



AMERICAN
CONSTITUTION
SOCIETY FOR
LAW AND POLICY

PANEL DISCUSSION AT THE NATIONAL PRESS CLUB:

“THE ALITO NOMINATION”

Introductions:

Lisa Brown,

Executive Director,
American Constitution Society

Moderator:

Thomas Goldstein,

Partner, Goldstein & Howe

Panelists:

Marcia D. Greenberger,

Co-President, National Women’s Law Center

Ralph Neas,

President, People for the American Way

Nancy Zirkin,

Deputy Director and Director of Public Policy,
Leadership Conference on Civil Rights

Bruce Fein,

Bruce Fein & Associates;

Former Associate Deputy Attorney General in the Reagan Administration

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LISA BROWN: Welcome everyone. Welcome. My name is Lisa Brown. I'm the executive director of the American Constitution Society, and we're thrilled to have all of you here today. Needless to say, we are all riveted by the recent nomination of Judge Samuel Alito to serve on the Supreme Court. And all you have to do is read the newspaper, I think, right now to understand why. He is likely to have a profound impact on issues that are increasingly complex, incredibly important to our country, whether it is detention and interrogation, the role of religion in our society, congressional power to protect us from violence and discrimination, or a woman's right to choose.

I think you can look at the broad level and he, if confirmed, would influence and help define what this country stands for, what our Constitution means in this day and age. On a personal level, he could have a very profound impact on some of the most personal issues in our lives, so we really have to look very closely at his record, at his judicial philosophy, and see what they tell us about what a Justice Alito would be like.

ACS has been doing panels all across the country on how judicial nominations and judges generally impact all the issues that we care about and about the process by which the Senate exercises its constitutional right to advise and consent. And our panel today is going to look at some of those questions with regard to Judge Alito and what impact would he likely have on the Supreme Court and how is this confirmation process likely to evolve as we go along in the coming months.

I want to introduce now Tom Goldstein, who is our moderator today. We're thrilled to have him. Tom lives a dual life in many ways, both as a very highly regarded Supreme Court and appellate court litigator, and as the proprietor of SCOTUSblog, which if you don't know it, it is probably the most highly regarded source of commentary and information on the Supreme Court on the web. Tom is, as you can guess, a founder and partner in the law firm Goldstein and Howe, and has actually built a Supreme Court practice himself, which is really amazingly impressive. And he has – they have – represent parties on the merits in eight cases before the court just this term, and he will argue at least three or four of them. So this is somebody who knows the court incredibly well. And he also, both through SCOTUSblog and through his own practice, is the perfect person to be moderating this. So, Tom, with no further ado.

THOMAS GOLDSTEIN: Thank you so much. It is a great pleasure to be here and on a couple of different levels. First, because of the panelists, and I'm – rather than sort of going through biographies, I'm going to let them introduce themselves in an attempt to have them shed a light on their perspective, where they're coming at the nomination from. So we have incredibly accomplished people who are deeply involved in the confirmation process and what could be a confirmation battle, and also I think it's terrific to have the audience that we do, because you are a self-selected group of people who have looked at this question, who are genuinely interested in it, who are likely open to persuasion, and really are willing to evaluate the arguments and the points and the ideas that the panelists bring to bear on it.

I propose to do this in sort of two parts. The first is going to be sort of briefer, and that is, I want to get a sense from the panelists about what the stakes are in the confirmation generally. And that is, we're going to talk mostly about Sam Alito through the panel, but I want – throughout the course of the panel, but I want to start with the idea, okay, Sandra Day O'Connor is going. What could that mean for better or for worse from the perspective of progressives/conservatives? What really could be the consequences of this?

Then, when everybody has a chance to speak to that, and from that you'll learn how they're coming at the problem; whether or not they think the court needs to become more conservative or more liberal or what have you. From that, I want to turn to Sam Alito and I want to talk about Sam Alito in two parts. The first itself will probably be more briefly and that'll be, look, when you think about the basic things that you want from a Supreme Court justice, you want intelligence, you want someone with experience – these are all the things that really made Harriet Miers the most qualified nominee. (Laughter.) Where is everybody at on Sam Alito?

And then I want to talk about specific issues. And I think that specific issues will occupy most of the time, because I think it's that that will be the lens through which we can learn about what will happen if he's confirmed.

Then I want to talk about people's predictions. What will happen within the Senate? Is he likely to be confirmed? What are the prospects for a filibuster? What are the prospects for him to be voted down? And leaving time at the end of that for questions.

Now, that would ordinarily mean that we would be here for 14 hours. We unfortunately can't do that. We are going to get out of here by 1:45. I want to leave 20 to 25 minutes for questions. We'll have some questions from the press and questions from the audience, and I'm really going to sort of moderate with an iron fist in the sense of making people answer the questions that are put to them, rather than speechifying or speaking in generalities. I think that this audience and this panel is so educated and so informed about these questions that you can get real genuine information.

So returning to the beginning, I'm going to turn to each of the four panelists, ask them to introduce themselves so you know what organizations they're affiliated with or simply what their perspective is, and talk for just a few minutes about what the stakes are in the retirement of Sandra Day O'Connor and the president's appointment of Sam Alito, without getting into details about Sam Alito himself, but just generally, broadly what are the stakes, and then we'll talk about Sam Alito himself. So let me start with Ralph Neas, if he could kick us off.

RALPH NEAS: Okay. How much time do we have, Tom, on this?

MR. GOLDSTEIN: You've got about – not as much as you want. Three or four minutes.

MR. NEAS: That's fine. My name is Ralph G. Neas. I'm president of People for the American Way and have been since early 2000. As many of you know, I headed the Leadership Conference on Civil Rights for 15 years, and chaired the Block Bork Coalition in 1987. Some of you may be surprised: I was a Republican for most of my life. I was chief counsel to Republican Senators Edward W. Brooke and David Durenberger. This is the 12th Supreme Court nomination I've had a chance to work on, one way or the other, starting with Justice Stevens in 1975.

In terms of what's at stake, I started January 3rd of 2000 and the first thing I asked Elliot Minberg, our chief counsel, was I've been hearing George W. Bush talk about "I want justices in the mode of Thomas and Scalia." So over the next five months, we did a study and looked at every dissent, every concurring opinion of Thomas and Scalia going back to '91 and '86 respectively. And what we found out is if Thomas and Scalia get a majority, more than 100 Supreme Court decisions will be overturned affecting, of course, privacy and reproductive rights, clean air, clean water, civil rights, religious liberty, consumer issues, campaign finance reform.

And what we found out is that there really is an epic struggle between two competing and radically different judicial philosophies. And since 1937 when the first New Deal measure, after four years of trying, was validated constitutionally in the Social Security Act, we've really had a second American Revolution. And so many rights and liberties and legal protections have come through the courts, Congress mainly because of how the commerce clause, spending clause, Fourteenth Amendment and privacy have been interpreted.

What Scalia and Thomas would do if they had a majority is overturn those 100 precedents going back to 1937 and point to – and this is really, really important – remove the constitutional authority for progressive government maybe for decades, because they believe the Constitution has been in exile since 1937. They want to redefine commerce and spending, the Fourteenth Amendment, privacy, other provisions. That's what's at stake. I could not give more of a sense of urgency to it, and I'm going to let other people talk about Sandra Day O'Connor and fifth and decisive vote. But basically, if someone to the right of Sandra Day O'Connor gets on that court, it will dramatically push the court to the right. In essence, that person will become a walking constitutional amendment. Many rights, freedoms and protections that we've taken for granted for decades could disappear overnight.

