TESTIMONY

CONCERNING THE NOMINATION OF JUDGE SAMUEL A. ALITO, JR.
FOR THE UNITED STATES SUPREME COURT

UNITED STATES SENATE, COMMITTEE ON THE JUDICIARY

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I am honored to have been asked to testify concerning the nomination of Samuel Alito to be an Associate Justice of the United States Supreme Court. It is impossible to overstate the importance of this nomination for the immediate future of constitutional law in the United States. Often in considering judicial nominees, the Senate can take refuge in doubt over the impact of a particular nominee. In considering the nomination of Judge Alito, there is no doubt as to the importance of this seat on the Supreme Court or as to Judge Alito's likely impact on the law.

For almost two decades, the Supreme Court has been frequently referred to as the "O'Connor Court" because of the pivotal role of Justice Sandra Day O'Connor in virtually every aspect of constitutional law. In almost every major area of constitutional law – campaign finance regulation, death penalty litigation, racial justice, reproductive freedom, separation of church and state – Justice O'Connor was in the majority in 5-4 decisions. Replacing her thus has the

possibility of dramatically changing the law in some of the most important and controversial areas of contemporary constitutional law.

This Committee thus must assess Justice O'Connor's prospective replacement in terms of his likely impact on constitutional law. Unlike many nominees in American history, Judge Alito has a long written record which provides clear indication of his views and what he is likely to do if confirmed to the United States Supreme Court. The contrast between Samuel Alito and Sandra Day O'Connor is stark.

I want to focus on one area: separation of powers and specifically checks and balances on executive power. No area of constitutional law is likely to be more important in the years ahead than constitutional challenges to claims of broad executive authority. In recent years, the Bush administration has claimed unprecedented executive power, including the authority to detain American citizens apprehended in the United States as enemy combatants; the power to engage in warrantless eavesdropping of conversations and electronic communications by American citizens with those in foreign countries; the ability to detain enemy combatants indefinitely in Guantanamo, Cuba, without due process; and the power to authorize torture of individuals.

My goal today is not to discuss the legality or desirability of any of these

executive actions. Rather, my point is that these and other issues of executive power are enormously important and are sure to come before the Supreme Court in the near future. As President Bush has explained, the war on terrorism is likely to last beyond all of our lives and thus surely will pose many other issues concerning executive power in the years and decades ahead.

Thus, a crucial issue before this Committee must be whether Samuel Alito is likely to examine the claims of executive power critically or whether he is likely to be a virtual rubber-stamp approving executive actions. What is striking about Judge Alito's record is that every available indication of his views – from his memos as a Justice Department lawyer, his speeches, and his judicial opinions – points in one direction: Judge Alito is likely to be extremely deferential to claims of executive power and very unlikely to enforce needed checks and balances. I have carefully reviewed Judge Alito's record and I could find no indication where he wrote a memo, gave a speech, or authored a judicial opinion favoring limits on executive power. My conclusion is that at this point in time, it is far too dangerous to approve someone for the Supreme Court with such a consistent record of strong deference to executive claims of authority.

The Importance of Limiting Executive Power

At the risk of saying the obvious, checking executive power was a central

goal of the American Constitution. For the framers of the Constitution, executive power was the power most to be feared. Indeed, in their view, reposing virtually all power in a single individual, such as King George III, threatened all liberty. Having endured the tyranny of the King of England, the framers viewed the principle of separation of powers as the central guarantee of a just government.[1]

Madison wrote the strict separation of powers was essential to preserve democracy in a republic because: "[n]o political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty than that . . . [t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."[2] Madison further warned, "[t]he great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger

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[1] *Freytag v. Commissioner*, 501 U.S. 868, 870 (1991).

[2] THE FEDERALIST NO. 47, at 301 (Madison)(C. Rossiter ed., 1961).

of attack."[3]

In the past, the Supreme Court has served an essential role in the system of separation of powers by checking executive power and rejecting presidential actions that usurp the powers of other branches of government or prevent them from carrying out their constitutional duties. In cases like *Youngstown Sheet & Tube Co. v. Sawyer,*[4] which rejected President Truman's effort to seize the steel mills during the Korean War, and *United States v. Nixon,*[5] which rejected President Nixon's effort to invoke executive privilege to keep the Watergate tapes from being used as evidence in court, the Court imposed essential checks on executive power. A crucial question must be whether Judge Alito will continue this tradition of judicially imposed limits on presidential authority or whether he will be a virtually sure vote for the executive on the important issues likely to come before the Court concerning separation of powers.

Samuel Alito's Record on Executive Power

Judge Alito's writings, speeches, and opinions indicate that his confirmation to the Supreme Court would shift the Court's balance towards potentially

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[3]THE FEDERALIST No. 51, at 321-22 (Madison)(C. Rossiter ed., 1961).

[4]343 U.S. 579 (1952).

[5]418 U.S. 683 (1974).

dangerous deference to executive power. In this, like every area, the contrast to Justice O'Connor is crucial in assessing the impact of confirming Judge Alito. Justice O'Connor, for example, in rejecting the Bush administration's position that it could detain enemy combatants without due process declared that even "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[6] Similarly, Justice O'Connor voted with the majority in holding that federal courts had jurisdiction to hear the habeas corpus petitions brought by detainees held in Guantanamo, Cuba.[7]

But there is nothing in Judge Alito's record to suggest recognition of the need for limits on executive power. Prior to becoming a judge, Alito worked exclusively in the executive branch of government, in the United States Department of Justice: as an Assistant United States Attorney, as Assistant Solicitor General, as Deputy Assistant Attorney General in the Office of Legal Counsel, and as a United States Attorney. In these capacities, he repeatedly expressed the need for expansive, unchecked executive power.

