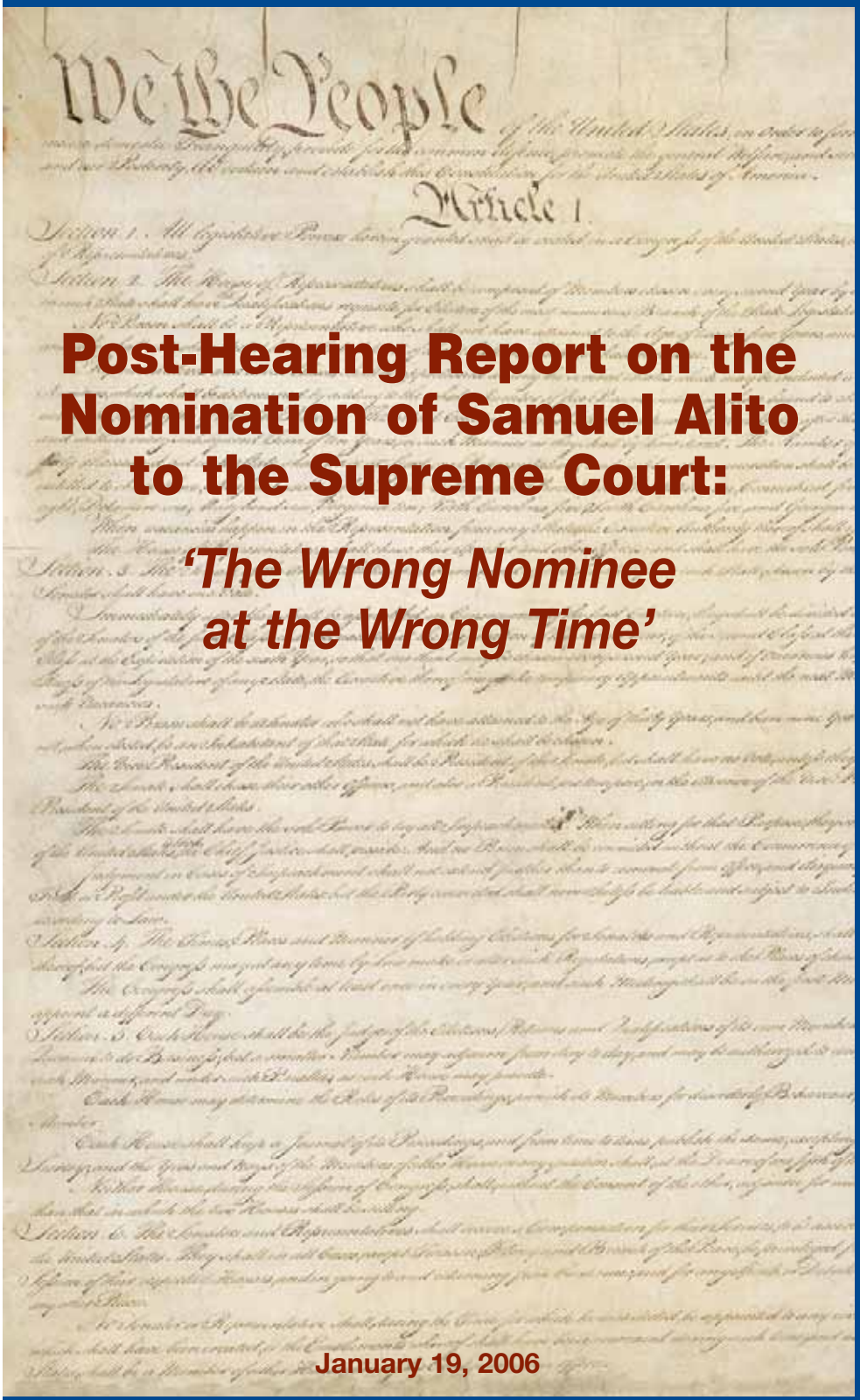
SPECIAL REPORT



Post-Hearing Report on the Nomination of Samuel Alito to the Supreme Court:

'The Wrong Nominee at the Wrong Time'

January 19, 2006

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PEOPLE FOR THE AMERICAN WAY

Table of Contents

I. INTRODUCTION

Even before Senate Judiciary Committee hearings began, the nomination of Samuel Alito to the Supreme Court had produced significant concern and opposition. Alito's record, beginning even before his 1985 job application for a political position in Edwin Meese's Justice Department, demonstrated a career-long pattern that puts him far to the right of Justice Sandra Day O'Connor, the swing justice on the Court whom he has been nominated to replace, on such key issues as presidential power, Congress' authority to protect Americans, privacy, reproductive rights and health, civil rights, religious liberty, and the environment. Alito's far-right supporters became even more enthusiastic as his record became more clear: Alito's dissents are more conservative than those of even fellow Republican judges 91% of the time;[1] his dissents argue against individual rights 84% of the time;[2] he has sided against 75% of people raising discrimination claims and against immigrants 7 out of 8 times;[3] and he has "seldom sided" with consumers suing big business.[4] As explained by law professor Jonathan Turley, who supported the confirmation of Chief Justice John Roberts, "there will be no one to the right of Sam Alito on this Court," and he is "the wrong nominee at the wrong time in this country."[5]

At his confirmation hearings, Judge Alito not only failed to resolve these concerns, but actually reinforced them. He evaded many questions, and sometimes appeared to mislead the Committee, even with respect to his own cases and opinions. His substantive answers demonstrated that the problems with his record are real, and in fact raised new ones. As one newspaper explained, Judge Alito "did not satisfy concerns that his philosophy has the balance the Court needs," and "we don't want him as a judge" on the Supreme Court.[6]

For example, even apart from his record on particular issues, Alito has been criticized because he "massages" precedents and legal doctrines inconsistently "to make them say what he wants them to say."[7] At the hearing, Sen. Charles Schumer demonstrated that "many of your fellow judges criticized you for ignoring, abandoning, or overruling precedent," and for "disregard of established principles of stare decisis."[8]

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1 *See* Transcript of "A survey course on Samuel Alito's legal views," NPR: *Morning Edition* (Nov. 11, 2005).

2 Letter from Prof. Cass Sunstein to Sen. Edward Kennedy (Dec. 29, 2005).

3 A. Goldstein and S. Cohen, "Alito, In and Out of the Mainstream," *Washington Post* (Jan. 1, 2006).

4 S. Henderson and H. Mintz, "Review of cases shows Alito to be staunch conservative," *Knight-Ridder* (Dec. 7, 2005).

5 Interview with Jonathan Turley, *NBC: The Today Show* (Oct. 31, 2005)(Transcript available at http://thinkprogress.org/2005/10/31/alito-turley/) (visited Jan. 18, 2006); J. Turley, "Roberts the Elder," *Village Voice* (Sept. 13, 2005); J. Turley, "Troubling Times, a troubling nominee," *USA Today* (Jan. 9, 2006).

6 "Alito wrong for Supreme Court" *Grand Forks Herald* (Jan. 16, 2006).

7 J. Bravin, "Alito prefers scalpel to sledgehammer," *Wall Street Journal* (Nov. 16, 2005) (quoting Professor Robert Post of Yale Law School).

8 Transcript of the Hearing on the Nomination of Samuel A. Alito, Jr. to be Associate Justice of the Supreme Court, Senate Judiciary Committee, 109th Cong., 2nd Sess. (Hereinafter "Hearing Trans.") at 229, 227 (Jan. 10, 2006).(Citations are to the transcript as published daily in the *Washington Post* and printed out in a single Word document.)

The hearing testimony similarly demonstrated Alito's inconsistent application of legal doctrines that, almost inevitably, harms individuals and favors government or large corporations. For instance, Alito testified that he had dissented in one case involving claims of egregious discrimination against a disabled person because he felt the relevant issue had not been adequately raised by the victim's lawyer in his brief and the principle of "judicial self-restraint" required that result.[9] Yet in another case, the majority noted that Alito's dissent in favor of a large corporation against an individual who had suffered serious injury faced an "insurmountable procedural difficulty," because the corporation had never raised the issue relied on by Alito, either at trial or on appeal.[10] In another dissent, Judge Alito claimed at the hearing, he felt it was proper to rely on an argument never raised by a state government against a criminal defendant because of considerations of "federalism" and "comity". Hearing Trans. at 463, 464 (Jan. 12, 2006). But Alito neglected to mention that the majority had specifically rejected that claim, pointing out that "consideration of that other great pillar of our judicial system -- restraint -- cuts sharply in the other direction" so that judges avoid "acting as advocates for the State rather than as impartial magistrates." *Smith v. Horn,* 120 F.3d 400, 409 (3d Cir. 1997) *cert. denied*, 118 S. Ct. 1037 (1998).

