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Alito Would Become Bush's Enabler

Robert Kuttner (op-ed)
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At this moment in American history, it would be hard to find a worse Supreme Court nominee than Samuel A. Alito Jr. His ideology captures everything extremist about the Bush administration. If confirmed, Alito would serve as Bush's enabler. He would give Bush effective control of all three branches of government and the hard-right long-term dominance of the high court. His confirmation or rejection will depend on the gumption of Senate Democratic leaders and the independence of a few Republicans.

Alito, who would replace the moderate Sandra Day O'Connor, has never hidden his ultraconservative views. Given the administration claims of an extra-legal presidency, what's most disturbing is the handy convergence of Alito's own conception of executive power and that of Bush.

Citing the wartime powers of the president, Bush has asserted his right to ignore the legislative mandate of Congress in allowing the military to torture prisoners. He insists on the government's prerogative to spy on Americans without a court warrant, and to treat not just foreigners but also U.S. citizens as "illegal enemy combatants" who lose the constitutional rights of criminal defendants. And he defended the government's right to incarcerate such persons indefinitely. Soon, some prisoners at Guantánamo will have been behind bars longer than any German POW during all of World War II.

Presidents do have extraordinary wartime powers, but this president asserts a state of permanent warfare, implying permanent erosion of liberty and democracy. Recently, signing a bill banning torture in interrogations - a bill forced on him by senior Republican senators - Bush asserted a concept never imagined by the Constitution's framers or permitted by any court: a "signing statement" claiming his right to interpret a law in his own fashion and to disregard aspects of it that he doesn't like. Alito backed that concept in his confirmation hearings.

It takes an independent judiciary to balance needs of liberty against claims of executive power in national emergencies. But Alito's views of the imperial presidency are almost perfectly in sync with Bush's.

Alito's apologists insist that his views from the mid-1980s, when he worked at the Reagan White House, do not reflect his current conception of the law. But in a speech to the Federalist Society in November 2000, while a sitting appellate judge, Alito claimed almost limitless powers for the presidency and criticized other courts for limiting executive power.

"The president has not just some executive power," he declared, "but the executive power - the whole thing."

Oddly, while Alito favors an almost monarchic executive, he believes the federal government has limited powers to protect the health and safety of Americans or safeguard the environment. Alito and his compatriots in the Federalist Society are critical of the fact that, since 1937, the Supreme Court has held that Congress, under the Constitution's commerce clause, may regulate to assure everything from a safe and healthy workplace to honest financial markets. According to University of Chicago professor Cass Sunstein and the watchdog group People for the American Way, Alito has written the largest number of dissents of any judge sitting on the conservative Third Circuit Court of Appeals, and more than 90 percent of his dissents were more conservative than those of his colleagues.

Despite the repeated setbacks to the Bush administration and its allies, and Alito's own far-right record, most observers expect him to be confirmed. Blocking Alito would take a filibuster supported by at least 41 senators. Although the Democrats have 45 senators (counting independent James Jeffords), the Senate Democratic leadership frets that a filibuster would divert attention from other Republican woes, might make Democrats look obstructionist, and might lead Republicans to use the so-called nuclear option, abolishing filibusters on judicial nominations.

Yet, in their weakened condition, it's not clear that Republicans could muster the votes to go nuclear. Moderate Senate Republicans may just welcome a chance to distance themselves from Bush's extremism - if Democrats lead. Alito epitomizes everything dangerous about George W. Bush. Unlike Bush, he would not be gone in three years. With some leadership, we may yet be spared an extremist high court.

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