

My mother, who turned 91 a couple of weeks ago, unfortunately is not able to be here today, but I am sure she is watching at home. Thank you very much, Mr. Chairman.

Chairman SPECTER. Well, thank you, Judge Alito. You have a beautiful family, and we are delighted to have them with us on the confirmation proceedings.

We will have 10-minute rounds of opening statements, each Senator 10 minutes. We will then turn to the presenters, those who will be presenting Judge Alito formally to the Committee. And then we will administer the oath to Judge Alito, and we will hear his testimony.

We will begin tomorrow morning at 9:30 for the opening round of questions. Each Senator will have 30 minutes on the opening round, and we have a second round scheduled of 20 minutes for each Senator. And then we will see how we will proceed.

Our practice is to adhere to the time limits, and we do that for a number of reasons. One of them is that Senators come and go, and if we maintain the schedule, which is known to everybody, they know when to return for their next round of questions. We will take 15-minute breaks at a convenient time, and, again, we will hold the breaks to 15 minutes.

I have worked closely with Senator Leahy on scheduling matters and all other matters, and this is the model that we used for the confirmation of Chief Justice Roberts. It is our intention to conclude the hearings this week, and as Senator Leahy and I worked out, the arrangement is to have a markup on Tuesday, January the 17th, subject to something extraordinary happening.

Now let me yield to the distinguished Ranking Member, Senator Leahy.

Senator LEAHY. Well, Mr. Chairman, I don't want to hold up your opening statement, or the others. I do appreciate people being here. As the hearing for Chief Justice John Roberts showed, there will be real questions asked. I would hope Senators on both sides of the aisle would do that. I think it is important. We are talking about a position representing 295 million Americans.

On the schedule, I will work with the senior Senator from Pennsylvania, the Chairman. I understand one of our leaders once said that getting Senators to all move in order is like having bullfrogs in a wheelbarrow. But we will continue to work towards that, and I think the most important thing is we have a good, solid hearing this week.

Mr. Chairman, you have been totally fair in your procedures for this, as always.

**OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S.
SENATOR FROM THE STATE OF PENNSYLVANIA**

Chairman SPECTER. Thank you very much, Senator Leahy. And now we begin the opening statements.

No Senator's vote, except for the declaration of war or the authorization for the use of force, is more important than the confirmation of a nominee to the Supreme Court for a lifetime appointment. Judge Alito comes to this proceeding with extensive experience as a Government lawyer, as a prosecutor, and as a judge. He has written some 361 opinions. He has voted in more than 4,800

cases. And it is possible to select a few of his cases to place him at any and every position on the judicial spectrum. By selecting the right cases, he could look like a flaming liberal or he could look like an arch-conservative.

This hearing will give Judge Alito the full opportunity to address the concerns of 280 million Americans on probing questions which will be put to him by 18 Senators representing their diverse constituencies. I have reserved my own vote on this nomination until the hearing is concluded. I am committed as Chairman to a full, fair, and dignified hearing. Hearings for a Supreme Court nominee should not have a political tilt for either Republicans or Democrats. They should be in substance and in perception for all Americans.

There is no firmly established rule as to how much a nominee must say to be confirmed. While I personally consider it inappropriate to ask the nominee how he would vote on a specific matter likely to come before the Court, Senators may ask whatever they choose, and the nominee is similarly free to respond as he chooses. It has been my experience that the hearings are really, in effect, a subtle minuet, with the nominee answering as many questions as he thinks necessary in order to be confirmed.

Last year, when President Bush had two vacancies to fill, there was concern expressed that there might be an ideological change in the Court. The preliminary indications from Chief Justice Roberts's performance on the Court and his Judiciary Committee testimony on modesty, stability, and not jolting the system all suggest that he will not move the Court in a different direction. If that holds true, Judge Alito, if confirmed, may not be the swing vote regardless of what position Judge Alito takes on the political spectrum.

Perhaps the dominant issue in these hearings is the widespread concern about Judge Alito's position on a woman's right to choose. This has arisen in part because of a 1985 statement made by Judge Alito that the Constitution does not provide for the right to an abortion. It has arisen in part because of his advocacy in the Solicitor General's office seeking to limit or overrule *Roe* and from the dissenting portion of his opinion in *Casey v. Planned Parenthood* in the Third Circuit.

This hearing will give Judge Alito the public forum to address the issue as he has with Senators in private meetings, that his personal views and prior advocacy will not determine his judicial decisions, but instead he will weigh factors such as *stare decisis*, that is, what are the precedents; that he will weigh women's and men's reliance on *Roe* and he will consider too whether *Roe* is "embedded in the culture of our Nation."