As the *New York Times* concluded, Alito's testimony gave Senators clear "reasons to oppose his nomination," including "evidence of extremism," his "opposition to *Roe v. Wade*," his "support for an imperial presidency," his "insensitivity to ordinary American's rights," and "doubts about nominee's honesty."[11] The *Sacramento Bee* asked whether members of Congress of both parties will "stand up" against Alito's "corrosive agenda" of limiting Congress' authority while expansively interpreting presidential power and "[i]f not now, when?"[12] The *Oregonian* raised a new concern, pointing out that Alito testified that the meaning of the Constitution should be interpreted strictly in accord with its text and the "meaning someone would have taken 'from the text' at the time of its adoption," which the paper characterized as an "18th century view" that could "roll back many hard-fought federal protections that Americans enjoy today."[13] Columnist David Broder concluded that the hearings showed Alito would be "the perfect company man who is likely to deliver exactly the kind of conservative rulings Bush prefers."[14] This is because, as the *Baltimore Sun* explained, despite Alito's "periodic assurances of having an open mind, the disturbing impression from the hearings is that on critical issues such as abortion, civil rights, and the limits of executive power, he does not."[15]

The remainder of this post-hearing report summarizes several major areas of concern about Judge Alito's record that his testimony failed to resolve or exacerbated. These include presidential and executive power, congressional authority, reproductive rights, civil rights and other individual rights claims, and credibility issues. Based on the hearing as well as Judge Alito's prior record, the Senate clearly should reject his confirmation.

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[9] Hearing Trans. at 253 (Jan. 11, 2006); 462 (Jan. 12, 2006).

[10] *Dillinger v. Caterpillar Inc.*, 959 F.2d 430, 447(3d Cir. 1992); Hearing Trans. at 464-65 (Jan. 12, 2006). Judge Alito could not explain the difference because he testified that he did not recall the *Caterpillar* case.

[11] Editorial, "Judge Alito in his own words," *New York Times* (Jan. 12, 2006).

[12] Editorial, "Constitutional powers hanging in the balance," *Sacramento Bee* (Jan. 15, 2006).

[13] Editorial, "The judge of Bush's dreams," *The Oregonian* (Jan. 15, 2006) *See also* "Not fit for the Court," *Boston Globe* (Jan 14, 2006).

[14] D. Broder, "Bush has found his 'yes man' in Alito," *Washington Post* (Jan. 15, 2006).

[15] "Not good enough," *Baltimore Sun* (Jan. 15, 2006).

II. JUDGE ALITO'S TESTIMONY FAILED TO RESOLVE, AND IN FACT REINFORCED, CONCERNS ABOUT HIS UNDUE DEFERENCE TO PRESIDENTIAL AND EXECUTIVE BRANCH POWER

One of the most significant concerns about Judge Alito is whether, in light of his troubling record, he can be expected to serve on the Supreme Court as a truly independent and effective check on presidential and executive branch power. Both Republican and Democratic Senators on the Judiciary Committee acknowledged the importance of this issue, especially in light of the unprecedented efforts by the current Administration to exert unilateral power in such areas as NSA wiretapping and indefinite detention of American citizens as alleged "enemy combatants." Unfortunately, Alito's testimony at the hearing served only to reinforce these concerns.

Initially, several Senators questioned Judge Alito about his statement, after he became a judge, that he adheres to the theory of the "unitary executive" –- a theory used by the Bush Administration and others to "aggressively push the constitutional boundaries" of presidential power.[16] Alito tried to minimize the importance of the issue by suggesting that the "unitary executive" theory refers only to the president's control of federal executive power, not how extensive such power is. Hearing Trans. at 117 (Jan. 10, 2005). But this attempt conveniently ignores Alito's own statement that one of the rationales for the "unitary executive" theory is to promote a "vigorous executive" that can even be "used to accomplish things that most would not favor."[17] When asked by Senator Durbin about Justice Thomas' use of the "unitary executive" theory to justify his extraordinary dissent in *Hamdi* that the President had the power to imprison American citizens indefinitely and without counsel as "enemy combatants," Judge Alito stated that he did not recall Justice Thomas' use of the term, but pointedly declined to state to Senator Leahy whether he supported Justice Thomas' dissent or Justice O'Connor's majority opinion repudiating such untrammeled presidential power.[18]

Senator Kennedy also pointed out that even Judge Alito's version of the "unitary executive" theory conflicts with the Court's important decision in *Morrison v. Olson,* 487 U.S. 654 (1988), that Congress can check the President where necessary through appointment of an independent prosecutor who cannot be fired by the President, as well as with the independence of independent agencies like the Federal Reserve and the Consumer Product Safety Commission. Alito's response was to suggest that he now has "no quarrel" with *Morrison* and related precedent, a phrase used by previous nominees to avoid saying whether they agree with a decision and which did not prevent Justice Thomas, for example, from joining a dissent soon after he was confirmed to make clear his disagreement with a precedent with which he had previously claimed he had "no quarrel."[19]

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16 *See* PFAW, *"*The Record and Legal Philosophy of Samuel Alito: "*No On to the Right of Sam Alito on This Court*," (hereinafter "PFAW Pre-Hearing Report"),at 20-22; J. Bravin, "Judge Alito's view of the presidency: expansive powers," *Wall Street Journal* (Jan. 5, 2006).

17 *See* Remarks of Judge Samuel Alito in "Administrative Law and Regulation: Presidential Oversight and the Administrative State," *Engage* (Nov. 2001) at 12.

18 *See* Hearing Trans. at 282-83, 389 (Jan. 11, 2005).

19 *See* Hearing Trans. at 416-19 (Jan. 12, 2005); *Compare* Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States, Hearings before the Senate Committee on

Judge Alito also failed to resolve concerns about his record in the Justice Department concerning presidential power. He claimed that he was simply representing a client in arguing for absolute immunity for high officials involved in illegal wiretapping, but as Senator Feingold suggested, he was expressing his "personal opinion on this legal issue."[20] He claimed that his memorandum concerning the use of presidential signing statements recognized that there were theoretical issues that needed to be explored but failed to acknowledge that an explicit purpose of his memo was to "increase the power of the Executive to shape the law" and give the President "the last word" on interpreting statutes when signing laws, in spite of the actions of Congress.[21] Despite the concerns expressed even by Senator Specter about the impropriety of relying on such signing statements, and despite the current abuse of such statements by the Bush Administration to seek, for example, to unilaterally amend or exempt itself from the prohibitions on the use of torture sponsored by Senator McCain and enacted by Congress, the most Judge Alito would say is that he and the Supreme Court have not "dealt with" the issue and it remains "unexplored."[22]

In fact, despite repeated questioning, Judge Alito seemed unwilling to recognize any specific limits on presidential power, other than his general statement that no one is "above the law." For example, he refused to answer substantively questions from Senators Leahy and Feingold as to whether the "president could not only ignore the law but authorize others to ignore the law," including violating the recently-passed ban on torture and "bypassing the FISA court to conduct warrantless spying on Americans."[23] He declined to answer Sen. Biden's questions on whether the President could "invade Iran tomorrow" without congressional approval or whether independent agencies like the FDA and FCC are "constitutionally permissible." Hearing Trans. at 429-31, 434 (Jan. 12, 2006). Particularly in this context, Sen. Feingold noted that he was "troubled" by the fact that Administration lawyers involved in defending recent controversial assertions of presidential power on issues like NSA wiretapping were also involved in preparing Alito for his confirmation hearings. *Id.* at 452. As Sen. Feingold explained, Alito's answers

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the Judiciary, 102d Cong., 1st Sess., Sept. 10, 11, 12 13, 16 and 19, 1991 at 265 (stating that he had "no quarrel" with Supreme Court's *Lemon* test on church-state separation) with *Lee v. Weisman*, 505 U.S. 577, 644(1992) (joining dissent referring to a hoped-for "internment" of *Lemon).* For further discussion of Alito's criticism of *Morrison* and his praise for Justice Scalia's dissent in that case, *see* PFAW Pre-Hearing Report at 22-23.

[20] *See* Hearing Trans. at 199 (Jan. 10, 2006). Judge Alito denied that he was expressing his personal view despite the clear language in his memorandum, and did not acknowledge that, whether the immunity was absolute or qualified, he clearly believed that there should be official immunity for such illegal conduct. *Id;* PFAW Pre-Hearing Report at 24.

[21] *See* Hearing Trans. at 116 (Jan.10, 2006); PFAW Pre-Hearing Report at 23-24.

[22] *See* Hearing Trans. at 116, 83-84 (Jan. 10, 2006); PFAW Pre-Hearing Report at 23-24; A. Liptak, "Presidential Signing Statements, and Alito's Role in Them, Are Questioned," *New York Times* (Jan. 14, 2006).

[23] *See* Hearing Trans. at 86, 88, 87, 193-94 (Jan. 10, 2006). Judge Alito's only answer was to suggest that in approaching such questions, he would use Justice Jackson's famous three-part test from the Steel Seizure cases, under which, according to Alito, the President is in "the twilight zone" in purporting to act in contradiction to the explicit or implicit will of Congress. *Id.* at 193. In fact, as Senator Leahy later pointed out, Judge Alito misstated Justice Jackson's test, under which the President is in "the twilight zone" when Congress has not expressed its will but the President's power is at its lowest ebb when acting contrary to Congress. *Id.* at 281-82 (Jan. 11, 2006). *See also* J. Barrett, "Samuel Alito misunderstands Justice Jackson's famous opinion in the steel seizure case," *History News Network* (at hnn.us/roundup/entries/20383.html)(Jan. 11, 2006)(visited Jan. 15, 2006).

"leave open the possibility that the president can assert inherent authority to violate the criminal law," threatening to "alter the basic balance between the Congress and the presidential power in a way that could affect our very system of government." *Id.* at 452, 454.

These concerns were reinforced by Judge Alito's disturbing answers to questions about cases he has considered as a judge concerning abuses of executive branch law enforcement power. The case that has most epitomized Judge Alito's dangerously constricted views of the protections guaranteed to every American by the Fourth Amendment is *Doe v. Groody*, 361 F.3d 232 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 111 (2004), in which Judge Alito would have upheld the strip search of a ten-year-old girl and her mother, even though they were not suspected of any crime or named in the search warrant.