MR. GOLDSTEIN: Bruce Fein, my sense is that with the exception of maybe the conclusion, you might agree with the general sense that there's an enormous amount at stake. And so if you could give your take on that, also maybe give your sense of what you think the change between Sandra Day O'Connor and someone else who's more conservative would mean.

My sense is that conservatives have been very frustrated by Sandra Day O'Connor, and I just wonder. George Bush wins the 2004 election, Sandra Day

O'Connor at the end of last term announces her retirement. Sort of what was your reaction? Was it the first proof that there's a God? What – (laughter).

BRUCE FEIN: That was what Justice Frankfurter said when Vinson died in the middle of *Brown* against the Board. He was a believer then.

MR. GOLDSTEIN: But what's at stake?

MR. FEIN: There is an enormous question as to the proper role of the Supreme Court in interpreting the Constitution that's at stake, and I think Sandra Day O'Connor represents, I think, the frustration of those who are, myself in the Reagan administration when the first vacancy arose as trying to appoint justices who would be under the law, rather than over the law.

By that, I mean, justices who feel constrained in their interpretative discretion by the language and purpose of the Constitution as understood by the framers, whether at the outset or framers of the amendment. And the reason for that is that there are not alternate methods of interpretation that confine the justice to do anything other than what they wish to impose on society as the so-called "good life." If you think of the alternate formulations for interpretation that have been endorsed by Sandra Day O'Connor, things like mysteries of the universe, the meaning of human existence, evolving standards of decency that mark the progress of a maturing society, not a stagnant or retrogressive one, these standards are outside the law. You don't learn about them at law school. You don't learn about them in *Blackstone's Commentaries*. You can stuff whatever you want in them.

When Justice Anthony Kennedy enjoined in a concurring opinion by Sandra Day O'Connor in the *Lawrence v. Texas* case said, "Well, these views of human existence and meaning and fulfillment under the due process clause require a ban on homosexual sodomy," and there was a question, well, what about same-sex marriage. Isn't that equally compelling – or polygamy – for people's sense of fulfillment, and isn't that an inevitable constitutional right? Basically his answer was, "Not until I say it's so."

These are arbitrary rulings of the justices based upon nonoriginalism. Not that originalism provides all unambiguous questions, because the intents of the framers can be different. Circumstances change. There wasn't in 1787 wiretapping and electronic surveillance that was addressed by the Fourth Amendment, but the goal and objective and purpose of the privacy enabled the court in the *Katz* case after 40 years of error to *Olmstead* to say, yes, the Fourth Amendment covers these kinds of things.

And what the O'Connor vacancy creates the opportunity for is a change in the philosophical balance of the court that feels itself bound, not because it's necessarily the greatest standard in the world if you could rewrite Article III again without an amendment, but bound by the understanding of the framers that the court was the least dangerous branch in part because it was confined in interpreting the Constitution in a way that honored the authors, because the alternative is lawlessness.

Think of this: we all understand that we would not want the United States of America to be absent a Bill of Rights. We would not want the United States of America to be absent the Civil War amendment. They're great testaments to our cherishing of liberty and freedom and equality, but we equally would not have wanted those amendments to be ordained like a papal encyclical by the Supreme Court who said, well, this is a great idea and so we will just do it on our own. It's that process that honoring the integrity of the process of decision-making that's at stake here.

Sandra Day O'Connor, in my judgment, was a great failure on that score. Everything in her mind was like a restricted railroad ticket: good for this day and train only. One day she'd vote one way, the next day another way with whatever her standard was in the evolving standards of decency issues, raising death penalty. In the last term *Roper* and *Simmons*, Anthony Kennedy says, "Evolving standards of decency say you can't execute individuals who committed their capital crime when they're less than 18." And then Sandra Day O'Connor writes a dissents, says, "No, because evolving standards of decency in my judgment don't require that ban," but there isn't any way to reconcile the two in any principled fashion, other than one person's druthers were different than another. That is the epitome of lawlessness that we cannot countenance in the Supreme Court.

MR. GOLDSTEIN: Excellent. And I really appreciate that everybody is doing a great job at staying within a sort of period of time. We're going to get to cover a lot of time. Marcia Greenberger, your organization deals with a specific set of issues, but also the court more generally. What do you think is at stake? It is polygamy? Can we go there? (Laughter).

MARCIA GREENBERGER: Well, I agree.

MR. GOLDSTEIN: And let me just ask if you'd just step back and – okay, just to identify for the audience.

MS. GREENBERGER: Okay. Well, I – as you said, I'm Marcia Greenberger, and I started working with the National Women's Law Center, co-president, and I started working on women's legal issues in 1972. And so during all of those years, I've had occasion through the work of the National Women's Law Center both to be involved in cases that went up to the Supreme Court, to deal with legislation both in response to Supreme Court decisions and enacting statutes to protect women's legal rights and in looking at agency rulemaking in the state policies and laws and the like.

Over the years, while in our early years we did not get involved in judicial nominations at all, especially during the Reagan administration, as I think Bruce alluded to, there was a real determined focus to look at the selection process for federal judges, and specifically and especially the Supreme Court, as a way of changing the judiciary, their judicial philosophy. And finally it culminated with the Bork nomination, and that

was the first nomination that the National Women's Law Center and I became involved in, and we've looked at those issues since.

The stakes are, as everybody has said it's beyond dispute. These are enormous stakes, obviously just in the most specific, because it's the O'Connor seat and she's been the swing vote on so many different issues, by definition, with the swing vote. She's been a big disappointment to us in some cases, but in every case we had a sense that she did have an open mind. And you can criticize that as having – not having a judicial philosophy that determined the outcome, but I think from our perspective it meant that she was open to hearing about the impact of a legal principle on real, live human beings, and what it would really mean to the country to rule in one way or another, and that gave us a chance at having an ultimately humane interpretation of the law.

And I want to go back to something that Bruce said, too, because I think that for all of us and for anybody who comes up to be – probably to be as – confirmed by the Senate for a judicial appointment, everybody would say that they are there to enforce the law and to interpret the law and not to make it. And everybody would say that they are constrained by the intent and by the language of the Constitution, and that they are not inventing principles that didn't exist before.

The rub comes in what was the founders' intent? How narrow was the founders' intent? When the founders talked about due process, did they intend that to be an evolving principle that would take into account the realities of a 21st-century world beyond technical changes like wiretapping, or did they intend that what was viewed as due process in the 18th century in a specific context had to remain that way over time? That obviously has – the answer to that question has enormous implications into the future for people's rights, but you can't start out by saying one is a legitimate approach and the other isn't a legitimate approach.

And of course, for somebody who cares about women's legal rights, as I do, and who's looked and seen over our history the law constraining women's opportunities, prohibiting them from practicing law, prohibiting them from being on juries, prohibiting women from owning property, and the list goes on, it was the interpretation, ultimately, of the equal protection clause and the Fourteenth Amendment that gave women some vital protection – constitutional protection against those kinds of barriers. Well, that was not necessarily something that those individual founders in the 18th century would have assumed would have been the proper interpretation, but that doesn't answer the question.

