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**The Constitution and the Environment: A Report on the
Troubling Record of Judge Samuel A. Alito**

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The Constitution and the Environment: A Report on the Troubling Record of Judge Samuel A. Alito

The nomination of Judge Samuel A. Alito to fill the vacancy left by Justice Sandra Day O'Connor on the United States Supreme Court raises fundamental concerns about the future of environmental law. The available record -- pieced together from his judicial opinions, speeches, his 1985 application for a political appointment in the Reagan Administration, and work product in that position -- suggests strongly that, if confirmed to the Supreme Court, Judge Alito's judicial philosophy and his understanding of the text and structure of the Constitution will lead him to strike down as unconstitutional important provisions of many of our most critical and popular environmental laws. Specifically, this report raises concerns about three aspects of Judge Alito's record.

First, Alito's record indicates he has a very narrow view of the role of the federal government and that his policy views in this area can infect his judicial decision making on issues such as the appropriate interpretation of the Constitution's Commerce Clause. With two monumental Clean Water Act cases presently pending before the Supreme Court, the importance of a full explication of his views on the power of Congress to enact environmental safeguards, including its authority to pass laws under the Constitution's Commerce Clause, could not be greater.

Second, Alito cast the deciding vote in a very disturbing ruling that imposed unjustifiable burdens on citizens trying to ensure that corporate polluters in their area obeyed federal environmental mandates. This opinion, and other aspects of his record, strongly suggests that Alito would join a group of justices, led by Justice Scalia, which would strike down as unconstitutional citizen suit provisions under numerous environmental statutes. These citizen suit provisions are a critical component of the nation's environmental enforcement regime, and Alito should clarify whether he believes them to be consistent with our constitutional charter.

Third, Judge Alito has enthusiastically endorsed what he calls the "theory of the unitary executive." This theory, which couples a limited view of Congress's powers under Article I of the Constitution with an expansive view of the Executive's powers under Article II of the Constitution, interprets the Constitution as vesting exclusive power to enforce federal laws in the President and those officers subject to his control. This theory potentially threatens the constitutionality of numerous environmental statutes, which give states, through programs of cooperative federalism, and citizens, through citizen suit provisions, a role in the execution of federal laws.

Judge Alito's record makes his testimony before the Senate Judiciary Committee extraordinarily important. He must dispel the concerns left by his record in these areas in order to warrant confirmation to the Supreme Court.

I. The Commerce Clause and Environmental Law

On February 21st, the Supreme Court will hear two cases that will determine how much Congress and the EPA can do to keep pollution out of America's waters. If the Court adopts the view of the federal Clean Water Act (CWA) advocated by polluters and development interests in these cases, then up to 99 percent of the streams, rivers, and wetlands currently protected by the Act will fall out of federal protection. It is no exaggeration to say that the future of environmental law hangs in the balance in these two cases.

If confirmed to the Supreme Court, Judge Alito could cast a deciding vote in these two cases. Thus, the importance of a full explication of his views on the power of Congress to enact environmental safeguards, including its authority to pass laws under the Constitution's Commerce Clause -- the source of authority relied on by Congress in passing most major environmental statutes -- could not be greater. Judge Alito's record raises red flags on this critical issue. Two of these red flags are Judge Alito's ruling in the one Commerce Clause case he has heard in his judicial career and his apparently very narrow view on the proper role of the federal government. Another, discussed in detail in Section III below, is his endorsement of the theory of the unitary executive, which is premised on a narrow reading of Congressional power.

A. *Rybar v. United States: The Commerce Clause and Machine Guns*

Raymond Rybar was a gun dealer who sold two machine guns at a Pennsylvania gun show in 1992. He admitted possessing and selling the guns illegally, but then challenged the constitutionality of a federal law that criminalized the possession and transfer of machine guns.¹ Two of the three Third Circuit judges hearing Rybar's case upheld the statute as a valid exercise of Congress's authority under the Commerce Clause, as did each one of the five U.S. Circuit Courts of Appeals that had addressed the question before the *Rybar* case.²

But Judge Alito, in dissent, voted to strike down the federal law as beyond Congress's Commerce Clause authority. His opinion reflects a radically different vision of the machine gun ban than that of his colleagues. The majority viewed the ban to be a "natural progression for Congress," which had long recognized the manifest need for federal regulation of the interstate market for dangerous weapons.³ Judge Alito, on the other hand, saw the machine gun ban as a "novel law that effects 'a significant change in the sensitive relation between federal and state criminal jurisdiction.'"⁴

Judge Alito also differed strongly with his colleagues in his reading of the Supreme Court's 1995 decision in *United States v. Lopez*.⁵ Alito called the machine gun transfer and possession law at issue in *Rybar* the "closest extant relative of the statute struck down in

¹ *United States v. Rybar*, 103 F.3d 273 (3d Cir. 1996).

² *Id.* at 283-284 (citing cases).

³ *Id.* at 282.

⁴ *Id.* at 294 (citation omitted).

⁵ 514 U.S. 549 (1995).

Lopez,”⁶ and he criticized the majority for reducing *Lopez* to the status of a “constitutional freak.”⁷

This overheated language ignores two critical distinctions between the machine gun ban at issue in *Rybar* and the Gun-Free School Zones Act struck down in *Lopez*. First, the law at issue in *Lopez* applied by its terms only to possession of guns in a school zone. This geographic restriction on the coverage of the Act led the *Lopez* majority to conclude that the Act was intended to protect school safety and was not part of a larger regulation of the interstate market for guns. Because Congress’s real objective -- school safety -- had only an attenuated impact on interstate commerce, and because Congress had not convincingly documented the link between school safety and interstate commerce, the Court ruled that the Act was beyond Congress’s Commerce Clause authority.⁸

No such argument could be made about the machine gun ban at issue in *Rybar*. The statute, 18 U.S.C. § 922(o), regulates possession and transfer of any machine gun anywhere in the country that was not legally owned prior to the passage of the law. As the *Rybar* majority held, this is a “significant distinction” between the machine gun ban and the Gun-Free School Zone Act, which Alito “disregards.”⁹ Unlike the law in *Lopez*, “Congress’ intent to regulate possession and transfer of machine guns as a means of stemming interstate gun trafficking is manifest.”¹⁰ The majority easily distinguished *Lopez*, concluding that “the concerns expressed by the majority in *Lopez* * * * about federal intrusion into local schools, an area traditionally left for the overview and regulation by states, are not presented” by the machine gun ban.¹¹

Equally significantly, the ban on possession of guns in school zones in *Lopez* applied regardless of the type of gun, how the gun was acquired or whether the gun was licensed in the state. Again, this aspect of the law supported the Supreme Court’s determination that the law was about school safety, not the regulation of the interstate gun market. In contrast, the law in *Rybar* applied only to one type of gun and regulated possession only of machine guns that were not lawfully acquired before the law was passed. As the *Rybar* majority said (quoting another circuit court that had heard a similar case), “[b]ecause there could be no unlawful possession without first an unlawful transfer, § 922(o)’s regulation of possession ‘regulates commerce’ itself.”¹²

⁶ *Rybar*, 103 F.3d at 287.

