



**DUKE UNIVERSITY
SCHOOL OF LAW**
Box 90360
DURHAM, NORTH CAROLINA 27708-0360

ERWIN CHERMERINSKY
ALSTON & BIRD PROFESSOR OF LAW

TELEPHONE/PAGER (919) 613-7173
TELEFAX (919) 613-7231
E-MAIL: CHERMERINSKY@LAW.DUKE.EDU

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Barr Huefner
Hearing Clerk
United States Senate
Committee on the Judiciary
222 Senate Dirksen Building
Washington, D.C.

Dear Mr. Huefner,

I am writing in response to your message conveying questions from Senators Coburn and Kennedy. I have stated the questions below and my responses. Please let me know if I can be of any further assistance.

Senator Coburn's question:

You expressed concern about Judge Alito's deference to executive power. Every time Judge Alito ruled for an immigrant or criminal defendant, Judge Alito was deciding against the executive, correct?

Response

Yes, though Judge Alito's overall record in criminal and immigration cases is very deferential to the executive. In my testimony, I mentioned *Doe v. Groody*, 361 F.3d 232 (3rd Cir. 2004), *cert. denied*, 125 S.Ct. 111 (2004). 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. *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).

There is a clear pattern to Judge Alito's writings, speeches, and judicial opinions: he tends to be very deferential to claims of executive authority.

Senator Kennedy's Questions:

Question 1. In your written testimony, you discussed Judge Alito's endorsement of the theory of the unitary executive. How would you explain that theory in practical terms?

Response: The "unitary executive" is a theory developed by conservatives that all executive power in government must be under the control of the government and that Congress is limited in its ability to restrict how it is exercised. In fact, a leading proponent of the theory has said that it would have a "dramatic" effect. Steven A. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 Harv. L. Rev. 1153, 1165-66 (1992). To be specific, under this theory, independent regulatory agencies – like the Securities and Exchange Commission, the Federal Trade Commission, and the Federal Communications Commission – are unconstitutional in that the President cannot, without cause, fire Commissioners. The independent counsel law – which was upheld by the Supreme Court in a 7-1 decision – would have been unconstitutional. Justice Clarence Thomas invoked the unitary executive theory in a dissenting opinion holding that the President can detain American citizens as enemy combatants without statutory authority and without due process. *Hamdi v. Rumsfeld*, 124 S.Ct 2633 (2004) (Thomas, J., dissenting).

Simply stated, the unitary executive theory takes a very expansive view of presidential power and a very narrow view of the ability of other branches to impose checks or limits on executive authority. If adopted by the Supreme Court, it would radically change the nature of American government.

Question 2. You were recently asked on a radio show hosted by Hugh Hewitt whether Judge Alito had ever voted in favor of an African-American, and you indicated that he had. It is my understanding that during the program, you were incorrectly informed that I had stated that Judge Alito had never voted in favor of an African American, although in fact I had stated "Judge Alito has not written one single opinion on the merits in favor of a person of color alleging race discrimination on the job."

a. Do you agree that the actual statement I made above is very different from saying that Judge Alito never voted in favor of an African American?

Response: Yes. I very much appreciate the opportunity to clarify this. Senator Kennedy's statement was misrepresented to me when I was asked about it. Senator Kennedy said that Judge Alito had not *written* any opinion in favor of a person of color alleging race discrimination on the job. This is an accurate statement. But I was asked whether Judge Alito ever had *voted* in favor of a minority in a civil rights case. The answer to that question is yes. But it is a very different point from the one made by Senator Kennedy.

b. Are you aware of any instance in which Judge Alito has written an opinion on the merits of a case in favor of a person of color alleging race discrimination on the job?

Response: I have carefully reviewed Judge Alito's record. I have read over 200 of his opinions, including all I can find in the civil rights area. I can identify no case where he wrote an opinion in favor of a person from a minority race alleging race discrimination on the job.

Please let me know if I can be of further assistance in any way.

Sincerely,

Erwin Chemerinsky