The question is, with evolving understanding and evolving notions of equality and evolving maturing of a society, would those founders have wanted to see the kind of flexibility in the equal protection clause to allow for women's equal right under the law, to allow for a *Brown v. Board of Education*, and the list goes on. So those are the issues that are at stake. The Sandra Day O'Connor seat meant that there was some openness to these evolving doctrines and principles. And then the real question is whether or not somebody will be replacing her who has such a rigid view of what the founders' intent was that we'll be turning back the clock.

MR. GOLDSTEIN: Nancy Zirkin, you are not only a specialist in the process and know more about how the Senate works and how this nomination may go forward than almost anyone, but I imagine you also have a sense of the stakes at issue.

NANCY ZIRKIN: Absolutely. I'd like to open this by saying, I think everybody said everything but not everybody has said it, so it's my turn. (Laughter.) I'm Nancy Zirkin, and I'm Deputy Director of the Leadership Conference on Civil Rights. I spent a lifetime fighting for rights of all Americans. And with Marcia I was in the trenches in women's effort to attain equal rights. And this was at a time in the '70s when it was perfectly permissible to discriminate against women in education, employment, in credit, in advertising, in everything you can think of. So old girls like me and my friend Marcia know firsthand what's at stake having lived through those times, and really worked on a lot of legislation that improved women's lives and the lives of all Americans.

And of course, when Sandra Day O'Connor was confirmed in 1981 – '2, whatever, we all cheered. It was a remarkable time because many of us felt that in ten short years, and it hadn't been ten short years, but that we had accomplished a whole lot, and obviously a whole lot more had to be accomplished.

As these rights – as all of the civil rights legislation was moving through the Congress starting in the '50s and into the '60s and into the '70s, there was a feeling on the right that the whole issue of what Congress was doing and how the courts were looking at it had gone too far. And about 1982, as you all know, there was an effort – or in '81 when Reagan was elected and they realized that there was no infrastructure, they started – the Republicans, the radical right started to put infrastructure in. And one of the things that they put in was the Federalist Society, which would provide the infrastructure for the thoughts of how the courts ought to look, how congressional authority ought to be viewed. And what's at stake here is really those laws.

Are the civil rights protections, which protect now, I'm proud to say, against discrimination in housing, education, and employment, and it also has – there are also other laws, violence against women, Family and Medical Leave Act. What is at stake is the progress. And I say "progress," because I am a child of the '60s that we have made from a time when women were truly discriminated against, where African-Americans were truly discriminated against, where people with disabilities and on and on and on. So that's what's at stake – what we have accomplished, what we have done – and that's why this pivotal seat will really produce, I think, a battle on those sides.

MR. GOLDSTEIN: All right. So we have a consensus that there is a great deal at stake. And now I want to turn to Sam Alito, and I want to do one thing very briefly, and that is, I just want – I think everybody now understands the perspective of the people on the panel, but I want to lock down for a second. I want to go through each of you and I want you to say whether or not you think Sam Alito should be confirmed or rejected, and I want you to predict on the record what you think the vote in the Senate will be. (Laughter.) Not what you think it should be. Not what you think it should be, but a

realistic assessment of what you think the vote in the Senate will be on Sam Alito. And let's just go from one end of the table to the other.

MS. ZIRKIN: Well, let me say this, that – you want the vote in the Senate?

MR. GOLDSTEIN: I want to know if you – should he be confirmed or rejected or it could be too early to say.

MS. ZIRKIN: I think in both cases – we are four days out, guys. That's it. This nomination hasn't even gotten up to the Senate. He nominated – Bush nominated on Monday, but what happens next is he has to send up to the Senate his intent to nominate, but he wasn't done that.

MR. GOLDSTEIN: Right, but odds are that's going to happen. (Laughter.)

MS. ZIRKIN: And so it's going to happen. But my point is, it's four days out.

MR. GOLDSTEIN: Right. Okay.

MS. ZIRKIN: This is an impossible prediction.

MR. GOLDSTEIN: Excellent. But this is the internet era and 24-hour cable news channels, and we – rushes to judgment are a good thing now, and so – (laughter).

MS. ZIRKIN: Only for some people.

MR. GOLDSTEIN: Right, exactly. All right. You can decline to answer, but do you think he – do you have a sense or is it simply too early for you to say whether you think he should be confirmed or rejected?

MS. ZIRKIN: What we are seeing right now is a record of a judicial activist. We have obviously not gone through everything. There are 3,500 cases, 300 opinions, there are speeches, there are writings, there is eight years in the Department of Justice, so there is a lot to go through. And the Leadership Conference on Civil Rights and our allies in our coalition are obviously going through all of the documents.

But as a matter right now, what we see is with his selection, Judge Alito seems to be, as you alluded to, the darling of the right. He comes in the wake of Miers. He comes in the wake of the right saying, "We demand someone who is very, very conservative; who is an identifiable conservative." His record is as a judicial activist, as I said, with a record hostile to civil rights, civil liberties, and fundamental freedoms. In fact, Alito has tried to go further than the Supreme Court in restricting Congress's ability to protect these rights and freedoms.

MR. GOLDSTEIN: Well, let me – I want to come back and we'll get into the details, but let me just finish off the quick predictions.

MS. ZIRKIN: Fine.

MR. GOLDSTEIN: The quick, inaccurate predictions.

Ralph?

MR. NEAS: Tom, we've been saying for years that we would oppose any nominee in the mode of Thomas, Scalia and Bork. Alito is such a nominee. We've been studying his judicial record for about three, three and a half years. Five minutes before the president spoke, we released that report. We issued a press release opposing his nomination.

MR. GOLDSTEIN: And yet he still did it? (Laughter.)

MR. NEAS: And yet – I know. I was really hoping for that moment of epiphany, but it didn't happen. It didn't happen, but perhaps it will shortly.

MR. GOLDSTEIN: And the vote?

MR. NEAS: And the vote, I think it will be narrow bipartisan rejection up and down or, if that's not there, then it will be a filibuster and Republicans will join a requisite number of Democrats. He will not be confirmed.

MR. GOLDSTEIN: And the nuclear option would be employed or not?

MR. NEAS: My guess is, that depends on Bill Frist's vote count. Last time he didn't have the votes, but Reid wasn't sure he had the votes. It was basically a 50/50 proposition after an extraordinary coalition campaign, *Mr. Smith Goes to Washington* ads. Two million Americans basically contacted the Senate on a parliamentary option. It was unbelievable. There'll be a lot more in the white heat of a Supreme Court nomination.

MR. GOLDSTEIN: And what's your –

MR. NEAS: The politics favor that the nuclear option will be defeated.

MR. GOLDSTEIN: Okay.

Marcia?

MS. GREENBERGER: The National Women's Law Center has not yet taken a position. We are very worried and I'm sure we'll be talking for the rest of the program about why. And when we take that position, then I will give the prediction.

MR. FEIN: I support the confirmation of Judge Alito. I think he will be confirmed something like 60 to 40. I think the Democrats will shy from any attempt to filibuster. They know that it's very likely to fail. It's throwing the dice and if they fail on this time, if there's a future vacancy for Bush, there'll be no sword of Damocles of a threat of a filibuster to deter him from nominating a Mike Luttig or Mike McConnell.

I would like to just have a brief remark about the Federalist Society, since I was there at the creation. The Federalist Society has never taken a position that would deny equal opportunity based upon race, gender, religion, ethnicity, or otherwise. The only debate has been if there are preferences based upon those criteria how might they be fought or limited, but the idea that the Federalist Society would ever tolerate any retrogression back to Jim Crow or times where women were treated in a subordinate fashion is preposterous.

