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Testimony of the American Civil Liberties Union on the Nomination of Judge Samuel A. Alito, Jr. as Associate Justice to the United States Supreme Court

Before the Senate Judiciary Committee

Submitted by

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January 18, 2006

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Chairman Specter, Ranking Member Leahy, and members of the Committee:

On behalf of the American Civil Liberties Union, a non-partisan, non-profit organization and its nearly 600,000 members, I welcome this opportunity to submit this statement in opposition to the confirmation of Judge Samuel A. Alito, Jr. to the United States Supreme Court.[1]

The ACLU does not make the decision to oppose Alito lightly. Only twice in the ACLU's 86 year history has our Board voted to oppose Supreme Court nominees – that of Chief Justice William Rehnquist, in his initial nomination to the Court, and Judge Robert Bork. But this is a momentous time in history, and Alito's confirmation to the Supreme Court would have significant impact on the American people. A nominee with Alito's history of deference to executive authority and support for government power would strike a blow to basic freedoms. In this high-stakes climate for civil liberties and civil rights, the Supreme Court must be a bulwark against incursions on our fundamental freedoms. If confirmed as the next Associate Justice of the Supreme Court, Alito could dramatically change the direction of the Supreme Court by tipping the balance from the moderate position of Justice O'Connor, whom he would be replacing, to a position hostile to civil liberties and civil rights. He could thereby change the country for years to come.

We are witnesses to an extraordinary time in history when our executive branch is trying to centralize power and bypass other branches of government. At a time when our President has claimed unprecedented authority to spy on our own people and jail people indefinitely without trial, America needs a Supreme Court justice who will uphold our precious civil liberties, staying true to the balance of powers envisioned by our Founders. But confirming Alito, someone with a proven record of undue deference to executive powers, could dangerously upset that balance of powers.

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[1] The ACLU has earlier submitted to the Senate Judiciary Committee a comprehensive report summarizing the judicial record of Alito. *See* ACLU, Report of the American Civil Liberties Union on the Nomination of Third Circuit Court Judge Samuel A. Alito, Jr. to be Associate Justice on the United States Supreme Court (Dec. 9, 2005), available at http://www.aclu.org/scotus/2005/23216res20051222.html.

ALITO HAS SHOWN AN ALARMING DEFERENCE TO THE POWER OF THE EXECUTIVE BRANCH.

It is of special concern that Alito will be replacing Justice Sandra Day O'Connor who has been a critical swing vote on issues relating to reproductive freedom, religion, employment discrimination, affirmative action, and civil rights. She has also exhibited the caution and courage necessary in times of war to protect civil liberties. We are deeply concerned that Alito would not bring the same balance and moderation to the Court.

Two years ago, Justice O'Connor eloquently expressed what is at stake in these critical times when she wrote that it is "clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[2] Having justices on the Supreme Court adhering to this viewpoint is critical now more than ever given the various issues the Court may consider, such as the constitutional limits of the Patriot Act and the President's authorization of warrantless spying on Americans. Throughout his career, Alito has promoted an expansive view of executive authority and a limited view of the congressional and judicial roles in curbing abuses of that authority.

His own record and public statements have led us to this conclusion. As an adherent to the "unitary executive theory," Alito and others working in the Office of Legal Counsel (OLC) in the Reagan Justice Department, advocated this theory to support an aggressive expansion of the recognized powers of the President. For example, in a 2000 speech to the Federalist Society, Alito stated that "I thought then, and I still think, that this [unitary executive] theory best captures the meaning of the Constitution's text and structure."[3] He said that under this theory, "the president has not just some executive powers, but *the* executive power – the whole thing."[4] Moreover, in a recently released 1986 document from Alito's time with the OLC, Alito recommended the increased use of presidential signing statements – a statement issued by the President setting forth his interpretation of the law – in order to trump congressional intent and legislative history. Alito recommended such a proposal in order to "increase the power of the Executive to shape the law."[5]

It is this unitary executive theory, to which Alito adheres, that has become the foundation for much of the Bush Administration's troubling behavior, including the now infamous torture memo and the jailing of U.S. citizens as enemy combatants without

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[2] *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (citing *Youngstown Sheet v. Tube Co*., 343 U.S. 579, 587 (1952)).

