

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

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

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

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

I thank you very much, Judge.

Chairman SPECTER. Thank you, Senator Biden.

Senator Kyl?

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

Senator KYL. Thank you, Mr. Chairman.

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

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

She will always be remembered by Arizonans and all Americans as an extraordinary public servant.

Judge Alito, I would like to discuss your background and experience in the context of other Justices on the Supreme Court so that everyone understands how well you satisfy what we have come to expect from our top judges. Like all the sitting Justices, you had an outstanding education. One of your classmates at Yale Law School, Tony Kronman, who later went on to be the dean of the law school and could, I believe, fairly be described as a political liberal, has recently remarked, and I quote, “He impressed me”—speaking of you—“as being more interested in the technical, intellectual challenges of the law and its legal reasoning than its political uses or ramifications.” Thus, even in your early 20’s, it appears you were focused on the law as an independent pursuit rather than using law to influence political ends.

With your intellect and education, you could have become a wealthy attorney, but instead you devoted virtually all of your legal career to the public service. In doing so, you meet, and even exceed, the stellar examples set by Justices Thomas and Souter, each of whom devoted most of their pre-judicial careers to public service. Perhaps this is because, like Justices Ginsburg and Scalia, you had a father who was an immigrant to this Nation. It seems that immigrants often have a special understanding of the incredible opportunities that this Nation affords its citizens. Moreover, your father’s long service to the people of New Jersey both as a school-teacher and as a civil servant in the State legislature plainly served as a model for you.

I also note that you served in the U.S. Army Reserves from 1972 until 1980. If confirmed, only you and Justice Stevens would have any military experience. You would also be the first Supreme Court Justice to have served in the Army Reserves since Justice Frank Murphy did so during World War II.

You have spent much of your career as a Federal prosecutor pursuing terrorists, mob kingpins, drug dealers, and others who threaten our safety and our security. Justice Souter had a distinguished career as a State prosecutor, but no sitting Justice has served as a Federal prosecutor. Again, this experience could prove helpful given that approximately 40 percent of the Supreme Court docket involves criminal matters.

You also served as an attorney in the executive branch. Like Chief Justice Roberts, you served in the Solicitor General’s office representing our Government before the Supreme Court. And like Justice Scalia, you served in the Office of Legal Counsel, providing constitutional advice to the President and the rest of the executive branch. In both of these roles, your job was to advance the policies of a President who twice won an electoral college landslide. He set the agenda, and you helped him implement it.

Similarly, Justice Thomas served Presidents Reagan and Bush in political/legal capacities, and Justice Breyer also worked in political jobs, both in President Johnson’s Justice Department and as a lawyer to this Committee.

I note that you were just 39 when nominated to serve on the Third Circuit. Justice Kennedy was only 38 when nominated to the Ninth Circuit, and Justice Breyer only 42 when nominated to the

First Circuit. Like them, you now have a great deal of hands-on experience that you can bring to the Court for years to come.

During your judicial service, you amassed an impressive record for the Senate to review, including more than 350 authored opinions. It is this judicial record that should be the focus of this Committee, just as it was with all of the other sitting Justices on the Court. It appears to me that you easily fit into the mold of what this Nation has come to expect from a Supreme Court Justice: a first-rate intellect, demonstrated academic excellence, a life of engagement with serious constitutional analysis, and a reputation for fair-mindedness and modesty. These are the standards for a Supreme Court Justice, and you plainly meet these expectations. As a consequence, I view your nomination with a heavy presumption in favor of confirmation. Before I conclude, I would like, though, to address two other points.

First, some of my colleagues are fond of asking the question, Which side are you on? You have heard that today. Politicians must pick sides regularly, every time they vote, so it is perhaps natural that they see the world as a battle between competing groups. But it is wholly inappropriate as an approach to the judicial role. The only relevant side is that of the law and the Constitution. We do great injury to the integrity of the court system when we start speaking of sides and stop devoting ourselves to the pursuit of impartial justice.

During Chief Justice Roberts's confirmation hearings, I was struck by the way he answered the question. Then Judge Roberts explained that he had been asked earlier in the confirmation process, Are you going to be on the side of the little guy? Roberts explained that this question troubled him, and this is how he answered. He said, "If the Constitution says that the little guy should win, the little guy is going to win. But if the Constitution says that the big guy should win, well, then the big guy is going to win because my obligation is to the Constitution. That's the oath. The oath that a judge takes is not that I will look out for particular interests. The oath is to uphold the Constitution and the laws of the United States." And this is the essence of justice. Our courts provide a neutral forum for the adjudication of disputes under the law, not based on economic or political power, on race, on sex, or any other personal characteristics. Big guy, little guy—it should make no difference. The rule of law demands neutrality.

Second, I want to address the proper scope of questioning during these hearings, a matter that has also come up already. As I reminded Chief Justice Roberts at his hearings, the American Bar Association Model Code of Judicial Conduct dictates that, and I quote, "a judge or candidate for election or appointment to judicial office shall not, with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office." In other words, no judicial nominee should answer any question that is designed to reveal how the nominee will rule on any issue that could come before the Court. This rule has come to be known as "the Ginsburg standard" because Justice Ginsburg stated during her own confirmation hearings that she would give no forecasts, no hints about how she

would rule on issues. And I was pleased to see that Chief Justice Roberts refused to prejudge issues or make promises in exchange for confirmation votes. We are all better off because of his principled stand.

Soon after his confirmation, Justice Ginsburg was asked about this Ginsburg standard as applied to the Roberts hearings, and she said, "Judge Roberts was unquestionably right. My rule was I will not answer a question that attempts to project how I will rule in a case that might come before the Court." In other words, Justice Ginsburg reaffirmed the Ginsburg standard.

In light of the Chief Justice's confirmation hearings and Justice Ginsburg's later remarks, I asked my colleagues for basic fair play. Apply the same standards to Judge Alito that we applied to John Roberts, Stephen Breyer, Ruth Bader Ginsburg, and all of the other sitting Justices. Let's not invent a new standard for Judge Alito or change the rules in the middle of the game. Politicians must let voters know what they think about issues before the election. Judges should not.

And it is not a hypothetical matter. Senator Kennedy in his opening statement expressed concern about the extent of the executive branch's authority to conduct surveillance of terrorists and said ultimately the courts will decide whether the President has gone too far. Indeed they will.

Judge Alito, I will tell you the same thing I told John Roberts. I expect you to adhere to the Code of Judicial Conduct, and I want you to know that I will strongly defend your refusal to give any indication of how you might rule on any matter that might come before you as a judge or to answer any question that you believe to be improper under the circumstances. Congratulations, Judge Alito, on your nomination.

Chairman SPECTER. Thank you, Senator Kyl.
Senator Kohl?

**STATEMENT OF HON. HERBERT KOHL, A U.S. SENATOR FROM
THE STATE OF WISCONSIN**

Senator KOHL. Thank you, Mr. Chairman.

Judge Alito, let me also send my welcome to you this afternoon and to your family. You are to be congratulated on your nomination.

Through its interpretation of the Constitution, the Supreme Court hugely shapes the fabric of our society for us and for future generations. Over the course of more than 200 years, it has found a right to equal education regardless of race. It has guaranteed an attorney and a fair trial to all Americans, rich and poor alike. It has allowed women to keep private medical decisions private. And it has allowed Americans to speak, vote, and worship without interference from their Government.

Through these decisions and many more, the judicial branch has in its finest hours stood firmly on the side of individuals against those who would trample their rights. In the words of Justice Black, "The courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are nonconforming victims of prejudice or public excitement."