⁷ *Id.* at 286.

⁸ *Lopez*, 515 U.S. at 563-68.

⁹ *Rybar*, 103 F.3d at 282.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 284 (quoting *United States v. Rambo*, 74 F. 3d 948, 951-52 (9th Cir. 1996)). Judge Alito responds to this point by positing that a “lawfully possessed semiautomatic weapon could be converted into an automatic,” *Rybar*, 103 F.3d at 289, but even he acknowledges, at least implicitly, that in most situations possession follows an unlawful transfer. *Id.* at 283 (“[A]s the dissent acknowledges, we may infer, at least in most situations, that such possession follows an unlawful transfer.”). Moreover, even in cases in which the defendant has manufactured a machine gun or converted a lawful weapon into an illegal machine gun, Congress has well-established authority to regulate home production and use of goods where necessary to control an interstate market for those goods, regardless of whether the market is legal or illegal. See *Gonzales v. Raich*, 125 S. Ct. 2195, 2206-07 (2005) (Congress may regulate home-grown and -consumed marijuana because it rationally concluded regulation would help control illegal interstate market in marijuana) (citing *Wickard v. Filburn*, 317 U.S. 111 (1942) (Congress may

It was on precisely these grounds -- that controlling or banning possession can be critical to the effective regulation of commerce -- that the Supreme Court distinguished the school-zone gun ban in *Lopez* from a general ban on the possession of homegrown marijuana for purely medicinal uses at issue in *Gonzalez v. Raich*.¹³ In *Raich*, the Court said, “The statutory scheme that the Government is defending in this litigation is at the opposite end of the regulatory spectrum” from *Lopez*.¹⁴ The majority continued, “Unlike those at issue in *Lopez* and [a similar case], the activities regulated by the [Controlled Substances Act] are quintessentially economic.... Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product.”¹⁵

The Supreme Court’s decision in *Raich* confirms what the *Rybar* majority was saying: that Judge Alito was not simply following *Lopez*, he was aggressively urging its extension to invalidate laws that had a much closer connection with interstate commerce than the statute at issue in that case.

B. Auto Fraud, Children’s Rights and Other Traditional Areas of State Concern

As *Rybar* illustrates, a judge’s view of the appropriate role of the federal government often informs decisions in federal power cases.

For this reason, Alito’s views on the role of the federal government from his years in the Reagan Justice Department are both relevant and troubling. In his 1985 application for a position as Deputy Assistant Attorney General in the Justice Department’s Office of Legal Counsel (OLC), Judge Alito professed a lifelong commitment to the goals of promoting “limited government” and “federalism.”¹⁶

At OLC Alito translated his commitment to these goals into policy recommendations. For example, in October 1986, Alito recommended that President Reagan veto the Truth in Mileage Act, a federal law designed to crack down on the then-rampant practice of odometer tampering. President Reagan signed the bill over Alito’s objection.

The Truth in Mileage Act was aimed at eliminating the deleterious effects of odometer tampering by creating uniform national reporting requirements, specifically a place for the odometer reading on the title of each automobile. State governments had attempted to address the hazardous and fraudulent practice of odometer tampering, but many states had different

regulate home-grown and -consumed wheat because it rationally concluded regulation would help control interstate wheat market)).

¹³ 125 S. Ct. 2195 (2005).

¹⁴ *Id.* at 2210.

¹⁵ *Id.* at 2211. The week after *Raich*, the Supreme Court vacated and remanded for further consideration the one circuit court opinion, written by Judge Alex Kozinski on the U.S. Court of Appeals for the Ninth Circuit, that followed Judge Alito’s *Rybar* dissent. See *United States v. Stewart*, 348 F.3d 1132 (9th Cir. 2003), *cert. granted and judgment vacated*, 125 S. Ct. 2899 (2005).

¹⁶ Samuel A. Alito, Jr., application letter for position of Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice. 1985, at pp. 15-16, available at <http://www.reagan.utexas.edu/alito/8105.pdf>.

reporting requirements, which created a substantial loophole. In drafting the Truth in Mileage Act, Congress addressed a national problem of fraud and hazardous situations that in 1986 was costing consumers “close to \$3 billion a year.”¹⁷ Businesses (including the National Automobile Dealers Association, which in 1986 represented 20,000 car dealerships), consumers, and safety officials were strongly in favor of the law.¹⁸

In a memo dated October 27, 1986,¹⁹ Alito recommended a veto of the law because of the bill’s “infringement on the principles of federalism.”²⁰ Alito attached a veto message statement to the memo explaining that the reporting requirements were “yet another infringement on principles of federalism” and that “the federal government should not intervene in matters that traditionally have been the responsibility of the States, and in which there is no overriding need for national policy.”²¹ But, as President Reagan’s decision to sign this legislation despite Alito’s recommendation indicates, the federal government has long played an important role in protecting auto safety and combating auto fraud. A federal response to the odometer tampering problem was necessary because of the inconsistent patchwork of state responses to this problem. Regulating automobiles -- one of the most important “instrumentalities” of interstate commerce -- is at the core of what Congress is authorized to do under the Constitution’s Commerce Clause.²²

Alito’s apparently cramped views of the role of the federal government are also in evidence in his comments on a draft Convention of the Rights of the Child.²³ Alito criticized the Convention’s “distinct bias in favor of centralized state control over the upbringing of children”²⁴ and for not reflecting “the traditional American aversion towards state intervention in

¹⁷ Warren Brown, *Stiffer Penalty for Odometer-Changing*, THE WASHINGTON POST, Oct. 29, 1986.

¹⁸ *Id.*

¹⁹ Memorandum from Samuel A. Alito, Jr. to John R. Bolton, Assistant Attorney General, Office of Legislative and Intergovernmental Affairs, S. 475, the Truth in Mileage Act, October 27, 1996, available at http://www.communityrights.org/truth_in_mileage.pdf.

²⁰ *Id.* at 1.

²¹ Memorandum from Samuel A. Alito, Jr. to Peter J. Wallison, Counsel to the President, Enrolled bill S. 475, October 27, 1996, at p.2. Bates stamped at 453897CU, available at <http://www.reagan.utexas.edu/alito/8097.pdf>.

²² The Supreme Court’s decision in *Pierce County v. Guillen*, 537 U.S. 129, 146-148 (2003), demonstrates this point. In *Pierce County*, the Court reviewed another act of Congress aimed at promoting highway safety through state involvement. In his OLC memo, Alito argued that automobiles and interstate fraud are areas that “traditionally have been the responsibility of the States.” Justice Thomas -- currently the Court’s most adamant proponent of limiting federal power -- made short work of such claims, stating:

It is well established that the Commerce Clause gives Congress authority to regulate the use of the channels of interstate commerce. In addition, under the Commerce Clause, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities... Congress adopted [this provision] to assist state and local governments in reducing hazardous conditions in the Nation’s channels of commerce... Consequently, both [provisions] can be viewed as legislation aimed at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce. As such, they fall within Congress’ Commerce Clause power.

