarizing figure”, then Kennedy should also oppose Hillary Clinton. Kennedy seems to have difficulty determining why Alito would be an undesirable Justice. Kennedy *should* be focused on Alito’s anti-abortion views, Alito’s opposition to a rigid wall between church and state, Alito’s deference to government and business in disputes with individual people,

reaction after the defeat

The National Organization for Women posted the following terse comment hours after the defeat for liberals in the cloture vote:

We commend the 25 honorable senators, led by John Kerry and Ted Kennedy, who voted on principle today — choosing a valiant stand for justice over weak-kneed capitulation to George Bush's stacking of the Supreme Court.

Today's vote is the only Alito vote that really counts. Votes against Alito tomorrow are irrelevant, and no senator who voted "Yes" today can hide behind a "No" vote tomorrow.

Supporters of women's rights, civil rights and the separation of powers lost this pivotal battle because senators who should have been fighting for their constituents chose not to do so. But in the process we exposed the despicable agenda of the right wing, and their unrelenting determination to undermine our rights and liberties.

This is the first of many fights for the soul of our democracy, and we will eventually emerge victorious.

Kim Gandy, *Statement* (30 Jan 2006) <http://www.now.org/press/01-06/01-30.html> .

I agree with Ms. Gandy about the cloture vote being the only “vote that really counts”, because a filibuster was the only way to stop the confirmation of Alito, given the Republican majority’s support for Alito. See my remarks above, at page122.

I disagree with Kim Gandy when she says “senators who should have been fighting for their constituents chose not to do so.” I think the cloture vote was won because liberals, feminists, and civil rights organizations were *ineffective* in opposing Alito, despite having adequate time. It is obvious that the majority of people who participate in the political process (i.e., write letters to senators, vote in elections, contribute money to political organizations, etc.) in the USA has shifted to the right, because the pro-choice believers were silent. Opinion polls continue to show that pro-choice believers are a majority in the USA, but the political process does not reward *nonparticipants* in the process.

Finally, Kim Gandy has a promise: “we will eventually emerge victorious.” *After* the constitutional right to an abortion is overruled by Scalia, Thomas, Roberts, Alito, and one other justice, maybe then feminists and liberals will get their act together and seriously oppose pro-life justices. Frankly, I was appalled at the relative silence by liberals and feminists during the confirmation process of Chief Justice Roberts, the silence by liberals during the brief consideration of Harriet Miers, and the *ineffective* opposition to Justice Alito. If this is the way that liberals and feminists “fight”, then I expect *many* more pro-life victories.

The statement at the Feminist Majority website, which is quoted below in its entirety, was strange:

We lost on Samuel Alito today, but we will be stronger because of this fight.

Progressives were strengthened by today’s battle.

Women’s groups, African-American groups, Latina groups, labor, and environmental groups have been fighting shoulder to shoulder against this nomination. Each battle over these reactionary Supreme Court nominees is making this massive progressive coalition stronger.

Millions of Americans called and emailed their Senators, urging them to save the Supreme Court for women’s rights, civil rights, environment protections, civil liberties, separation of church and state, disability rights, and to stop a Bush power grab. Today’s vote showed that this demand for Senators to stand on principle and vote for cloture was heard by a significant bloc of 25 Senators.

This is already more than the 22 Senators who voted against the confirmation of Chief Justice John Roberts in September, and we expect the number of Senators who will vote against Samuel Alito tomorrow on the Senate floor to be nearly double the no on Roberts number of 22.

This fight lays the groundwork for a future filibuster of a right-wing Supreme Court nominee. This principled vote will only become easier as decisions by Justice Alito and Chief Justice Roberts demonstrate that they will work to drive the country back 40 years. And the threat of a filibuster will grow because these Senators were willing to step forward on the Alito nomination.

Tragically, not enough Senators stood up for women’s rights and civil rights by voting today to stop the confirmation of Judge Alito. But this fight shows that African-Americans, women’s rights supporters, Latinos, people with disabilities, and workers are not going to quietly lose their rights.

Eleanor Smeal, *Statement: Coalition Is Stronger for the Next Fight*, (30 Jan 2006)

<http://www.feminist.org/news/presstory.asp?id=9495> .

The principal message here is that the liberals are somehow “stronger” as a result of getting knocked out in the U.S. Senate. That is total nonsense. Ms. Smeal characterizes the 25 senators who lost as a “significant bloc” — this is ludicrous, it’s only one-quarter of the Senate. Anyone interested in winning can ignore the losing 25%. Remember back in the year 1964, when Barry Goldwater received 38% of the vote and Goldwater was ridiculed as a big failure by Democrats? Well, 38% is 1.5 times better than the 25% in Ms. Smeal’s so-called “significant bloc”.