Seeking to minimize Senators' concerns about his dissent in *Groody*, Judge Alito repeatedly sought to portray the case as one involving "a rather technical issue" about whether the police affidavit applying for the search warrant, which sought permission to search all occupants of the premises in question, should be incorporated into the warrant itself, which identified *only* the suspect John Doe as the person to be searched. He also suggested that the police were operating under "time pressure."[24]

These claims are inconsistent with the facts and the holding in *Groody.* As the opinion in the case expressly states, the search was the culmination of "a long-term investigation of John Doe." 361 F.3d at 235. It was only when police determined they were ready to bring their case that they asked for a search warrant; there was no real "time pressure." In addition, as then-Judge Michael Chertoff, now the head of the federal Department of Homeland Security, recognized in writing the majority decision in *Groody*, the issue was hardly "technical" at all but went to the heart of the Fourth Amendment's requirement that a judicial officer review and approve a search warrant application. According to Chertoff, the approach advocated by Alito "might indeed transform the judicial officer into little more than the cliché 'rubber stamp.'" 361 F.3d at 243.

Judge Alito also tried to minimize the concerns about his position in *Groody* by explaining that even if the warrant did not actually authorize the strip search of the child and her mother, the police were "reasonable" in thinking that it did.[25] Senator Leahy's reply to Judge Alito summed up how shocked most Americans are about his position in *Groody*: "I spent eight years in law enforcement. I don't know where any reasonable officer under those circumstances would feel they could strip-search a ten-year-old girl."[26]

Attempting to rehabilitate Judge Alito, Senator Kyl asked him to "cite some specific cases" to refute what he called Senator Kennedy's assertion that Judge Alito had an "almost total disregard of the impact of [executive powers] on the rights of individuals."[27] In several instances, however, Judge Alito told less than the full story of the case in order to make his ruling appear more favorable to individual litigants than it actually was.

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[24] Hearing Trans. at 92, 113 (Jan. 10, 2006); *id.* at 472 (Jan. 12, 2006).

[25] Hearing Trans. at 92 (Jan. 10, 2006).

[26] *Id.* at 93 (Jan. 10, 2006). Despite this discussion, Alito adhered to the view expressed in his dissent in *Groody*, as well as his split majority opinion to take away from the jury a family's claim of excessive police force in evicting them from their farm, despite the dissent's concern that the government conduct was "Gestapo-like." *Id.* at 91, 196; *Mellott v. Heemer,* 161 F.3d 117, 127 (3d Cir. 1998).

[27] Hearing Trans. at 145 (Jan. 10, 2006).

One case cited by Judge Alito, for example, was *Bolden v. SEPTA*, 953 F.2d 807 (3d Cir. 1991) (*en banc*), *cert. denied*, 504 U.S. 943 (1992).[28] This case concerned a local transit authority's policy of requiring certain employees to be tested for drugs. At his hearing, Judge Alito said that in *Bolden,* "I found that the [drug] tests constituted a search and a seizure and would be a violation absent consent on the part of the party who was searched."[29] This was a half-truth by Judge Alito, since his opinion in the case then went on to hold -- although he did not mention this at the hearing -- that the union had consented on behalf of the employee to the drug test. This drew a sharp dissent from Judge Nygaard, who wrote that "[i]ndiscriminate drug testing, entailing invasive blood drawing or other bodily intrusions, is not rendered reasonable for Fourth Amendment purposes by a collective bargaining agreement. The Fourth Amendment bars such drug testing absent a valid *individual* consent or waiver." 953 F.2d at 834 (emphasis in original). Judge Alito chose not to mention any of this at his hearing, giving a version of *Bolden* that made it seem as though he had rendered a ruling far more favorable to workers than it was.[30]

Likewise, Judge Alito told only a half-truth about another case that he cited in response to Senator Kyl -- his ruling for a unanimous court in *Leveto v. Lapina*, 258 F.3d 156 (3d Cir. 2001).[31] This case was a lawsuit brought against IRS agents by a veterinarian and his wife, who were subjected to what they contended was improper conduct by the agents in carrying out a search and seizure at their home and at his veterinary hospital. Among other things, the agents had performed a pat down search of Mrs. Leveto, although she was only wearing a nightgown. At his hearing, Judge Alito stated in response to Senator Kyl that

> I thought the search was not carried out properly; that the officers violated the Fourth Amendment in the way they went about carrying out that search. They forced the occupants of these premises to remain on the premises for a very extended period of time while the search was being conducted and violated their Fourth Amendment rights. And that's what I said in the opinion.[32]

Anyone not familiar with Judge Alito's opinion in the case would likely conclude from his testimony that he had actually ruled in favor of the Levetos, but in fact he ruled that the federal agents were entitled to qualified immunity from liability because they were reasonable in believing that their conduct was lawful. Alito thus upheld the ruling of the district court *dismissing the Levetos' case.* 258 F.3d at 175.[33]

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28 Hearing Trans. at 145 (Jan. 10, 2006).

29 *Id.*

30 Likewise, Judge Alito allowed Senator Hatch's misleading description of *Bolden* to go uncorrected, when Sen. Hatch cited *Bolden* to Alito as a case "where you ruled for a former maintenance custodian for a public transportation agency, concluding that the Fourth Amendment barred a suspicionless drug test." Hearing Trans. at 102 (Jan. 10, 2006).

31 Hearing Trans. at 145-46 (Jan. 10, 2006).

32 *Id.*

33 It is interesting to note that while Judge Alito in *Groody* also would have held that the police were immune from liability, unlike the situation in *Leveto* he would not even have held in *Groody* that the Fourth Amendment had been violated by the strip search. In his testimony at Judge Alito's hearing, Yale law professor Ronald Sullivan found it quite disturbing that Judge Alito had shown such concern about the indignity of the pat down of a veterinarian's wife but seemed to lack that same concern about the strip search of a drug suspect's wife and child. According to Professor Sullivan:

What Judge Alito said –- and did not say –- about his judicial record at his hearing, coupled with the unrefuted statistical evidence concerning that record and the serious concerns about his views on presidential and executive power, confirms the conclusion that placing him on the Supreme Court would jeopardize the fundamental right of all Americans to be free of unconstitutional abuse of government power and threaten the balance of powers among our three branches of government. As Senator Kennedy explained:

> The record shows time and again that you have been overly deferential to executive power, whether exercised by the president, the attorney general or law enforcement officials. And your record shows that, even over the strong objections of other federal judges -- other federal judges -- you bend over backward to find even the most aggressive exercise of executive power reasonable. But perhaps most disturbing is the almost total disregard in your record for the impact of these abuses of powers on the rights and liberties of individual citizens.[34]

As the *Grand Forks Herald* recently concluded, when Alito "reads the Constitution, he finds too few rights for individuals and too much power for the president."[35]

III. JUDGE ALITO'S HEARING REAFFIRMED THAT HE HOLDS DANGEROUSLY NARROW VIEWS OF CONGRESSIONAL AUTHORITY TO PROTECT AMERICANS

A key subject at Judge Alito's confirmation hearing was his troubling view of federalism and congressional authority, beginning with his 1985 job application and extending though his judicial career.[36] Alito's testimony not only failed to resolve but in fact reinforced these concerns.

For example, Senator Feinstein asked Alito about his 1986 recommendation that President Reagan veto the Truth in Mileage Act, a recommendation that President Reagan rejected. Alito attempted to walk away from his extreme statement that the Act violated "the principles of federalism"[37] by suggesting that it was a policy matter.[38] As Alito's 1986 veto

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> In no other -- I repeat, no other Fourth Amendment case that Judge Alito authored did he spend even a fraction of the time expressing the dignitary objections that he did in *Leveto*. One is forced to wonder whether Judge Alito has a more robust appreciation for the privacy and dignity concerns of the wealthy or the class of individuals typically charged with tax evasion or crimes of that sort.

Hearing Trans. at 586 (Jan. 13, 2006). Senator Durbin likewise voiced similar concerns about the disparity in Judge Alito's views of the two searches. Hearing Trans. at 470-73 (Jan. 12, 2006).

[34] Hearing Trans. at 109 (Jan. 10, 2006).

[35] "Alito Wrong For Supreme Court," *Grand Forks Herald* (Jan. 16, 2006).

[36] *See, e.g.,* PFAW Pre-Hearing Report at 14-25.

[37] *See* Memorandum from Samuel A. Alito, Jr. to Peter J. Wallison, Counsel to the President, re: Enrolled Bill S.475 (Oct. 27, 1986) and attached proposed Veto Message.

[38] Hearing Trans. at 447 (Jan. 12, 2006).

memo makes clear, however, he took the position that it is the states, not the federal government, that are "charged" with protecting Americans' health, safety, and welfare. This clearly expresses more than a policy preference but a view of the Constitution -- the "charging" or instructional document of our form of government. Alito's suggestion that the federal government was not "charged" with helping protect our health, safety, and welfare, despite the Preamble's explicit statement that one of its purposes is to "promote the general welfare," is both radical and dangerous.

