

# United States Senate

WASHINGTON, DC 20510

December 23, 2005

Honorable Samuel A. Alito, Jr.  
c/o Department of Justice  
Washington, D.C. 20530

Dear Judge Alito:

This morning the National Archives made available a number of documents you wrote during your time in the Reagan Justice Department. One of these is a memorandum to the Solicitor General, dated June 12, 1984. In that memorandum, you addressed, among other things, whether the Government should argue in favor of absolute immunity on behalf of former Attorney General John Mitchell in connection with his warrantless wiretapping of Americans in the early 1970's.

Your memo raises a number of questions in areas that I intend to pursue at the upcoming confirmation hearing.

First, with respect to the issue of absolute immunity for warrantless wiretapping, you wrote: "I do not question that the Attorney General should have this immunity, but for tactical reasons I would not raise the issue here." At some length, then, you went on to explain why – tactically speaking – this was not "the case to choose" to establish decisively that the Attorney General should have absolute immunity in connection with warrantless wiretapping.

These statements raise a number of questions in my mind and, I believe, in the minds of my fellow Judiciary Committee members:

- Do you believe that current law gives the Attorney General (and other executive branch officials apart from the President) absolute immunity from suits based on even willful unconstitutional acts?
- Do you believe that such officials **should have** such absolute immunity, an argument supported by your memo, but contrary to the Supreme Court's ruling in *Forsyth v. Kleindienst*?
- Do you believe that the courts should provide a check on unrestricted power by the executive branch, and if so, to what extent?

Second, your memo indirectly raises questions about your views of the constitutionality of the underlying activities in question, namely, the warrantless wiretapping of American citizens. You note in the memo that when the warrantless wiretapping took place in 1970, "the illegality of domestic national security wiretaps was not clearly established."

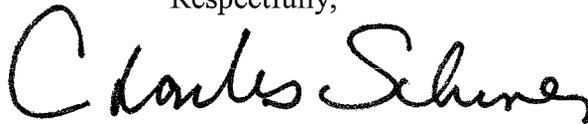
- Do you believe that it is now clearly established law -- whether by rulings of the Supreme Court or by acts of Congress -- that domestic national security wiretaps require a court order?
- If so, do you believe that this now “clearly established” law raises any issues of constitutional concern?
- Do you agree with the reasoning of the Supreme Court cases that establish this principle?

The balance between liberty and security is a delicate one, but one which the Supreme Court is uniquely entrusted with defining. In light of recent revelations, these questions are perhaps more important than they have been at any time in the past three decades. Given their singular importance, it will be imperative that you answer questions about your views of these matters fully and forthrightly.

Indeed, if you refuse candidly to answer questions about these subjects at the hearing, it will make it harder for members of the Senate Judiciary Committee to vote for your confirmation.

I look forward to hearing your testimony at the upcoming hearing.

Respectfully,

A handwritten signature in black ink that reads "Charles E. Schumer". The signature is written in a cursive, flowing style with a large initial "C".

Charles E. Schumer