Ms. Smeal goes further and suggests that opposition gets easier after Justices Roberts and Alito have shown “they will work to drive the country back 40 years.” She’s probably correct, because people get angrier about actually losing their legal rights than about the hypothetical possibility of losing those rights. But after Roberts and Alito are confirmed, it will be too late to remove them from the Court. Justices Roberts and Alito are now 51 and 55 years of age and they could easily serve on the Court until the year 2035. If one wants a continuation of — or an expansion of — constitutional privacy rights, including a legal right to abortion, it was very important that neither Roberts nor Alito be confirmed. The confirmation of these two justices is a significant defeat for liberals, and the consequences of these defeats will be felt by children whose parents have not yet been born. There is no way that propaganda from Kim Gandy or Eleanor Smeal can whitewash that defeat for liberals, and that defeat for women who want an abortion.

In my opinion, feminists and liberals should blame themselves for being *ineffective* in convincing Americans to oppose Alito. Blaming senators is a cheap shot — senators do what will get them re-elected, such as paying attention to people who contribute money to their campaigns and paying attention to citizens who will actually vote in their elections. In addition to the specific examples of poorly written statements and examples of obsolete webpages mentioned above, the feminists and pro-choice organizations have a long history — going back to at least the late 1970s — of asking for money once or twice a year because of some alleged “crisis”. When a *real* crisis, such as the nomination of Alito occurs, many potential donors may ignore the call to contribute as just another piece of hysterical exaggeration.

news media ignored anti-Alito organizations

From 1 Nov 2005 through 31 Jan 2006, I looked several times each day for news about Alito in each of the following sources:

- the homepages of both *The Washington Post* and the *San Francisco Chronicle*,
- the Associated Press current news,
- the Supreme Court blog at *The Washington Post* website,
- the Google News search engine for the query Alito “Supreme Court”,

and I looked once each weekday at

- The Kaiser Family Foundation’s Daily Women’s Health Policy Report.

During January 2006, I noticed the absence in news stories about Alito in the mainstream media of mention of:

- liberal organizations (e.g., the ACLU, People for the American Way),
- feminist organizations (e.g., National Organization for Women, Feminist Majority), and
- pro-choice organizations (e.g., Planned Parenthood, National Abortion Federation, NARAL)

during the confirmation process. In the rare occasions when a liberal organization was mentioned in a mainstream media story about Alito, the journalists usually mentioned only People for the American Way, as if that one organization was typical of all of the liberal, feminist, or pro-choice organizations.

I first noticed this lack of coverage in the mainstream news media on 4 Jan 2006, when the major news sources failed to cover a joint press conference by three feminist organizations.⁹⁷ That was the first time I noticed this omission in coverage by major news media, although the omission may have been occurring before that 4 Jan 2006 example.

To check to see whether I had missed coverage of these organizations in the mainstream media, I did several searches of Google News on the night of 31 Jan 2006, which returned stories published during the previous 30 days, for the following search queries:

- "Kim Gandy" Alito
- "Feminist Majority" Alito
- "Planned Parenthood" Alito
- "National Abortion Federation" Alito

While these searches returned some hits from press releases, small-town newspapers, and pro-life websites, these searches confirmed that, during January 2006, the mainstream media were ignoring these feminist and pro-choice organizations.

I am surprised at this finding. The mainstream media is commonly accused of having a liberal bias. If the mainstream media were liberal, I would expect mentions of numerous liberal, feminist, or pro-choice organizations in news stories. Each of these organizations certainly issued *many* press releases during the three months of the Alito confirmation process.

I have no certain explanation for why the mainstream media ignored these liberal, feminist, or pro-choice organizations. Perhaps journalists wanted to concentrate on facts (including events in the Senate), and ignore advocacy or propaganda by nongovernmental organizations. Perhaps journalists mentioned these organizations back in November 2005, then made the judgment that the positions of these organizations were unchanged, and therefore were no longer genuine news.

It seems likely that failure of these organizations to get their positions mentioned in the mainstream media hurt the ability of these organizations to motivate citizens to write senators in opposition to Alito.

⁹⁷ See above, at page 131.

Are Democrats to Blame?

