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Sam Alito

Rule of Law

Judge Alito's View Of the Presidency: Expansive Powers

Court Pick Endorsed Theory Of Far-Reaching Authority; Tenet of Bush White House A Debate Over Terror Tactics

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In November 2000, while the nation fixated on whether George W. Bush or Al Gore would emerge victorious from the electoral confusion in Florida, Judge Samuel Alito laid out his view of what powers the future president would hold.

The Constitution "makes the president the head of the executive branch, but it does more than that," Judge Alito said in a speech to the Federalist Society at Washington's Mayflower Hotel. "The president has not just some executive powers, but the executive power -- the whole thing."

Judge Alito was describing the theory of the "unitary executive," an expansive view of presidential powers that he and his colleagues set forth while working in the Office of Legal Counsel of the Reagan Justice Department. Although the Supreme Court has not always agreed, he said in his speech, "I thought then, and I still think, that this theory best captures the meaning of the Constitution's text and structure."

President Bush has repeatedly invoked this theory as he asserts broad presidential powers to fight the war on terror. Now the president's approach to executive power -- including his authorization of a domestic surveillance program -- is drawing criticism in Congress. Disputes over some White House policies may ultimately be resolved by federal courts. The record of Judge Alito, who is Mr. Bush's latest nominee to the Supreme Court, suggests he could support the president's viewpoint.

Amid controversy over the domestic wiretapping program and the detention of enemy combatants, Judge Alito is likely to be questioned extensively about his views on presidential power during his confirmation hearings, scheduled to open Jan. 9. In separate letters to Judge Alito last month, the Republican chairman of the Senate Judiciary Committee, Arlen Specter of Pennsylvania, and the ranking Democrat, Patrick Leahy of Vermont, both indicated an intention to explore the topic. (See related article.)

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In an interview yesterday evening, Assistant Attorney General Rachel Brand, speaking for the Bush administration, cautioned against drawing conclusions from Judge Alito's 2000 speech. "There's no way to say how he would rule" on executive-power issues that might come before the court, she said.

In 2000, Judge Alito referred to the unitary-executive theory of presidential power as "the gospel according to OLC," a reference to his office in the Reagan Justice Department. The theory has since become the foundation for the current administration's assertions that it has the power to interpret treaties, determine the fate of enemy prisoners, and jail U.S. citizens as enemy combatants without charging them.

Thus far, the theory has fared unevenly in federal courts. Bush administration officials have criticized some court rulings and pledged to appoint new judges more sympathetic to executive-power claims.

The judiciary had a "disturbing tendency...to inject itself into areas of executive action originally assigned to the discretion of the president," Attorney General John Ashcroft said in a November 2004 speech to the Federalist Society, a conservative lawyers' network. "These encroachments include some of the most fundamental aspects of the president's conduct of the war on terrorism," he said, and they impede "the tremendous energy and resolve of President Bush."

While serving on the District of Columbia Circuit Court of Appeals, the president's first Supreme Court appointee, Chief Justice John Roberts, joined a June 2005 decision that gave Mr. Bush broad authority to try foreigners before military commissions. The Supreme Court has agreed to hear an appeal, and if Judge Alito is confirmed, he will help decide the case.

In written statements issued when he signs legislation, Mr. Bush routinely cites his authority to "supervise the unitary executive branch" to disregard bill provisions he considers objectionable. A statement Mr. Bush issued on Dec. 30 when he signed Sen. John McCain's antitorture amendment, for example, said in part that the executive branch "shall construe" a portion of the act 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 and consistent with the constitutional limitations on the judicial power." The statement raised questions among critics of the administration's policies about the extent to which the White House considers itself bound by the legislation.

Open-Ended

Some supporters of unitary-executive theory argue that the White House has the constitutional power to remove officials of independent agencies such as the Federal Trade Commission if they disobey the president.

Article II of the Constitution says that "the executive power shall be vested in a president of the United States of America," but it doesn't precisely define that power. It says that

the president shall be "commander in chief of the Army and the Navy," but separately assigns the power to declare war, raise armies and regulate the taking of prisoners to Congress. Advocates of the unitary-executive theory contend that the president's power is open-ended compared with that of Congress, noting that Article II doesn't expressly limit executive powers to those "herein granted."

"At its core, the unitary executive is the notion that the Constitution gives the president the executive power, and it includes the power to superintend and control subordinates in the executive branch," says Northwestern University law professor Steven Calabresi, who helped develop the theory in the Reagan Justice Department and has written extensively on its historical basis.

ON THE RECORD

Use of the phrase "unitary executive" by President Bush, broken down by type ...

	2001	2002	2003	2004	2005
Signing Statement	2	31	20	35	15
Executive Order	0	1	2	2	1
Other	0	0	1	0	0
Total	2	32	23	37	16*

LOOKING BACK

...And compared with previous presidents.

Reagan	1
G.H.W. Bush	6
Clinton	0
G.W. Bush	110*

**to date*
Source: Christopher Kelley, Miami University

Adherents to the theory -- called unitarians -- reject the view that regulatory agencies should operate independent of political control. The White House should have final say over rules and decisions issued by the federal bureaucracy, they say.

But advocates differ on the degree of executive authority. Some believe only that Congress cannot create agencies or officers that operate outside the president's direction. Others contend the president has executive powers beyond those granted by Congress or listed in the Constitution.

Bush administration lawyers, in confidential memorandums, adopted this broader view after the Sept. 11, 2001, terrorist attacks. They contended that the "unitary" nature of presidential power over national security meant Mr. Bush could not be constrained either by treaties or laws passed by Congress that governed treatment of enemy prisoners.