MR. GOLDSTEIN: All right. So now let's talk about Sam Alito. I want to talk about it, as I said, in two steps. I want to talk about core judicial qualifications. I want to see if he can measure up to Harriet Miers. (Laughter.) And then I want to talk about particular issues.

All right, from what I have read and what I know, no one had made a serious argument on two – I want to focus issue by issue. No one has made a serious argument that Sam Alito is lacking either in intellect, in education, or in experience, but I want to see just pausing on that particular question. We'll get to activism, ideology. That's what we'll talk about most, but I want to see if anyone wants to make the case that he doesn't measure up to Harriet Miers or some other standard that you want to set. I mean, are we agreed that – everybody agrees that he has the intellect for the job, the education for the job, and the experience of the job?

Now, whether he's the person you want in the chair could be an entirely different matter, but on that set of qualifications is there anybody who has some question? Okay. I'm sorry.

MR. FEIN: If I might add, judicial temperament.

MR. GOLDSTEIN: Well, I think this may – it's something I want to turn to in just a second.

MS. GREENBERGER: I don't have any quarrel, to coin a phrase, with your statement per se, although I do think that there was a lot of conversation, including by the president of the United States, about the importance of diversity on the court. And I don't only mean by gender or by race, but also by experience.

And so I don't want by agreeing in a narrow sense with what you are describing that that necessarily means that in looking at what would be best for the country and his qualifications and his background and his areas of experience are actually the best for the court under these circumstances.

MR. GOLDSTEIN: Sure.

MR. NEAS: Just 30 seconds, Tom. I think that Alito, like Robert Bork, does have excellent legal credentials, and like Robert Bork is a person of integrity, so I think they are comparable in many ways, and we'll get into other ways that are comparable in a few minutes.

With Harriet Miers, I – Tom, I do want to just lightly respond to your two cracks about Harriet Miers and expose, I think, the hypocrisy of the right. Harriet Miers certainly was much more qualified than Clarence Thomas with about 17 years more of legal experience, extraordinary experience in the local bar, state bar, the American Bar Association, five years at top level of the United States government in the White House. I do think she may not have brought the exact same credentials that Chief Justice Roberts brings – constitutional law. Few people do. But she certainly brought other credentials more akin to Justice Lewis Powell out of Richmond, Virginia, who was a community activist, active in the American Bar Association, had a lot of commercial litigation.

So I'm not saying she ranked on the top echelon of all nominees in terms of legal credentials, but I certainly didn't hear the right criticizing Clarence Thomas's credentials back in 1991. And I can remember William Coleman, the Republican Department of Transportation secretary under Gerald Ford testifying that he was the least qualified nominee in the 20th century.

MR. GOLDSTEIN: All right. Well, let's pause on Harriet Miers for just a second, and I'd like another prediction. And that is, do you think that progressives will rue the day that Harriet Miers slipped through their grasp?

MR. NEAS: Tom, I don't know what the judicial philosophy of Harriet Miers is. Our position was that she deserved a hearing. Only Caleb Cushing in 1877 was withdrawn when his own party reacted and forced the president, Ulysses S. Grant at the time, to withdraw a nominee. Those who have been advocating an up-and-down vote were the ones leading the charge against Harriet Miers and wouldn't even give her a chance to testify regarding her credentials and her judicial philosophy.

MR. GOLDSTEIN: Was this some sort of secret filibuster? Was it some – was a denial of the constitutional process?

MR. FEIN: No, I think it's an exercise of freedom of speech. I think, Ralph, you should have read all of her ink blot kind of writing and insofar as she ever did address constitutional issues in a serious fashion to understand how shallow and ridiculous they were. She made a statement on her questionnaire – this is a questionnaire to the United States Senate. No time limit. She's got unlimited resources at the White House to check things, saying that Supreme Court had ruled under the equal protection clause that proportional representation was required in city council elections. It sounds a little bit

like Lani Guinier. The Supreme Court never made any such ruling in its life. She puts this in the Senate questionnaire answer.

Her other musings, insofar as they relate to constitutional issues, suggested that legislators have no obligation to pay respect to the Constitution when they legislate. They're setting policies only for the courts to decide, and that's why the Dallas city council could ban flag burning after the Supreme Court said flag burning is protected by the First Amendment. It was shocking, the few occasions where she said anything about the Constitution, how upside down she knew the law was, as well as what positions she had taken in her private capacity and other elements.

For example, setting aside based upon race and gender seats on the board of governors of the Texas Bar Association: a clear set aside that ran contrary to the *Adarand Construction* case, there wasn't any finding of past discrimination. So the idea that Harriet Miers was out there, she didn't have a fair day to present her arguments and her philosophies, she could have called a press conference at any time and said, "I'll explain to you what my background is and how I am conversant with these constitutional issues. I will not be a potted plant on the United States Supreme Court." She never did that. She withdrew on her own. (Laughter.) The president didn't approach her. There was no senator that approached her. She withdrew on her own because she feared the embarrassment of a hearing. There was no one who went to her and said, you have to withdraw, although obviously in a free country people can urge things on everyone in government life or otherwise.

MS. GREENBERGER: The truth is I was actually thinking to myself, I wasn't sure how lively this conversation would be because I actually agree quite a bit with most of what I've seen Bruce Fein say in public about the stakes, how important it is. Of course, we disagree about whether when things change, that will be change for the better or a disastrous change, in my view. But this is going much further that I can sit back quietly and allow it to continue.

I think we're making a mistake to spend too much time on Harriet Miers' qualifications when we now have Judge Alito's nomination before us, and I think it is important to get to that. But what I do think is of enormous importance is the real opposition to Harriet Miers was based on her judicial philosophy and the lack of the right wing's confidence that she would be a for-sure vote. That's number one.

And the second ground for the real opposition was the terrible signal that the right wing thought was sent that the Bush White House was not willing to stand up in a forthright way and say they are picking a nominee who will turn back the clock in all the ways that the right wing wants that clock turned back, and we are seeing exactly the same thing starting to play out with Judge Alito.

All of a sudden, the person who has been on everybody's short list as a brilliant right-wing judge who should be on the Supreme Court now has an open mind. We have no idea how he will rule on Roe. (Laughter.) We don't know what he could possibly be

thinking. He has no particular judicial philosophy that will lead him to any particular conclusion in any area, in any way. His writings are not writings that we should pay attention to because they may be academic musings, or he thought he was bound by the Supreme Court, or he was trying to figure out what was going on, or it was just factual in nature. We shouldn't pay any attention to the bottom line of how he ruled.

So we are starting to see, despite the right-wing glee the instant that he was named, the fact that he had been on everybody's short list in contrast to Harriet Miers, who was an unknown with respect to her constitutional views, that we now as members of the public, and senators, too, should view him as a total blank slate in terms of what he will do when he gets to the Supreme Court.

MR. GOLDSTEIN: Okay. So let's –

MS. GREENBERGER: And it's that hypocrisy with respect to Harriet Miers that I think has to be underscored.

(Cross talk.)

MR. GOLDSTEIN: – answer it. I'll come to you first on Samuel Alito and then you can sort of wrap up.

MS. GREENBERGER: Okay.

MR. FEIN: I'm done.

MR. GOLDSTEIN: Okay. We just – we have 30 minutes now to deal with all of the issues on which it can make a difference, but let's turn to Sam Alito.

