TESTIMONY OF RONALD S. SULLIVAN JR.

PREPARED FOR THE

COMMITTEE ON THE JUDICIARY

OF THE

UNITED STATES SENATE

HEARING: JUDICIAL NOMINATION

SAMUEL A. ALITO, JR. OF NEW JERSEY

TO BE

ASSOCIATE JUSTICE OF THE SUPREME COURT

OF THE UNITED STATES

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INTRODUCTION

I am an Associate Clinical Professor of Law at the Yale Law School, and a Senior Fellow at the Jamestown Project at Yale. I teach and write in the areas of criminal law, criminal procedure, legal ethics, and race theory. Prior to joining the faculty at Yale, I served as Director of the nation's premier public defender office, the Public Defender Service for the District of Columbia, where I represented hundreds of indigent clients in thousands of matters as a staff attorney, General Counsel, and, then, as Director.

I am here pursuant to the Committee on the Judiciary's request that I discuss Judge Alito's Fourth Amendment jurisprudence. Toward that end, I have reviewed each of Judge Alito's published opinions that implicates Fourth Amendment values from his fifteen-year tenure on the federal bench.[1] In total, Judge Alito authored 17 opinions in which the Fourth Amendment figures prominently. He wrote the majority opinion in 15 of those cases, while writing the dissent in two.

Although the primary focus of my testimony is limited to Judge Alito's Fourth Amendment opinions, I have completed a comprehensive review of his constitutional criminal procedure decisions, as well, in order to better place his Fourth Amendment jurisprudence in context. Accordingly, I have read a total of 51 of Judge Alito's opinions that turn on either a Fourth, Fifth, Sixth Amendment analysis, or that regard his resolution of habeas appeals. Where appropriate, my testimony will reference these additional opinions to the degree they shed light on Judge Alito's judicial philosophy or his jurisprudential tendencies.

By way of summary, Judge Alito's Fourth Amendment opinions reveal a jurist who is a skilled legal writer with a sharp analytical mind. His opinions, generally

speaking, are careful, measured, and deferential to precedent and controlling legislation. He infrequently employs a moral vocabulary in his writing, making it difficult to speculate on his philosophical leanings on contested issues likely to come before the Supreme Court. But difficult does not imply impossible. Judge Alito's Fourth Amendment jurisprudence provides an adequate basis for a reasoned judgment. His opinions demonstrate a clear pattern of privileging government power when it comes in conflict with the liberty interests of citizens. Nothing in his decisions suggests that his judicial philosophy and his understanding of the history, structure, and purposes of the Fourth Amendment would change if he were to be confirmed.

In his more than fifteen years on the Circuit court, Judge Alito has ruled to suppress evidence on Fourth Amendment grounds once,[2] and he vacated a District Court judgment of forfeiture once.[3] Other than these two instances, in the 15 remaining Fourth Amendment cases in which Judge Alito wrote an opinion, he either found no constitutional violation, or reasoned that any violation was cured by an exception to the Fourth Amendment's exclusionary rule. Moreover, this tendency to side with government power is consistent with Judge Alito's criminal law jurisprudence, generally. In over 50 constitutional criminal procedure cases in which Judge Alito authored an opinion, he ruled in the government's favor over 90 percent of the time.[4] On the Third Circuit, where Judge Alito currently sits, he rules adverse to claims of violations of constitutional rights more often than his fellow judges.[5]

Of course, the fact that Judge Alito almost always rules for the government, without more, does not speak to the quality of his legal reasoning. One could argue that his consistently favorable government rulings are merely a function of cases and

controversies that qualitatively merited resolution in the way he decided. Judges are supposed to judge one case at a time, and are not in the business of ensuring statistical equipoise. But, I submit, more than a statistical pattern is at stake. Judge Alito's tendency to privilege government power represents a failing in his jurisprudence. His decisions manifest an inadequate concern for the constitutional value of individual liberty. Although Judge Alito's prose is temperate, considered, and not explicitly ideological, his Fourth Amendment corpus is striking in its consistency. With rare exception, he upholds the government's view in Fourth Amendment cases. This consistency forces one to query whether Judge Alito would, if confirmed, sufficiently question the awesome power of the government in accord with long-standing constitutional norms designed to guarantee enduring liberty in the United States.

To be sure, no single decision provides a blueprint to Judge Alito's Fourth Amendment jurisprudence. Read in isolation, almost none of his opinions appears to be a radical departure from accepted jurisprudential conventions. Rather, his constitutional criminal procedure opinions, read together, demonstrate a pattern that cannot be ignored. Judge Alito is a near-guaranteed vote for the government in criminal appeals. To the degree one conceives a central purpose of the Bill of Rights to shield the common citizen from the might of the government, Judge Alito's Fourth Amendment jurisprudence is overly deferential to governmental authority.

Fourth Amendment cases, more often than any substantive area of the law, expose the tension between individual liberty and government power that any free and open society experiences. As one scholar succinctly puts it, "Individual liberties entail social costs."[6] Freedom often finds itself at loggerheads with government power. But, that is

precisely the point of the Fourth Amendment. Law enforcement officials, as Justice Douglas has recognized, certainly "are honest and their aims worthy, [but] history shows they are not appropriate guardians of the privacy which the Fourth Amendment protects."[7] Put more bluntly, as Justice Jackson wrote, "Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government."[8] Thus, how jurists resolve Fourth Amendment questions speaks volumes about their conception of the importance they place on protecting individual liberty and privacy.