[3] Judge Samuel Alito, Third Circuit Court of Appeals, Administrative Law and Regulation: Presidential Oversight and the Administrative State, Panelist Address before the Federalist Society (Nov. 2000), *in* 2 ENGAGE: THE JOURNAL OF THE FEDERALIST SOCIETY'S PRACTICE GROUPS, Nov. 2001, at 12).

[4] *Id.* (emphasis in the original).

[5] Memorandum from Samuel A. Alito, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, to The Litigation Strategy Working Group, Using Presidential Signing Statement to Make Fuller Use of the President's Constitutionally Assigned Role in the Process of Enacting Law 2 (Feb. 5, 1986) (hereafter Signing Statement Memo).

charging them.[6] And, just as Alito once advocated, this Administration has used the unitary executive theory to attempt to trump congressional interpretation of statutes through the use of presidential signing statements. For example, President Bush recently used this exact process to undermine the Senate's anti-torture legislation. Late last year, in a vote of 90 to 9, the Senate passed an amendment, sponsored by Senator John McCain, to ban the use of torture at home and abroad. While the White House threatened to veto the legislation, Senator McCain convinced the President to approve the anti-torture law. When the President signed the law, however, he issued a signing statement setting forth, in part, that "[t]he executive branch shall construe [the law], relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief. . . ."[7] The signing statement undermined his commitment to ban torture and set forth a presidential claim that he can authorize torture regardless of Congress' intent and in contravention of the plain language of the statute.

The fact that Alito has advocated that courts give a president's signing statement great deference in determining the meaning and intent of the law is particularly problematic at a time when the executive branch is trying to usurp power in a way we have not seen since the Nixon Administration. We know that Alito has advocated the use of presidential signing statements in order to curb what he saw as abuses by Congress by providing the President with the "last word" on statutory interpretation.[8] That should be particularly problematic to the Senate since giving deference to such authority means that the intent of Congress may be circumvented. If confirmed, Alito would now be in the position of reviewing the type of troublesome presidential action he himself helped to foster.

There are more examples of Alito's undue deference to the executive branch. While in the Solicitor General's office, in a brief before the Supreme Court in *Mitchell v. Forsyth*, Alito advocated that the Attorney General, who had authorized illegal wiretaps of Americans, was entitled to absolute immunity for any personal liability.[9] In a recently released 1984 memo, he had earlier advised arguing for qualified, rather than absolute immunity, for fear of losing the case at the Supreme Court, but he made clear that he personally believed that officials should have absolute immunity with regard to such behavior.[10] Alito stated: "I do not question that the Attorney General should have

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[6] For example, Justice Thomas recently referred to the unitary executive in dissenting from the Court's decision to restrict Presidential power to unilaterally detain U.S. citizens as enemy combatants in *Hamdi v. Rumsfeld. See Hamdi,* 542 U.S. at 580-81. (Thomas, J., dissenting).

[7] Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 41 WEEKLY COMP. PRES. DOC. 1918, 1919 (Dec. 30, 2005).

[8] Signing Statement Memo, *supra* note 5, at 2.

[9] Questionnaire of Samuel A. Alito, Jr. of New Jersey, Nominee to the Supreme Court of the United States 33 (2005). The Supreme Court ultimately rejected this approach. *See Mitchell v. Forsyth,* 472 U.S. 511 (1985).

[10] Memorandum from Samuel A. Alito to the Solicitor General, re: *Forsyth v. Kleindienst* 5 (June 12, 1984).

[absolute] immunity, but for tactical reasons I would not raise the issue here."[11] This is certainly a dismaying revelation considering the fact that at the highest levels, this Administration has authorized and conducted spying on U.S. citizens. If confirmed, these issues are almost certain to come before Alito as a justice.