²³ Memorandum from Samuel A. Alito, Jr. to John R. Bolton, *Convention on the Rights of the Child*, January 14, 1987, available at http://www.communityrights.org/Convention_on_the_Rights_of_the_Child.pdf.

²⁴ *Id.* at 1 n.1.

childrearing practices.”²⁵ He therefore urged that the Department of Justice “vigorously endorse”²⁶ the Department of State’s proposal to include a Federal-State Clause in the Convention that “there are certain areas in which states, rather than the federal government, exercise jurisdiction.”²⁷

In particular, Alito noted that the “Convention deals with areas of the law -- juvenile and domestic relations law and the rights of children -- that have traditionally been the almost exclusive concern of the states.”²⁸ Alito also objected to specific provisions “that appear to guarantee that the signatory nations will undertake to provide broad protections for children.”²⁹ Particular examples highlighted by Alito included provisions that required parties “to provide, if possible, for the free care of disabled children (Art. 12(3)), free primary education (Art. 15(1)(a)), and no capital punishment.”³⁰ Alito stated that state law presently governs these topics and asserted that he “would vigorously oppose” federal legislation in these areas “on federalism grounds.”³¹ He thus advocated that the Department of State “should make clear in negotiations with the Working Group that it is unlikely that the United States will in fact undertake any of these obligations and that their fulfillment will be at the discretion of the states.”³²

C. The Commerce Clause and the Environment: Two Critical Pending Cases

What do machine guns, auto fraud, and clean water have in common? Potentially quite a bit, as illustrated by the Supreme Court’s most important recent environmental Commerce Clause case, a 5-4 ruling in *Solid Waste Agency of Northern Cook County (SWANCC) v. United States*.³³

In *SWANCC*, Chief Justice Rehnquist viewed the regulation of “isolated,” intrastate, wetlands to be a “federal encroachment on a traditional state power” of regulating land use.³⁴ The *SWANCC* Court thus interpreted the Clean Water Act narrowly to avoid what it viewed to be “serious constitutional problems”³⁵ under the Commerce Clause with a broad interpretation of the Act.³⁶ The dissenting justices saw the matter fundamentally differently, explaining that the CWA “is not a land-use code; it is a paradigm of environmental regulation.”³⁷ As such, the dissent concluded that the Act did not encroach upon state prerogatives and did not raise problems under the Commerce Clause. “Such a regulation,” the dissent asserted, “is an accepted exercise of federal power.”³⁸

²⁵ *Id.*

²⁶ *Id.* at 2.

²⁷ *Id.* at 2 n.2.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ 531 U.S. 139 (2001).

³⁴ *Id.* at 172.

³⁵ *Id.* at 173 (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

³⁶ *Id.* at 172-73.

³⁷ *Id.* at 191.

³⁸ *Id.*

The concerns about Judge Alito's record on issues of Congressional power are thus greatly exacerbated by the looming presence of the monumental cases³⁹ following up on *SWANCC* on the Court's docket this Term. The issue in these two cases is whether Congress and the EPA go beyond their constitutional authority in broadly protecting the "waters of the United States."

The wetlands at issue in the cases before the Court this term overflow into tributaries of navigable waters. Prior Supreme Court cases indicate that Congress can regulate wetlands that are adjacent to navigable waters, but, per *SWANCC*, it cannot regulate wetlands that are completely isolated from navigable waters where the only basis for doing so is their use by migratory birds. The specific question pending before the Court is, how far upstream does Congress's authority reach?

Most courts have found that wetlands like those in the cases before the Court are within the reach of the Act. But judges on one federal appeals court have stated that "[t]he CWA [is] not so broad as to permit the federal government to impose regulation over 'tributaries' that are neither themselves navigable nor truly adjacent to navigable waters."⁴⁰ This is the position advocated in *Carabell* and *Rapanos* by the development industry and its allies. A Supreme Court ruling adopting this view of the Act would gut one of our foundational environmental statutes. An article written by Lance Wood, a senior lawyer for the U.S. Army Corps of Engineers, estimates that less than one percent of the current geographic coverage of the Act would remain under federal protection.⁴¹

In this context, Judge Alito's record is very troubling. Judge Alito appears to oppose, as a matter of policy, laws enacted by Congress in areas that he believes to be traditionally regulated by the states. In the one major Commerce Clause case he has addressed, these views contributed to a dissenting opinion that would have stretched Supreme Court precedent beyond its natural implications to strike down an important federal law regulating the possession and transfer of machine guns. Combined, these views could mean a very damaging outcome in *Rapanos* and *Carabell*, and in Commerce Clause cases for decades to come.

II. Standing on Shaky Ground: The Future of Citizen Suits to Enforce Environmental Mandates

A core objective of Congress in passing environmental statutes such as the Clean Air and Clean Water Acts was to ensure that federal environmental mandates are followed even in situations in which federal enforcement resources are unavailable. To achieve this goal, Congress enacted broad citizen suit provisions, allowing citizens impacted by pollution to act as "private attorneys general," enforcing the law when the political will or resources are lacking in Washington.

³⁹ *Rapanos v. United States*, No. 04-1034 and *Carabell v. United States Army Corps of Eng'rs*, No. 04-1384.

⁴⁰ *United States v. Needham*, 354 F.3d 340, 345 (5th Cir. 2003).

⁴¹ Lance D. Wood, *Don't Be Misled, CWA Jurisdiction Extends to All Non-Navigable Tributaries of the Traditional Navigable Waters and to Their Adjacent Wetlands*, 34 ENV'T L. REP. 10187, 10187 (2004).

This critical component of our nation's environmental enforcement regime is threatened by a reading of the Constitution, promoted most vigorously by Justice Scalia, that prohibits any interference by Congress with the discretion of the President in executing federal law. Judge Alito's record strongly suggests that he would join Justice Scalia in reading the Constitution to prohibit citizen suits that enforce federal environmental mandates. As described below in this section, Judge Alito's judicial record includes one of the most disturbing environmental standing rulings issued by a court of appeals in recent years. Further, as discussed in Section III below, Judge Alito has also expressly endorsed the "theory of the unitary executive" that forms the basis of Justice Scalia's critique of citizen suits.