In addition, Alito's testimony failed to resolve the serious concerns about his judicial record in this area, particularly his dissent in *United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996), *cert. denied*, 522 U.S. 807 (1997), in which he voted to strike down the federal ban on the transfer or possession of machine guns as exceeding Congress's power under the Commerce Clause. Alito's dissent rejected not only the views of his own colleagues on the Third Circuit, but also the holdings of all six circuit courts that had previously considered the issue and upheld Congress's machine gun law, including the five circuits that had done so *after United States v. Lopez* -- the Supreme Court decision striking down the Gun-Free School Zones Act that Alito claimed to be following in his *Rybar* dissent.[39] Although he did not repeat his statement at the hearing, even arch-conservative Senator Tom Coburn has recognized that Alito's dissent was an improper effort to legislate from the bench and strike down a law passed by Congress.[40] Astonishingly, Alito described his position in *Rybar* as "very modest,"[41] and declined to say that he would decide the case differently, even after the recent Supreme Court decision in *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), rejecting similar reasoning.[42]

Attempting to rehabilitate Judge Alito, both Senator Kyl and Senator Cornyn tried to wrap Judge Alito's *Rybar* dissent in the jurisprudence of Justice O'Connor, noting that O'Connor had joined the Court's decision in *United States v. Lopez*.[43] However, Justice O'Connor also joined the concurring opinion of Justice Kennedy in *Lopez*, expressly stating that the ruling was a "limited holding,"[44] which was specifically relied on by the Third Circuit majority in *Rybar* in rejecting Judge Alito's view.[45] Replacing Justice O'Connor with Alito threatens to shift the Court even further to the right on the crucial issue of congressional power.

This conclusion is reinforced by Judge Alito's testimony concerning his ruling in *Chittister v. Department of Community and Economic Development*, 226 F.3d 223 (3d Cir. 2000), that it was unconstitutional for Congress to authorize a state employee to sue his employer for damages for firing him because he took medical leave under the federal Family and Medical Leave Act (FMLA). The votes of Justice O'Connor and Chief Justice Rehnquist were the difference in a 6-3 ruling by the Supreme Court reaching precisely the opposition conclusion with respect to FMLA family leave in *Nevada Dept. of Human Resources v. Hibbs,* 538 U.S. 721 (2003).

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39 *See* PFAW Pre-Hearing Report at 17.

40 *See* "Interview: Senator Tom Coburn Discusses the Supreme Court, the CIA Leak and the Iraq War." *NBC News: Meet the Press* (Nov. 6, 2005).

41 Hearing Trans. at 148 (Jan. 10, 2006).

42 Hearing Trans., Response to Sen. Schumer (Jan. 12, 2006), *New York Times*.

43 Hearing Trans. at 148, 235 (Jan. 10, 2006).

44 *Lopez,* 514 U.S.at 568.

45 *See Rybar*, 103 F.3d at 277-78.

In response to questioning about this at his hearing, Judge Alito attempted to seek refuge in the fact that *Chittister* concerned the sick leave provision of the FMLA, whereas *Hibbs* concerned the family leave provision; according to Alito, Congress had not made findings that women had been subjected to sex discrimination in terms of sick leave policies.[46] But as Senator Biden noted, Judge Alito's explanation in fact failed to consider pregnancy-related sick leave and the intent of Congress to protect women from discrimination by employers because only women can become pregnant.[47] Indeed, as the National Women's Law Center -- an expert in this area -- has stated, "in enacting the FMLA, Congress recognized the connection between the medical leave provision and sex discrimination."[48]

Judge Alito's hearing testimony, in particular his refusal to back away from his position as an outlier in *Rybar*, even in the face of the Supreme Court's subsequent ruling in *Raich*, and his continued defense of his opinion in *Chittister*, even after the Supreme Court's ruling in *Hibbs*, reaffirms that his confirmation to the Supreme Court would jeopardize for a generation or more the ability of Congress to enact and enforce laws protecting the health, safety and welfare of all Americans.

IV. JUDGE ALITO'S TESTIMONY DEMONSTRATED THAT AS A SUPREME COURT JUSTICE, HE WOULD UNDERMINE REPRODUCTIVE RIGHTS AND LIKELY VOTE TO OVERTURN ROE V. WADE

At his hearings, Judge Alito pointedly refused to answer questions about the statement he made in his 1985 job application that he "personally believe[d] very strongly" that "the Constitution does not protect a right to an abortion."[49] While he did admit that was "an accurate statement of [his] views at the time,"[50] Alito refused to say whether he still held that view. Alito repeatedly dodged questions about this statement from Senators Specter, Schumer, and Durbin,[51] saying that, as a judge, he would approach that question "with an open mind."[52]

This is little consolation. First, it is simply not plausible that Alito no longer has an opinion on this legal issue. As rejected 1987 Supreme Court nominee Robert Bork noted, "I can't imagine anybody who is interested in constitutional law who hasn't made up his or her mind about whether or not a right to abortion is included in the Constitution. ... I'm sure Alito still doesn't think [the Constitution supports a right to an abortion], but he is probably wise not to say that."[53]

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46 *See, e.g.*, Hearing Trans. at 159 (Jan. 10, 2006).

47 Hearing Trans. at 318 (Jan. 11, 2006).

48 National Women's Law Center Special Report, "The Nomination of Samuel Alito: A Watershed Moment for Women," at 24 and n.170 (Dec. 15, 2005), available at <http://www.nwlc.org/pdf/NWLCAlitoReport12-15-05.pdf (visited Jan. 15, 2006).

49 *See* Attachment to PPO Non-Career Appointment Form of Samuel Alito, Nov. 15, 1985.

50 Hearing Trans. at 219 (Jan. 10, 2006).

51 *See, e.g.*, Hearing Trans. at 80 (Jan. 10, 2006), 219 (Jan. 10, 2006), and 246-47 (Jan. 11, 2006).

52 Hearing Trans. at 247 (Jan. 10, 2006).

53 "Judge Robert Bork shares his views on the hearing of Judge Samuel Alito, Jr.," Fidelis.org (Jan. 10, 2006). Podcast available online at: <http://www.fidelis.org/podcasts/bork_011006.mp3. (visited Jan. 18, 2006)

Moreover, Alito's assurances that he will keep an "open mind" on the issue are chillingly reminiscent of testimony that Justice Clarence Thomas gave during his own confirmation hearings. Asked by then-Senator Brown if he had an opinion about the right to an abortion, Thomas said, "I am open about that important case. I work to be open and impartial on all the cases on which I sit. I can say on that issue and on those cases I have no agenda. I have an open mind, and I can function strongly as a judge."[54] Less than a year later, Justice Thomas voted to overturn *Roe v. Wade*, joining a dissent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 984 (1992), that likened abortion to polygamy, sodomy, incest and suicide.

Americans have good reason to fear Alito will follow in Thomas' footsteps. In addition to refusing to disavow his 1985 statement, Alito refused to concede that *Roe v. Wade* is "settled law,"[55] explaining that he would not comment because the issue could come before the Court. These refusals stood in marked contrast to his willingness to recognize that the principle of one-person, one-vote is "well settled,"[56] even though, as Senator Feinstein pointed out, at least four cases relating to that issue are pending in the Court.[57]

This was also in contrast to Chief Justice Roberts, who agreed at his hearing that *Roe* was "settled as a precedent of the Court, entitled to respect under principles of *stare decisis*."[58] Right-wing leader Paul Weyrich highlighted this difference, suggesting that Alito "out-performed" Chief Justice Roberts by not agreeing that *Roe* was "settled."[59] In addition, Roberts sought to justify his refusal to further discuss the subject by noting that he had not previously discussed his views on abortion, and doing so at his Judiciary Committee hearings could create the impression that he had prejudged the issue.[60] In contrast, Alito had previously stated his view that there is no such constitutional right, and his refusal to clarify or respond to questions only reinforced the clear impression that he has indeed prejudged this critical issue, to the detriment of women's constitutional rights.

Instead of providing straightforward answers about his views, Alito frequently launched into general discussions about respecting precedent and *stare decisis*.[61] In discussions about reproductive rights, however, Alito took care to emphasize, repeatedly, that *stare decisis* is not an "inexorable command."[62] He also refused to agree with Senator Specter that *Roe*, having been reaffirmed 38 times, was a "super-precedent."[63] Instead, Alito only acknowledged that "when a

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54 Nomination of Judge Clarence Thomas to Be Associate Justice of the Supreme Court of the United States, Hearing before the Senate Committee on the Judiciary, 102d Cong., 1st Sess., September 10, 11, 12, 13, 16, and 19 (1991) at 244.

55 *See* Hearing Trans. at 247-48 (January 11, 2006), 346 (January 11, 2006), and 374 (January 11, 2006).

56 Hearing Trans. at 153 (Jan. 10, 2006).

57 Hearing Trans. at 346 (Jan. 11, 2006).

58 Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, Hearing before the Senate Committee on the Judiciary, 109th Cong., 1st Sess., September 12-15, 2005 (here after "Roberts Hearing") at 145.

59 Paul Weyrich, "Judge Samuel J. Alito, Jr. Surely Will be Confirmed," Free Congress Foundation (Jan. 13, 2006) available at http://www.freecongress.org/commentaries/2006/060113.asp (visited Jan. 18, 2006).

60 *See* Roberts Hearing at 186-89.

61 *See, e.g.,* Hearing Trans. at 80 (Jan. 10, 2006), 248 (Jan. 11, 2006).

62 *See id.* at 75, 79, 177 (jan. 10, 2006) and 344 and 346 (Jan. 11, 2006).