I want, if you would, to pick out Nancy and Ralph, and Marcia, and then I want to give Bruce the opportunity to respond on the questions that he thinks are most relevant, to make sure that he's able to address them.

I'm interested in one issue – one decision of Sam Alito that really points up the way in which you think he is wrong for the Supreme Court, something specific that he has done that people could, if they wanted to, go read his lower court opinion or something that he's written, contrast it with what Sandra Day O'Connor has done, and is a great illustration of that point. And Nancy, I think I'll come to you last, because you can also build in questions of process.

MS. GREENBERGER: Okay.

MR. GOLDSTEIN: So let me just start with you, Ralph. What – if you wanted people to go read a case, an opinion by Sam Alito, and say, "Look, this illustrates that this guy is outside the mainstream," what should people be looking at?

MR. NEAS: Tom, I'm going to defer on, too, that I would start with Marcia and then Nancy.

MR. GOLDSTEIN: All right.

MR. NEAS: Especially the *Casey* decision and the Family and Medical Leave Act decision, which I think are two outstanding decisions of Alito that would help people figure out where his judicial philosophy is.

I guess if I were going to pick one, because, as I said before, I think that the Commerce Clause is so central to the discussion of these two competing and radically different judicial philosophies, and the redefining of the Commerce Clause would redefine the role of Congress perhaps for decades in terms of what it could enact affecting civil rights and the environment and consumer issues and so many other issues that are based on the Commerce Clause. So that would probably be the *Rybar* case when Machine Gun Sammy decided that the Commerce Clause did not allow Congress to enact legislation prohibiting the sale and transfer of machine guns. I'm not talking pistols. I'm not talking about hunting rifles. I'm talking about machine guns at gun shows. And of course, he did not have the votes and we still have that law, but he tried hard to make sure that every American had a right to a machine gun.

MR. GOLDSTEIN: Yeah. Can I ask about your characterization of the decision? Because my sense of it – and tell me if I'm wrong – was that his concern – and this is in the wake of *Lopez* – was that there wasn't a finding requirement or a finding made by Congress that the machine guns actually travelled in interstate commerce. And I had thought that he had suggested that if there was that finding in the statute that it would be constitutional. Are you looking at something more broadly or am I just misunderstanding the opinion?

MR. NEAS: Tom, you're absolutely right. That's what he said. And the majority of the Third Circuit said, you're absolutely wrong, Judge. You just misinterpreted what the Supreme Court and the law of the land has been with respect to the Commerce Clause, and you build a case that just doesn't persuade.

MR. GOLDSTEIN: So what worries you about an opinion that says there has to be a finding of an effect on interstate commerce? Is it that you think that's indicative of the direction he would go in terms of limiting the Commerce Clause or do you have a real problem with requiring findings?

MR. NEAS: Having had the opportunity over the last 32 years to work with two senators and to be with the leadership conference and be with People for the American Way, and especially with respect to enacting legislation that will stand Supreme Court scrutiny, of course, whether it was the Americans with Disabilities Act where he had a problem there or if it was with respect to any other civil rights or environmental or other kind of issue that is premised on the Commerce Clause, of course you have to make sure

that the findings are going to be able to withstand constitutional scrutiny by the Supreme Court.

MR. GOLDSTEIN: Marcia, what's a good illustration to your mind?

MS. GREENBERGER: Well, I just –

MR. GOLDSTEIN: In few seconds –

MS. GREENBERGER: I want to add just one – a couple very quick points on *Rybar*, too, and give you my answer to the question that you asked, Ralph. First of all, I think it is the height of judicial imperialism to say that Congress has to start going through and making specific findings to satisfy a judge about whether they had (audio break).

MR. GOLDSTEIN: – respect for precedent, but what is your best estimation on the question of if the question were put to Sam Alito on the Supreme Court would he vote to overrule *Roe v. Wade*.

MS. GREENBERGER: I don't think that's the question, frankly. I can speculate as to the answer. I can tell you I'm terribly, terribly worried that he would, and that, to me, is really what the question should be for anyone in the public, let alone in the Senate. Do they think that there is a serious risk in light of his record that he would actually be a vote to overturn *Roe* or to basically vitiate its protections? And I hear about "chipping away," which is a very dismissive way about talking about ultimately taking the underpinnings out of a right that's so important for women.

And so to me the issue is risk, and obviously this is something that we are evaluating right now. And the Center hasn't ultimately taken a position yet, but I am very, very worried. When I read this opinion, I see no real articulation of concern for women's privacy rights in this balancing at all. There's some mention about how violence against women, domestic violence is a bad thing, of course, but nothing about the ultimate privacy right.

MR. GOLDSTEIN: Okay, Nancy, let me come to you now. Do you – is there a case that you want to use as an illustration or are there themes?

MS. ZIRKIN: Well, I think that one case in terms of the Leadership Conference that is very important – and it's really a whole series of cases because time after time in the cases that we've reviewed so far Alito has set a very high threshold for proving discrimination on race, disability, and gender.

I'm going to be brief, because I would like to talk about the process.

MR. GOLDSTEIN: All right.

MS. ZIRKIN: Because I think that's important. But the one that I would cite is the one that is on race discrimination, *Bray v. Marriott Hotels*. And he strongly disagreed with the Third Circuit rulings vindicating the civil rights of African-Americans. He disputed a ruling by Theodore McKee, the Circuit's only African-American judge, which allowed a race discrimination case to go to trial. McKee said that Alito's position would "immunize an employer from the reach of Title VII if the employer's belief that it had selected the best candidate was the result of conscious racial bias." In other words, Alito's finding would basically eviscerate Title VII.

Alito complained that McKee's ruling would actually convert antidiscrimination law into a "condition of employment law" where disgruntled employees imposed litigation costs on employers who have not intentionally discriminated, but who have treated their employees unfairly.

MR. GOLDSTEIN: So, Bruce, let me come to you and let me take this in two parts. The first is I want to put to the side some of the rhetoric and the rhetoric is important and valuable, and it illustrates the stakes for both sides. But I want to take the premise of the three people who have gone before you, and that is that they believe that Sam Alito will more narrowly construe the Commerce Clause – Congress' power under the Commerce Clause; that he will more narrowly read, perhaps overrule, the abortion right that has been found thus far in the Constitution; and that he will more narrowly read the antidiscrimination laws like Title VII.

And just can you tell us – there was some suggestion earlier that conservatives who were defending the nomination, now actually deny those premises and say, you don't know that much about what he would do as a Supreme Court justice. But on the other hand, it seems to me that some conservatives would take those premises and applaud them. And I wonder what your view is on those issues.

MR. FEIN: Let me address them seriatim, Tom. And number one, I'm not one who's suggesting you can't make a deduction, and shouldn't, from Sam Alito's experience as a judge, as a fellow department employee at the Department of Justice. That's why I support him and opposed Harriet Miers because of her philosophy. I wasn't trying to be disingenuous.

But with regard to the Commerce Clause, I think it is fair to say that Justice Alito would require some interstate connection when you're dealing with noneconomic issues outside the realm of what the lawyers call *Wickard v. Filburn*, which related to feeding home-grown wheat animals on the farm that affected the supply and demand curve and interstate commerce and therefore Congress could regulate it.

MR. GOLDSTEIN: From now on, they're just going to call it *Raich*.

