



The only question for Alito that matters

By HARVEY SILVERGLATE | January 12, 2006

President George W. Bush's relentless attack on the separation of powers, most recently laid bare in a December 16 *New York Times* story that he has been eavesdropping on Americans without a court order, shifted the critical focus of Judge Samuel Alito Jr.'s Supreme Court confirmation hearings drastically: where Alito stands on overweening presidential power has suddenly emerged as the preeminent issue. Period. Alito must be rejected should he refuse to state his opinion about executive supremacy or claim agreement with Bush's approach to the constitutional separation of powers. And remember: I'm the guy who argued in this column that we should regard Alito's nomination with an open mind (see "[Give Alito a Chance](#)," This Just In, November 4, 2005).

The limits of presidential power may sound esoteric and technical, especially when compared to the more hot-button "culture war" issues — abortion, church-state separation, affirmative action, gay marriage, gun control, and the death penalty — that have occupied Supreme Court confirmation hearings for the past three decades. Separation of powers is not a mere "issue" that can be influenced over time under our existing structure of government. Separation of powers is our existing structure of government, an essential tenet underlying our continued existence as a free country. Let's be clear: with the Alito hearings, the potential transformation of the presidency into an elected monarchy hangs in the balance.

Bush has lent fresh urgency to the question of executive supremacy, which is why Alito is obligated to state precisely where he stands on this all-important matter. Just as worrisome as Bush's domestic-spying activity, for example, is his recent jujitsu move on torture: when, after much resistance, he finally agreed to sign the anti-torture statute forced on him by Republican senator John McCain of Arizona and a bipartisan congressional coalition, he issued a "signing statement" warning that he would construe the act "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." Interestingly, Alito devised the concept of a presidential "signing statement" as a young attorney in the Reagan administration, thus enabling presidents to spin how they intended to interpret a statute. Bush spun this already dubious principle all the way out, reserving the right to ignore the congressional statute, and the courts too, if in his sole judgment he believes that

torture is in the national interest. This may not have been Alito's intent, but Alito should not be afforded the luxury of refusing to answer questions about presidential power — in this instance or any other — merely because a case involving this principle might come before the Supreme Court.

Both the *Times* and Senator McCain forced Bush to give due warning of where he is headed. Unless we maintain a clear majority of Supreme Court justices prepared to join Congress and the rest of us in fighting an imperial presidency, Bush and his successors might prevail. Reasonable people can disagree on an assortment of highly contentious issues, but not on whether the Constitution must be protected from a wrecking ball.

Members of all three branches of government take an oath of office promising to "protect and defend the Constitution of the United States." Betrayal of that oath is an impeachable offense for a sitting president. Shouldn't it also be a disqualifying condition for a Supreme Court nominee?