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U.S. Senator Harry Reid's Remarks as Prepared for Delivery on the Senate Floor Before the Vote on the Nomination of Judge Samuel Alito to the U.S. Supreme Court

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SPEAKER: U.S. SENATOR HARRY REID (D-NV), SENATE MINORITY LEADER

[*] REID: I rise today to explain the reasons I will vote against the nomination of Samuel A. Alito to the Supreme Court of the United States.

In his opening statement to the Judiciary Committee, Judge Alito asked: "How in the world did I get here?" That rhetorical question raises a serious concern that has shadowed this nomination from the start. The fact is, Judge Alito became President Bush's candidate to replace Justice Sandra Day O'Connor only after the radical right-wing torpedoed the nomination of White House Counsel Harriet Miers and insisted that someone with Sam Alito's ideology be put forward in her place. That is how Judge Alito "got here."

I continue to believe that Harriet Miers received a raw deal. She is an accomplished lawyer, a trailblazer for women and a strong advocate of legal services for the poor. Not only was she denied the up-down vote that my Republican colleagues say every nominee deserves, but she was never even afforded the chance to make her case to the Judiciary Committee.

I believe that radical elements in the President's own party demanded that Miers withdraw not because of her lack of judicial experience as some claimed, but because they were insufficiently confident she would support their extreme agenda. The right wing's distrust of Harriet Miers, and their immediate elation when Judge Alito was named, raised my suspicions on the day he was nominated.

Those suspicions were heightened when Alito's 1985 application for a political job in the Reagan Administration came to light. In it, Alito stated, "I am and always have been a conservative." He spoke proudly of his work on behalf of the extreme agenda of the Reagan Justice Department, his disagreement with landmark rulings of the Warren Court in favor of equal rights, and his membership in right-wing organizations. In effect, the 1985 document amounted to Judge Alito's pledge of allegiance to a conservative Republican ideology.

I do not oppose the Alito nomination on the basis of a 20-year-old job application. Instead, I view that document as a road map to Judge Alito's subsequent judicial opinions and speeches.

Judge Alito's judicial opinions have been largely consistent with the ideological signals he sent in the 1985 job application and on other occasions. Professor Cass Sunstein of the University of Chicago Law School, who generally supported the nomination of John Roberts, analyzed Alito's opinions and found "a remarkable pattern" of "almost uniformly conservative" dissents. Professor Sunstein concluded that "the real question about Alito involves the disturbingly close link, in so many cases, between his political convictions and his legal conclusions."

My concerns about Judge Alito fall into three broad categories:

First, I fear he will not vindicate the role of the judiciary as a check on executive power. Second, he is a leader in the so-called "federalism" movement which would limit congressional power to pass environmental laws and remedy other national problems.

Third, in disputes between ordinary American citizens and large powerful entities like corporations and the government, Judge Alito is too often on the side of the powerful and against the interests of the individual.

I will address each of these concerns in turn.

First, I am disturbed by Judge Alito's overall deference to executive power. At a time when President Bush has asserted unprecedented authority over the lives of American citizens and the Republican-controlled Congress seems too willing to cede those powers to him, I cannot support the confirmation of a judge predisposed to give the President the benefit of every doubt.

In matters ranging from domestic spying to the use of torture, the current President has effectively declared himself above the law. Meanwhile, a Congress controlled by the President's party has stripped the courts of jurisdiction to hear habeas corpus cases brought by Guantanamo detainees, some of whom have absolutely nothing to do with terrorism.

In the face of such profound threats to the separation of powers in our Constitution, we need a Supreme Court comprised of independent and impartial judges willing to stand up to an imperial presidency.

Rather than serving as a check on President Bush's abuses of power, I worry that Judge Alito will instead serve as a rubber stamp. Both on and off the bench, Alito's writings and opinions show a record of extreme deference to executive power, whether exercised by the president or by federal and local law enforcement officials.

Even before he was a judge, Alito made a name for himself arguing for expansive executive power. As a Justice Department attorney, he wrote that the Attorney General should have absolute immunity from lawsuits arising from illegal wiretaps. He also argued on the side of a Tennessee police officer who shot and killed an unarmed 15 year old boy not because the officer believed the boy was armed, but to prevent escape from a petty crime.

Alito's judicial rulings on executive power heighten my concerns in this area. In the recent decision of *United States v. Lee*, he found that an FBI undercover probe that included audio and video surveillance of the defendant's hotel suite without a warrant did not violate the Fourth Amendment.

In an earlier case in which Judge Alito voted to uphold the strip-search of a 10-year-old girl, then-Judge Michael Chertoff, now President Bush's Secretary of Homeland Security, criticized Alito's views as threatening to "transform the judicial officer into little more than the cliché 'rubber stamp.'"

Judge Alito's unshakable deference to police officers conducting intrusive searches seems to extend to his view of the power of the president to act unilaterally when setting national policies.