In a Sept. 25, 2001, advisory legal opinion prepared for the White House, John Yoo, then a Justice Department attorney, wrote: "The centralization of authority in the president alone is particularly crucial in matters of national defense, war, and foreign policy, where a unitary executive can evaluate threats, consider policy choices, and mobilize national resources with a speed and energy that is far superior to any other branch."

An August 2002 memorandum signed by Assistant Attorney General Jay Bybee advised that "even if an interrogation method arguably were to violate [an anti-torture law], the statute would be unconstitutional if it impermissibly encroached on the president's constitutional power to conduct a military campaign." President Bush has since appointed Mr. Bybee to a federal appeals court.

The Justice Department later withdrew that internal legal opinion, but it has not backed away from its theory on presidential power, which also underlies the domestic surveillance program and the detention of U.S. citizens as enemy combatants. In all three instances, the president has asserted an inherent power to take actions that critics say are contrary to specific laws -- respectively, the 1994 Torture Statute, the 1978 Foreign Intelligence Surveillance Act and the 1971 Non-Detention Act.

"If the theory were wrong, there would be no way the Bush administration's antiterrorism policies could be constitutionally justified," says Mr. Calabresi, co-chairman of the Federalist Society, which he co-founded in 1982. Although the theory is closely associated with many Federalist Society leaders, Mr. Calabresi stops short of fully endorsing the Bush administration's view. "They have pushed the envelope, and if I were a judge I am not at all sure I would uphold everything they have done, although I would probably uphold most of it."

'Hotly Debated'

Judge Alito, a Federalist Society member who currently sits on the Third U.S. Circuit Court of Appeals in Philadelphia, noted in his 2000 speech that as a judge, he had had few occasions to rule on presidential authority. He observed that "what the executive power encompasses has been very hotly debated."

He noted that "the Supreme Court has not exactly adopted the theory of the unitary executive," instead taking a "two-track approach." The high court has protected presidential powers specifically enumerated in the Constitution, such as the right to pardon convicts and to sign or veto bills, he said. "But when it's been confronted with an inroad on the general grant of executive power to the president, it has basically engaged in balancing" of competing interests, rather than deferring to the White House's assertion of authority.

IN ACTION

From Bush's Dec. 3, 2003 statement on signing the 21st Century Nanotechnology Research and Development Act:
"The executive branch shall implement these provisions in a manner consistent with the President's constitutional authority to supervise the **unitary executive** branch and to recommend for the consideration of the Congress such measures as the President judges necessary and expedient."

Over the past 80 years, the Supreme Court has backed the president on some questions of executive power, but not on others. In the 1940s, for example, the court upheld several Roosevelt administration policies, including the internment of Japanese-Americans and the trial of German saboteurs before a secret military commission. But in the landmark 1952 steel seizure case, the court rejected President Truman's claim that as commander in chief, he could take possession of steel mills, then closed by strikes, to ensure production of arms for the Korean War. The opinion, by Justice Hugo Black, defined the president's commander-in-chief power narrowly, "even though 'theater of war,' " he wrote, may be "an expanding concept."

In 2004, the Supreme Court cited the steel seizure case to rule that prisoners at Guantanamo Bay, Cuba, and others the president designated as "enemy combatants" had the right to challenge their detentions in court. "We have long since made 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," wrote Justice Sandra Day O'Connor, who Judge Alito has been nominated to succeed.

Supporters and opponents of expansive presidential powers disagree about the intent of the Constitution's framers. In his 2000 speech, Judge Alito argued that the framers "saw the unitary executive as necessary to balance the huge power of the legislature and the factions that may gain control of it."

Critics say the framers were concerned about the unchecked power of a king, who could act without regard to elected representatives. "Some people would argue that the whole point of the Revolution was not to have a king," says Michael Froomkin, a law professor at the University of Miami.

Roots in the 1970s

The current debate about presidential power has its roots in the 1970s, when Congress and courts responded to controversial and in some cases illegal practices of the Nixon White House. New laws curtailing presidential power were enacted. The Supreme Court ruled that newspapers could not be barred from publishing leaked classified documents on the Vietnam War, the attorney general could not wiretap suspected subversives without a warrant, and Mr. Nixon had to surrender transcripts of his secret White House tapes to a Watergate special prosecutor.

Lawyers working under Mr. Nixon's successor, Gerald Ford, "began looking at ways they could advance presidential powers in ways that wouldn't raise the alarm bells it did during the Nixon administration," says Christopher Kelley, a political scientist at Miami University in Oxford, Ohio. Leading that effort was Antonin Scalia, who headed the Ford administration's Office of Legal Counsel and today sits on the Supreme Court.

The push to extend presidential powers continued into the Reagan and George H.W. Bush administrations, in part to contend with Congress when it was controlled by Democrats. The Clinton administration asserted a similar authority over government agencies, particularly after Republicans took control of Congress in 1994.

In March, the current administration's efforts to further expand presidential authority may face another test at the Supreme Court. It has agreed to hear a challenge to the president's plan to try suspected foreign terrorists at Guantanamo before military commissions, a type of special court created by the president in which defendants have limited rights. At issue, among other things, is whether the Geneva Convention affords the Guantanamo prisoners further legal protections.

Last month, Congress approved legislation intended to protect prisoners, in part by providing them with limited rights to appeal. The administration is expected to cite that legislation in an effort to head off the Supreme Court review.

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