A. Citizen Suits and the Supreme Court

The Supreme Court's rulings in the area of environmental standing over the past decade have been something of a roller coaster ride, with shifting majorities taking what seem to be very different approaches to the issue. In *Lujan v. Defenders of Wildlife*,⁴² and *Steel Co. v. Citizens for a Better Environment*,⁴³ a closely divided Court rejected standing for environmental groups, using language suggesting that broader restrictions were likely in the future. In *Friends of the Earth v. Laidlaw Env'tl Services*,⁴⁴ the Court by a 7-2 vote upheld standing for an environmental organization and rejected the implications of the Court's language in prior cases. This section will focus on what appears to be the most important live issue before the Court after *Laidlaw*, the question of whether broad citizen suit provisions unduly interfere with the power and prerogative of the President, and thus violate Article II of the Constitution.

For the first time in history, the Supreme Court in *Lujan* ruled that courts can second-guess congressional decisions designating individuals or groups as sufficiently harmed to warrant judicial intervention. Justice Scalia, writing for the Court, held that Congress could not give citizens the right to ensure that the requirements of the Endangered Species Act are met in overseas projects funded by the U.S. Government, stating:

To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3. It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department," and to become "virtually continuing monitors of the wisdom and soundness of Executive action."⁴⁵

A dissent written by Justice Blackmun in *Lujan*, and joined by Justice O'Connor, rejected this "anachronistically formal view of the separation of powers."⁴⁶ According to the dissent, "the principal effect of foreclosing judicial enforcement of such procedures is to transfer power into

⁴² 504 U.S. 555 (1992).

⁴³ 523 U.S. 83 (1998).

⁴⁴ 528 U.S. 167 (2000).

⁴⁵ 504 U.S. at 571.

⁴⁶ *Id.* at 604 (Blackmun, J., dissenting).

the hands of the Executive at the expense -- not of the courts -- but of Congress, from which that power originates and emanates.”⁴⁷ The *Lujan* decision thus “reflects an unseemly solicitude for an expansion of power of the Executive Branch.”⁴⁸

In a 2000 case called *Friends of the Earth v. Laidlaw Environmental Services, Inc.*,⁴⁹ the Court revisited the issue of environmental standing in the context of the citizen suit provision of the Clean Water Act, and here Justice Scalia advanced an even more absolute argument:

By permitting citizens to pursue civil penalties payable to the Federal Treasury, the Act does not provide a mechanism for individual relief in any traditional sense, but turns over to private citizens the function of enforcing the law. A Clean Water Act plaintiff pursuing civil penalties acts as a self-appointed mini-EPA.⁵⁰

This structure, according to Justice Scalia, is “constitutionally bizarre” because “[e]lected officials are entirely deprived of their discretion to decide that a given violation should not be the object of suit at all, or that the enforcement decision should be postponed.”⁵¹

Unlike in *Lujan*, however, Justice Scalia’s dissenting opinion in *Laidlaw* garnered support only from Justice Thomas. The *Laidlaw* majority found that Friends of the Earth had standing and rejected Justice Scalia’s assertion that citizen suits were a threat to the powers of the president, calling this argument “overdrawn,” particularly in light of the fact that “the federal Executive Branch does not share the dissent’s view that such suits dissipate its authority to enforce the law.”⁵² As the Court notes, in *Laidlaw*, “the Department of Justice has endorsed this citizen suit from the outset, submitting *amicus* briefs in support of FOE in the District Court, the Court of Appeals, and this Court.”⁵³

The Court’s majority in *Laidlaw* based its argument mainly on Article III, concerning the power of courts to hear cases and controversies. But a concurrence by Justice Kennedy⁵⁴ and the dissent by Justices Scalia and Thomas⁵⁵ express a willingness to revisit the question of citizen suits under the aegis of Article II of the Constitution.⁵⁶ Kennedy’s short concurrence in *Laidlaw* states in its entirety:

Difficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States. The questions presented in the petition for certiorari did not

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ 528 U.S. 167 (2000).

⁵⁰ *Id.* at 209 (Scalia, J., dissenting).

⁵¹ *Id.* at 210 (Scalia, J., dissenting).

⁵² *Id.* at 188.

⁵³ *Id.*

⁵⁴ 528 U.S. at 197.

⁵⁵ *Id.* at 209-11.

⁵⁶ *Id.* at 197-215 (Kennedy, J. concurring, Scalia, J. and Thomas, J. dissenting).

identify these issues with particularity; and neither the Court of Appeals in deciding the case nor the parties in their briefing before this Court devoted specific attention to the subject. In my view these matters are best reserved for a later case. With this observation, I join the opinion of the Court.⁵⁷

While Justice Kennedy's *Laidlaw* concurrence is not conclusive (unlike Justice Scalia's strongly worded dissent joined by Justice Thomas), it suggests that there are at least two, and perhaps three, votes on the Supreme Court for an interpretation of Article II that would dramatically limit citizen suit provisions under a wide variety of federal environmental laws.⁵⁸ This would make Chief Justice Roberts and Judge Alito, if confirmed to the Court, the deciding votes on an Article II environmental standing question.

B. Judge Alito and Citizen Enforcement of Federal Law

In *Public Interest Research Group v. Magnesium Elektron Inc.*,⁵⁹ Judge Alito cast the deciding vote in one of the most troubling environmental standing rulings issued in the last decade by a court of appeals.⁶⁰ The majority opinion, signed onto by Judge Alito,⁶¹ dramatically undermined the citizen suit provision of the Clean Water Act and reversed a trial court conclusion that a polluter should pay more than \$2 million in fines for violating the Act. Until its reasoning was rejected by the Supreme Court in *Laidlaw*, the *MEI* opinion forced downstream landowners had to do more than show that they lived near a waterway that a company was polluting with excessive discharges, including 150 violations of its Clean Water Act permit. Instead, the plaintiffs had to hire experts that could trace specific detrimental impacts to the polluter's discharge. This high hurdle contravenes the intent of Congress, which in the Clean Water Act had explicitly substituted this difficult, expensive process of tracing pollution impacts to specific sources with an easy-to-monitor system of pollution limits. But Judge Alito deemed Congress's intent to give groups like PIRG standing irrelevant.

Two aspects of the ruling bear special note. The first is the ruling's treatment of the "law of the case" doctrine. This doctrine applied in *MEI* because the Third Circuit had already addressed the standing question and found that the downstream citizens had standing to sue.⁶²

Law of the case doctrine "directs courts to refrain from re-deciding issues that were resolved earlier in the litigation."⁶³ In the words of the Supreme Court:

⁵⁷ *Id.* at 197 (Kennedy, J. concurring).

⁵⁸ Justice Scalia's opinion for the Court in *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765 (2000), similarly reserves the Article II question in the analogous context of *qui tam* suits under the False Claims Act. *Id.* at 778 n.8 ("We express no view on the question whether *qui tam* suits violate Article II, in particular the Appointments Clause of § 2 and the "take Care" Clause of § 3."). *Qui tam* provisions are similar to private attorney general citizen suit provisions, in that they allow citizens to bring suits on behalf of the federal government.

⁵⁹ 123 F. 3d 111 (3d Cir. 1997).