MR. FEIN: All right. We call it the *Raich*. That's the medical marijuana case, for those who haven't read it.

But the one thing is important to recognize that the court has not retreated, even in *Lopez* and in *Morrison*, from the idea that if it's economic regulation, you don't need these strict findings; that is, if there's an impact upon supply and demand or the cost or innovation of a product that moves interstate commerce, that's sufficient to establish congressional power.

Now, with regard to the decision on the guns, it was stated, I think a little too hastily, that because Sam Alito was just one vote out there and he'd been disputed by many other jurors that indicated he was wrong. And just as an aside, remember there was a famous case over 100 years ago. There was just one Supreme Court justice who dissented. It was John Harlan. He said, "No, the Constitution is color blind, and separate-but-equal isn't good enough." He was that one dissenter who sort of stood there lonely for some 54 years before he was finally vindicated, so it's really not so sensible to say because someone is in dissent, therefore, they've got to be wrong.

But putting that aside, the Constitution itself gives Congress the power to regulate interstate commerce. In the shotgun case, there's no finding that the gun had moved or had any connection with interstate commerce. What is the congressional authority?

Now, Ralph suggests that without this power to regulate in this dimension without an interstate finding that suddenly we'll all have machine guns everywhere. States won't forbid guns of that sort, which of course they have the authority to do. But one thing you should remember in the aftermath of the *Lopez* case, which banned – which the Supreme Court said Congress could not without a finding that a gun travelled in interstate commerce prohibit its use or possession near a school, there was an amendment that was sponsored by Dianne Feinstein that required an interstate nexus. And no one's been able to identify that now that the law doesn't operate adequately. More –

MR. GOLDSTEIN: But can I just press on this for a second? Is the sense that the idea was that somebody had made a machine gun in New Jersey and that that guy had bought it in New Jersey and sort of carried his machine gun around just in New Jersey?

MR. FEIN: Well, in the proving the crime, obviously burden of proof is on the government to prove each element beyond a reasonable doubt, and Congress did not make an interstate nexus the hand – the shotgun part of the definition of the crime.

Now, you could distinguish and say, well, this didn't relate to schools and maybe the gun was more threatening to people who wouldn't move in interstate commerce, but the idea that it's outrageous to have to force Congress to make a finding, I think, is quite foolish. Even with regard to liberals, I have been the one – I denounced that bill passed by Congress without any findings the Terry Schaivo legislation. What's Congress' power to legislate with regard to Florida's right-to-life statute?

The same with regard to partial birth abortion. I've written articles saying, where does Congress get the power, under the Commerce Clause or otherwise, to regulate partial birth abortion? So that you can turn the Commerce Clause into ways that you

would find them quite mischievous, I think, on the liberal side unless you require some nexus to interstate commerce aside to just honoring the simple words of the Constitution, which speaks of the interstate commerce as being different than something that transpires solely within a state.

And I do not think, despite the Armageddon predictions of Ralph, that the Congress will then shrink from this Leviathan into some little tiny acorn because it doesn't have the authority to regulate everything it wants to without making a finding of an impact on interstate commerce. Then, of course, because of the revolution in transportation and communications and otherwise, it's generally very simple for Congress to make a finding with regard to interstate commerce. And lastly, the *Lopez* and *Morrison* decisions, which were forecast to be the death knell of congressional power, were certainly very much confined in the *Raich* decision on medical marijuana, which was joined by Justice Scalia, who may be joined by Scalito, if Judge Alito is confirmed.

Now, with regard to the issues of right of privacy, abortion that you referred to, I think there's no doubt that Judge Alito would be skeptical of employing the interpretive standard of Sandra Day O'Connor, David Souter, Justice Kennedy in the *Casey* case, which built on the emanations and penumbra standard of the court in *Griswold* and finding that these elusive ideas regulate and restrict the discretion of state legislatures in dealing with this very agonizing issue.

And when Judge Alito wrote in his opinion about the interests of the father here being notified, he wasn't expressing his own views saying a legislature might legitimately weigh the interests of the father. There were waivers if there's showing of imminent danger to the woman if she notified the father that she could go forward anyway, but that it's not irrational and improper for legislators to decide that the balance of interests here might weigh in favor, subject to narrow restriction on imminent danger that, a father be notified with regard to an abortion. And with –

MR. GOLDSTEIN: Well, can I ask you the question I asked Marcia? What do you – on the basic question, what is your bet – nobody knows, but what is your bet on the question of whether he would vote to overrule *Roe*?

MR. FEIN: As a prudential matter, I do not think he would vote to overrule *Roe*. In fact, I don't think Justice Antonin Scalia at this stage would vote to overrule *Roe*. I don't think John Roberts would either.

One of the things that was very striking in George Bush's first statement after his inaugural was conceding the country isn't ready for an amendment to overrule *Roe v. Wade*. I was in the Reagan administration. There was never any effort by any of the Republicans even to get out of the committee an amendment to disturb *Roe v. Wade*. We've now had some 33 years. All the political opportunity to go forward and make serious challenges all bypassed. I don't think the court as a matter of prudence is going to say now we should upset these – what seems to be a politically settled situation and

overrule *Roe*, which I think would be a disaster for the Republican Party as a political matter in any event.

And insofar as we can drive some kind of expectation on that theory, I refer you to the *Dickerson* case. This was, I think, the decision in 2000. The issue raised as to whether *Miranda v. Arizona*, the Dirty Harry interrogation warnings you've got to give to suspects held in custody, should be overruled. The *Miranda* case was on much more fragile grounds than *Roe v. Wade*, because the court had never explicitly stated at the time of *Dickerson* whether it was a constitutional rule or one that was simply part of the supervisory power of the Supreme Court to require proper interrogation procedures by the police.

And Rehnquist himself as an associate justice and as chief when this issue arose had scathingly denounced *Miranda* as something invented out of thin air, yet *Dickerson* comes 7 to 2. The Supreme Court reaffirms the *Miranda* and says it's a constitutional rule, that it had become such a fixture of our law enforcement establishment that the Court would not disturb it. The idea that the court will lightly overrule any case I think is vastly exaggerated. It's not that it can never be done, but on issues of this sort, I think it's highly unlikely.

But I wanted to go forward and if I could have a little time to amplify on *Roe* and the role of the father. You may recall that in *Planned Parenthood v. Danforth* – it's one of the first sequel cases to *Roe* – the issue arose as to whether or not a father had any greater interest in preserving the life of the fetus than the state; whether you would need the consent of the father for an abortion.

Now, it doesn't on its face seem outrageous because if a father after *Roe* decided – wanted to urge that the mother have an abortion and the mother said, "No, I want to carry the fetus to term," the father doesn't have any right to demand that the fetus be aborted, even though he may assume all of the obligations of fatherhood if there is a child.

Now, if that's true, then it doesn't seem so unfair in the balance of interest between fathers and mothers in a reciprocal situation if the father would want the child born or at least to be notified before a child is aborted to have that right, since the mother has the right to decide, well, I'll carry the fetus to term, even if the father doesn't want that.

I simply raise the issue because it shows, I think, that there is some intellectual fragility in the way in which the Supreme Court has approached the relative interests of the father and the mother in the abortion context. But I want to come back again to the idea that I broached at the outset. What's at stake here is not necessarily the most enlightened policy for the nation. It's whether the court is honoring the rule of law when it plucks from thin air these nonlegal concepts about mysteries of the universe and emanations and penumbras. Justice Harry Blackmun wrote in three sentences in *Roe v. Wade* – he just said, "Well, the right of privacy includes the right to an abortion."