In a speech to the Federalist Society in November 2000 he professed his strong belief in the so-called "unitary executive" theory of constitutional law, a theory embraced by those who advocate for expanding executive powers at the expense of the judicial and legislative branches of government.

Judge Alito's disturbing views on the constitutional separation of powers is also reflected in his refusal to condemn laws in which Congress strips courts of jurisdiction to hear certain disputes. For example, Senator Leahy asked the nominee if Congress could strip the Supreme Court of jurisdiction over all cases arising under the First Amendment. Alito declined to respond directly, saying the matter was the subject of academic dispute.

These comments lead me to doubt that Judge Alito fully appreciates that the role of the courts to protect constitutional rights and liberties in the face of an overreaching majority.

Second, I am concerned that Judge Alito would limit the authority of Congress to address environmental protection and other national needs. I fear that Alito would join Justices Scalia and Thomas in their activist campaign to narrow congressional power under the Commerce Clause, a movement that threatens important public health and welfare laws in the name of "federalism."

Once again, the roots of Judge Alito's ideology can be found in his work during the Reagan Administration. As Deputy Attorney General in 1986, Judge Alito recommended that President Reagan veto the Truth in Mileage Act, a law designed to prevent odometer tampering, because "it violates the principles of federalism."

And again, Judge Alito seems to have carried his Reagan-era ideology with him when he joined the Third Circuit. In the Chittester case, for example, he held that Congress lacks authority to allow state employees to enforce aspects of the Family and Medical Leave Act. His logic would cripple the ability of Congress to help people with real problems.

There is every reason to fear that Judge Alito will work to continue the Court's unwarranted restriction of Congressional power in these areas.

Third and finally, Judge Alito's nomination troubles me because in his 15 years on the bench he has repeatedly and consistently favored the power of government and corporations over the rights of individual American citizens. As many commentators have observed, Judge Alito hardly ever sides with the proverbial "little guy."

A Knight-Ridder review of Alito's 311 published opinions on the 3rd Circuit Court of Appeals found that Judge Alito very rarely supports individual rights claims. In a separate study, Professor Sunstein found that Judge Alito ruled against the individual in 84 percent of his dissents. In civil rights cases, Judge Alito has often voted to impose higher barriers for people with claims of discrimination. In *Bray v. Marriott Hotels*, his colleagues said Title VII of the Civil Right Act "would be eviscerated" if Alito's approach were followed. And in *Nathanson v. Medical College of Pennsylvania*, he dissented in a disability rights case where the majority said: "few if any Rehabilitation Act cases would survive" if Judge Alito's view were the law.

Perhaps the most important instance when the rights of an individual conflict with the interests of the government are when the state seeks to carry out the death penalty. Senators Leahy and Feingold asked Judge Alito whether it would be unconstitutional to execute an "unquestionably innocent man."

In my view such an execution would be plainly unconstitutional, but Judge Alito refused to say so. Instead, he spoke in bland bureaucratic terms about the need for the innocent person to file the proper petitions under proper federal rules.

That was a chilling moment. If the Constitution means anything it means that the state cannot put to death an "unquestionably innocent" person. If Judge Alito cannot say that without equivocation, he is not the kind of judge I want on the Supreme Court of the United States.

These three broad concerns about Judge Alito's record on the bench are all the more troubling in light of the fact that Judge Alito has been nominated to replace Justice Sandra Day O'Connor, a national icon who has been a voice of moderation and reason on the Court for the last quarter of a century.

President Bush was not obligated to nominate a clone of Justice O'Connor. But this President has no mandate to move the Supreme Court and American law in a radical rightward direction. That is precisely what replacing Justice O'Connor with Judge Alito will accomplish.

That Judge Alito has been nominated to replace Justice O'Connor is relevant in another sense. Justice O'Connor was the first of only two women ever to sit on the Supreme Court. It remains disturbing to me that she would be replaced by a man, leaving only one woman on the nine-member Court.

Today, more than half of the nation's law students are women. There are countless qualified women on the bench, in elective office, in law firms, and serving as law school deans. I can't believe the President searched the country and was unable to find a qualified female nominee. But maybe he was unable to find a qualified female nominee who satisfied the far right wing of the Republican Party.

Meanwhile, for the third time, this President has turned down the opportunity to make history by nominating the first Hispanic to the Court. How much longer must Hispanics across America wait before they see someone on the nation's highest court who shares their ethnic heritage and their shared experiences?

I have no doubt that Sam Alito is a decent man. He is well liked and respected by his colleagues and has served as a mentor to many. He is to be admired for devoting his entire legal career to public service.

But a confirmation debate is not a popularity contest. The rights and liberties of the American people are at stake. This particular nomination raises profound questions about our system of checks and balances.

We need to ask whether a Justice Alito will serve as an effective check on a swaggering President and his reckless policies.

At this critical moment in our nation's history, I cannot support the confirmation of this nominee to fill this vacancy on the Supreme Court of the United States.