The weekend before the final vote in the U.S. Senate, Senator Barack Obama said on Sunday, 29 Jan 2006, “the Democrats have to do a much better job in making their case on these issues” of showing that Alito did *not* have core American values.⁹⁸

Two days after Justice Alito was confirmed, *The Washington Post* published an analysis of why Alito was confirmed. They credit (1) the Republican majority in the Senate and (2) the superior propaganda of the Republican administration in convincing people that Alito had mainstream values: “a guy who could be your neighbor in the suburbs.” Buried in *The Washington Post's* long, insightful analysis are the following sentences about why Democratic senators generally refused to fight on the abortion issue:

Neas [president of People for the American Way] and Aron [president of Alliance for Justice] always thought that Alito's views on abortion should be a focal point of the opposition, but it was not a strategy their Democratic allies in the Senate embraced. Heading into the 2006 elections, the last thing they [i.e., Democrats in the Senate] wanted was to look like a party supporting abortion on demand.

....

Abortion was ruled out as a major issue for fear of alienating moderate Democrats. Lois Romano and Juliet Eilperin, “Republicans Were Masters In the Race to Paint Alito: Democrats' Portrayal Failed to Sway the Public,” *The Washington Post*, page A01, (2 Feb 2006) <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/01/AR2006020101597.html>

There was probably no risk to the Democrats in refusing to fight on abortion, since liberals and feminists are guaranteed to prefer Democrats, even if the Democrats offend the liberals and feminists on some specific issues. The only credible political opposition to Democrats is the Republicans, who are much more offensive to liberals and feminists than Democrats. But, by abandoning the liberal, feminist, and pro-choice organizations on the Alito confirmation, the Democrats essentially agreed with the Republican propaganda that mainstream America wants restrictions on a woman's right to an abortion and that mainstream America wants to trade civil liberties for security.

One day after the confirmation of Justice Alito, the topic of Alito essentially disappeared from both the mainstream news media and feminist websites. On 9 Feb 2006, when I was preparing the final version of this essay, I searched Google News and found little analysis or comment on the failure of the Democrats, liberals, feminists, and pro-choice advocates to prevent the confirmation of Alito. Kate Michelman, the only representative of a feminist or pro-choice

⁹⁸ Jeff Zeleny, “Democrats didn't make their case on Alito, Obama says,” *San Jose Mercury News*, (29 Jan 2006); Jeff Zeleny, “Obama joins filibuster bid against Alito, But senator criticizes tactic, says it will fail,” *Chicago Tribune*, (30 Jan 2006).

organization to testify at the Judiciary Committee hearings on Alito, was quoted in several newspapers and I think her remarks are worth preserving here. Three days after the U.S. Senate confirmed Justice Alito, Michelman's hometown newspaper reported:

It's over," Kate Michelman sighed in a tone that did little to hide her feelings about the confirmation of Samuel Alito to the U.S. Supreme Court.

Alito and John Roberts' nominations to the court were supposed to lead to pitched battles with filibusters, "nuclear options" and millions spent waging election-style campaigns to win the public's support.

Michelman has been fighting such battles for three decades, first as head of Planned Parenthood of Harrisburg and then as president of NARAL Pro-Choice America for nearly 20 years.

The latest fight ended with little more than a whimper this week, as Democrats and moderate Republicans failed to mount a serious challenge to Alito's confirmation.

"It's just profound disappointment that we've arrived at this moment that the right wing has been dreaming of and planning for and working toward for 25 years," said Michelman, 63.

She said she's angry at conservative Republicans for trying to take away women's reproductive rights, at complacent abortion-rights supporters and at pro-choice lawmakers who didn't fight the nominations hard enough.

....

Turning the political tide won't be easy, with conservatives controlling the White House and Congress and shifting the judiciary, she said. She predicted a gradual shift by the Supreme Court that will restrict rights of women, minorities and people with disabilities.

"I have to give credit to the right wing, [which] has been very deliberate, has been focused, has had a plan of action. It's held its course very steady, it's held its candidates to a high standard of adherence to their views," Michelman said.

Abortion-rights supporters need to be as disciplined, she said.

Brett Lieberman, "Activist sees Alito as wake-up call in fight," *The Patriot-News*, Harrisburg, Pennsylvania, (3 Feb 2006).

On 29 Jan 2006, Jane Hamsher, a pro-choice feminist blogger called for people to stop giving money to NARAL after the awful job NARAL did in opposing the confirmations of Chief Justice Roberts and Justice Alito.

