

Senate Democrats prostrate as Alito confirmation hearings get under way

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12 January 2006

The Senate hearings that began this week for Supreme Court nominee Samuel Alito have provided a further demonstration of the impotence and cynicism of the Democratic Party and its lack of any serious commitment to the defense of democratic rights.

Alito, an official in the Justice Department under Ronald Reagan and a federal appeals court judge since 1990, is a member of the right-wing Federalist Society and judicial reactionary known for his pro-corporate rulings, his support for expanded presidential and police powers, his hostility to abortion rights, and his dismissive attitude toward civil liberties.

The questioning of Alito by liberal senators like Edward Kennedy and Charles Schumer was perfunctory, and by midweek leading Senate Democrats were admitting to the press that they had little hope of blocking the nomination, either on the Judiciary Committee or in the full Senate.

In their remarks at the Judiciary Committee hearing and their questions to Alito, the Democrats downplayed the dimensions of the shift to the right on the Supreme Court which is being engineered by the addition of two Bush nominees—newly installed Chief Justice John Roberts and Alito. The latter, if confirmed, will replace Sandra Day O'Connor, the court's long-time swing vote.

On the first day of questioning, January 10, not a single Democrat mentioned the name of Harriet Miers, Bush's previous nominee for the O'Connor seat. Miers was withdrawn after two weeks of frenzied attack by Christian fundamentalist elements, who considered her insufficiently reliable on social issues like abortion and gay rights. The embrace of Alito by these ultra-right forces tells more about the judge's real views than anything he might choose to reveal at his confirmation hearings.

The hearings themselves have been largely scripted in advance, on the model provided by the Roberts nomination. The Supreme Court nominee speaks only in the vaguest generalities or refuses to answer questions outright, Republican senators heap praise on him and denounce any opposition as illegitimate, and Democrats either join in the celebration or make half-hearted and largely futile attempts to penetrate the smokescreen.

The basic tenor of the hearings was established on Monday with the opening statement of Senator Arlen Specter, a Republican and the chairman of the committee. He began by addressing the issue of what questions a nominee must answer. "It has been my experience," Specter said, "that the hearings are really, in effect, a subtle minuet, with the nominee answering as many questions as he thinks necessary in order to be confirmed."

In other words, Alito is obliged to make certain general pronouncements, amounting to nothing more than platitudes, on such questions as the importance of precedents in determining court decisions and the requirement that the president act within his powers under the Constitution. However, as with Roberts before him, Alito is permitted to avoid making any definitive statements on any specific issues.

One exchange between Alito and Senator Herb Kohl (Democrat of Wisconsin) captured the farcical character of the whole exercise. Kohl asked the nominee to give his views on the Supreme Court's decision in *Bush v. Gore* which put Bush in the White House. "Was the Supreme Court correct to take this case in the first place?" Kohl asked.

Alito responded, "As to that particular case, my answer has to be, I really don't know. I have not studied it in the way I would study a case that comes before me as a judge. And I would have to go through the whole judicial process."

Kohl repeated the question, observing, "That was a huge, huge case. And I would like to hope and I would bet that you thought about it an awful lot, because you are who you are. And I would like for you to give an opinion from the convictions of your heart. As a person who's very restrained with respect to judicial activism, this being a case of extreme judicial activism, were they correct in taking this case, in your opinion?"

Again, Alito evaded a response: "Senator, my honest answer is I have not studied it in the way that I would study the issue if it were to come before me as a judge. And that would require putting out of my mind any personal thoughts that I had on the matter and listening to all of the arguments and reading the briefs and thinking about it in the way that I do when I decide legal issues that are before me as a judge. And that's the best answer I can give you to that question."

If it were true that Alito, who has 25 years experience in national politics and the law, had given no serious thought to the issues raised by a political and legal battle that riveted the country for five weeks, that fact alone would seem enough to disqualify him from any significant official position, let alone a seat on the Supreme Court replacing the very justice who provided the fifth vote for the majority decision in *Bush v. Gore*. But Kohl acquiesced to his stonewalling, thanked Alito, and shut up. No other Democrat even mentioned the issue.