There's no elaboration. It's 100-some pages elaborating and dilating on the views of the American Nurses Association, the American Medical Association. He spent all his time in the summer at the Mayo Clinic are you reading Blackstone and the Federalist Papers or are you reading doctoral dissertations? You know, what is your job here as a Supreme Court justice?

And if they're worried in an overruling of *Roe*, which I don't predict, is it really plausible that legislators everywhere would say, oh, it's – and with all the political rights and claims that can be made on behalf of pro-choice policies that they'll be deaf and will return to pre-*Roe* case? That's not true.

I was in California as a youngster when Ronald Reagan was governor in 1967. He signed the bill that was *Roe v. Wade*, and he never announced it. The idea that necessarily if the Supreme Court doesn't accomplish something, our political system will descend into the Stone Age is, I think, counterfactual and does a great disservice to all of its citizens who are able and articulate, who press upon legislators and run for office ourselves to ensure if these are not constitutional rights that they are enshrined anyway. The 1964 Civil Rights Act – a great act, the Magna Carta of civil rights – that was enacted by Congress. It wasn't ordained by the United States Supreme Court.

MR. GOLDSTEIN: So, Bruce, let me now get something said about process so that we have at least 15 or 20 minutes to do questions. And so, Nancy, you know more about the process than maybe anybody here. What's going to happen now, those who are opposing Alito, what do you think they can and should do? The one thing I notice is that Lindsay Graham, Senator DeWine, to some extent Senator Nelson, part of the Gang of 14 seems to be strong – to some extent either flat out endorsing or strongly indicating that they'll support him. What happens next?

MS. ZIRKIN: Well, this happens to be a long process. This is a job interview for an individual who is going to serve probably 30 to 40 years. He's 55. Thirty-five years on the Supreme Court. And so it's very important that it is done right, that people are comfortable with its thoroughness, with its deliberativeness. And I think what's important at this stage is to understand the process because it is a cumbersome process.

As I said, his nomination has not gone up. The intent to nominate is what first goes up, and that was not received as of first thing this morning. What is received next is the rest of the paperwork will go to the secretary of the Senate sometime next week. Right now, the majority, in consultation with the minority, is actually writing his questionnaire. And it will look a lot like Roberts' because the experience is a lot the same, and that questionnaire takes about a week or so at least. It took Harriet Miers – and don't say anything, Bruce – two weeks, but anyway, it generally takes a week or two weeks, somewhere in there.

Meanwhile, the White House is working with – starting next week with the Senate figuring out what are the documents, what am I going to give you, what do you want. And this is – so there is a give-and-take with Roberts. All the documents that the White

House agreed to supply, which was not all of the documents – let me say that – happened in about four weeks from the time of the nomination announcement. Obviously, visits are happening at the same time. When the questionnaire comes back, some senators are going to be asking other questions. You saw with Miers they both asked together, which was extraordinary. I'd never seen it. Meanwhile, the FBI and ABA process are happening, which is separate from anything in the Senate, obviously, and that takes about five weeks. This is only day four.

With Roberts, when the questionnaire came back, the minority, majority ranking and chair of the Judiciary Committee – the minority leaders, majority leader – the four of them sat down and talked about hearing date and process and when that would be. The average time between confirmation and hearing – this is average, and it depends on the record – but the average – and on the Senate schedule is six weeks. Now, Alito has a record that, as I said, 3500 cases, 300 opinions, eight years at the Department of Justice, speeches, writings. It's an enormous volume right there. So we will have to see.

And Specter – both Specter and Leahy have said that they want complete and fair hearings. Leahy has said that he doesn't think that there could possibly be a fair and honest hearing in December. And if you do the math, he's right, because it would be somewhere around Christmas at the earliest, and that really does not give people on both sides – I'm talking Republicans, Democrats, advocates on both sides – the time necessary to thoroughly review.

In some sense, Specter made the Roberts hearing a model of what is to be done. It was this give-and-take with Leahy. And the hearing wasn't set, as I said, until the questionnaire came back. Leahy, Frist, and Specter met to agree on the hearing dates and the floor consideration. Each side had 15 witnesses and senators could ask as many questions as they wanted, 30-minute round first, 20-minute round second. And I would hope that it is the same process.

What's happened this week in the Senate, and then I'll stop – this whole dust up, which we've all seen in the Senate this week, might be having fallout on the nomination. Frist is now demanding to meet with Specter, Leahy, and Reid to set a hearing date, to set a floor time, to do all the things that aren't normally done for a good two weeks from now. And he is going around talking, as you all have heard, that these are going to be done by Thanksgiving. I mean, I heard that yesterday, which is a little crazy. But anyway, that is the process. The hearing itself ranges four, five days. Bork's was five days, five and a half days. Roberts was four. And then when the committee meets, they have basically three choices. And they can meet within a week after the hearing is concluded, and they have basically three choices, although any senator can hold the nomination over one week.

But the three choices are: approve with recommendation for a Senate confirmation; reject, but it will be sent to the floor without recommendation – Thomas was handled that way; and reject, but it will be sent to the floor with a negative recommendation. Bork was handled that way. So that's basically the process. It can

then go to the floor within a week after the hearing, after the executive session, and then generally on the floor for about a week. So that is the process and it's a long process, as well it should be.

MR. GOLDSTEIN: All right. So we're now into our question time. Ralph, you had said that you had something very quickly you wanted to say about Graham and DeWine.

MR. NEAS: I made a prediction, pursuant to your instructions, that there would be a bipartisan majority against the nomination opposing confirmation. And like Harry Reid and Ted Kennedy and Chuck Schumer, I certainly believe you should not take the filibuster off the table. It's not appropriate or right or talk about it now. It's weeks away, I'm sure.

However, I think it's very important to point out, as I said before, on May 23rd, neither Frist nor Reid knew where the votes were, but I'll tell you this. DeWine and Graham would have supported the nuclear option. And the White House and Frist are putting DeWine and Graham out there as part of the Gang of 14 to make it look like there's no way in the world to defeat the nuclear option. They're not in the vote count. There were 50 votes against a nuclear option without DeWine and Graham. It's Specter you should be looking at and one or two others, but DeWine and Graham represent the White House on this issue and it should not be seen as an indication of weakness on the Democratic side for those who might filibuster or vote against a nuclear option.

MR. GOLDSTEIN: Right. Specter this morning, though, said that he could not imagine that this nomination would rise to extraordinary circumstances.

MR. NEAS: The chairman of the Judiciary Committee, who is a Republican, can say nothing but that at this stage of the game.

MR. GOLDSTEIN: All right. So now we have time for questions. And we'd like to start with the press and then other folks in the audience. If everybody who's asking a question could, when you raise your hand, make sure we get you a microphone and also identify your affiliation.

Q: Ken Jones with the CQ Press. Bruce, two parts. Are the people who are calling for Alito's confirmation as a prelude to overturning *Roe v. Wade* delusional? And if not, should Republican senators in support of the nomination say so? And in terms of Marcia's comment, do you believe that Judge Alito's approach in his dissent in *Casey* would, indeed, vitiate *Roe v. Wade* case by case?