An ideal judge remains "watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."[9] Properly conceived, the Bill of Rights – specifically, the Fourth, Fifth, and Sixth Amendments – embodies prophylactic protections that restrain police investigative practices. Judges who understand the Constitution in this way are protective of individual freedoms against government intrusion. They also tend to be sensitive to the ways in which race and class insinuate themselves into the criminal justice system. As Justice Brandeis admonished:

> The makers of our Constitution undertook . . . to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.[10]

A jurist in this tradition understands that the Fourth Amendment serves to limit government power.

Judge Alito, quite clearly, does not subscribe to this view of the Fourth Amendment. Based on his published opinions in constitutional criminal procedure,

Judge Alito does not have a sufficiently robust conception of the Constitution and his role as judge under the Constitution as protecting liberty interests of citizens. His decisions demonstrate that he is less inclined to constrain the way in which government polices its citizens. Judge Alito is highly deferential to the government – prosecutors, law enforcement, legislatures, and administrative agencies, except perhaps in the area of religious freedoms.[11]

Judge Alito's judicial record is unassailable on the proposition that he rules, nearly without fail, for the government in Fourth Amendment matters. But *how* he arrives at his pro-government power conclusions is a separate question. And the answer to this question explains my conclusion that his consistently pro-government constitutional criminal procedure represents a failure of his jurisprudence. In view of his entire corpus of authored opinions in criminal procedure, a pattern in his decisions clearly is apparent. The following three propositions emerge from a review of Judge Alito's Fourth Amendment jurisprudence: (1) Judge Alito has an insufficient concern for the dignitary implications raised in Fourth Amendment cases; (2) even when Judge Alito finds violations of the Fourth Amendment, he broadly uses exceptions to the exclusionary rule to, in effect, cure the violation; and (3) Judge Alito is inconsistent in his deployment of certain interpretive principles depending on the government's interests in the matter before him.

The foregoing will serve as an explanatory framework to discuss Judge Alito's Fourth Amendment opinions. I will discuss each proposition, in turn, below, and analyze several of Judge Alito's opinion within this framework.

Fourth Amendment's Dignitary Implications

Judge Alito's jurisprudence manifests an insufficient concern for serious privacy and personal dignitary concerns protected by the Fourth Amendment. Indeed, in *United States v. Williams*,[12] Judge Alito wrote that "it is *sometimes* appropriate for a court to balance 'the public interest and the individual's right to personal security free from arbitrary interference by law officers.'"[13] A problem with Judge Alito's jurisprudence is that he rarely ever balances law enforcement interests with personal freedom. The Fourth Amendment "impose[s] a standard of 'reasonableness' upon the exercise of discretion by government officials, including law enforcement agents, in order 'to safeguard the privacy and security of individuals against arbitrary invasions . . . .'"[14] Judge Alito's Fourth Amendment cases fail to show the requisite balance in decision-making. Or, put differently, the balance is too heavily weighted toward the government without appreciation for the protection of individual dignity and privacy that should underwrite any Fourth Amendment analysis.

Perhaps Judge Alito's most controversial criminal law opinion better illustrates my point. In his dissent in *Doe v. Groody*,[15] Judge Alito reasoned that the strip search of a ten-year-old girl and her mother – neither of whom were named on the face of the warrant – passed constitutional muster.[16] Chastising the majority opinion written by now-Secretary of the Department of Homeland Security, Michael Chertoff, for being overly "technical and legalistic," Judge Alito did not view the strip searches as offensive to any constitutional norm. At issue in *Groody* was a warrant that authorized the police to search a home for drugs. When the police arrived at the home to be searched, the ten-

year-old and her mother were present. Neither of the two was a target of the drug investigation. They, nevertheless, were forced to submit to a strip search.

Groody presents significant and obvious dignitary concerns. The mother and daughter were taken to a bathroom in the home and "instructed to … lift their shirts."[17] After lifting their shirts and being subjected to a pat down search, a female officer ordered the mother-daughter pair to "drop their pants and turn around."[18] The officer then completed a visual search and determined that neither mother nor the ten-year-old had contraband on her person.[19] Other than a tactile cavity search, the search here was the most invasive imaginable. Judge Chertoff held that "[s]earching [the mother and daughter] for evidence beyond the scope of the warrant and without probable cause violated their clearly established Fourth Amendment rights."[20]

Judge Alito's dissent spent a grand total of one clause – not even a full sentence – giving voice to the mother and daughter's Fourth Amendment right to be free of forced nudity under the probing eye of a government official.[21] Instead, Judge Alito focused nearly all his intellectual and analytical attention on readings of the warrant that would authorize the government to search the woman and young girl. Significantly, once Judge Alito reasoned that the officers had the right to search the occupants of the home, he never analyzed whether such authorization permitted a strip search, as opposed to an outer-body pat down search or a garment search.

