*SCHUMER QUESTIONS NOMINEE'S THEORY ON EXECUTIVE ROLE The Boston Globe January 10, 2006 Tuesday*

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**HEADLINE: SCHUMER QUESTIONS NOMINEE'S THEORY ON EXECUTIVE ROLE**

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**BODY:**

WASHINGTON Senator Charles E. Schumer yesterday signaled that he will grill the Supreme Court nominee, Samuel A. Alito Jr., over the next few days about the judge's endorsement of the "unitary executive theory," an expansive view of presidential power that calls for greater White House control of government operations and a reduced role for Congress.

"That's a marginal theory at best, and yet it's one that you've said you believe," said Schumer, a New York Democrat, during his opening statement at Alito's hearing before the Senate Judiciary Committee.

"This is not an abstract debate," Schumer said. "The Bush administration has repeatedly cited this theory to justify its most controversial policies in the war on terrorism."

Schumer added, "Under this theory, the Bush administration has claimed the right to seize American citizens in the United States and imprison them indefinitely without a charge.

"They've claimed this right to engage in torture, even though American law makes torture a crime.

"What was the rationale?" Schumer added. "The unitary executive theory, which you've spoken of."

Adherents of the theory say that the Constitution prevents Congress from passing a law restricting the president's power over executive branch operations. And, they say, any president who refuses to obey such a statute is not really breaking the law.

As a lawyer during the Reagan administration, Alito worked for a Justice Department office that helped developed the modern form of the theory. Alito and colleagues were seeking ways to increase the power of the president.

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In a speech in November 2000 before the conservative Federalist Society, Alito said he believes that the Constitution gives the president "not just some executive power, but the executive power the whole thing."

"We were strong proponents of the theory of the unitary executive, that all federal executive power is vested by the Constitution in the president," Alito said, referring to his days in the Reagan administration. "And I thought then, and I still think, that this theory best captures the meaning of the Constitution's text and structure."

Alito did not specify how he would apply the theory. But other adherents have invoked it to argue for giving the president increased powers, including authority to withhold information from Congress; to take secret actions without telling Congress; and to take control of independent agencies.

When President Bush took office, many adherents of the "unitary executive theory" joined his administration.

During Bush's first term, according to a study by a Portland State University professor in Oregon, Phillip J. Cooper, Bush objected to 82 provisions of new laws on grounds that they violated his power, in Bush's words, to "supervise the unitary executive."

The mechanism that Bush used to make those 82 complaints was the presidential signing statement, an official document in which a president lays out an interpretation of a new law.

As a Reagan administration lawyer, Alito helped expand the use of signing statements to ensure, in his words, that "the president will get in the last word on questions of interpretation."

Bush's interpretations of torture and surveillance laws have come under dispute in several recent cases.

Two weeks ago, he issued a signing statement invoking his executive powers to reserve the right to waive a law governing torture.

Because the Supreme Court may be called upon to resolve disputes over the president's wartime powers, Schumer said yesterday, Alito must explain whether his embrace of the "unitary executive theory" means that he might feel inclined to resolve such disputes in the president's favor.

"We need to know, when a president goes too far, will you be a check on his power or will you issue him a blank check to exercise whatever power he alone thinks appropriate?" the New York senator added.

Ronald Cass, dean emeritus of the Boston University School of Law and an Alito supporter, said that Alito was merely endorsing the idea that the federal bureaucracy should be more accountable to the president, because the president is the official elected nationwide.

"There is absolutely nothing in Judge Alito's record that shows that he's an apologist for presidential authority," Cass said. "Politicians always use whatever means are available to score their political points and to fling arrows at their political opponents.

"That's what is going on here. I don't think it's a fair way to judge what Sam Alito would do as a justice on the Supreme Court."

But Cooper, the Portland State professor who studied Bush's assertion of executive authority, said Alito's support for a "unitary executive theory," coupled with his help in developing the signing statement as a device for expanding executive power, cannot be dismissed lightly.

"The question is the degree to which the court is going to defer to the interpretation of a law issued in a presidential signing statement," Cooper said.

"As someone who asserted [his belief in] a unitary executive, he is going to have to assure everyone that the view of the president will not control his decisions" as a Supreme Court justice.