But something went horribly wrong with the Samuel Alito nomination Despite the fact that NARAL was whipping their membership into a checkwriting frenzy over the matter and money came flooding into their coffers for the express purpose of fighting this particular battle, NARAL waged no aggressive campaign against his confirmation. Over at **MyDD**, Matt Stoller gives an idea of what a true campaign *would* have looked like, but we saw nothing like that. Perhaps they thought the battle was already lost and not worth fighting, but they don't appear to have been telling people this when they were pumping them for money.

The fact is that Alito's elevation to the Supreme Court tips the balance inexorably toward the right, and yet in response NARAL sat on the war chest they had collected for the purpose of opposing him and did next to nothing.

Jane Hamsher, "NARAL and Coathanger Chafee," (29 Jan 2006 12:43 PST),

http://firedoglake.blogspot.com/2006_01_29_firedoglake_archive.html#113876660767761797

reprinted at “NARAL Gives Chafee Pass on Alito, Cashes Checks,” *San Francisco Bay Area Indymedia*, (1 Feb 2006) <http://www.indybay.org/news/2006/02/1799698.php> .

NARAL produced a widely criticized and misleading television advert about Roberts, NARAL withdrew their advert a few days after it first ran, and then the opposition to Roberts seemed to collapse. As Hamsher says, NARAL appears to have done essentially nothing to oppose Alito. For these reasons, NARAL may deserve to see its former financial supporters turn to other feminist or pro-choice organizations. But which feminist and pro-choice organizations should survive? From what I can see, *all* of the feminist and pro-choice organizations were equally *ineffective* in opposing Alito.

Hamsher’s article then calls for the defeat of Senator Chafee (the only Republican to vote against Alito, although Chafee did vote for cloture) and other so-called pro-choice Republicans. I think the defeat of these few pro-choice Republicans would be a *big* mistake for those of us who believe in a woman’s legal right to an abortion. If Senators are to be targeted for defeat, I suggest starting with the pro-life Republicans, especially the Republican leadership in the Senate. It was the Republican leadership in the U.S. Senate that insisted on *all* Republicans voting as a bloc, regardless of their individual opinion, thereby squashing the few Republicans who are personally pro-choice on abortion. Personally, voting along a strict party line is abhorrent, regardless of whether it is the Republican party line, the Democratic party line, the Communist party line, or the Nazi party line. I urge that people be valued as individuals, and *not* as members of a political group, which forces its members to vote in rigid lock-step with the party line. In short, we need the pro-choice Republicans in the U.S. Senate and we need them to be free to vote their conscience. Having pro-choice Republicans in the U.S. Senate who are free to vote their conscience moves us toward a bipartisan consensus that freedom of choice is a good thing.

My Concluding Comments

I am personally pro-choice on abortion, I favor the continuing expansion of constitutional privacy rights,⁹⁹ I favor a rigid wall of separation between church and state,¹⁰⁰ and I believe the Fourth Amendment has been weakened in a desire to accommodate law enforcement and public safety.¹⁰¹ Accordingly, I am gravely concerned that Judge Alito opposes a constitutional right to abortion, has a limited view of the role of the judiciary that makes new privacy rights unlikely,¹⁰² favors prayer in public schools,¹⁰³ and upheld the right of police to strip search a 10 y old girl without probable cause.¹⁰⁴

On the other hand, I believe it is highly *unlikely* that President Bush will nominate anyone with whom I agree on the above constitutional issues. It may be that Judge Alito — who is undeniably an unusually intelligent man, as well as an experienced appellate judge — is the best that Bush will nominate.

The concern¹⁰⁵ with precedent (i.e., upholding *Roe v. Wade* because it is 33-year old decision that has been reaffirmed many times) avoids the real issue: “Is legal abortion a good thing?” Because abortion is likely to come before the U.S. Supreme Court, the concept of an impartial judiciary prevents Judge Alito from giving his personal views on abortion during the confirmation process. Given that Senators can not ask Alito directly about abortion, all they can do is ask about his respect for precedent. Which is how we get into the silly position of demanding respect for precedent, even if the earlier case was wrongfully decided. I hope it is obvious that the Supreme Court *should* correct their errors, as soon as they realize their previous decision was wrong.

⁹⁹ Standler, *Fundamental Rights Under Privacy in the USA*, <http://www.rbs2.com/priv2.pdf> (Aug 1998).

¹⁰⁰ Standler, *Freedom from the Majority in the USA*, <http://www.rbs2.com/majority.pdf> (Nov 2005).

¹⁰¹ Standler, *Legal Aspects of Searches of Airline Passenger in the USA*, <http://www.rbs2.com/travel.pdf> (Dec 2004).