Significantly, the only Fourth Amendment case in which Judge Alito considered the dignity concerns implicated by a search and seizure regarded a tax evasion case involving the wealthy owner of a veterinary hospital and his spouse. In *Leveto v. Lapina*,[22] an appeal from a dismissal of a *Bivens*[23] complaint based on the conduct of IRS

agents, Judge Alito ruled that the police violated the couple's Fourth and Fifth Amendment rights by, among other things, conducting a pat down search of the spouse while she was in a bathrobe and questioning the couple without advising them of their *Miranda* rights. With respect to the pat search, Judge Alito affirmed that, "Indeed, a pat down can be 'a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment.'"[24] In addition to finding the search of Mrs. Leveto unconstitutional, Judge Alito found Dr. Leveto's seizure unconstitutional, as well. Judge Alito reasoned that "Dr. Leveto's freedom of movement was restricted, and he was even prevented from speaking with others or using a restroom without a chaperone. Dr. Leveto was thus subjected to an extended 'seizure' within the meaning of the Fourth Amendment."[25] Judge Alito continued, "Dr. Leveto's detention at his place of business . . . arguably increased the stigma imposed by the agents' search, for it allowed co-workers to see how Dr. Leveto was being treated by the authorities . . . ."[26] In the final analysis, however, and notwithstanding his dignitary concerns, Judge Alito sided with the government in *Leveto* and ruled that government actors were immune from civil liability per the qualified immunity doctrine.[27] Government power proved to be the dominant value in the end.

Leveto is important in its contrast to *Groody*. Judge Alito's concern with the "indignity" of a pat down search in *Leveto* was nowhere to be found in *Groody*. He was scarcely bothered by "indignity" or "stigma" in *Groody* where a ten-year-old girl was strip searched, but deeply concerned with the "indignity" of a wealthy business owner being "forced [to] ride with IRS agents to his home and back to his office."[28] Compared to the one clause Judge Alito committed to dignitary concerns with the strip search in

Groody, he devotes more than four pages of text to the content and scope of the Fourth Amendment violation in *Leveto*. In fact, in no other opinion authored by Judge Alito did he give even a modest fraction of attention to Fourth Amendment dignity concerns as he did in *Leveto*. All of his other Fourth Amendment opinions rather mechanically marshal decisional law, with no comment on the degree of invasiveness of the search. This contrast raises serious class concerns; that is, one is forced to wonder whether Judge Alito has a more robust appreciation for the dignity and autonomy of the wealthy, or the class of individuals typically charged with crimes like tax fraud, than for the rest of America.

Judge Alito's opinions dealing with video surveillance also demonstrate an inadequate concern for the dignity and privacy values embodied in the Fourth Amendment. Justice Joseph Story reminds us that the Fourth Amendment's "plain object is to secure the perfect enjoyment of that great right of the common law, that a man's house shall be his own castle, privileged against all civil and military intrusion."[29] Judge Alito's opinion in *United States v. Lee*[30] provides an example of how he values privacy concerns. In *Lee*, the FBI, without a warrant, secreted a video camera in Mr. Lee's hotel room with the permission of an informant who rented the room for Mr. Lee's benefit. The camera was in place and operable twenty-four hours a day. Judge Alito rejected Fourth Amendment privacy arguments and discounted any potential for the government abusing the video surveillance by recording bedroom or bathroom activities, or any other private conduct outside the scope of the investigation.

Lawyers for Mr. Lee argued that the police conduct in this case ran afoul of Fourth Amendment norms because (1) Mr. Lee had a heightened expectation of privacy

in a hotel room; (2) the video equipment remained operable even when the cooperating witness was not present; and, (3) video is inherently more intrusive than audio and, thus, required greater justification. Mr. Lee primarily relied on a First Circuit precedent which recognized that by allowing the government to keep operable video equipment in a hotel room around the clock, courts created a perverse incentive for police to permanently bug a hotel room with the "hope that some usable conversations with agents would occur."[31] More generally, Mr. Lee maintained that the court should create a "prophylactic rule designed to stamp out a law enforcement technique" that presents an "unacceptable risk of abuse."[32]

As is typical with all of his Fourth Amendment opinions (with the exception of *Leveto*) Judge Alito expressed very little concern with the potential of the government recording the innocent, but intensely personal activities, of a suspect. He summarily dismissed such concerns, by saying: "Nor is it intuitively obvious that there is much risk of such abuse."[33] In his typical drafting style, Judge Alito, over a vigorous dissent, marshaled precedent and concluded that the risk of government abuse "is not great enough to justify" erecting a prophylactic safeguard.[34]

Other home search cases are similar in that Judge Alito, as a rule, appears not to give privacy concerns much consideration. In *Williams*, for instance, Judge Alito rejected arguments that video surveillance in a gambling case did not warrant "such an intrusive investigative technique."[35] In *United States v. Hodge*,[36] he reversed a district court's grant of a motion to suppress by finding that a search of an apartment was permissible despite no evidence of a nexus between the drug trade and Mr. Hodge's home.[37] Similarly, in *United States v. Zimmerman*,[38] Judge Alito dissented to the

majority's reversal of district court's denial of a motion to suppress with characteristically no discussion of the privacy issues at stake.[39] The point here, to reiterate, is not to suggest that any single one of Judge Alito's opinions falls radically outside accepted modes of legal reasoning. But, his corpus demonstrates a judicial philosophy that, in my view, improperly subordinates privacy, dignity, and autonomy concerns to the interests of the government.

Suppression of Evidence – Exceptions to the Exclusionary Rule

In Judge Alito's November 1985 Justice Department application, he commented on his "disagreement with Warren Court decisions, particularly in the areas of criminal procedure, the Establishment Clause, and reapportionment."[40] Judge Alito's Fourth Amendment decisions clearly reflect a jurist who has held true to this view and is antagonistic to Warren Court decisions, preferring instead to allow illegally seized objects in evidence.

