Testimony of

Ms. Beth Nolan

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Before the Committee on the Judiciary
United States Senate
On the Nomination of Samuel A. Alito, Jr.
to the Supreme Court of the United States

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Mr. Chairman, Senator Leahy, and Members of the Committee:

The members of this Committee and the Senate face a range of important issues in considering the nomination of Judge Alito to serve as Associate Justice of the Supreme Court. As a Justice Department report in the last months of the Reagan Administration noted, "few factors . . . are more critical to determining the course of the Nation, and yet are more often overlooked, than the values and philosophies of the men and women who populate the third co-equal branch of the national government--the federal judiciary." The question for this body is how the "values and philosophy" of Judge Alito will affect the course of this nation.

I wish to address one issue in particular: How would Judge Alito, if he should become Justice Alito, approach questions of Executive power? Of course, the Supreme Court has a special role in resolving questions about the constitutionality of laws or government actions and can be expected to address many critical issues about the Executive's authority. This is especially likely given the current Administration's expansive positions on such authority.

Issues of Executive power have sometimes been viewed as esoteric or cabined - subjects of great interest only to a small circle of academics, government actors, and panelists at the Federalist Society or the American Constitution Society. I agree with those who have suggested that Executive power should be viewed as among the most important issues in these confirmation hearings, because they may be among the most important issues facing the Supreme Court in the near future. The way we understand the Executive's power in our constitutional system, and correspondingly the powers of the Legislative and Judicial Branches, greatly affects the lives of individuals here in the United States and increasingly the lives of those around the world.

From 1999 to the end of the Clinton Administration, I served in the White House as Counsel to the President. I have also served as a political deputy in the Office of Legal Counsel (the same position Judge Alito once held), as an Associate Counsel to the President, as a Constitutional Law professor, and as a career attorney in the Office of Legal Counsel, in the Reagan Administration. As might be expected of one who has served as legal counsel to the President of the United States, I believe it is essential to defend the power of the President to undertake his constitutionally assigned responsibilities, whether considering the exercise of his powers under the Appointments Clause or under the Commander in Chief Clause. In my view, the Executive Branch is right to resist inappropriate incursions on its power from the Legislative and Judicial branches, and we should thus expect that Executive branch lawyers will strongly defend Executive power. Certainly, in my role as Counsel to the President, I sometimes was in conflict with Congress as each branch struggled to assert its views of its authority. This is just what the Framers expected, that the ambition of one branch would work to counteract the ambition of the other.

This does not mean, however, that the Executive is right to assert a view of its power that is virtually unconstrained, or that fails to take account of the constitutional powers of Congress. I have always understood the role of legal

adviser to the President to include interpreting Presidential power with proper respect for the coordinate branches, not solely to maximize Presidential power. This view is consistent with Justice Jackson's classic opinion in the Steel Seizure Case, setting forth a three-tier test for examining Executive authority, and in Justice O'Connor's recent reminder in Hamdi that "a state of war is not a blank check for the President."

Judge Alito's service on the United States Court of Appeals for the Third Circuit has not offered him much opportunity to address directly issues of Executive Power. But we have some indication of his views, including his November 2000 remarks to the Federalist Society, some of his work in the Office of Legal Counsel in the mid-1980's, and his application to be a political deputy in that Office. I find particularly instructive and troubling his November 2000 Federalist Society remarks, in which Judge Alito announced his support of the "unitary executive theory." He described the unitary executive as "best captur[ing] the meaning of the Constitution's text and structure," and lamented the fact that "the Supreme Court has not exactly adopted the theory." In fact, cases like Morrison v. Olson, to which Judge Alito referred in his remarks, reflect a decisive rejection of the unitary executive theory. In that case, Justice Scalia argued alone in dissent for its application. Since then, Justice Thomas has added his voice for application of the theory, in his dissent in Hamdi v. Rumsfeld. What Judge Alito means by his support for this theory is a critical question in considering his confirmation.