63 Hearing Trans. at 78-79 (Jan. 10, 2006).

precedent is reaffirmed, that strengthens the precedent," but quickly noted that, "I don't want to leave the impression that *stare decisis* is an inexorable command."[64] Later, Senator Feinstein pressed Alito on the precedential strength of *Roe*, asking him "[w]hat special circumstances would justify overruling it."[65] Alito answered that "there is a special justification for overruling a precedent" if the "rule is proven to be unworkable."[66] Several justices have already found *Roe* and *Casey*, the decision that reaffirmed *Roe*'s central holding, to be "unworkable" and have voted to overturn *Roe* altogether.[67] Alito's record and tight-lipped testimony suggest that he would join these justices and vote to overrule *Roe*.

In an apparent attempt to assuage concerns that he would do just that, Alito and his supporters sought to moderate his record. Senator Cornyn even suggested that Alito's and Justice O'Connor's approaches to reproductive choice were similar, likening Alito's advocacy at the Justice Department to restrict reproductive rights in *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747 (1986), to O'Connor's dissenting opinion in *Akron v. Akron Center for Reproductive Health,* 462 U.S. 416 (1983).[68] But Senator Cornyn miscast Alito's *strategic* recommendation not to mount a "frontal attack"[69] on *Roe*, and instead to use O'Connor's approach in *Akron* to chip away at *Roe*, as evidence of Alito's agreement with O'Connor. This clearly misrepresents the fact that Alito's stated goal was the "eventual overruling of *Roe v. Wade*"[70] and ignores the key distinction that O'Connor, unlike Alito, recognizes that the Constitution protects a fundamental right to choose.

Similarly, Alito sought to moderate his judicial record. In 1991, Alito dissented in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part, rev'd in part,* 505 U.S. 833 (1992), and would have upheld a law requiring women in certain circumstances to notify their spouses before seeking an abortion. In his dissent, Alito asserted that if parental notification requirements were constitutional, as the Supreme Court had previously held, then spousal notification requirements must be permissible as well. In his testimony, Alito defended his opinion by saying "the law just was not very clear at that time"[71] and that the comparison between parental and spousal consent requirements was merely an "analogy."[72] This "analogy" was severely criticized by Justice O'Connor, who pointedly stated that a "[s]tate may not give to a man the kind of dominion over his wife that parents exercise over their children." *Casey,* 505 U.S. at 898. When presented with a case not controlled by clearly

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64 *Id.* at 79. Senator Schumer accordingly demonstrated that Alito's statements concerning adhering to precedent not only were disturbingly similar to those of Justice Thomas at his Senate Judiciary Committee hearing, before he voted to overturn *Roe*, but were also undermined by his colleagues' criticism concerning his lack of adherence to precedent on the Third Circuit. *See* Hearing Trans. at 223-25, 229 (Jan. 10, 2006).

65 Hearing Trans. at 177 (Jan. 10, 2006).

66 *Id.*

67 In *Casey*, Justice Thomas joined a dissenting opinion written by Justice Scalia that urged the reversal of *Roe* and argued that the "undue burden" standard put forth by the Court's majority was "inherently manipulable and will prove hopelessly unworkable in practice." 505 U.S. at 986 (1992).

68 Hearing Trans. at 237-38 (Jan. 10, 2006).

69 *Id.* at 237.

70 Memorandum to the Solicitor General from Samuel A. Alito, re: *Thornburgh v. American College Obstetricians & Gynecologists,* No. 84-495; *Diamond v. Charles,* No. 84-1379 (May 30, 1985) (hereinafter "*Thornburgh* memo"), at 8.

71 Hearing Trans. at 156 (Jan. 10, 2006).

72 *Id.* at 179.

on-point, binding Supreme Court precedent, Alito argued for an interpretation that would roll back reproductive rights protections. This was precisely in accord with Alito's recommendation in 1985 of "mitigating" the effects of *Roe* before its "eventual overruling."[73]

Such unconvincing misrepresentations concerning Alito's record, along with his failure to disavow his 1985 statement, and his refusal to give straightforward answers to questions about the right to choose, only reinforce Alito's solidly anti-choice record on the bench and in the executive branch. There can be little question that, in light of divisions on the Supreme Court on this crucial issue, replacing Justice O'Connor's swing vote with Judge Alito would seriously endanger women's reproductive rights, even if he did not vote to overturn *Roe*. As the *New York Times* concluded, moreover, "if Judge Alito gets to the Court, there is every reason to believe that he will vote to overturn *Roe v. Wade* when the opportunity comes."[74]

V. JUDGE ALITO'S TESTIMONY REINFORCED CONCERNS THAT HE REPEATEDLY SIDES WITH THE GOVERNMENT OR LARGE CORPORATIONS AND AGAINST INDIVIDUALS IN CIVIL RIGHTS AND OTHER CASES

As was well-documented prior to the start of his hearings, Judge Alito's judicial record demonstrates that he consistently takes positions in favor of the government or large corporations and against individuals in civil rights and other cases.[75] Alito failed to dispel these concerns at his hearing. Instead, his testimony raised even more concerns by misstating the facts or law in some of his cases and even suggesting a predisposition against some civil rights claimants.

- **Civil Rights and Worker Protection**

In responding to concerns that he has "almost never" ruled for African American plaintiffs in employment discrimination cases,[76] Judge Alito suggested a disturbing predisposition on his part about such cases. Senator Biden questioned Alito about his dissent in *Bray v. Marriott Corp.*, 110 F.3d 986 (3d Cir. 1997) (*en banc*), in which Alito disagreed with the

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[73] *Thornburgh* memo at 8. In fact, Alito's dissent in *Casey* is the only part of his judicial record that provides any meaningful insight into his approach as a judge to reproductive rights. In one other case, *Planned Parenthood of Central New Jersey v. Farmer, et. al*., 220 F.3d 127 (3d Cir. 2000), Alito voted to strike down an unconstitutionally vague law banning so-called "partial birth abortion." This tells us little, however, as the Supreme Court had just struck down a very similar Nebraska law, creating direct, controlling precedent for Alito's court, and Alito refused to join his court's majority opinion, which discussed the New Jersey statute's constitutional inadequacies at length, and instead issued a much narrower concurring opinion explaining that the recent Supreme Court decision clearly dictated the result. In the other abortion-related case that Alito cited as evidence of his lack of an agenda on abortion, *Elizabeth Blackwell Health Ctr. for Women v. Knoll,* 61 F.3d 170 (3d Cir. 1995), the issue was not constitutional protection for reproductive rights at all, but rather a question of administrative law as to what deference should be given to a federal administrative regulation that was in conflict with provisions of a state statute. *See* PFAW Pre-Hearing Report at 60-62.

[74] Editorial, "Pro-Choice Senators and Judge Alito," *New York Times* (Jan. 13, 2006), A20.

[75] *See* PFAW Pre-Hearing Report at 40-46 (civil rights), 46-55 (immigration), 97-106 (environment), 108-14 (worker protection), and 115-18 (other cases involving corporations).

[76] *See* NAACP LDF Report on the Nomination of Samuel Alito to the Supreme Court of the United States (Dec. 2005).

court's ruling that an employee claiming race discrimination by her employer had put forward sufficient evidence to present her case to a jury. In response, Alito stated:

> Well, this case was one of quite a few that we get that are on the line, and when you think about the nature of the appellate system, it stands to reason that it's going to work out that way. The really strong cases tend to settle; the really weak cases are either dismissed and not appealed or they settle for a modest amount. So the ones that are hotly contested on appeal tend to be the ones that are close to the line, whatever the legal standard is.77

In other words, when an employment discrimination case comes before Judge Alito on appeal, he has already presumed that it is not a "really strong case." It is therefore not surprising that the majority in *Bray* criticized Judge Alito's dissent as threatening to "eviscerate[]" Title VII, as the majority has criticized his dissents in other similar cases.[78]

Senator Biden also questioned Judge Alito about his sole dissent in *Sheridan v. E.I. DuPont de Nemours and Co*., 100 F.3d 1061 (3d Cir. 1996) (*en banc*), *cert. denied*, 521 U.S. 1129 (1997), where he disagreed with all ten of his colleagues that a sex discrimination victim had presented enough evidence to present her case to the jury that found in her favor. In an attempt to defend his dissent, Alito inaccurately claimed that "in *Reeves v. Sanderson Plumbing Products, Inc.*, [530 U.S. 133 (2000)], Justice O'Connor wrote the opinion for the Supreme Court and she agreed with my analysis of this legal issue."[79] In *Sheridan*, Judge Alito offered a test requiring an individual to show that discrimination was the "determinative cause" of an employer's action, and argued that a case could be taken from a jury where there is simply some evidence of "some other possible explanation" for the allegedly discriminatory action.[80] In contrast, Justice O'Connor explained in *Reeves* that a case could be kept from the jury only if the record "conclusively revealed" a non-discriminatory explanation for the employer's action or, if an employee presented weak evidence of the employer's deceit, there was "abundant and uncontroverted independent evidence that no discrimination had occurred."[81] As Senator Biden pointed out, Justice O'Connor was "much more prepared to give the benefit of the doubt to the employee in that situation," while Judge Alito is "much more prepared to give the benefit of the doubt to the employer."[82]

Judge Alito was also asked about his dissent in *Riley v. Taylor*, 277 F.3d 261 (3d Cir. 2001)(*en banc*), in which he would have given no relief to an African American convicted of murder and sentenced to death by an all white jury from which blacks had been excluded due to race. Alito disparaged the defendant's statistical evidence showing that the prosecution had repeatedly excluded blacks from juries in capital cases by asserting that this was comparable to an analysis attempting to explain why a disproportionate number of recent U.S Presidents have been left-handed. 277 F.3d at 327. The majority sharply criticized Judge Alito, noting that his attempted comparison minimized the "history of discrimination against prospective black jurors and black defendants." *Id.* at 292. Senator Durbin agreed that Alito's analogy was "troubling"

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77 Hearing Trans. at 132 (Jan. 10, 2006) (emphasis added).