In the lone case where Judge Alito suppressed evidence, *United States v. Kithcart*,[41] he remanded the case to the district court with a virtual roadmap for it to salvage the conviction at the re-hearing. In short, Judge Alito held that the officers in *Kithcart* did not have probable cause to arrest and search the suspect.[42] Nearly in the same breath, however, Judge Alito suggested that the district court analyze the case on remand under the less rigorous "reasonable and articulable suspicion" standard.[43]

Significantly, in the only other Fourth Amendment opinion authored by Judge Alito in which he sided with a defendant, the matter involved the seizure of $92,422.57; dignity concerns of the type present in *Groody* were of no moment. In *United States v. $92,422.57*,[44] Judge Alito, writing for the majority, vacated the forfeiture order of the

district court, and remanded the matter for further proceedings concerning the propriety of the seizure.[45]

Despite Judge Alito's expressed disavowal of Warren court criminal procedure, he has not mounted a frontal assault on the basic constitutional norms that define the Warren court. That is to say, his opinions do not explicitly question, say, the right not to be interviewed by police once a critical stage of the prosecution has commenced. But rather, Judge Alito diminishes the force of such well-know constitutional norms by employing exceptions to the exclusionary rule.

This tendency – and its effects – may be better understood by examining the distinction between "conduct rules" and "decision rules."[46] Conduct rules protect basic constitutional norms – the right to be free from unreasonable searches and seizure, for instance. They describe the scope of permissible conduct for law enforcement officials. Decision rules, on the other hand, are designed to determine the consequences of violating conduct rules. Using this vocabulary, many of Judge Alito's decisions may be understood in the following way. Even when he finds that police violated a conduct rule – say, the warrant requirement under the Fourth Amendment, he employs a decision rule – say, good faith exception – the result of which is that the government experiences no consequence for its misbehavior.

Thus, Judge Alito tends to side with the government in several cases by reliance on either the good faith exception or the qualified immunity doctrine. He relied on the good faith exception to the warrant requirement in the following cases: *Hodge*[47] (finding that even if there were no substantial basis for finding probable cause, the good faith exception applied), *Zimmerman*[48] (reasoning that even if the warrant was not supported

by fresh probable cause, the good faith exception would apply and the evidence would be admissible), and *United States v. $92,422.57*[49] (relying on the good faith exception to defeat arguments that the warrant failed to meet the particularity requirement). Judge Alito relied on the qualified immunity doctrine in *Leveto*[50] (finding significant Fourth Amendment violations, but reasoning that government officials were protected by the qualified immunity doctrine) and *Groody*[51] (arguing that even if warrant did not support the strip search of the little girl and mother, the qualified immunity doctrine foreclosed any civil relief).[52]

Thus, in nearly a third of his Fourth Amendment decisions, Judge Alito either directly relied, or argued reliance in the alternative, on exceptions to the exclusionary rule. The distinction between what I refer to as conduct rules and decision rules also helps to explain the real world consequences of such exceptions. The lay public is well aware of conduct rules – the constitutional norms that define the substance of individual liberties vis-à-vis claims of necessary government incursions. Indeed, public polling by a variety of groups indicates that Americans overestimate the quantum of rights that criminal defendants receive.[53] And the popular media reinforces this overestimation with apocalyptic stories of criminals bursting out of jail cells due to "technicalities." Notwithstanding some degree of public cynicism regarding the (grossly incorrect) impression that law breakers are avoiding punishment, citizens nonetheless are heartened by the knowledge that courts still honor the long-standing national commitments to respect civil and individual liberties.

Conduct rules – rules that articulate the substance and content of rights – allow the public to remain steadfast in the belief that a host of substantive civil liberty

protections exist. This belief, however, often represents the elevation of form over substance. With the ever-expanding list of exceptions to the exclusionary rule, the substantive rights that the Fourth Amendment protects may fairly be described as illusory. The exceptions swallow the rule. In fact, one legal academic commentator refers to modern Fourth Amendment jurisprudence as a "mess," and I find that to be an accurate assessment.[54] Many of Judge Alito's opinions illustrate how messy Fourth Amendment cases can be when exceptions to the exclusionary rule come into play. Take *Leveto* for instance. For all the passionate rhetoric about the indignity and stigma attached to the IRS agents' conduct, Judge Alito foreclosed any remedy at law by interposing a decision rule – the qualified immunity doctrine.

The insidious effect of undermining constitutional norms with decision rules is that the public, generally speaking, does not know decision rules. They are quite familiar with conduct rules, but decision rules often are hyper-technical and reserved for institutional actors. One scholar describes this phenomenon as "acoustic separation."[55] That is, the public hears one set of rules (conduct rules), but police and judges hear another set of rules (decision rules). One effect of this acoustic separation is that police officers have admitted under oath to purposely violating the constitutional rights of a suspect, because they knew that the consequence of the violation would not be detrimental to the prosecution.[56] The other, rather obvious, effect is that constitutional violations by government actors will vary directly with the number of exceptions to the exclusionary rule. The more exceptions, the less scrupulous government actors will be in respecting the constitutional rights of citizens accused of crimes.

