

Chairman SPECTER. Thank you very much, Senator Leahy.
Senator Hatch.

**OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S.
SENATOR FROM THE STATE OF UTAH**

Senator HATCH. Thank you, Mr. Chairman.

I welcome you, Judge Alito, your family members, friends and others who are accompanying you.

This hearing is part of an ongoing evaluation of Judge Samuel Alito's nomination to replace Justice Sandra Day O'Connor as Associate Justice of the Supreme Court of the United States. It is remarkable that after a nearly record-long period without a Supreme Court vacancy, we are here considering a second nominee in less than 6 months.

Mr. Chairman, let me first commend you for firmly and fairly handling these hearings. The timetable we are following reflects your efforts to accommodate all sides, and the 70 days since President Bush announced the nomination significantly exceeds the average for other Supreme Court nominees.

The debate over this and other judicial nominations is a debate over the judiciary itself. It is a debate over how much power unelected judges should have in our system of government, how much control judges should have over a written Constitution that belongs to the people. Ending up in the right place in this debate requires starting in the right place. The right place to start is the proper description of what judges are supposed to do, and the rest of the process should reflect this judicial job description.

The process for evaluating Judge Alito's nomination began when President Bush announced it more than 2 months ago. It continued with Judge Alito's meetings with more than two-thirds of the Senators and a vigorous debate in the media among analysts, scholars, and activists. As the Senate completes the evaluation process, we must keep some very important principles in mind and follow a few basic rules.

The first principle is that in this judicial selection process, the Senate and the President have different roles. Under the Constitution, the President, not the Senate, nominates and appoints judges. The Senate has a different role. We must give our advice about whether President Bush should actually appoint Judge Alito by giving or withholding our consent. Abiding by the Constitution's design and our own historical tradition requires that after Judge Alito's nomination reaches the Senate floor, we vigorously debate it and then vote up or down.

The second principle is that in our system of Government the judicial and legislative branches have different roles. As Chief Justice Roberts described it when he was before this Committee last fall, "Judges are not politicians. Judges must decide cases, not champion causes. Judges must settle legal disputes, not pursue agendas. Judges must interpret and apply the law, not make the law." This principle that judges are not politicians lies at the very heart of the judicial job description.

In addition to these two principles, a few basic rules should guide how we complete this confirmation process. First, we must remember that judicial nominees are constrained in what they may dis-

cuss and how they may discuss it. Like Chief Justice Roberts and others before him, Judge Alito is already a Federal judge. He not only will be bound by the canons of judicial ethics as a Supreme Court Justice, he is already bound by these canons as an appeals court judge. Because judges may not issue advisory opinions, judicial nominees may not do so either, especially on issues likely to come before the Court. That rule has always been honored.

Needless to say, those who will demand such advisory opinions in this hearing will do so precisely on those issues that are likely to come before the Court. They have a right to ask those questions. But as the Washington Post editorialized just this morning, however, “he will not—and should not—tell Americans how he will vote on hotly contested issues.”

When Judge Ruth Bader Ginsburg was before us in 1993, she said that her standard was to give no hints, no forecasts, no previews, and declined to answer dozens of questions.

The second rule we should follow is to consider each part of Judge Alito’s record on its own terms for what each part actually is. He wrote memos when he worked for the Justice Department. He has written judicial opinions while on the appeals court. He wrote answers to the questionnaire from this Committee in 1990 and again last year. He has written articles and given speeches. He has joined certain groups, and each of these is different. Each of these must be considered in its own context, on its own terms, rather than squeezed, twisted, and distorted into something designed instead to support a preconceived position or serve a preplanned agenda.

The third rule we should follow is considering Judge Alito’s entire record. Some interest groups focus on—some would say they obsess about—one recusal question, or they cherry-pick from the thousands of cases in which Judge Alito participated and the hundreds of opinions he authored or joined. Or they look at the results that ignore the facts and the law in those cases.

Judge Alito comes to us with a record that is long, broad, and deep. He deserves, and our constitutional duty requires, that we consider his entire record.

Finally, and perhaps most important, we must apply a judicial rather than a political standard to the information before us, and we do have a lot of information. The record includes more than 360 opinions of all kinds—majority, concurring, and dissenting—written during his judicial tenure. We have more than 36,000 pages of additional material, including unpublished opinions, legal briefs, articles, speeches, and Department of Justice documents relating to his service in the Office of Legal Counsel and in the Solicitor General’s office. We must apply a judicial, not a political, standard to this record. Asking a judicial nominee whose side you will be on in future cases is a political standard. Evaluating Judge Alito’s record by asking those whose side he has been on in past cases is, again, a political standard.

Scorecards are common in the political process, but they are inappropriate in the judicial process. The most important tools in the judicial confirmation process are not litmus paper and a calculator. Applying a proper judicial standard to Judge Alito’s record means putting aside the scorecards and looking at how he does what

judges are supposed to do, namely, settle legal disputes by applying already established law.

A judicial standard means that a judicial decision can be entirely correct even when the result does not line up with our preferred political positions or cater to certain political interests. When he was here last fall, Chief Justice Roberts compared judges to umpires who apply rules they did not write and cannot change to the competition before them. We do not evaluate an umpire's performance based on which team won the game, but on how that umpire applied the rules inning after inning. We do not hire umpires by showing them the roster for the upcoming season and demanding to know which teams they will favor before those teams even take the field. Similarly, we should evaluate judges and judicial nominees based on the general process for applying the law to any legal disputes, not on the specific result in a particular case or dispute.

The fact that Judge Alito is such a baseball fan gives me even more confidence that he knows the proper role of a judge. I know that there is a pitched battle going on outside the Senate, with dueling press conferences, television ads, e-mail, petition drives, and stacks of reports and press releases. The Senate can rise above that battle if we remember the proper role for the Senate and the proper role for judges. We can rise above that battle if we respect that judicial nominees are limited in what they may discuss. Take each part of Judge Alito's record on its own terms. Consider Judge Alito's entire record and apply a judicial rather than a political standard.

Judge Alito, I know you. I have known you for a long time. You are a good man. You are an exceptional judge as well. I welcome you and your family to this Committee, and I hope that the days ahead will reflect more light than heat. We congratulate you that you are willing to go through this grueling process to represent your country on one of the three separated powers. It means so much to all of us, and I am grateful to personally know you as well as I do.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Hatch. Senator Kennedy?

**STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR
FROM THE STATE OF MASSACHUSETTS**

Senator KENNEDY. Thank you, Mr. Chairman.

Judge Alito, I join in welcoming you and your family to this Committee. I appreciated the opportunity to visit with you in my office a few weeks ago, and I was particularly impressed by your personal family story of how you were encouraged to do well and contribute to your community. And I also applaud your dedication to public service throughout your lifetime.

Supreme Court nominations are an occasion to pause and reflect on the values that make our Nation strong, just, and fair. And we must determine whether a nominee has a demonstrated commitment to those basic values. Will a nominee embrace and uphold the essential meaning of the four words inscribed above the entrance of the Supreme Court Building, "Equal justice under law."