⁶⁰ See Douglas T. Kendall and Eric Sorkin, *Nothing for Free*, 25 HARV. ENVTL. L. REV. 405, 464-67 (identifying *Magnesium Elektron* as one of the "most activist anti-environmental rulings of the past decade").

⁶¹ The *Magnesium Elektron* opinion was written by Judge Roth, and Judge Lewis dissented.

⁶² See *PIRG v. MEI*, 34 ERC (BNA) 2077 (D. N.J. 1992), *aff'd* 983 F.2d 1052 (3d Cir. 1992).

⁶³ 123 F. 3d at 116.

A court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, although as a rule courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was ‘clearly erroneous and would work a manifest injustice.’⁶⁴

The *MEI* court got around this doctrine by finding, in essence, that lack of standing is *always* an extraordinary circumstance:

[W]e conclude that the concerns implicated by the issue of standing -- the separation of powers and the limitation of this Court's power to hearing cases or controversies under Article III of the Constitution -- trump the prudential goals of preserving judicial economy and finality.⁶⁵

The problem with this conclusion is that it is in significant tension with the Supreme Court's balancing of these goals in its unanimous decision in *Christianson v. Colt Industries*.⁶⁶ As the *MEI* court recognized, the Court in *Christianson* applied the law of the case doctrine in the context of a jurisprudential dispute and stated that “Perpetual litigation of any issue -- jurisdictional or nonjurisdictional -- delays, and therefore threatens to deny, justice.”⁶⁷ *Christianson* is very difficult to square with the rule coming out of *MEI*, which is that there is an “extraordinary circumstance,” justifying the waiver of the doctrine of law of the case, whenever facts developed at trial tend to undermine an initial determination of standing.⁶⁸

The *MEI* court erred even more severely in its ruling on the merits that the downstream landowners lacked standing to sue, which departed from the plain language of the Clean Water Act, a prior ruling of the Third Circuit, and, ultimately, the judgment of the Supreme Court.

The issue in *MEI* was the showing a downstream landowner must make to bring suit under the Clean Water Act, which authorizes suits initiated by “a person or persons having an interest which is or may be adversely affected.”⁶⁹ PIRG argued that the plain language of the Act should control. Because they had demonstrated that their members had an interest in using the Delaware River as a source of water, fish, and recreation, and that those interests were adversely affected by the knowledge of *MEI*'s permit violations, PIRG argued that the Third Circuit should affirm the district court's standing ruling. The *MEI* court rejected this argument, declaring that “Congress can confer only so much power on citizens wishing to sue polluters who have violated their NPDES permit.” Thus, “even if PIRG's members can show that they

⁶⁴ *Christianson v. Colt Ind.*, 486 U.S. 800, 817 (1988) (citations omitted).

⁶⁵ 123 F.3d at 118.

⁶⁶ 486 U.S. 800 (1988).

⁶⁷ 486 U.S. at 816, n.5.

⁶⁸ 123 F. 3d at 117. *Christianson* dealt with the application of the law of the case doctrine in the context of a dispute between the Seventh Circuit and the Federal Circuit about which court had jurisdiction over a particular claim. While the Court notes the potential for a “vicious circle of litigation” that arises in the transfer context, its analysis of the importance of the law of the case doctrine and the doctrine's application to jurisdictional disputes is unqualified and transcends the transfer context. Thus, while *MEI* is correct in arguing that the *Christianson* Court did not intend “to eviscerate, in all instances, federal courts' prerogative to revisit important jurisdictional questions,” *Id.* at 118, the *MEI* court goes too far in arguing that the Court's ruling in *Christianson* “applies only in the context of transfer cases.” *Id.*

⁶⁹ 33 U.S.C. §§ 1365 (a), (g).

‘may be adversely affected’ by MEI’s pollution into the Wickecheoke Creek, they must also demonstrate that their threat of injury is imminent.”⁷⁰

For similar reasons, the *MEI* court distinguished an earlier Third Circuit ruling that applied a more lenient test for finding standing under the Clean Water Act.⁷¹ The court held that this earlier test “in no way replaces” the constitutional test for standing and “does not and could not stand for the principle that generic claims of harm, without more satisfy the injury requirement for standing.”

Ultimately, the *MEI* court ruled that PIRG lacked standing because “neither PIRG nor its members can show any actual injury or credible threat of injury to the Delaware River.”⁷² This burden of showing injury to the river (rather than injury to the plaintiffs) was unprecedented at the time, and it established a nearly insurmountable hurdle for citizens wanting to sue under the CWA to prevent pollution of rivers and streams. The reason is simple: proving harm to the river -- necessary for establishing standing under the Third Circuit’s ruling -- often requires a team of lawyers and scientists and an upfront investment of resources that is impossible for citizens and public interest organizations.

In *Friends of the Earth v. Laidlaw*, the Supreme Court rejected this analysis of standing under the CWA, concluding that what matters for standing “is not injury to the environment, but injury to the plaintiff.”⁷³ The Court ruled that focusing on harm to the river, rather than plaintiffs’ harm “is to raise the standing hurdle higher than ... necessary...”⁷⁴

III. The Theory of the Unitary Executive and its Implications for Environmental Law

In a 2000 speech to the Federalist Society, Judge Alito endorsed what he called “the theory of the unitary executive.” Harkening back to his work as a Deputy Assistant Attorney General in the Office of Legal Counsel (OLC) of the Reagan Justice Department, Alito stated that “We [at OLC] were strong proponents of the theory of the unitary executive, that all federal executive power is vested by the Constitution in the President. And I thought then, and I still think, that this theory best captures the meaning of the Constitution’s text and structure...”⁷⁵

These were notable statements for a lower federal court judge to make, because, as Alito recognized later in his speech, the Supreme Court “had not exactly adopted the theory of the

⁷⁰ 123 F. 3d at 122.

⁷¹ *Id.* at 121 (distinguishing *PIRG of New Jersey, Inc. v. Powell-Duffryn Terminals, Inc.*, 913 F.2d 64, 71 (3d Cir. 1991)). The *Powell-Duffryn* court had held that a plaintiff could establish standing by showing: “a defendant has (1) discharged some pollutant in concentrations greater than allowed by a permit (2) into a waterway in which plaintiffs have an interest that may be adversely affected by the pollutant and that (3) this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs.”

⁷² *Id.* at 123.

⁷³ 528 U.S. 167 (2000).

⁷⁴ *Id.* at 181.