MR. FEIN: Let me take the last question first. I don't think it's accurate to say it would vitiate *Roe v. Wade* case by case because it wouldn't overrule the court holding of *Roe v. Wade*. I could conceive of the court reversing the *Stenhardt* decision and saying that there is authority to prohibit partial birth abortions if you have an exception for the life of the mother, but that's hardly going to the core of *Roe v. Wade*, and there certainly

has not been that understanding or expectation in the community in the – as *Roe v. Wade* has, and *Carhart's* is much shorter lifespan that might cause the court to shun from overruling that.

But insofar as we are talking about wrinkles on the edges of *Roe* concerning parental involvement in decisions by minors, I do think that Alito would be one who would try to confine the existing situation or provide marginally more involvement of parents with minors, perhaps with regard to bypass standards.

With regard to those who are championing Alito, are they necessarily delusional in thinking that he's a clear vote to overrule *Roe v. Wade*? You know, the wish is father to the thought, and many of those who wish that, I would oppose, because they would want the Supreme Court to hold the due process clause prohibits a legislature from taking a pro-choice policy. I mean, I view them as the flip side of the liberals who want the court to invent rights, because they can't get them through the legislative body in a way that they find appealing.

I don't think it's appropriate for the senators to try to extract or to say, "Well, you're not going to vote if –" I don't think it's up to the Senate, as opposed to people in public life commenting today that you're going to vote one way or another on overruling a precedent. Certainly it's appropriate for the senators to make enquiries with regard to how much weight a nominee to precedent, and it was done to John Roberts. But I can't conceive it being informative for the senators to make projections and say, "Well, you will or will not vote for *Roe v. Wade*." That's not part of the confirmation process.

MR. GOLDSTEIN: All right. Next? Hold just a second.

Q: Hi. Bill Adair from the *St. Petersburg Times*. I wonder if any of you want to comment on Judge Alito's record on First Amendment issues and sort of general freedom of expression. And in particular, if you're familiar with the *Aleva* (ph) case, this is the little boy who brought the picture of Jesus into class when asked for something that he was thankful for, in which Judge Alito wrote a very passionate dissent.

MR. FEIN: I think Judge Alito, like Justice Scalia and I think John Roberts, is very profoundly pro-speech. And Scalia voted twice in favor of protecting flag burning as protected expression, and I think that will carry over also into campaign finance reform. We all think it's important to protect people's ability, as long as there's full disclosure and you punish corruption, for there to be complete and thorough ventilation of ideas. That would mean, for example, I think one of Tom's cases – maybe the Vermont ceiling on expenditures would be in some kind of jeopardy, but I think it's fully consistent with original understanding and meaning and this Scalia standard to have wide and broad protection of free speech.

Now, you did also mention the First Amendment in general, which has an establishment clause where Judge Alito has written a very critical and seminal case on church/state matters and a crèche in public places. And there, I think he clearly would be

more inclined to accept, say, posting of the Ten Commandments where it isn't done with a clear intent to proselytize, than what Sandra Day O'Connor has indicated by her two votes in the last day of the last term.

MR. GOLDSTEIN: Next? In the back. I'm giving you quite a bit of exercise.

Q: Hi. I'm Elaine Middleman. I'm not press, so I guess I'm a second-class citizen here. (Laughter.) I'm just plain old attorney, but I'm very interested in First Amendment issues.

This may not be totally on point, but given the complexity of Judge Alito's record, I don't think he's going to be confirmed by Thanksgiving. And I'm wondering if that leaves Sandra Day O'Connor in a very awkward situation in the court with Chief Justice Roberts. Will they either hurry up decisions, delay decisions, have her not make decisions? I just – is there a chance she might go ahead and resign given the length of time between her – when she said she wanted to resign and her replacement may come in? In other words, her commitment to stay on probably didn't include this many months, so I'm just wondering if there's any thought on those subjects.

MS. ZIRKIN: I'll take that. I'm happy to answer that question. The fact of the matter is that he is very unlikely to be confirmed by Christmas. What that means is that it seems to me sometime in January at the earliest. If that is the case considered for a vote in January at the earliest and seated on the court, if that happens, at the end of January. What that will mean is that O'Connor will have heard two-thirds of the oral arguments by that time. There are 38 oral arguments in the entire Supreme Court season, and she will have heard by the end of January 23 or 22, something like that.

In the controversial cases, if she is not there, if it's a 4-4 they will likely be reheard, but there is a whole history of what can happen. Sometimes the new justice reviews all the documents. Sometimes it is reheard. There are a lot of controversial cases, so it would not surprise me if they are reheard.

MR. GOLDSTEIN: If I could clarify one thing. The court will hear argument this term in 78 cases. Those are – the argument session is between October and April and they average around 10 to 12.

MS. ZIRKIN: It's 38 days. I'm sorry.

MR. GOLDSTEIN: It's 38 days.

MS. ZIRKIN: It's 38 days. I misspoke.

MR. GOLDSTEIN: Right. And so –

MS. ZIRKIN: And so she will have heard 21 of those days, roughly.

MR. GOLDSTEIN: Yeah, she will have heard just over half of the cases in the term, and the court's policy for the last couple of times – for example, Clarence Thomas, because of the controversy over Anita Hill, came to the court late in the term. And the court's recent practice has been to hear reargument when the departing justice – if the justice has to be there on the day the case is argued and the case is decided, if the justice leaves and that leaves the court four to four, then the court hears this again later in the term or the next term.

MS. GREENBERGER: I wanted to just mention something about one of those cases. It's the *Ayotte* case that deals with – it comes up in the context of parental notice case, but just to pick up on something – or a few things that Bruce had said in talking about *Roe v. Wade* and overturn versus some modest adjustments to it, but not going to the core.

One of the core holdings of *Roe v. Wade* actually is that the state can't endanger women's health in erecting hurdles. And that health exception is the issue that was the overriding issue in this partial birth abortion case because it – it was decided 5-4 with Sandra Day O'Connor as the fifth and deciding vote, because neither the federal law, which is working its way up to the Supreme Court, or the state laws, which were the subject of that 5-4 decision, had a protection for women's health so that that procedure could be done in order to protect the woman's health. And as O'Connor wrote, that was and is a core part of the *Roe v. Wade* holding – that however states do impinge on women's access to choice, they can't do it in a way that endangers her health.

And so talking about the possibility of that being taken away in a parental notice case, which is the one that's coming up in the Supreme Court to be argued at the end of November, could be very, very important for all kinds of other kinds of restrictions that states or the federal government could impose. There's been a lot of discussion about the fact that even if *Roe v. Wade* were overturned that the political climate in different states wouldn't change, and so I heard some commentators saying the blue states you could get abortion, maybe in some of the red states you couldn't, but then people could go to the blue states. That doesn't go even to the fact of what, of course, a constitutional right is all about: that it shouldn't have to depend on where you live.

But also, of course, it does mean that the federal government isn't constrained, Commerce Clause or other issues to the side as we've seen with the medical marijuana case – some of these principles seem to shift depending on the subject area that Congress is legislating on – that we could find wherever women live that Congress is precluding state – or allowing restrictions and requiring restrictions across the country, regardless of what a state legislature might prefer. And that's a big issue actually coming up this term, and so there is a lot hanging on the answer to where Sandra Day O'Connor will be and for how long she'll be there.

MR. GOLDSTEIN: It is now 1:45. (Taps on desk, laughter.) That was the iron fist. Exactly. Let me thank all of our panelists and ask you to join me in doing so for what I think was really a terrific discussion.

(Applause.)

(END)