The strong version of this acoustic separation theory argues that judges who disagree with the Warren court's criminal procedure intentionally undermine the norms put in place by that court in an indirect manner. Such a judge would never overrule, say, *Mapp v. Ohio*,[57] but will find or create so many exceptions to the basic principle as to render the principle devoid of content. The reluctance to explicitly objecting to the principle itself is knowledge of broad public reliance on enduring constitutional norms – even if most of the public never has occasion to invoke the protection of the Fourth, Fifth, or Sixth Amendments.

A weak version of this theory simply maintains that judges apply the law to particular factual scenarios. Decisions to announce an exception to the exclusionary rule are not motivated by a desire to undermine Warren court norms, but rather any such decision is made pursuant to a neutral application of the existing law. On this account, so-called acoustic separation may bring a functionalist critique to bear, but it does not speak to the motivation of individual jurists.

On either the strong or weak version of this theory, Judge Alito's propensity toward finding exceptions to the exclusionary rule when he finds or suspects substantive violations of constitutional protections merits discussion. The strong version suggests duplicity – and I neither make nor imply any claim whatsoever about this nominee. But, the weak version is problematic as well. The space between conduct rules and decision rules in the Fourth Amendment context is vast. Decision rules in the form of exceptions to the exclusionary rule work to eviscerate the rule. Citizens should not labor under the impression that they have shelter in a set of substantive protections, when such protections are mere forms. As an Associate Justice of the Supreme Court of the United

States, Judge Alito would be in a position to either undermine or enforce the long-standing constitutional norms put in place by the Warren court.

A fair area of inquiry for this nominee certainly includes the scope of his admitted "disagreement with the Warren Court decisions . . . in the area[] of criminal procedure."[58] Further, this Committee might consider questioning the nominee on how he would have decided – in very precise terms – the Warren court decisions with which he disagrees.[59]

Inconsistent Interpretive Principles

In various media, Judge Alito has been described as deliberate, impartial, faithful to precedent, and conservative.[60] Distilled to its essence, Judge Alito's judicial temperament has been characterized by his supporters as bound by positive law, notwithstanding his personal views or moral sensibilities. On my read of his record, Judge Alito, for the most part, is a careful jurist in the sense that he is decidedly deferential to settled law. He tends not to stray too far from controlling statutes or doctrine. However, when government power comes into conflict with the civil liberties of the accused, Judge Alito has a tendency to deploy more "creative" interpretive principles in his resolution of the matter before him. The creativity of which I speak is subtle and nuanced, but evident upon reading his entire constitutional criminal procedure record. It suggests that his jurisprudence shifts from being unambiguously textually bound to interpolating facts and inferences outside of the record into a statute or a warrant.

The best way to illustrate the foregoing claim is by example. In a standard Alito opinion, he relies heavily on the plain and ordinary meaning of words and the formal structure of statutory schema. Where a question is resolvable within the four corners of a

controlling document, case, or statute, Judge Alito tends to eschew looking elsewhere to resolve matters before him. In *Sandoval v. Reno*,[61] for example, the majority held that district courts continue to have habeas jurisdiction on deportation orders for crimes listed under the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA),[62] and that the Antiterrorism and Effective Death Penalty Act (AEDPA),[63] which was passed during the pendency of Mr. Sandoval's case, did not preclude the discretionary relief he sought.[64] The majority reached its conclusion in nearly twenty pages of text as it wrestled with complicated questions of jurisdiction and the doctrine of repeal by implication. More broadly, the majority, through various interpretive devices, sought to determine the intent of the Congress – whether it intended to divest the court of jurisdiction – in adopting IIRIRA and AEDPA. The specific arguments adduced are not necessary to my point. But, suffice it to say, the majority found the question presented to be sufficiently complicated to merit significant attention and analysis.

Judge Alito dissented. And his dissent in *Sandoval* is illustrative of his standard approach to judging. In a mere two pages of text, Judge Alito found the resolution of the AEDPA question to be quite simple. Three times, in all capital letters, and in bold font, Judge Alito points out that the relevant section of AEDPA is entitled, "**ELIMINATION OF CUSTODY REVIEW BY HABEAS CORPUS**."[65] In the main, this was enough for Judge Alito to conclude that AEDPA revoked the district court's jurisdiction, even though courts generally require extremely clear evidence of congressional intent to strip the federal court of jurisdiction. There was no need, in his view, to probe inconsistencies in the legislative structure to infer intent. To be sure, my purpose in using *Sandoval* is not to address the merits. Rather, I put forward the *Sandoval* case as a way to

demonstrate the standard manner in which Judge Alito approaches cases. The majority of his opinions in the constitutional criminal procedure arena are analyzed in this sort of plain-meaning fashion, not dissimilar to *Sandoval*.

In criminal cases in which a standard Alito analysis might jeopardize a conviction or other government interest, however, the nominee applies a different set of interpretive principles. He reaches deeper into his interpretive toolkit to pull out interpretive principles that result in the government prevailing in any given appeal. *United States v. Lake*[66] provides a good example of Judge Alito's shifting jurisprudence that results in consistently anti-liberal decisions. *Lake* regarded an appeal from a conviction in a criminal case. Specifically, Lake was convicted of carrying a firearm during and in relation to a crime of violence, to wit, carjacking.[67] The jury returned the firearm conviction even though it acquitted Lake on the underlying carjacking count in the indictment. Thus, Lake was convicted of using a gun during a carjacking that the jury decided he did not commit.[68] The major contention on appeal was that Lake could not properly be convicted of carrying a firearm during the commission of a carjacking when he was acquitted on the predicate offense.

