

# United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

December 19, 2005

The Honorable Samuel A. Alito  
United States Circuit Judge for the Third Circuit  
357 U.S. Post Office and Courthouse  
Federal Square and Walnut Street  
Newark, NJ 07101

Dear Judge Alito:

I was glad that we had a chance to meet last month, if only briefly, and look forward to hearing from you at the upcoming hearings. I expect to ask you a number of questions about the role of the courts and judges in our democratic government. I write to you now, in advance of the hearing, so that you will have an opportunity to reflect on these issues and provide fully responsive answers at the hearings.

Last week, we celebrated the 214<sup>th</sup> anniversary of the adoption of the Bill of Rights to the Constitution. The Framers also embedded protections into the structure of our democracy. The checks and balances among our three branches of government provide fundamental safeguards for the rights of all Americans by ensuring that when one branch overreaches, it can be constrained by the others. Americans rely on this governmental structure to maintain the critical stability and balance necessary to preserve our freedoms and liberty.

At your nomination hearing next month I plan to ask you about your views on the President's power as Commander in Chief under our Constitution and the scope of congressional power in the time of war. There have been times throughout our history when the separation of powers has been tested by Presidents claiming unfettered power. Recent revelations that the President authorized domestic eavesdropping without following the statute that requires approval of the Foreign Intelligence Surveillance Court is but one of several areas where the Court's role as a check on overreaching by the Executive may soon prove crucial. The Supreme Court's role in resolving disputes between the two political branches of federal government involving the withdrawal of troops, and the methods of interrogation, are two other examples of issues that I will want to discuss with you.

Just as with any Federal judge, I view a Supreme Court Justice's willingness to serve as a check on executive power as among the most important issues to consider in a nomination process. It is ironic that after years of issuing decisions that were strongly supportive of executive claims of authority, especially in cases involving so-called "enemy combatants," the Fourth Circuit is now questioning the Bush Administration's switch in its position on whether Jose Padilla can be tried as a civilian in federal criminal court. These issues were also raised in the case of Hamdi v. Rumsfeld, in which Justice O'Connor wrote that our Constitution does not afford the President a blank check, even

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in war time. I raised these concerns with Chief Justice Roberts when I asked him about congressional power to end a war and the Bybee memo and its theory of a Commander in Chief override of legal restraints on torture.

Because your career includes an extensive period in the Meese Justice Department and because your advancement in 1990 and proposed elevation this year owe much to selection and nomination of Presidents, I will ask what assurance you can give to the American people that you will not improperly defer to the executive, but will act as an effective check on abuses of presidential power.

I also will want to explore your view of the role of the federal courts in protecting the rights of Americans. I have often noted that the words engraved in the Vermont marble on the facade of the Supreme Court are not just "Under Law" but "Equal Justice under Law." Judges and justices do not act mechanically but must exercise their judgment and discretion in the interests of justice, within the bounds of the law and the Constitution, as they did in such crucial cases as Brown v. Board of Education and Baker v. Carr.

Finally, I will ask about your view of congressional authority. Along with many others, I have grown increasingly concerned over the last few years at the Court's overruling of congressional actions to protect the environment, ensure equal justice and provide health care and other basic benefits. Your speeches to the Federalist Society in these regards raise particular concerns, and I am sure that you will be asked about your endorsement of such judicial activism.

Following as it does the President's withdrawal of the nomination of Harriet Miers because of complaints by supporters of the President's, and coming as it does with the wholehearted endorsement of those same supporters, your nomination directly raises the concern whether this is all part of an effort to move the Supreme Court and the law radically to the right. I want all Americans to know that the Supreme Court will protect their rights and will respect the authority of Congress to act in their interests. I want a Supreme Court that acts in its finest traditions as a source of justice. The Supreme Court must be an institution where the Bill of Rights and human dignity are honored. If confirmed as an Associate Justice on the United States Supreme Court, you would not be just another appointee of a Republican President, but must serve as a check on abuses of presidential power.

I wish you and your family a Merry Christmas and a healthy and happy New Year. I look forward to seeing you again on January 9.

Sincerely,



PATRICK LEAHY  
Ranking Democratic Member

cc: The Honorable Arlen Specter