Alito's confirmation hearings take place within the context of revelations of massive illegal spying carried out by the Bush

administration and justified on the grounds of legal arguments that seek to grant the president virtually unlimited powers. It has become clear that the US government is storing vast amounts of data on US citizens, including on opponents of the war in Iraq.

The Bush administration further maintains that it has, as part of the “war on terrorism,” the right to indefinitely detain individuals, including US citizens, without charging them or granting them access to the courts.

It is well known that Alito supports an interpretation of presidential powers that flies in the face of constitutional limits and the principle of “checks and balances” between the executive, legislative and judicial branches of government. There is no doubt he was selected by Bush, in part, because he is deemed an ally of the White House in its assertion of quasi-dictatorial powers.

In the course of the hearings, Alito has indicated, in carefully hedged language, that he does not oppose the view that the president has the right to order spying without court warrants and detain individuals indefinitely.

In his opening remarks, Senator Patrick Leahy, the ranking Democrat on the Judiciary Committee, advised Alito that he would ask him “to demonstrate his independence from the interests of the president appointing him or nominating him,” and that “no president, Democratic or Republican...is above the law.”

Alito obliged Leahy’s request by declaring, in his opening statement, that “no person in this country—no matter how high or powerful—is above the law.” Leahy, in his questioning of Alito, raised the question again, within the context of the spying ordered by the administration and the legal memos drawn up by administration lawyers claiming a presidential right to torture prisoners.

In his answer, Alito suggested that what is “above the law” is an entirely open question. The “president has to follow the Constitution,” he said, but added that whether a specific act that contradicts existing legislation—such as the Bush administration’s decision to order spying in a manner prohibited by the Foreign Intelligence Surveillance Act—is unconstitutional depends on the “specifics of the situation.”

The *Wall Street Journal* reported on January 5 that Alito is a strong supporter of the so-called “theory of the unitary executive,” which holds that the president should have complete control over all executive bodies. In practice, the theory has been used repeatedly by administration lawyers to bolster arguments for the elimination of restraints on presidential power.

According to the *Journal*, “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.”

When he signed the recent Defense Department appropriations bill, which included a measure passed by Congress prohibiting torture by US agencies, Bush wrote that the executive branch would follow the law “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.”

In other words, Bush asserted his right to disregard the letter and spirit of the anti-torture provision of the law.

In an analysis of Alito’s legal record published January 6, the news agency Knight-Ridder found that “Even when government authorities have overstepped the bounds of legal searches, Alito has argued—in both judicial opinions and prior memos—that most should not be held liable.” The article went on to say that in his court decisions, Alito “has almost never found a government search unconstitutional and that he has argued to relax warrant requirements and to broaden the kinds of searches that warrants permit.”

On the question of abortion, Alito replied with similar innocuous-sounding but evasive statements. “I would approach the question with an open mind,” he said, attempting to downplay the significance of a document he wrote in the 1980s arguing against a constitutional right to privacy and outlining a strategy to roll back the right to abortion.

The precedents established by *Roe v. Wade* and subsequent decisions upholding the right to abortion are important, he said, and must be taken into consideration when deciding future cases. He refused, however, to repeat the words used by Roberts in his confirmation hearings, when Roberts called *Roe v. Wade* “settled law.”

The day before the Senate hearings opened, representatives of Christian fundamentalist groups met at a Philadelphia church in the third in a series of rallies televised nationally by Christian-oriented cable networks. The outlook of these groups was expressed by Tony Perkins of the Family Research Council, one of several speakers who fantasized a nationwide onslaught that was on the brink of making Christianity illegal.

At the Senate hearing the following day, not a single Democrat made reference to the assembly of ultra-right and fascist-minded elements who fervently support Alito’s addition to the Supreme Court.



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