The relevant facts in *Lake* follow.[69] The complaining witness was sitting on a beach in Little Magen's Bay, St. Thomas, Virgin Islands, reading a newspaper. Lake, not known to the complaining witness, approached him several times and asked to borrow his car. Predictably, the complaining witness demurred. Lake approached once more, pointed a firearm at the complainant, and demanded the keys. When the complainant protested that he did not have his keys, Lake turned to the complainant's friend who had arrived on the beach. They struggled, but after she saw the gun, the friend surrendered

the keys. Lake left the beach, walked up a "steep path bordered by vegetation and rocks" to the road, which could not "be seen from the beach."[70]

Judge Alito, over a forceful dissent, ruled that one could be convicted of using a firearm during a carjacking when the carjacking itself was not proved at trial.[71] At issue was whether Lake's conduct constituted carjacking, given that the car was not on the beach, but in a parking lot, up a hill, and out of sight of the owners. As the dissent sardonically put it, Lake may have a committed a "keyjacking," but not a "carjacking."[72] To be sure, the dissent would have upheld convictions for robbery and grand larceny, but considered carjacking to be an expansive and incorrect read of the relevant statutory authority.[73]

Judge Alito analyzed the carjacking statute, 18 U.S.C. § 2119, in a remarkably broad fashion. For criminal liability to attach under 18 U.S.C. § 2119, the government must prove, among other things, that car must have been taken "from the person or presence of another." The focus of the dispute in *Lake* turned on whether Lake took the car (as opposed to the car keys) "from the person or presence" of someone. Clearly, the car was not taken from the "person" of the complainant, but what about the "presence"? The dissent decided this issue in a narrow, restrained way, insisting that some reasonable special proximity must define "presence." The car was "in city terms, a block away, up the hill, [and] out of sight."[74] Chief Judge Becker, writing the dissent, reasoned, "[a]t all events, my polestar is the plain meaning of words, and in my lexicon, [the] car cannot fairly be said to have been taken from her person or presence . . . ."[75]

Judge Alito, using a much more expansive lexicon, found that a car parked a block away from the complaining witnesses was in the complainant's presence. To arrive

at this conclusion, Judge Alito quotes from a Ninth Circuit car *robbery* opinion for the proposition that "property is in the presence of a person if it is 'so within his reach, inspection, observation or control, that he could if not overcome by violence or prevented by fear, retain his possession of it.'" On this basis, Judge Alito ruled that the victim was prevented from retaining possession of the car by following Lake up the hill to the parking area due to fear of the gun. This is a different form of argument than that which Judge Alito applied in *Sandoval*. There, he relied on ordinary meaning and plain language to construe the federal statute at issue. In *Lake*, he uses a Ninth Circuit opinion in a robbery – not even carjacking – case to construe an out-of-sight automobile as within the presence of the victim. A *Sandoval*-type jurisprudence would have led Judge Alito to agree with the dissent that Lake's crimes were grand larceny and robbery – *that* conclusion would have shown the sort of judicial restraint that Judge Alito's supporters tout. Instead, Judge Alito stretched the definition of "presence" beyond any rational and common sense understanding of the word. (And the irony of Judge Alito relying on a Ninth Circuit opinion to affirm a conviction should not be lost on this Committee.).

Other Fourth Amendment cases demonstrate what I have termed inconsistent interpretive principles. In *United States v. Hodge*,[76] a search warrant case, for example, Judge Alito had to pile inference upon inference to conclude that the facts made out probable cause. In *Stiver v. United States*,[77] Judge Alito – rather than restraining himself to the four corners of the warrant – cited two dictionaries for the proposition that a telephone could be defined as drug paraphernalia.[78] In *United States v. Bell*,[79] he made several, uncharacteristic inferential leaps to rule that federal criminal liability attached to what, on the face of the record, appeared to be a homicide motivated by a state court

prosecution. In *United States v. Zimmerman*,[80] Judge Alito, once again, uncharacteristically piled inference upon inference to salvage evidence collected in a child pornography case.

Judge Alito's jurisprudence is usually predictable in that he typically employs fairly limited principles of interpretation in deciding cases. This is true in the criminal context, except where the government's interests are in jeopardy. From his record, it appears that government power is a dominant norm in Judge Alito's thinking – so much so that he selectively applies interpretive principles in criminal cases. I do not mean to question the resolution in any particular decision that I cite (although I am in clear disagreement with some). My limited aim is to show that, when criminal convictions are threatened on appeal, this nominee engages in the very sort of expansive interpretive enterprise that he criticizes in other contexts. In his 1985 Justice Department application, Judge Alito praised "judicial restraint" in the mode of the Alexander Bickel, former Sterling Professor of Law at the Yale Law School. In criminal cases, the nominee proves not to be restrained when validating the exercise of government authority. This begins to look like a results-driven jurisprudence, which should give the committee cause for concern.