⁷⁵ Samuel A. Alito, Jr., *Panel Discussion at Federalist Society 2000 National Lawyer’s Convention: Administrative Law & Regulation: Presidential Oversight and the Administrative State*, in 2 ENGAGE 11, 12 (Washington, D.C., Federalist Soc’y, 2001) [hereinafter, Alito, 2000 *Federalist Society Discussion*], available at http://www.communityrights.org/unitary_executive.pdf.

unitary executive.”⁷⁶ Rather, in *Morrison v. Olson*,⁷⁷ the Court rejected this theory by a vote of 7-1. Thus, Alito was aligning himself with what he had previously described as Justice Scalia’s “brilliant, but very lonely” dissent in *Morrison*, and against Chief Justice Rehnquist’s majority opinion.⁷⁸

Alito’s embrace of the unitary executive theory raises a number of important environmental concerns. First, as noted above, this theory forms the basis of Justice Scalia’s assertion in *Laidlaw* that statutes allowing citizens to bring suit to enforce federal mandates are “constitutionally bizarre.” Thus, Judge Alito’s embrace of the theory of the unitary executive significantly enhances the concern, raised by the *MEI* case, that Judge Alito would issue rulings limiting or eliminating citizen suit provisions under numerous environmental laws. Second, as explained below, this unitary executive theory depends upon a narrow interpretation of Congress’ constitutional powers, particularly Article I’s Necessary and Proper Clause. Because the interpretation of this Clause is a critical component of the Court’s analysis of Commerce Clause issues,⁷⁹ Alito’s embrace of this theory is troubling with respect to those issues. Finally, as Justice Stevens notes in his dissent in *Printz v. United States*,⁸⁰ a broad application of the unitary executive theory could upset the cooperative federalism programs that form the heart of modern environmental laws such as the Clean Air and Clean Water Acts, because these laws give state officials an important role in executing federal law. Thus, this is another area where close Senate scrutiny is imperative.

A. A Short History of the Theory of the Unitary Executive

It is a historical fact that our Constitution establishes a “unitary” executive. The Executive power is vested in the President, not, for example, a cabinet or a privy council. And Office of Legal Counsel (OLC) has an obligation “to assert and maintain the legitimate powers of privileges of the President against inadvertent or intentional congressional intrusion.”⁸¹

But when Judge Alito refers to the “theory of the unitary executive” he is referring to a particularly aggressive formulation of executive powers advocated during his years at OLC and rejected subsequently by both the Supreme Court⁸² and by Alito’s successors at OLC.⁸³ A report by the Congressional Research Service, published in 1987, the year Alito left OLC, chronicles the development of this theory. As this report’s “abstract” explains: “In support of a variety of actions since 1981 designed to ensure ultimate presidential control of decisionmaking in all

⁷⁶ *Id.* at 13.

⁷⁷ 487 U.S. 654 (1988).

⁷⁸ Samuel A. Alito, Jr., *Introduction to Debate: After the Independent Counsel Decision: Is Separation of Powers Dead?* in 26 *Am. Crim. L. Rev.* 1667, 1667 (1989) [hereinafter, *Alito 1989 Introduction*], available at <http://www.law.umich.edu/library/news/topics/alito/articles/introductiontodebateafterthe.pdf>.

⁷⁹ See *Gonzalez v. Raich*, 125 S. Ct 2195, 2209 (2005). Indeed the Court has melded its analysis of the Commerce Clause with an analysis of the Necessary and Proper Clause, stating the test to be whether Congress was acting “within its authority to ‘make laws which shall be necessary and proper’ to ‘regulate Commerce . . . among the several States.’” *Id.*

⁸⁰ 521 U.S. 898, 960 (1997) (Stevens, J. dissenting).

⁸¹ 20 Op. Off. Legal Counsel 124, *3 (1996).

⁸² *Morrison v. Olson*, 487 U.S. 654 (1988).

⁸³ See 20 Op. Off. Legal Counsel 124 at *57-59 (invalidating Reagan/Bush interpretation of the Appointments Clause and disavowing four opinions issued during this era).

executive branch agencies, the Reagan administration has articulated a constitutional based theory of a unitary executive.”⁸⁴

While this theory promotes expansive Presidential power, CRS explains, its development was “motivated by a limited-government, deregulatory ideology.”⁸⁵ The idea was to gain complete Presidential control over the functioning of the executive branch and then to use that control to shrink the size of the federal government. The administration proposed a “highly centralized bureaucratic structure of government” where the President possessed “broad supervisory and managerial powers as well as an encompassing political presence in administrative agencies.”⁸⁶

This theory of a unitary executive is premised upon two general provisions of Article II of the Constitution, the “vesting clause” (Article II, § 1, clause 1), which provides that “The executive Power shall be vested in a President of the United States” and (2) the “take care” provision (Article II, § 3), giving the President the responsibility to “take Care that the Laws be faithfully executed.” Proponents of this theory read these provisions together, and in conjunction with other constitutional provisions such as the Appointments Clause, to establish a general bar against Congressional interference with the President’s discretion in executing the law.⁸⁷

Thus, for example, while Alito was at OLC he served as the lead counsel for the Department of Justice in what appears to be the first legal brief submitted by the Department arguing that portions of the independent counsel statute were unconstitutional because the independent counsel was not removable at will by the president or the attorney general.⁸⁸ Alito’s brief asserted that “subordinate executive offices created by statute possess no constitutional

⁸⁴ MORTON ROSENBERG, CONGRESSIONAL CONTROL OF AGENCY DECISIONS AND DECISIONMAKERS: THE UNITARY EXECUTIVE THEORY AND SEPARATION OF POWERS, CRS REPORT FOR CONGRESS, 87-838, October 19, 1987 [hereinafter CRS REPORT], available at <http://www.communityrights.org/CRS.pdf>.

⁸⁵ CRS REPORT at 1.

⁸⁶ *Id.*

⁸⁷ For example, in 1986, Alito wrote an OLC memorandum raising constitutional concerns about the use of alternative dispute resolution (ADR) techniques, such as arbitration, to resolve disputes between citizens and the federal government on the grounds that arbiters would exercise significant governmental duties. See Memorandum for Stephen J. Markman by Samuel Alito on the Administrative Conference Recommendation on Federal Agencies’ Use of Alternative Dispute Resolution Techniques (April 24, 1986), available at <http://www.communityrights.org/ADR.pdf>. Citing the Supreme Court’s 1976 ruling in *Buckley v. Valeo*, Alito opined that a proposal to encourage ADR raised constitutional concerns under the Appointments Clause. The problem, according to Alito, was that permitting arbitration would allow private individuals to decide issues of significance to the government. He wrote that any “significant government duty” must be “performed by ‘officers of the United States’ appointed in accordance with the Appointments Clause” of the Constitution. *Id.* In 1995, Walter Dellinger, then-head of OLC, took the unusual step of repudiating exactly this reading of *Buckley* and the Appointments Clause in an opinion that concluded that “the Appointments Clause does not prohibit the federal government from submitting to binding arbitration.” See 19 Op. Off. Legal Counsel 208, *48 (1995) (repudiating testimony of former OLC head William Barr on the constitutionality of binding arbitration).