In addition to the extremely broad view of executive authority taken in his earlier writings, Alito has also taken a narrow view on congressional power in his judicial opinions. For example, in *United States v. Rybar*, Alito argued in dissent that Congress had exceeded its power under the Commerce Clause by making it a federal crime to possess a submachine gun, despite the federal government's long history of regulating firearms.[12] Although it is only one example, the significance of *Rybar* should not be understated. The Commerce Clause is the basis for numerous congressional statutes protecting many individual rights, including civil rights and the health and safety of Americans.

In another example of ruling to limit congressional authority, Alito wrote the majority opinion in *Chittister v. Department of Community & Economic Development.*[13] In that case, Alito held that a provision of the Family Medical Leave Act (FMLA) entitling employees to leave when they or family members are seriously ill could not be applied against the states. Doing so, he wrote, exceeded Congress' authority under the Fourteenth Amendment.[14] Alito reasoned that Congress had purported to abrogate sovereign immunity under the FMLA in order to prevent employment discrimination on the basis of gender and that Congress' findings focused on: 1) the importance of both men and women caring for young children and family members with serious health conditions, and 2) the disproportionate burden family caretaking imposes on women.[15] Instead, he found "[n]otably absent . . . any finding concerning the existence, much less the prevalence, in public employment of personal sick leave practices that amounted to intentional gender discrimination in violation of the Equal Protection Clause" or such evidence in the legislation record.[16] His opinion cut further into congressional authority to protect civil rights by holding:

> [E]ven if there were relevant findings or evidence, the FMLA provisions at issue here would not be congruent or proportional. Unlike the Equal Protection Clause, which the FMLA is said to enforce, the FMLA does much more than require nondiscriminatory sick leave practices; it creates a substantive entitlement to leave. This is 'disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act.'[17]

Alito's position on the FMLA was later implicitly rejected by the Supreme Court in a similar case. Three years later, in *Nevada Department of Human Resources v. Hibbs*,

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[11] *Id.*
[12] 103 F.3d 273, 286 (3d Cir. 1996) (Alito, J., dissenting).
[13] 226 F.3d 223 (3d. Cir. 2000).
[14] *Id.* at 229.
[15] *Id.* at 228.
[16] *Id.* at 228-29.
[17] *Id.* at 229 (quoting *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 63 (2000)).

the Supreme Court held, in a decision written by Chief Justice Rehnquist, that states could be required by FMLA to provide employees with leave to care for an ill family member.[18] The Court held "that Congress 'is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment,' but may prohibit 'a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text.'"[19]

There is every indication from Alito's record that his confirmation to the Supreme Court would tip the Court away from a balancing of powers toward undue deference to presidential and executive power. The basic civics lesson here is that there are three co-equal branches of government that should provide checks and balances to the others. This concept is being fundamentally rejected by this Administration, the same Administration that now has nominated a jurist to the Supreme Court who not only agrees with its philosophy, but also has been instrumental in developing this approach.

THE ALITO NOMINATION THREATENS THE LEGACY OF JUSTICE SANDRA DAY O'CONNOR.

Replacing Justice O'Connor on the Supreme Court has the possibility of dramatic changes in many areas of constitutional law. It is, therefore, not enough to evaluate Alito's record in a vacuum. It must be considered in light of the Justice whom he will be replacing on the Court, if confirmed. Indeed, Justice O'Connor has often been in the 5-4 majority of decisions to protect individual rights. Her opinions took into account the real life impact of her decisions – whether they were, for example, considering the burden on women of restrictions on their reproductive lives or recognizing the value of diversity in higher education. Unfortunately, in addition to raising dramatic presidential and executive authority concerns, Alito has repeatedly advocated against our fundamental civil rights and civil liberties.