Conclusion

We are living in an historical moment where the Executive is making extraordinary claims of its authority to conduct investigations of U.S. citizens. The bourgeoning controversy around allegations of domestic spying without prior judicial authorization is only the most recent.[81] The Executive's claim that it can detain citizens without judicial process or assistance of counsel is another.[82] Finally, the ongoing debate

over whether and for how long to extend certain provisions of the Patriot Act[83] represents yet another significant claim of governmental investigatory authority.[84] The delicate balance between liberty and safety that the Framers fought so hard to erect and their successor generations fought so hard to maintain needs our continued vigilance to sustain.

In the United States, perhaps no right is regarded as more sacred – more worthy of vigilant protection – than the right of each and every individual to be free from government interference without the "unquestionable" authority of the law.[85] Judge Alito, on my read of his constitutional criminal procedure opinions, shows an inadequate consideration for the important values that underwrite these norms of individual liberty – the very norms upon which this constitutional democracy relies for its sustenance. This Committee and this Senate's decision on whether to consent to Judge Alito's nomination will profoundly impact how liberty is realized in the United States. The Constitution commits this task to your sound discretion.[86] Thank you for the opportunity to testify, and I look forward to answering any questions the Committee may have.

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[1] I include cases in which privacy interests, broadly construed, are implicated, even if the case is not, in a formal sense, resolved on Fourth Amendment grounds. This statement is limited to cases in which Judge Alito authored an opinion, not cases in which he joined. In my view, the former class of opinions better predicts how Judge Alito will analyze cases as an Associate Justice of the Supreme Court.

[2] *See United States v. Kithcart*, 134 F.3d 529 (1998).

[3] *See United States v. Ninety-Two Thousand Four Hundred Twenty-Two Dollars and Fifty-Seven Cents*, 307 F.3d 137 (3d Cir. 2002).

[4] *See The Alito Opinions: A Report of the Alito Project at the Yale Law School* 36 (2005), *available at* http://www.law.yale.edu/outside/html/Public_Affairs/685/YLS%20Alito%20Project%20Final%20Report.pdf.

[5] In each of the Fourth Amendment cases in which Judge Alito participated where judges of the Third Circuit disagreed about the scope of citizens' rights, Judge Alito sided with the government. *See* Robert Gordon, *Alito or Scalito? If You're a Liberal, You'd Prefer Scalia*, Slate, Nov. 1, 2005, www.slate.com/id/2129107.

[6] Carol S. Steiker, *Second Thoughts About First Principles*, 107 Harv. L. Rev. 820, 820 (1994).

[7] *Jones v. United States*, 362 U.S. 257, 273 (1960) (Douglas, J., dissenting).

[8] *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

[9] *Byars v. United States*, 273 U.S. 28, 32 (1927) (citing *Boyd v. United States,* 116 U.S. 616, 635 (1886)).

[10] *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[11] *See The Alito Opinions*, *supra* note 4, at 2.

[12] *United States v. Williams*, 124 F.3d 411 (3d Cir. 1997).

[13] *Id.* at 417 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)) (emphasis added).

[14] *Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979).

[15] *Doe v. Groody*, 361 F.3d 232 (3d Cir. 2004).

[16] For more detail regarding the warrant, see *id.* at 244 and *infra* text accompanying note 20.

[17] *Groody,* 361 F.3d at 237. The searches of the girl and her mother were conducted by a female officer. *Id.* at 236-37 (noting that the Task Force enlisted the help of a female traffic meter patrol officer).

[18] *Id.*

[19] *Id.*

[20] *Id.* at 244.

[21] *Id.* at 249 ("I share the majority's visceral dislike of the intrusive search of John Doe's young daughter, but it is a sad fact that drug dealers sometimes use children to carry out their business and to avoid prosecution.").

[22] 258 F.3d 156 (3d Cir. 2001).

[23] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

[24] *Leveto*, 258 F.3d at 163 (quoting *Terry v. Ohio*, 392 U.S. 1, 17 (1968)).

[25] *Id.* at 167.

[26] *Id.* at 169.

[27] *Id.* at 175.

[28] *Id.*

[29] 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1893, at 747 (Fred B. Rothman Publications, 2d prtg. 1999) (1833).

[30] 359 F.3d 194 (3d Cir. 2004).

[31] *Id.* at 201 (quoting *United States v. Padilla*, 520 F.2d 526, 528 (1st Cir. 1975)). Judge Alito rejected this First Circuit decision in favor of Second and Eleventh Circuit opinions to the contrary. *Id.* (arguing that the Second and Eleventh Circuit opinions reflect a "well-established principle" that should govern the present case).

[32] *Id.* at 202.

[33] *Id.*

[34] *Id.* at 203.

[35] *United States v. Williams,* 124 F.3d 411, 416 (3d Cir. 1997).

[36] *United States v. Hodge*, 246 F.3d 301, 310 (3d Cir. 2001).

[37] I will have more to say about *Hodge* at notes 76-80, *infra*, and accompanying text.

[38] *United States v. Zimmerman,* 277 F.3d 426, 438-41 (3d Cir. 2002) (Alito, J. dissenting).

[39] For a more detailed analysis of *Zimmerman*, see text accompanying notes 48 and 85, *infra*.

[40] Application for Deputy Assistant Attorney General, to Mark Sullivan, PPO Associate Director, (Nov. 18, 1985), *available at* http://www.law.com/pdf/dc/alitoDOJ.pdf.

[41] *United States v. Kithcart,* 134 F.3d 529 (3d Cir. 1998).

[42] *Id.* at 531.