The history of the Court is full of surprises on the issue. The major case upholding *Roe* was *Casey v. Planned Parenthood*, where the landmark opinion was written jointly by three Justices, Justice O'Connor, Justice Kennedy and Justice Souter. Before coming to the Court, Justice Souter, Justice Kennedy and Justice O'Connor, had all expressed views against a woman's right to choose. David Souter, as Attorney General of New Hampshire, even opposed changing New Hampshire's law prohibiting abortion even after the Supreme Court of the United States had declared it unconstitutional. At the time of Justice Souter's confirmation hearing, there

was a stop Souter rally of the National Organization for Women a few blocks from where we currently are holding this hearing, displaying in red a banner “Stop Souter or Women Will Die,” “Stop Souter Rally, a Mass Lobbying Day,” somewhat similar to this morning’s press where banners are paraded in front of the Supreme Court “Save Roe” and a brochure circulated again by NOW, “Save Women’s Lives, Vote No on Alito.”

The history of this issue has been one full of surprises. This hearing comes at a time of great national concern about the balance between civil rights and the President’s national security authority. The President’s constitutional powers as commander in chief to conduct electronic surveillance appear to conflict with what Congress has said in the Foreign Intelligence Surveillance Act. This conflict involves very major considerations raised by Justice Jackson’s historic concurrence in the *Youngstown Steel* seizure cases, where Justice Jackson wrote, “When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right, and all that Congress can delegate. When the President acts in absence of a congressional grant of authority, he can rely only upon his own independent powers. When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb.” And as Justice Jackson noted, “What is at stake is the equilibrium established in our constitutional system.”

Another major area of concern is congressional power, and in recent decisions the Supreme Court of the United States has declared Acts of Congress unconstitutional, really denigrating the role of Congress. In declaring unconstitutional legislation designed to protect women against violence, the Supreme Court did so notwithstanding a voluminous record in support of that legislation, but because of Congress’s “method of reasoning,” rather insulting to suggest that there is some superior method of reasoning in the Court.

When the Supreme Court handled two cases recently on the Americans with Disabilities Act, they upheld the Act as it applied to discrimination as to access, and declared it unconstitutional as it applied to discrimination in employment. They did so by applying a test of what is called “congruent and proportionate,” which candidly stated, no one can figure out. In dissent, Justice Scalia called it a flabby test, where the Court set itself up as the taskmaster to see if Congress had done its homework, and Justice Scalia said that it was an invitation to judicial arbitrariness by policy driven decisionmaking, and this hearing, I know, will involve consideration as to Judge Alito’s views on congressional power.

There is reason to believe that our Senate confirmation hearings may be having an effect on Supreme Court nominees on their later judicial duties. Years after their hearings, Supreme Court Justices talk to me about our dialogs at these hearings. This process has now evolved to a point where nominees meet most of the Senators. In this process, nominees get an earful. While no promises are extracted, statements are made by nominees which may well influence their judicial decisions. Chief Justice Roberts, for example, will have a tough time giving a jolt to the system after preaching modesty and stability. There is, I think, a heavy sense of drama

as these hearings begin. This is the quintessential example of separation of powers under our constitutional process, as the President nominates, the Senate confirms or rejects, and the successful nominee ascends to the bench. While it may be a bit presumptuous, I believe the Framers, if they were here, would be proud and pleased to see how well their Constitution is being applied.

My red light just went on, and I now yield to my distinguished colleague, Senator Leahy.

**STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR
FROM THE STATE OF VERMONT**

Senator LEAHY. Thank you, Mr. Chairman.

Good afternoon, Judge and Mrs. Alito, and the others.

Following up on what the Chairman was saying, the challenge for Judge Alito in the course of these hearings is to demonstrate that he is going to protect the rights and liberties of all Americans, and in doing that, serve as an effective check on Government overreaching. I have said that the President did not help his cause by withdrawing his earlier nomination of Harriet Miers in the face of criticism from a narrow faction of his own party who were concerned about how she might vote.

Supreme Court nominations should not be conducted through a series of winks and nods designed to reassure a small faction of our population, while leaving the American people in the dark. And no President, I think we would all agree, should be allowed to pack the courts, and especially the Supreme Court, with nominees selected to enshrine Presidential claims of Government power. The checks and balances that should be provided by the courts, Congress and the Constitution are too important to be sacrificed to a narrow partisan agenda.

This hearing is the opportunity for the American people to learn what Samuel Alito thinks about their fundamental constitutional rights and whether he—you, Judge—will protect their liberty, their privacy and their autonomy from Government intrusion.

The Supreme Court belongs to all Americans, not just to the person occupying the White House, and not just to a narrow faction of either political party, because the Supreme Court is our ultimate check and balance. Independence of the Court and its members is crucial to our democracy and our way of life, and the Senate should never be allowed to be a rubber stamp. Neither should the Supreme Court. So I will ask the Judge to demonstrate his independence from the interests of the President nominating him. This is a nomination to a lifetime seat on the Nation's highest Court. It is a seat that has often represented the decisive vote on constitutional issues, so we have to make an informed decision. That means knowing more about Samuel Alito's work in the Government and knowing more about his views.

I will, as the Judge knows, ask about the disturbing application he wrote to become a political appointee in the Meese Justice Department. In that application he professed concern with the fundamental principle of "one person, one vote," a principle of the equality that is the bedrock of our laws. This hearing is the only opportunity that the American people and their representatives have to consider the suitability of the nominee to serve as a final arbiter