For example, as an Assistant Solicitor General, Alito addressed the question whether high-ranking executive officials should have absolute immunity from

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[6]Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004).

[7]Rasul v. Bush, 542 U.S. 466 (2004).

lawsuits claiming that they authorized the illegal, warrantless wiretapping of American citizens thought to present domestic threats to national security. In 1972, the United States Supreme Court unanimously ruled that the President could not authorize such warrantless electronic surveillance.[8] After this decision, individuals who were subjected to illegal wiretapping sued the Attorney General and other executive branch officials. Alito, who was working in the Justice Department at the time, wrote a memo saying that he believed that those responsible were protected by absolute immunity. He declared: "I do not question that the Attorney General should have this [absolute] immunity."[9] The United States Supreme Court rejected this position and declared in words that seem quite important today: "The danger that high federal officials will disregard constitutional rights in their zeal to protect national security is sufficiently real to counsel against affording such individuals an absolute immunity."[10]

Judge Alito's views about executive power are reflected in other writings when he was at the Justice Department. For instance, he wrote a memorandum urging that the President issue statements when signing bills so that presidential

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[8]United States v. United States District Court, 407 U.S. 297 (1972).

[9]Memorandum from Samuel A. Alito to the Solicitor General, Re: Forsyth v. Kleindienst, No. 82-1812 (June 12, 1984).

[10]Mitchell v. Forsyth, 472 U.S. 511, 523 (1985).

views, and not legislative history, be used in interpreting statutes.[11] Alito's clearly stated objective was to shift power from the legislature, whose legislative history often guides statutory interpretation, to the executive branch. He said that his goal was to give the Executive "the last word" on issues of statutory interpretation and to "increase the power of the Executive to shape the law."[12]

Since becoming a judge, Alito has given a number of speeches in which he has advocated expansive executive powers. For example, in a 1989 speech, Judge Alito sharply criticized the Supreme Court's decision in *Morrison v. Olson,* upholding the constitutionality of the federal law providing for an independent counsel.[13] The Supreme Court, in a 7-1 decision, recognized the need for Congress to create an independent counsel to investigate wrong-doing by the President and high level executive officials. Judge Alito, in his speech, strongly disagreed and characterized Justice Scalia's lone dissent as "brilliant."[14] In other words, Judge Alito rejected the need for checks and balances and sided with

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[11]Memorandum from Samuel A. Alito, Jr., to the Litigation Working Group, re: Using Presidential Signing Statement to Make Fuller Use of the President's Constitutionally Assigned Role in the Process of Enacting Law (February 5, 1986).

[12]Id.

[13]487 U.S. 654 (1988).

[14]Introduction by Samuel Alito, *Debate: After the Independent Counsel Decision: Is Separation of Powers Dead?*, 26 Am. Crim. L. Rev. 1667 (1989).

Justice Scalia's dissent which favored broad executive power.

In a speech to the Federalist Society, in 2001, Judge Alito expressed his view that "the theory of the unitary executive . . . best captures the meaning of the Constitution's text and structure."[15] He explained that under this theory, "all federal executive power is vested in the President" and "a vigorous executive is needed."[16] This theory would significantly increase presidential power and greatly limit the ability of Congress to impose checks on it. As its advocates explain, "[t]he practical consequence of this theory is dramatic: it renders unconstitutional independent agencies and counsels to the extent that they exercise discretionary executive power."[17] This theory requires all executive tasks to be under presidential control and rejects most limits on presidential power. The fact that Judge Alito champions the unitary executive theory is strong indication that as a Justice he would be a consistent vote for executive power.

On the Third Circuit, Judge Alito has not had the occasion to deal directly with issues of presidential power. But repeatedly Judge Alito has had to deal with

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[15]Remarks of Judge Samuel Alito in "Administrative Law and Regulation: Presidential Oversight and the Administrative State," Engage (November 2001) at 12.

[16]Id. at 12.

[17]Steven A. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv. L. Rev. 1153, 1165-66 (1992).

cases involving the conflict between executive, law enforcement power and individual rights. Judge Alito consistently has ruled against individuals and in favor of government powers. For example, in *Doe v. Groody*,[18] Judge Alito dissented from a decision that allowed a woman and her 10 year old daughter to receive money damages after they were strip searched by police who were executing a search warrant unrelated to these two individuals. Judge Alito sided with the police and would have precluded any recovery for the injured individuals.

On some occasions, Judge Alito has dissented from *en banc* decisions on his Court protecting individual freedoms from government power. For example, Judge Alito dissented from a 9-2 decision of his court holding that notice must be sent by mail to the place where a person is being held and from a 10-1 decision that notice must be reasonably calculated to actually reach the person whose property is being seized.[19]

Conclusion

Simply put, there is nothing in Judge Alito's memos, speeches, or opinions that offer hope that he will be a vote to uphold checks and balances. Instead, everything points to his being a strong voice and vote for expansive executive

[18]361 F.3d 232 (3rd Cir. 2004), *cert. denied,* 125 S.Ct. 111 (2004).

[19]United States v. McGlory, 202 F.3d 664, 673 (3d Cir. 2000) (en banc); United States v. One Toshiba Color Television, 213 F.3d 147 (3d Cir. 2000) (en banc).

power. At this point in American history, replacing Justice O'Connor with Judge Alito likely will mean a significant shift on the Supreme Court in favor of executive authority and against checks and balances. For this reason, and so many others where Judge Alito is likely to bring about a dramatic change in the law, he is the wrong nominee at the wrong time to go on the Supreme Court.