⁸⁸ In transmitting Alito’s brief to Attorney General Edwin Meese, Meese’s deputy William Weld, then the head of DOJ’s Civil Division, recognized that the principle constitutional argument advanced by Alito was “undercut by some language in *Myers* [*Myers v. United States*, 272 U.S. 52 (1926)] and may well prove unappetizing to the court * * *”. The argument was included, according to Weld, because “OLC is strongly of the view that both Constitutional arguments should be advanced now.” See Memorandum from William F. Weld to the Attorney General and The Deputy Attorney General, February 11, 1987, available at <http://www.archives.gov/news/samuel-alito/accession-060-89-372/IndCounselEPA-1987-box107-memoWeldtoAG-Feb11.pdf>.

power independent of the President. Any executive power authorized by such offices is the President's power and therefore must be exercised in accordance with his direction."⁸⁹ While recognizing that the Supreme Court had, for more than a century, permitted Congress to limit the President's ability to fire an "inferior" federal officer except for misconduct or other "cause," Alito opined that these precedents could be construed as permitting removal whenever "the president believed the inferior officer not to be executing the laws faithfully."⁹⁰ The Supreme Court ultimately rejected precisely this argument in *Morrison v. Olson* and upheld the constitutionality of the independent counsel statute by a vote of 7-1.⁹¹

B. The Theory of the Unitary Executive Critiqued

In his 2000 Federalist Society speech, Judge Alito asserted that the Constitution's text and structure support the Supreme Court's adoption of the theory of the unitary executive.⁹² This is a serious claim, because interpreting our framing document is the most important and awesome responsibility of a Supreme Court Justice. But, as explained by the Supreme Court throughout its 215-year history, his reading of the Constitution's text is neither the only, nor the best, reading of the Constitution's text and structure.⁹³

Indeed, Chief Justice Rehnquist -- who served as head of OLC under another strong proponent of executive power, President Richard Nixon -- dismissed in a footnote what he called Justice Scalia's "rigid demarcation" of executive powers in *Morrison*:

The dissent says that the language of Article II vesting the executive power of the United States in the President requires that every officer of the United States exercising any part of that power must serve at the pleasure of the President and

⁸⁹ See Response of the Department of Justice to the Application of the Independent Council for Referral of Related Matters Pursuant to 28 U.S.C § 594(e), Division No. 86-1, Draft dated 2/11/87, at 18, available at <http://www.archives.gov/news/samuel-alito/accession-060-89-372/IndCounselEPA-1987-box107-memoWeldtoAG-Feb11.pdf>. As explained by an accompanying memorandum from William F. Weld to the Attorney General and the Deputy Attorney General, this draft brief [hereinafter *Morrison Brief*] was due to be filed the next day, February 12, 1987. Subsequent correspondence confirms that this brief was filed. See <http://www.archives.gov/news/samuel-alito/accession-060-89-372/IndCounselEPA-1987-box107-memoWeldtoAG-Apr2.pdf>.

⁹⁰ *Morrison Brief* at 24. (Next to this sentence is a comment that reads, "weakness? Bryson and Alito will discuss.")

⁹¹ *Morrison v. Olson*, 487 U.S. 654 (1988). The Court found that the critical question in determining whether the Act violated Article II was whether the Act impermissibly undermined the powers of the Executive by "preventing the Executive Branch from accomplishing its constitutionally assigned functions." *Id.* at 695. The Court determined that the restriction on removal imposed by the independent counsel act was valid because it did not "impede the President's ability to perform his constitutional duty." *Id.* at 691. Clearly, Alito's views were not shaken by the Supreme Court's rejection. In remarks in 1989, soon after the Court's decision, Alito bitterly critiqued Chief Justice Rehnquist's majority opinion, saying that it "hit the doctrine of separation of powers about as hard as heavy weight champ Mike Tyson usually hits his opponents ... restrict[ing] the executive's constitutionally guaranteed appointment power and, more importantly, establish[ing] that henceforth any alleged infringements on the President's removal power or on his executive authority in general would be judged by whether, in the Court's subjective view at the time, the encroachment went too far." Alito, *1989 Introduction*.

⁹² Alito, *2000 Federalist Society Discussion*, at 12.

⁹³ See generally, CRS REPORT; 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 680-722 (3d ed. 2000); 20 Op. Off. Legal Counsel 124, (1996). This critique of the theory of the unitary executive draws heavily from 20 Op. Off. Legal Counsel 124 (1996).

be removable by him at will. This rigid demarcation -- a demarcation incapable of being altered by law in the slightest degree, and applicable to tens of thousands of holders of offices neither known nor foreseen by the Framers -- depends upon an extrapolation from general constitutional language which we think is more than the text will bear. It is also contrary to our holding in *United States v. Perkins*, decided more than a century ago.⁹⁴

In fact, the Court has repeatedly rejected the “archaic view of the separation of powers as requiring three airtight departments of government.”⁹⁵ Instead, the Court has concluded that:

While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but independence, autonomy but reciprocity.⁹⁶

Specifically, the Constitution couples the broad language of Article II (which is Alito’s admitted focus⁹⁷), with equally broad language in Article I (which Alito seems to largely ignore) giving Congress a number of specific powers as well as the power to “make all laws which shall be necessary and proper for carrying into execution the foregoing Powers [of Congress], and all other Powers vested in this Constitution in the Government of the United States, or in any department or officer thereof.” As Chief Justice Marshall opined for the Supreme Court almost two centuries ago, the Constitution permits Congress “to exercise its best judgment in the selection of measures to carry into execution the Constitutional powers of the government.”⁹⁸

The Constitution thus provides “a degree of overlapping responsibility, a duty of interdependence as well as independence.”⁹⁹ The reality of our Constitution’s structure has translated into three general principles for resolving disputes between Congress and the President. First, the Court has been precise in following the Constitution’s text where “[e]xplicit and unambiguous provisions of the Constitution prescribe and define just how powers are to be exercised.”¹⁰⁰ Second, the Court has fairly aggressively enforced an “anti-aggrandizement principle,” striking down laws in which Congress takes executive power for itself.¹⁰¹

With respect to Congressional actions that are neither prescribed by a particular constitutional provision nor designed to aggrandize Congress’s own power, however, the Court

⁹⁴ *Morrison*, 487 U.S. at 691 n.29 (1988) (citations omitted).

⁹⁵ *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 443 (1977).

⁹⁶ *Mistretta v. United States*, 488 U.S. 361, 381 (1989) (quoting *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 635 (Jackson, J., concurring)).

⁹⁷ Alito, *2000 Federalist Society Discussion*, at 12 (“When I was in OLC, however, we were known, actually, to read the text of the Constitution, in particular Article Two . . .”).

⁹⁸ *M’Culloch v. Maryland*, 17 U.S. 316, 420 (1819).

⁹⁹ *Mistretta*, 488 U.S. at 381.

¹⁰⁰ *INS v. Chadha*, 462 U.S. 919, 947 (1983).