78 *Bray,* 110 F.3d at 993; *see also* PFAW Pre-Hearing Report at 41-46.

79 Hearing Trans. at 136 (Jan. 10, 2006).

80 *Sheridan*, 100 F.3d at 1078-89.

81 *Reeves*, 530 U.S. at 148.

82 Hearing Trans. at 137 (Jan. 10, 2006).

and "inappropriate."[83] In response to Senator Durbin's questions about *Riley*, Judge Alito's response was simply to state that "*Riley* was a very, very difficult case."[84]

In an attempt to rehabilitate Judge Alito's record in this area, he and his supporters referred several times to *U.S. v. Kithcart*, 134 F.3d 529 (3d Cir. 1998), a racial profiling case about which Alito testified that he struck down such profiling, but conveniently neglected to state that, despite a dissent, he did not reverse the defendant's conviction and ultimately wound up upholding it.[85] Earlier at the hearing, Senator Hatch had even misrepresented the facts of *Kithcart*, stating that Judge Alito had "reversed a criminal conviction because the police lacked probable cause for a search," a significant error that Alito allowed to stand uncorrected.[86] Although Alito ruled that the stop and arrest were unconstitutional because they were made without probable cause, he did not reverse Kithcart's conviction, but returned the case to the district court to determine whether the police had a legal basis for an investigative stop and weapons search. Judge McKee disagreed with the decision to send the case back to the district court, explaining that "the same testimony that requires us to reverse the district court's determination that the government had probable cause also establishes that Officer Nelson did not have reasonable suspicion to stop and detain the occupants of the car." 134 F.3d at 532-33. When the district court subsequently approved the search, and the case again reached Judge Alito on appeal, Alito voted to uphold the denial of Kithcart's motion to suppress, effectively affirming his conviction.[87] This is yet another example of Judge Alito and his supporters telling less than the full story of the case in order to make his ruling appear more favorable to individual litigants than it was.

In addition, Senator Cornyn attempted to demonstrate that Judge Alito's views of affirmative action were very similar to those of Justice O'Connor based on her opinion in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986), and Alito's decision to join the majority in *Taxman v. Bd. of Educ. of Piscataway*, 91 F.3d 1547 (3d Cir. 1996) (*en banc*), *cert. dismissed*, 522 U.S. 1010 (1997).[88] Although in *Wygant* the Court held that a "layoff provision" in a collective bargaining-agreement between the school board and the teachers' union was unconstitutional because it was designed to combat "societal discrimination" under a theory that it would provide role-models for minority students, not designed to remedy past discrimination, Justice O'Connor's opinion was significantly different than Alito's in *Taxman*. In *Taxman*, Alito agreed that an affirmative action policy required a "remedial purpose," and that there was no support for the finding that "racial diversity for education's sake" could be the "sole justification for a race-based decision." *Taxman*, 91 F.3d at 1550, 1559. In her concurrence in *Wygant*, however, Justice O'Connor contended that she did not agree that a "contemporaneous or antecedent finding of past discrimination by a court" was a prerequisite for an employer's voluntary affirmative action plan. 476 U.S. at 278. In further contrast, she pointed out that "a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." *Id.* at 276. In fact, she was the deciding vote to uphold a higher education affirmative action plan in *Grutter v. Bollinger*, 539 U.S. 306 (2003), based on diversity as a compelling interest. Judge

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83 *Id.* at 251 (Jan. 10, 2006).

84 *Id.* at 252.

85 Hearing Trans. at 145 (Jan. 10, 2006).

86 Hearing Trans. at 102 (Jan. 10, 2006).

87 *See U.S. v. Kithcart*, 34 Fed. Appx. 872 (3d Cir. 2002), *cert. denied*, 537 U.S. 1061 (2002).

88 Hearing Trans. at 234, 237 (Jan. 11, 2006).

Alito's record clearly suggests that if he had been on the Court instead of Justice O'Connor, the Court would have completely banned higher education affirmative action programs.[89]

In the area of worker protection, Senator Durbin asked Alito about his decision in *RNS Services, Inc. v. Secretary of Labor*, 115 F.3d 182 (3d Cir. 1997), in which Alito dissented from a ruling that a coal processing site was subject to safety regulation under federal mine safety law.[90] Judge Alito would have held that the Federal Mine Safety and Health Review Commission did not have any power to protect the workers at the coal-processing site. In response to Senator Durbin's questioning, Alito attempted to use the "difficult case" excuse, stating that, "the issue in the [*RNS Services*] case was the kind of technical issue of interpretation that we get all the time."[91] Senator Durbin described his concern that Alito "drew this statute as narrowly as he could," siding against the individual.[92] He explained that this "recurring pattern" raised the serious concern whether "the average person, the dispossessed person, the poor person who finally has their day in court, and may make it all the way through the process to the Supreme Court, are going to be subject to the crushing hand of fate when it comes to your decisions."[93]

- **Immigration**

Concerned by Judge Alito's overwhelmingly anti-individual record in immigration cases, Senator Durbin questioned Judge Alito about his dissent in *Dia v. Ashcroft*, 353 F.3d 228 (3d Cir. 2003) (*en banc*).[94] In this case, Alito argued that a Guinean citizen who claimed the Guinean military was planning to kill him because he belonged to a particular political organization and refused to serve in the military should be denied asylum. *Id.* at 262-66. The majority strongly criticized Alito's dissent for "not only gut[ting] the statutory standard, but ignor[ing] our precedent." *Id.* at 251, n.22. In response to Senator Durbin, Judge Alito claimed that the problem was the immigration system, and the "very limited role in reviewing factual findings [of] immigration judges" accorded by Congress to federal judges, essentially ignoring the majority's criticism of his dissent.[95]

Recognizing that, in contrast, Alito had challenged the decisions of immigration judges in two cases involving individuals who sought asylum due to their expected persecution on account of their Christian faith or opposition to abortion, *Liu v. Ashcroft*, 372 F.3d 529 (3d Cir. 2004) and *Zhang v. Gonzales*, 405 F.3d 150 (3d Cir. 2005), Senator Durbin asked Alito why he was not more sensitive to the real issues that real people faced, asking, "do you not feel at your level that you have to be more sensitive to the fact that there are people's lives at stake here."[96] Alito merely responded, "[t]hese are problems for Congress to address."

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89 *See* PFAW Pre-Hearing Report at 30-31. Indeed, at his hearing, Judge Alito declined to agree that promoting diversity is a compelling state interest, stating only that *Grutter* is a "precedent that directly addressed the issue." Hearing Trans. at 457 (Jan. 12, 2006).

90 Hearing Trans. at 254 (Jan. 11, 2006).

91 *Id.*

92 Hearing Trans. at 255 (Jan. 11, 2006).

93 *Id.*

94 Hearing Trans. at 473 (Jan. 12, 2006).

95 *Id.*

96 Hearing Trans. at 474 (Jan. 12, 2006).

In addition, the Mexican American Legal Defense and Educational Fund (MALDEF) has expressed serious concern about Judge Alito's failure to answer a question posed by Senator Schumer concerning Congress' authority to pass a statute denying citizenship to a person born in the United States, despite the explicit constitutional statement to the contrary.[97]

In an effort to rehabilitate Judge Alito's record, Senator Brownback referred to a letter from one of Judge Alito's former law clerks, describing *U.S. v. Igbonwa*, 120 F.3d 437 (3d Cir. 1997), *cert. denied*, 522 U.S. 1119 (1998), as a case in which Alito sided in favor of the "little guy."[98] Senator Brownback described this case as involving a Nigerian citizen "set to be deported for drug dealing who . . . was fearful of being deported, that he would be killed once back in Nigeria."[99] Again, Judge Alito and his supporters used the tactic of telling less than the full story of the case in order to make his ruling appear more favorable to individual litigants and failing to correct the discussion of the facts. Although Igbonwa was going to be deported for a drug conviction, his claim was that he should not be deported because the Assistant United States Attorney had promised him that orally, not because he was afraid that he would be killed in Nigeria. Alito's opinion would not have had the effect of ultimately overturning his deportation. 120 F.3d at 441, 442. In his dissent, Alito suggested that the case be returned to the district court to clarify its findings regarding the attorney's promise.[100] Similarly, Judge Alito's response to Senator Hatch's questioning suggested he had ruled in favor of an immigrant in *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993), when in fact Alito had affirmed the denial of a request for asylum by an Iranian woman in that case.[101]

- **Death Penalty and the Innocent Capital Case Prisoner**

In addition to the concerns about abuse of executive authority by police and other agencies as discussed above, Senator Leahy asked Alito "whether the Constitution permits the execution of an innocent person," who had been convicted and sentenced to death, but was later determined to be innocent through DNA or other evidence.[102] Alito evaded the question, focusing instead on a discussion about the "procedural safeguards" established to prevent such a situation and the many procedures that this individual would have to follow in state or federal court to overturn his conviction.[103]

In follow-up questioning, Senator Feingold asked whether even if all such procedures were followed and there were no legal errors, a person later shown to be innocent would nevertheless have a constitutional right not to be executed.[104] Alito again evaded the question and would not agree with the fundamental proposition, as Senator

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97 *Id.*

98 Hearing Trans. at 256 (Jan. 11, 2006).

99 *Id.*

100 *See MALDEF* Press Release, "Denying Birthright Citizenship Becomes Issue in Alito Hearing" (Jan. 13, 2006).