Perhaps the best description of Alito's overall philosophy in these critical areas was provided by Alito himself in 1985, when he submitted a now well-publicized letter to the Reagan Administration seeking a position with the Justice Department's Office of Legal Counsel. "I am and always have been a conservative and an adherent to the same philosophical views that I believe are central to this Administration," he wrote.[20] Alito then went on to explain that he had been inspired to attend law school by his disagreement with the decisions of the Warren Court, "particularly in the areas of criminal procedure, the Establishment Clause, and reapportionment."[21] He also expressed particular pride in the role he had played in the Solicitor General's Office in helping to craft Supreme Court briefs arguing "that racial and ethnic quotas should not be allowed and that the Constitution does not protect a right to an abortion."[22] Finally, his

[18] 538 U.S. 721 (2003).
[19] *Id.* at 737 (quoting *Kimel*, 528 U.S. at 81).
[20] Application of Samuel A. Alito, Jr. for Deputy Assistant Attorney General in the Office of Legal Counsel (Nov. 15, 1985).
[21] *Id.*
[22] *Id.*

letter proclaimed, in stark contrast to the position taken by Chief Justice Roberts during his recent confirmation hearings, that these were positions "in which I personally believe very strongly."[23]

These remarks, made two decades ago, would be easier to discount if they were not largely consistent with positions that Alito has taken during his fifteen years on the United States Court of Appeals for the Third Circuit. This is particularly worrisome because his remarks involve a series of issues – racial justice, religion, and reproductive rights – in which Justice O'Connor has played a critical role on the Supreme Court as an often-decisive swing vote.

ALITO HAS REPEATEDLY ADVOCATED AGAINST OUR FUNDAMENTAL CIVIL RIGHTS AND CIVIL LIBERTIES.

Alito's judicial philosophy raises serious questions about his commitment to preserving our fundamental constitutional freedoms and civil rights. Alito has an extensive public record accumulated over a quarter century as a federal prosecutor, Justice Department attorney, and federal judge. His intellectual qualifications are not in doubt. But credentials alone do not warrant elevation to the Supreme Court; one's judicial philosophy is paramount. There is often considerable room to interpret Supreme Court decisions and congressional statutes, and Alito has regularly used that room as an opportunity to narrow and restrict civil rights and civil liberties protections. For example, Alito:

- Wrote a dissent in *Planned Parenthood v. Casey* arguing that a state's spousal notification requirement did not unduly burden a woman's right to privacy, a position later rejected by the Supreme Court;
- Joined a dissent arguing that a student-led prayer at a high school graduation ceremony did not violate the Establishment Clause;
- Wrote several dissents arguing for higher standards for plaintiffs seeking trial on their race, gender and disability discrimination claims;
- Dissented from a decision ruling that the strip search of a suspect's wife and ten-year-old daughter exceeded the scope of the search warrant and was therefore unconstitutional;
- Rejected a death row inmate's ineffective assistance of counsel claim where the trial counsel had failed to uncover substantial mitigating evidence – a decision later reversed by the Supreme Court;
- Dissented from an *en banc* ruling in a death penalty case arguing that the prosecution had unconstitutionally used its peremptory challenges to exclude all the black prospective jurors;

[23] *Id.*

- Wrote a dissent arguing that a policy prohibiting all prisoners in long-term segregation from possessing newspapers, magazines or photographs unless they were religious or legal did not violate the First Amendment.

It is, of course, impossible to summarize a fifteen-year judicial career in a few bullet points or with a few cases. But it is also fair to say that these highlighted decisions illustrate a broader pattern of judicial decision-making privileging governmental power over individual rights. What is critically important to remember is that while Alito may state that he would be guided by *stare decisis* – the principle of following prior case law – as a Supreme Court Justice, unlike a court of appeals judge, Alito would *create* precedent according to his own interpretations, not be *bound* by it.

Recent revelations about presidential authorization of domestic spying, in defiance of the law, make it clear that the Senate cannot, and must not, approve a nominee who has little regard for the constitutional system of checks and balances. The Supreme Court is the final guardian of our liberties, and Alito has all too often taken a hostile position toward our fundamental civil liberties and civil rights. At a time in our history when so many are worried about an administration that thinks it is above the law, now is not the time to approve any nominee who gives undue deference to the executive branch. We urge the Senate to reject the nomination of Samuel A. Alito to the Supreme Court.