¹⁰¹ See, e.g., *Bowsher v. Synar*, 478 U.S. 714 (1986) (striking down a portion of the Gramm-Rudman Deficit Reduction Act that allowed an official subject to Congressional control to make decisions about how the executive implemented the Act).

applies a more general test, asking if the legislation prevents the executive branch “from accomplishing its constitutionally assigned functions.”¹⁰² Alito has criticized this effort to balance the authority of Congress to pass necessary and proper legislation with the President’s executive authority as leading to results that depend at least in part on “the Court’s subjective view at the time.”¹⁰³ But this describes much of constitutional law, and it is a product of the Framers’ decision to provide the branches with “a degree of overlapping responsibility, a duty of interdependence as well as independence.”¹⁰⁴

The “gospel according to OLC,”¹⁰⁵ practiced by Alito as an appointee in the Reagan Administration and preached by Alito after becoming a federal appellate judge, would replace this balancing test with a bright line rule that, when important executive functions are at issue, the president always wins. This might be a plausible reading of Article II were it written in isolation. But it is not, which is why this “airtight” idea of separation of powers was rejected almost unanimously by the Court in *Morrison* and why it no longer represents the position of OLC.¹⁰⁶

C. The Lingering Presence of the Unitary Executive Theory in Supreme Court Case Law

Notwithstanding the Supreme Court’s nearly unanimous rejection of the basic premise of the unitary executive theory in *Morrison*, Justice Scalia has remained a forceful proponent of this interpretation of the Constitution. Most importantly, as explained above, he has introduced the ideas and principles of the theory of the unitary executive into the debate over the constitutionality of environmental citizen suits and *qui tam* actions.

Another important example comes in *Printz v. United States*.¹⁰⁷ In *Printz*, the Supreme Court ruled, 5 to 4, that sections of the Brady Handgun Violence Prevention Act were unconstitutional. The Act temporarily required local law enforcement officials to perform background checks on persons who purchased handguns from dealers until the U.S. Attorney General established a national system. Justice Scalia, writing for the majority, found this provision violated principles of constitutional federalism by “compel[ling] the States to enact or administer a federal regulatory program.”¹⁰⁸ The primary reasoning supporting the holding in *Printz* was the anti-commandeering principle that the Court had derived from the Constitution’s Tenth Amendment in a prior case, *New York v. United States*.¹⁰⁹

¹⁰² *Nixon v. Administrator of Gen. Servs.*, 433 U.S. at 443.

¹⁰³ Alito 1989 Introduction at 1667.

¹⁰⁴ *Mistretta*, 488 U.S. at 381.

¹⁰⁵ Alito, 2000 *Federalist Society Discussion* at 12.

¹⁰⁶ See 20 Op. Off. Legal Counsel 124 (1996) (superseding a 1989 opinion by William Barr, which broadly endorsed the theory of the unitary executive). While the current administration appears to have drawn from the theory of the unitary executive in developing its absolutist notions of the President’s Commander-in-Chief powers, see Neil Kinkopf, *Furious George*, LEGAL AFFAIRS, Sept./Oct. 2005, OLC has apparently decided against superseding Dellinger’s memorandum and reestablishing the theory of the unitary executive as official administration position with respect to domestic executive powers.

¹⁰⁷ 521 U.S. 898 (1997).

¹⁰⁸ *Id.* at 933-34.

¹⁰⁹ 505 U.S. 144 (1992).

Justice Scalia, however, offered a second justification for the holding: the Brady Act provisions violated separation of powers by “reducing the power of the Presidency.”¹¹⁰ This short passage in *Printz* is the theory of the unitary executive, pure and simple. Justice Scalia asserts that the “Take Care” provision of Article II gives the power to enforce the laws solely to the President and those under his control; state officials under the Brady Act are not subject to “meaningful presidential control.”¹¹¹ Justice Scalia contends that the “unity in the Federal Executive ... would be shattered” if Congress could act effectively without him simply by requiring state officers to execute its laws.¹¹²

This passage was not necessary for the result in *Printz*,¹¹³ and it has not been employed by the Court in subsequent cases, but its potential significance has been noted by commentators across the political spectrum.¹¹⁴ Jay Bybee, now a judge on the Ninth Circuit and before that the head of OLC under President George W. Bush, claims that Justice Scalia “picked the Court’s pocket clean on separation of powers” interjecting a “theory of the unitary executive that the remainder of the Court has never supported.”¹¹⁵ Bybee argues that “Justice Scalia’s separation of powers principle in *Printz* would ... threaten ... the independence of the fourth branch of government, the independent agencies.”¹¹⁶ Laurence Tribe agrees:

If this view of unitary and inviolable presidential power is actually embraced by a majority of the Court, then the constitutionality of much of the federal regulatory apparatus could be considered in grave doubt, for all genuinely independent agencies are of necessity directed by law officers over whom the President does not have unfettered removal power.¹¹⁷

In dissent, Justice Stevens dismissed Scalia’s unitary executive passage as “colorful hyperbole,” but warned somewhat ominously that it “contradicts” prior holdings of the Court that approve a variety of cooperative federalism programs (including specifically the Clean Water Act and the Resource Conservation and Recovery Act), which employ state officials in the execution of federal laws.¹¹⁸

IV. Conclusion

This week, the American Bar Association rated Judge Alito “well qualified” to serve on the Supreme Court. Based solely on his resume and his number of years on the Third Circuit Court of Appeals, this assessment is difficult to refute. But since at least 1795, when the Senate

¹¹⁰ 521 U.S. at 923-924.

¹¹¹ *Id.* at 922-23.

¹¹² *Id.* at 937.

¹¹³ As a result, some have questioned whether this language is “an independent ground for decision of the case” or merely dicta. See Tribe, *supra* note 93 at 716.

¹¹⁴ See Jay S. Bybee, *Printz, The Unitary Executive, and the Fire in the Trash Can: Has Justice Scalia Picked the Court's Pocket?*, 77 NOTRE DAME L. REV. 269, 270-71 (2001), available at <http://www.communityrights.org/bybee.pdf>; Tribe, *supra* note 93 at 715-17.

¹¹⁵ Bybee, *supra* note 114 at 270-71.

¹¹⁶ *Id.* at 271.

¹¹⁷ Tribe, *supra* note 93 at 716.

¹¹⁸ 521 U.S. at 960 (Stevens, J. dissenting).

refused to confirm John Rutledge as Chief Justice of the United States primarily over Rutledge's opposition to Jay's Treaty, the Senate's advice and consent process has been about more than a review of a nominee's resume. It is also about assessing a nominee's constitutional vision and judicial method. This assessment in the case of Judge Alito should prominently include an inquiry into the concerns raised in this report about whether his vision of the Constitution is compatible with the laws that protect our citizens' health and our nation's natural environment. Only if these concerns are satisfactorily addressed, should the Senate consent to his confirmation.