101 See Hearing Trans. at 294 (Jan. 11, 2006) (testimony by Alito that *Fatin* was "one of the first cases in the country to hold that requiring a woman to be returned to a country where she would have to wear a veil and conform to other practices like that would amount to persecution.")

102 Hearing Trans. at 404-05 (Jan. 12, 2006).

103 *Id.*

104 Hearing Trans. at 455-56 (Jan. 12, 2006).

Feingold explained, that such an innocent person would "still have a constitutional right not to be executed."[105]

- **Court-Stripping**

Senator Leahy asked Alito several questions about whether he believed that Congress should be able to enact laws that purport to strip all federal courts, including the Supreme Court, of jurisdiction to hear cases involving constitutional issues, such as the First Amendment cases involving freedom of speech, press, or religion.[106] Alito refused to answer.[107] By refusing to say that Congress could not strip federal courts of their authority to address constitutional issues, Alito placed himself in a more radically right-wing position than Senator Arlen Specter[108] and many prominent conservatives, including former Chief Justice Rehnquist at his confirmation hearings,[109] Senator Barry Goldwater, [110] and Robert Bork.[111] The view that Congress can strip the federal courts of their power to remedy violations of constitutional rights is far outside the mainstream of legal thought and would jeopardize the rights of all Americans.

VI. JUDGE ALITO'S TESTIMONY FAILED TO RESOLVE, AND IN FACT EXACERBATED, CONTINUING CREDIBILITY PROBLEMS

As discussed above, Judge Alito failed to fully answer a number of key questions at his hearing, and indeed appeared to mislead the Judiciary Committee with his answers to others. On no issues did Alito's testimony raise more "doubts about the nominee's honesty"[112] and credibility than did issues pertaining to his membership in Concerned Alumni of Princeton ("CAP") and his recusal promise concerning Vanguard.

A. Concerned Alumni of Princeton

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105 *Id.* Only Justices Scalia and Thomas have suggested that it would be constitutional to execute an innocent person in such circumstances. See *Herrera v. Collins*, 506 U.S. 390, 427 (Scalia, J., concurring).

106 Hearing Trans. at 409-11 (Jan. 12, 2006).

107 *Id.* at 409, 410 (Jan. 12, 2006).

108 At Alito's confirmation hearings, Senator Specter stated that it "[s]eems to me patently clear that the Congress cannot take away the jurisdiction of the Supreme Court on constitutional issues -- cannot do it. That's the principal function of the Supreme Court of the United States, is to interpret the Constitution. And if the Congress can take away that authority, the court's authority would be vacuous." Hearing Trans. at 415 (Jan. 12, 2006).

109 Senator Specter noted that former Chief Justice Rehnquist had explained, at his own confirmation hearing, that he was wrong in an article that suggested Congress could take away the jurisdiction of the Supreme Court on various issues. Hearing Trans. at 414-15 (Jan. 12, 2006); *see also* Confirmation Hearings of Chief Justice Rehnquist.

110 Senator Goldwater referred to court-stripping efforts of the 1980's as a "frontal assault on the independence of the Federal Courts . . . a dangerous blow to the foundations of a free society." Linda Greenhouse, "How Congress Curtailed the Courts Jurisdiction," *New York Times* (Oct. 27, 1996), at E5.

111 At his confirmation hearings, Robert Bork said that Congress could not strip the Supreme Court of its authority to enforce the Constitution. He stated that court-stripping would result in "50 different constitutions running around out there." Frank Trippett, "Trying to Trim the U.S. Courts," *Time* (Sept. 28, 1981).

112 Editorial, "Judge Alito in His Own Words," *New York Times* (Jan. 12, 2006).

"I am a member of . . . Concerned Alumni of Princeton University"
Samuel Alito, Nov. 15, 1985, Reagan Justice Dept.
Job Promotion Application

"I really have no specific recollection
of that organization"
Samuel Alito, January 10, 2006, Confirmation Hearing
Testimony

In his 1985 application for a promotion to Deputy Assistant Attorney General in the Reagan Justice Department, Alito cited his membership in CAP as one of two groups he mentioned to help convince the Administration of his suitability for the job and answer a White House question specifically asking him to show his "philosophical commitment to the policies of this Administration."[113] As has been well documented, CAP was a reactionary organization with "an innocuous-sounding name that disguised a less benign agenda, which included preventing women and minorities from entering an institution that had long been a bastion of white male privilege."[114]

Given CAP's abhorrent views and the often ugly rhetoric with which it promoted them, Alito -- having touted his CAP membership to help get a high level job in the Reagan Administration -- not surprisingly was questioned extensively at his hearing about CAP. Alito claimed total amnesia about the organization, maintaining that he had "no specific recollection of that organization" or of its ugly rhetoric about women, racial minorities, and gay people.[115]

This seems incredible to say the least, not only because Alito was a member of CAP and because CAP's views were notorious, particularly to Princeton students and alumni, but also because Terry Eastland, a managing editor during the mid-1970s of CAP's magazine, *Prospect* (and spokesperson for Attorney General Ed Meese in 1985), wrote after the conclusion of Alito's hearing that *Prospect* "was sent to all alumni."[116] And, as the *Washington Post* has reported, "the now-defunct group was widely reported in major newspapers and magazines to be against increased admission of minorities and women -- positions advanced in its magazine, fliers and letters to alumni."[117] Moreover, one of Alito's college friends, classmates, and ROTC colleagues, current Fox News commentator Andrew Napolitano (Princeton '72), served in varying CAP leadership positions (advisory board, executive committee, Secretary) throughout CAP's history, from 1972 until its demise in the mid-1980s.[118]

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[113] White House PPO Non-Career Appointment Form at 2 and Alito 1985 job application. The other group identified by Alito was the Federalist Society. *Id*.

[114] Eyal Press, "Alito the CAP Crusader," *The Nation* (Dec. 12, 2005). *See also* PFAW Pre-Hearing Report at 31-39.

[115] Hearing Trans. at 93-94 (Jan. 10, 2006) and 250, 299, 302 (Jan. 11, 2006). It is important to note that the absence of Alito's name in the private papers of CAP board member William Rusher at the Library of Congress does not change the fact of Alito's membership, which he has not contested. The issue has never been *whether* Alito was a CAP member; access to the Rusher files was sought because, given Alito's amnesia about CAP, they might have shed light on when he joined, and otherwise provided additional information about the organization.

[116] Terry Eastland, "Inside Concerned Alumni of Princeton," *The Weekly Standard* (Jan. 23, 2006).

[117] Dale Russakoff, "Alito Disavows Controversial Group," *Washington Post* (Jan. 12, 2006).

[118] *See Prospect* (1972-85); David D. Kirkpatrick, "From Alito's Past, A Window on Conservatives at Princeton," *New York Times* (Nov. 27, 2005); Jennifer Epstein and Matt Davis, "CAP's ROTC

Anxious to provide a seemingly benign explanation for his membership in such a noxious organization, and while professing no knowledge of the group, Alito nonetheless testified that he must have joined CAP because of his concerns that ROTC had been temporarily expelled from the Princeton campus during the Vietnam war in the early 1970s.[119] Of course, if Alito had "no specific recollection of the organization," how did he know what, if any position, CAP had taken on ROTC?

As columnist E.J. Dionne Jr. has noted, "[t]he first public reference I can find to the ROTC rationale came not from anything Alito has said but from talking points put out Monday [Jan. 9] by Republican National Committee Chairman Ken Mehlman."[120] Moreover, since Alito testified that he must have joined CAP at around the time of his 1985 job application,[121] his explanation of concern about Princeton's treatment of ROTC in the early 1970s made little sense. According to an analysis by the campus paper, the *Daily Princetonian*, by the 1980s, "ROTC appears to have disappeared as a major issue for both CAP and the University."[122] Senator Kennedy similarly reported that according to his staff's research, the only mention of ROTC in *Prospect* from 1983 to 1985 was in a 1985 issue that said "ROTC is popular once again."[123]

When viewed in the context of Alito's job application, CAP was specifically identified by Alito, in the same sentence as his Federalist Society membership, to send a message that he was ideologically in tune with the Reagan Administration. This means not only that Alito was a CAP member, but also that he had to have known what CAP stood for in order to decide that his membership would send a message to the White House and Ed Meese about his "philosophical commitment" to the "policies" of the Administration. Support for ROTC surely was not the message being sent, but CAP's right wing, anti-equality, anti-affirmative action, anti-gay views, Alito apparently believed, dovetailed nicely with the "policies" of that Administration. As

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Advocacy Died Down in 1980s," *Daily Princetonian* (Jan. 13, 2006). Efforts by some Republican Senators to distance CAP from what CAP published in its own magazine, *Prospect*, cannot withstand scrutiny. Many of what Republicans called "scurrilous" pieces were published without bylines and written by *Prospect's* own staff, and many were documents written by CAP itself. *See, e.g.,* PFAW Pre-Hearing Report at 35-37. And, of course, the numerous misogynistic and anti-minority statements made by CAP officials and stated in its fund raising letters cannot be attributed to anyone but CAP. *See*, *e.g.*, PFAW Pre-Hearing Report at 32-35.