¹⁰² See above, beginning at page 52.

¹⁰³ See *C.H. v. Oliva*, above, beginning at page 25.

¹⁰⁴ See *Doe v. Groody*, above, beginning at page 42.

¹⁰⁵ For example, see the remarks of Senator Specter, above, at page 10, again at page 62, and again at page 84.

In addition to my unhappiness with President Bush's nominees, I am also appalled by the statements from feminists. Some of the feminist's statements are propaganda that not only repels thoughtful people, but also is *ineffective* in convincing people in the middle to support freedom for each individual to make their own autonomous choices on private matters, instead of having government restrict freedom. Strangely, nowhere in these feminist statements is a citation to the fact that opinion polls consistently favor a woman's right to an abortion, which makes continuation of *Roe v. Wade* a genuine mainstream view. And nowhere in these feminist statements is a hint that there are additional — perhaps better — reasons to support legalized abortion than the reasons given in *Roe*. The feminists put forth a weak argument to defend *Roe*, and to oppose Judge Alito, when a much stronger argument was possible. In the future, when *Roe* has been overruled (or so riddled with exceptions as to make the remaining rights from *Roe* meaningless), the cause (i.e., blame) for loss of reproductive freedom should be shared equally by:

- (1) the pro-life Christians who diligently organized a massive political campaign for more than 25 years to push a view held by a minority of Americans into the majority view of legislators and presidents,
- (2) feminists who responded to the anti-abortion positions with weak and ineffective reasoning,
- (3) citizens who are pro-choice, but who did not write letters to their U.S. Senators that urge opposition to pro-life justices on the U.S. Supreme Court,
- (4) and citizens who are pro-choice, but who did not vote in elections for U.S. Senators and the President.

In regard to reasons 3 and 4: democracy functions well only when everyone participates.

As I said above, on page 113, the struggle over the confirmation of Alito is *not* about liberal vs. conservative. It is about the effort of fundamentalist Christians who have hijacked the Republican party to use law to impose their moral values on everyone in America. Doesn't anyone want to fight for freedom and liberty anymore? A number of feminist or liberal organizations (including the ACLU and People for the American Way) have carefully explained why Judge Alito is a bad choice for civil liberties. But the people in America seem apathetic about civil liberties: people are not demanding that Republican Senators vote against Judge Alito.

We can only hope that — like some other justices appointed by conservative presidents since 1950 — Justice Alito will vote with liberals, now that he is on the U.S. Supreme Court.

Links

The following links are *not* a bibliography for this document. Full citations are given above for each quotation or fact. The following links are to additional information about Judge Alito.

<http://www.loc.gov/rr/law/alito.html> Library of Congress bibliography of articles by Judge Samuel Alito, and collection of links.

<http://www.law.umich.edu/library/news/topics/alito/alitoindex.htm> University of Michigan Law Library

<http://www.archives.gov/news/samuel-alito/> National Archives documents written by Alito.

<http://blogs.washingtonpost.com/campaignforthecourt/> Blog at *The Washington Post* has links to important news articles, opinions, and documents during one week. Archive of previous blogs:

<http://blogs.washingtonpost.com/campaignforthecourt/archives.html>

The *Post* also has an index to its own articles:

<http://www.washingtonpost.com/wp-dyn/content/linkset/2005/03/24/LI2005032400136.html>

<http://media.pfaw.org/stc/AlitoPreliminary.pdf> People for the American Way, *The Record of Samuel Alito: A Preliminary Review*, 24 pp. (31 Oct 2005). This document is unusual amongst political advocacy in that it gives a scholarly citation to legal cases.

<http://media.pfaw.org/stc/alito-final.pdf> *Final Report*, 155 pp. (4 Jan 2006).

http://www.prochoiceamerica.org/publications/liberty_risk_alito.cfm National Abortion Rights Action League (NARAL), *Liberty at Risk: The Vulnerability of Reproductive Rights Under Alito*, 24 pp. (14 Dec 2005).

<http://www.nwlc.org/pdf/NWLCAlitoReport12-15-05.pdf> National Women's Law Center, *The Nomination of Samuel Alito: A Watershed Moment for Women*, 36 pp. (15 Dec 2005). From the style of this report, one can tell that it was written by a lawyer.

<http://www.aclu.org/scotus/2005/23216res20051222.html> ACLU Report on Alito (22 Dec 2005).

<http://www.aclu.org/scotus/alito/> Alternate URL.

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