Just fourteen months ago, a Washington Post article referred to the unitary executive theory as an "obscure philosophy." But, its proponents, like Judge Alito, have not shied away from their support for it. Nor has this President, who has referred to it frequently in signing statements and other public statements explaining his interpretation of the law. Equally important, the theory of the unitary executive has been well developed in both the academic literature and also in the Department of Justice's Office of Legal Counsel during the time Judge Alito served there.

"Unitary executive" is a small phrase with almost limitless import: At the very least, it embodies the concept of Presidential control over all Executive functions, including those that have traditionally been exercised by "independent" agencies and other actors not subject to the President's direct control. Under this meaning, Congress may not, by statute, insulate the Federal Reserve or the Federal Election Commission, to pick two examples, from Presidential control. The phrase is also used to embrace expansive interpretations of the President's substantive powers, and strong limits on the Legislative and Judicial branches. This is the apparent meaning of the phrase in many of this Administration's signing statements.

In his Federalist Society speech in November 2000, Judge Alito explicitly endorsed OLC's theory of the unitary executive as developed during the period he served in that office as a supervising Deputy. OLC precedent from that time demonstrates the significance of the "unitary executive" theory in the setting of foreign and military affairs and also highlights that the theory not only accords a broad reading to Executive power but also typically embodies a narrow view of Congressional power. That is, corresponding to the claim that the Constitution grants the President exclusive power over a matter is the understanding that the Constitution withholds from Congress any authority to regulate the execution of the law in that area.

For example, when the Reagan Administration undertook the covert arms-for-hostages operation that eventually grew into the Iran-Contra scandal, it triggered the requirement of the National Security Act that the Administration provide Congress "timely notification" of the covert operation. To determine the boundaries of this requirement, OLC read the phrase "timely notification" against the background of its view of the President's constitutional authority. OLC expressed the President's authority in sweeping terms: "The President's authority to act in the field of international relations is plenary, exclusive, and subject to no legal limitations save those derived from the applicable provisions of the Constitution itself." The same opinion offered as limited a view of Congressional power as it did a broad view of Executive power, opining that "[t]he Constitution gave to Congress only those powers in the area of foreign affairs that directly involve the exercise of legal authority over American citizens." In a footnote appended to this statement, OLC made clear that by "American citizens" it meant "the private citizenry" and not the President or other executive officials. If such claims are taken seriously, then the President is largely impervious to statutory law in the areas of foreign affairs, national security, and war, and Congress is effectively powerless to act as a constraint against presidential aggrandizement in these areas.

That version of the unitary executive sounds remarkably similar to the assertions of unreviewable and unconstrained powers the current President asserts. The now-withdrawn legal opinion on torture, the Administration's response to the McCain Amendment, and the domestic surveillance program, the full contours of which we do not yet know, have

all been premised, in significant measure, on the same aggressive view of the President's authority. That view is perhaps best encapsulated by the words of a formal OLC legal opinion issued in 2001, that statutes may not "place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response." It is a good bet that this "obscure philosophy" has also been used to justify other executive actions of which we have not yet been informed.

Even accepting, as I certainly do, that questions of foreign relations and national defense are ones in which the President has great constitutional authority, and acknowledging that the struggles we face in combating terrorism are monumental and place a special burden on the President to ensure our safety, I believe that the President is obligated to interpret the Constitution and enforce the laws of the United States with due regard for the constitutional views of Congress and the laws of the United States. To the extent the unitary executive theory is understood to provide the President with authority to override those laws unilaterally, it does not accurately describe the allocation of power provided for in the Constitution.

Judge Alito indicated over twenty years ago his "strenuous" disagreement with "the usurpation by the judiciary" of the decisionmaking authority of the political branches. Does this signal that he will defer to the Executive's extreme positions on its power and its claims that these positions are largely unreviewable? Or will he, like the Justice he is nominated to succeed, see a clear role for the courts in protecting our constitutional balance, and hence our civil liberties? Judge Alito's statements about Executive power raise legitimate and serious questions that should be explored.