[119] *See*, *e.g.*, Hearing Trans. at 94 (Jan. 10, 2006).

[120] E.J. Dionne Jr., "A Hearing About Nothing," *Washington Post* (Jan. 13, 2006).

[121] *See, e.g.,* Hearing Trans. at 143 (Jan. 10, 2006).

[122] Jennifer Epstein and Matt Davis, "CAP's ROTC Advocacy Died Down in 1980s," *Daily Princetonian* (Jan. 13, 2006).

[123] Hearing Trans. at 303 (Jan. 11, 2006). At the hearing, Senator Kyl placed into the record a Feb. 12, 1985 article about CAP from a Princeton town paper, the *Princeton Packet* (erroneously described by the Senator as a campus paper), which according to Senator Kyl said ROTC "was a core motivation behind the CAP in 1985." Hearing Trans. at 143 (Jan. 10, 2006). The article said nothing of the sort, but instead mentioned ROTC only in passing, in an otherwise long article about the controversial nature of CAP and its demands for doing away with the Women's Studies program, its complaints about a gay student organization, the admission of more minority students, the campus Third World Center, and more. Charles Stile, "A Conservative Voice Targets the University," *Princeton Packet* (Feb. 12, 1985).

Dahlia Lithwick has explained, "CAP was code in 1985 for all the things Alito refused to write on his application and refuses to discuss before the Committee now."[124]

A recent editorial in the *San Francisco Chronicle* cogently summarized Judge Alito's credibility problems concerning CAP:

> His claimed lack of recollection of his membership in the Concerned Alumni of Princeton -- which he highlighted in a 1985 job application with the Reagan administration -- defies credibility. This was not an obscure club, but a group that was attracting national attention with its assertion that the university was lowering its standards in admitting more women and minorities -- and fewer children of alumni. Does anyone really believe that an alumnus as astute as Alito would be oblivious to its activities, or the message its inclusion on a job application might send?[125]

Really, does anyone?

B. Failure to Keep Promise to Recuse in Vanguard Cases

In written answers to the Senate Judiciary Committee questionnaire in 1990, Samuel Alito promised, under oath, that if confirmed to the Third Circuit, he would recuse himself from cases involving a number of parties, including the Vanguard companies, with which he had invested significant funds. Yet in 2002, Alito participated in a case (*Monga*) in which three Vanguard companies were named as defendants, and was the presiding judge of the three-judge panel that ruled in favor of the defendants.[126] Although Alito's supporters have tried to divert attention from the issue by arguing that Alito had no independent ethical obligation to recuse himself, the issue in fact is Judge Alito's failure to keep his promise and his failure to give a single, consistent explanation why. Judge Alito's testimony did not clear up these concerns but instead created further confusion, particularly as he admitted that the excuses originally offered were incorrect.

- **Failure to put Vanguard on standing recusal list**

Initially, it became apparent at the hearing that, following his confirmation in 1990, Judge Alito failed to put the Vanguard companies on his standing recusal list, a list that readily alerts

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[124] Dahlia Lithwick, "Confirmation Report," *Slate* (Jan. 11, 2006). At Alito's hearing, Senator Durbin quoted the reaction of Diane Weeks (Princeton '75), who worked with Alito in the U.S. Attorney's Office, upon learning that Alito had been a member of CAP: "When I saw Concerned Alumni of Princeton on that 1985 job application, I was flabbergasted. I was totally stunned. I couldn't believe it. *CAP made it clear to women like me we were not wanted on campus.* And he is touting his membership in this group in 1985, 13 years after he graduated? He's not a young man at this point." Hearing Trans. at 249 (Jan. 11, 2006) (emphasis added).

[125] Editorial, "Alito's 'Open Mind,'" *San Francisco Chronicle* (Jan. 12, 2006).

[126] The entire Vanguard issue is discussed in greater detail in the PFAW Pre-Hearing Report at 139-46.

the clerk's office of the Third Circuit not to assign a case concerning specified parties to Judge Alito.[127] Given that Alito in 1990 had just made a written promise to recuse himself from all cases involving Vanguard, his apparent failure to list such cases on his standing recusal list raises a question as to his commitment to keeping that promise. Indeed, when Senator Feingold first asked Alito if, after being sworn in as a judge, he had notified the court of his "commitments to the Senate" and requested that Vanguard be put on his standing recusal list, instead of answering "of course" or even "I would assume that I did, given my promise," Judge Alito replied, "Senator, I don't have a copy of the initial computer list, so I can't answer that question."[128]

- **It was a "computer glitch," it wasn't a "computer glitch"**

When Judge Alito's failure to recuse himself became the subject of public attention and concern last year, the White House "said that Alito was put on the case due to an error by a computer" because the Vanguard investments "were listed in the database."[129] Similarly, Judge Alito reportedly told Senator Kent Conrad that "there was a computer glitch . . . ."[130]

As just discussed, however, there apparently was no information in the clerk's office "database" stating that Judge Alito should not have been assigned to a Vanguard-related case, and at his hearing, Judge Alito admitted that it was not, in fact, a "computer glitch" that resulted in his participating in the *Monga* case.[131] Even before the hearing, however, the "computer glitch" excuse made no sense, since the Vanguard companies were named as defendants in the case; even if a "computer glitch" had resulted in the case being sent to Judge Alito's chambers, this would not have explained why Judge Alito thereafter participated in the case, having promised not to.

- **The promise extended only to "initial service," the promise did not extend only to "initial service"**

In a November 2005 letter to Senator Specter about the Vanguard matter, Judge Alito claimed that he had no obligation to recuse himself from cases involving Vanguard and further stated that "[t]he 1990 questionnaire sought my recusal plans for my 'initial service' as a judge."[132] Some Republican Senators at the hearing sought to portray Judge Alito's promise as limited to his "initial service," and Judge Alito appeared to go along with this. For example:

> Senator Hatch: But the fact of the matter is that, quote, "initial service," doesn't mean 12 years away, does it, when there's no chance in the world that you could ever receive any monetary benefit from Vanguard?
>
> Judge Alito: Well, I don't think initial service means 12 years away.[133]

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127 *See* Hearing Trans. at 203 (Jan. 10, 2006).

128 Hearing Trans. at 202 (Jan. 10, 2006).

129 Sarah Schweitzer and Michael Kranish, "Plaintiff Alleges Alito Conflict," *Boston Globe* (Nov. 3, 2005).

130 Sheryl Gay Stolberg, *New York Times* (Nov. 10, 2005).

131 Hearing Trans. at 204 (Jan. 10, 2006).

132 Letter from Judge Samuel A. Alito, Jr. to Hon. Arlen Specter (Nov. 10, 2005).

133 Hearing Trans. at 294-95 (Jan. 11, 2006).

When Senator Kennedy followed up, however, Alito admitted that the "initial service" excuse had nothing to do with his failure to recuse himself from the *Monga* case and that he "did not rely on that time limitation."[134] The "initial service" excuse also conflicts with the "computer glitch" excuse, and also with the fact that Judge Alito, following *Monga*, placed Vanguard on his standing recusal list[135] and in fact has recused himself from Vanguard cases after *Monga*, including as recently as 2005.[136]

- **"I asked that the original decision in the case be vacated"**

Part of the strategy of Judge Alito and the White House in dealing with Alito's broken promise about Vanguard has been to claim that it did not matter, because Judge Alito was part of a unanimous panel in *Monga* and the new panel reached the same decision anyway. But this sheds no light on why Judge Alito failed to keep his promise in the first place.

Nonetheless, at his hearing, Judge Alito went further than he had previously in seeking to minimize what had happened, suggesting that once the issue came up, he specifically "asked that the original decision in the case be vacated -- that is, wiped off the books. . ."[137] This is not entirely correct. In Judge Alito's letter of December 10, 2003 to then-Chief Judge Scirica concerning the motion in *Monga*, Judge Alito -- never mentioning his promise to the Judiciary Committee -- claimed that he had no obligation to recuse himself but said he would do so anyway.[138] But he did *not* ask that the original decision be vacated; to the contrary, he noted that a new panel would have to be constituted to consider the pending motion to vacate.[139]

In sum, Judge Alito's hearing testimony regarding the Vanguard matter served only to further confuse an already confusing situation involving his broken promise and his shifting excuses for why he failed to keep that promise. As Senator Kennedy concluded, that should be a "matter of concern" to "all of us."[140]

For all these reasons, Judge Alito's hearing served to underscore the conclusion already apparent from his pre-hearing record –- that America cannot afford to have him confirmed to the Supreme Court.

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134 Hearing Trans. at 298 (Jan. 11, 2006). *See also* Letter from Senator Edward M. Kennedy to Judge Samuel A. Alito, Jr. (Dec. 5, 2005) (pointing out that 1990 questionnaire and Alito's answer were not time-limited).

135 Hearing Trans. at 363 (Jan. 11, 2006).

136 Appendix 4 to Answers of Samuel A. Alito, Jr. to Senate Judiciary Committee Questionnaire (November 2005).

137 Hearing Trans. at 100 (Jan. 10, 2006).

138 Letter from Samuel A. Alito to Chief Judge Anthony J. Scirica (Dec. 10, 2003).

139 Letter from Samuel A. Alito to Chief Judge Anthony J. Scirica (Dec. 10, 2003).

140 Hearing Trans. at 422 (Jan. 12, 2006).