[43] *Id.* at 532.

[44] *See United States v. Ninety-Two Thousand Four Hundred Twenty-Two Dollars and Fifty-Seven Cents*, 307 F.3d 137 (3d Cir. 2002).

[45] *Id.* At issue was the seizure of all Chinese language documents during the execution of the warrant. The agents testified that they did not have a translator and, thus, needed to seize all the Chinese language documents in order to have them translated. Judge Alito ruled that "gaps" in the trial court record preclude the majority from determining whether the seizure was reasonable. *Id.* at 154-55.

[46] *See* Carol Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 Mich. L. Rev. 2466 (1994). Professor Steiker adapts a vocabulary introduced by Professor Meir Dan-Cohen to constitutional criminal procedure. For Steiker, and different from Dan-Cohen, conduct rules define constitutional norms and decisions rules define the consequences of running afoul of such norms. *Id.* at 2469-70; *cf.* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separaton in Criminal Law*, 97 Harv. L. Rev. 625, 626 (1984).

[47] *United States v. Hodge*, 246 F.3d 301 (3d Cir. 2001).

[48] *United States v. Zimmerman,* 277 F.3d 426, 438 (3d. Cir. 2002) (Alito, J., dissenting).

[49] *United States v. Ninety-Two Thousand Four Hundred Twenty-Two Dollars and Fifty-Seven Cents*, 307 F.3d 137 (3d Cir. 2002).

[50] *Leveto v. Lapina*, 258 F.3d 156 (3d Cir. 2001).

[51] *Doe v. Groody*, 361 F.3d 232, 244 (3d Cir. 2004) (Alito, J., dissenting).

[52] Judge Alito's criminal procedure jurisprudence outside of the Fourth Amendment context yields similar results. *See, e.g.*, *Brosius v. Warden*, 278 F.3d 239 (3d Cir. 2002) (harmless error); *Elkin v. Fauver*, 969 F.2d 48 (3d Cir. 1992) (same).

[53] *See* Steiker, *supra* note 46, at 2549.

[54] Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 759 (1994).

[55] *See* Steiker, *supra* note 46 at 2470-71. Here again, I use the term "acoustic separation" in the way Professor Steiker adapted it.

[56] *Id.* at 2546. A District of Columbia police officer testified at a motion on a hearing to suppress that he purposely violated the rule articulated in *Massiah v. United States*, 377 U.S. 201 (1964), because the officer knew that the prosecutor could use the illegally obtained statement for impeachment purposes. On the ground, this gambit had the effect of "locking in" the defendant, so that he could not later testify in a way that is consistent with the ensuing discovery. See *Simpson v. United States*, 632 A.2d 374 (D.C. 1993), for more detail on this case.

[57] 367 U.S. 643 (1961).

[58] Application for Deputy Assistant Attorney General, *supra* note 40.

[59] *See* Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, Yale L.J. (The Pocket Part), Jan. 2006, http://www.thepocketpart.org/2006/01/post_and_siegel.html. Professors Post and Siegel argue that Senators appropriately mediate between the competing norms of judicial independence and democratic legitimacy by asking nominees to describe how they would have decided cases that the Supreme Court has already decided.

[60] *See, e.g.*, Peter Baker, Alito Nomination Sets Stage for Ideological Battle, The Washington Post, November 1, 2005, at A1, available at http://www.washingtonpost.com/wp-dyn/content/article/2005/10/31/AR2005103100180.html.

[61] 166 F.3d 225 (3d Cir. 1999).

[62] Pub. L. No. 104-208, 110 Stat. 3009 (1996).

[63] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

[64] *Sandoval*, 166 F.3d at 231.

[65] *Id.* at 242-43 (Alito, J., dissenting).

[66] *United States v. Lake*, 150 F.3d 269 (3d Cir. 1998).

[67] *See* 18 U.S.C. § 924(c)(1) (2000).

[68] *Lake*, 150 F.3d at 271.

[69] See *id.* at 270-71 for a description of the facts.

[70] *Id.* at 270.

[71] *Id.* at 274-75.

[72] *Id.* at 275.

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] 246 F.3d 301 (3d Cir. 2001).

[77] 9 F.3d 298 (3d Cir. 1993).

[78] *Id.* at 303.

[79] 113 F.3d 1345, 1348-50, 1352 (3d Cir. 1997).

[80] 277 F.3d 426, 438-41 (3d Cir. 2002) (Alito, J., dissenting).

[81] *See* Memorandum from Congressional Research Service on Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information (Jan. 5, 2006), *available at* http://www.fas.org/sgp/crs/intel/m010506.pdf; *see also* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1.

[82] *See, e.g.*, Rasul v. Bush, 542 U.S. 466 (2004); *see also* Hanft v. Padilla, --- S. Ct. ----, 2006 WL 14310, 2006 U.S. LEXIS 1 (Jan. 4, 2006) (mem.).

[83] USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

[84] *See* Sheryl Gay Stolberg, *Postponing Debate, Congress Extends Terror Law 5 Weeks*, N.Y. Times, Dec. 23, 2005, at A1; Sheryl Gay Stolberg & Eric Lichtblau, *Senators Thwart Bush Bid to Renew Law on Terrorism*, N.Y. Times, Dec. 17, 2005, at A1.

[85] *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (quoting *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

[86] U.S. Const. art. II, § 2.