My knowledge of Sam Alito is based almost entirely on my personal acquaintance with the man, but since his nomination to the Supreme Court, I have attempted, as have many others, to glean at least a sense of his judicial temperament by reading a few of his opinions. I haven't read many. I haven't made a systematic study of them, but the ones that I have read suggest to me rather strongly that the judicial temperament that I discern in these opinions is entirely consistent with the human temperament of the man I came to know and admire more than 30 years ago.

The temperament of the judge, as I see it, is marked by modesty, by caution, by deference to others in different roles with different responsibilities, by an acute appreciation of the limitations of his own office, and by a deep and abiding respect for the past.

There is a name that we give to all of these qualities, taken together. We call them judiciousness, and in calling them that we recognize that they are the special virtues of a judge. Judge Alito has been a judicious judge and my confidence that he will be a judicious Justice is based on my personal knowledge of the man and my belief that his judicial temperament is rooted in his human character, which is the deepest and strongest foundation it could have.

Thank you very much.

[The prepared statement of Mr. Kronman appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Kronman.

We turn now to Ms. Beth Nolan, a partner in Crowell & Moring's Litigation Group. She has a broad practice which focuses on constitutional and public policy issues. Ms. Nolan held prestigious and high-ranking positions in the Clinton administration and the Department of Justice in the Office of Legal Counsel. She had been a clerk to Chief Judge Collins Seitz, of the Third Circuit, has an undergraduate degree from Scripps College and a law degree, magna cum laude, from Georgetown in 1980.

Thank you for being with us today, Ms. Nolan, and we look forward to your testimony.

STATEMENT OF BETH NOLAN, PARTNER, CROWELL & MORING, LLP, WASHINGTON, D.C.

Ms. NOLAN. Thank you, Mr. Chairman, Senator Leahy, members of the Committee. I am delighted to be here today, and thank you for inviting me to provide my views.

I want to address one issue: how Judge Alito, if he should become Justice Alito, would approach questions of Executive power. I have served, as you mentioned, Mr. Chairman, in the White House as Counsel to the President and in political and career positions in the Office of Legal Counsel in the Clinton and Reagan administrations.

And as might be expected of one who has served as Legal Counsel to the President, I believe it is essential to defend the power of the President to undertake his constitutionally assigned responsibilities and to resist illegitimate incursions on that power. And certainly, in my position as White House Counsel, I sometimes was in conflict with Congress, as each branch struggled to assert its views of its authority.

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

This does not mean, however, that the Executive should assert a view of its power that is virtually unconstrained or that fails to take account of the constitutional powers of Congress. Presidential power should be interpreted even by lawyers for the President with proper respect for the coordinate branches, not solely to maximize Presidential power.

Judge Alito's service, as has been mentioned, on the Third Circuit has not offered him much opportunity to address issues of Executive power, but we do have some indication of his views, and I find particularly instructive and troubling his 2000 Federalist Society remarks in which he announced his support of the unitary Executive theory. What he means by that support is a critical question.

It is a small phrase in one way, "unitary Executive," but it has almost limitless import to many of its adherents. At one level, it embodies the concept of Presidential control over all executive functions; as Professor Chemerinsky mentioned, a concept that has been soundly rejected by the Supreme Court.

But the phrase also often serves to embrace a bundle of expansive interpretations of the President's substantive powers and correspondingly stringent limits on the legislative and judicial branches. This is the apparent meaning of the phrase in many of this administration's signing statements claiming broad powers for the President.

In his Federalist Society speech, Judge Alito endorsed the theory of the unitary Executive as developed during the period he served in the Office of Legal Counsel as a supervising deputy. An important question is how he views OLC precedents from that time. In one opinion from that time involving covert activities, OLC expressed the President's authority in sweeping terms, adopting Justice Sutherland's dicta from a very different context to assert that 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, while declaring that Congress had only those powers in the area of foreign affairs that directly involve the exercise of legal authority over U.S. citizens.

This would seem to mean that the President is essentially above the law in the areas of foreign affairs, national security and war, and Congress is powerless to act as a constraint against Presidential overreaching in these areas. It is a fair question whether Judge Alito agrees with these sweeping views.

This is not just of historical interest, of course. That version of unitary Executive from the 1980s sounds remarkably similar to the assertions of unreviewable and unconstrained powers the current President has asserted with regard to this authority to ignore the laws passed by Congress, such as those forbidding torture and those regulating electronic surveillance. These issues may well come before the Supreme Court.

Judge Alito indicated over 20 years ago his strenuous disagreement with the usurpation by the judiciary of the decisionmaking authority of political branches. Does this signal that he will defer to the executive branch's positions on its power and its claims that these positions are largely unreviewable, or will he, as Justice

O'Connor did in *Hamdi*, 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.

[The prepared statement of Ms. Nolan appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Ms. Nolan.

Our next witness is Professor Charles Fried, of the Harvard Law School, an expert in the areas of constitutional, legal and moral philosophy. From 1985 to 1989, he was Solicitor General of the United States, and from 1995 through 1999 he was an Associate Justice of the Supreme Judicial Court of Massachusetts. He holds a bachelor's degree from Princeton, a doctor of law from Columbia, and both a bachelor's and master's from Oxford University. Professor Fried, in his capacity as Solicitor General, was Judge Alito's superior when Judge Alito worked in that office.

Thank you for joining us, Professor Fried, and we look forward to your testimony.

STATEMENT OF CHARLES FRIED, FORMER SOLICITOR GENERAL OF THE UNITED STATES, AND BENEFICIAL PROFESSOR OF LAW, HARVARD LAW SCHOOL, CAMBRIDGE, MASSACHUSETTS

Mr. FRIED. Thank you, Chairman Specter, and I thank the members of the Committee for inviting me.

I think what I can most usefully do is cast some light on Judge Alito's—and if I slip into "Sam," please forgive me, because we were a small and very colleaguely and friendly office—Judge Alito's work in that office.

The Reagan administration, no doubt, had a point of view about the law, just as did the FDR administration in 1933 or the JFK administration in 1961. That is not unusual. That is what elections are about. Part of that view encompassed the notion that the lower courts had gone too far in limiting the ability of law enforcement; that the lower courts had moved too far away from an appropriate view of affirmative action, as expressed by Justice Powell in *Bakke*, toward quotas. And I suppose emblematic of the notion that courts sometimes just make things up was the notion that *Roe* v. *Wade* was incorrectly decided, a notion which, may I say, was shared by people across the political spectrum—Professor Paul Freund; Archibald Cox expressed that view as late as 1985; and Dean Ely.

Now, the first job of the staff of the Solicitor General's office was to make sure that when the Solicitor General presented the Solicitor General's client's position to the Supreme Court, this was done in a professional, correct and respectful way.

That office had career lawyers, some of whom stretched back to the time of Lyndon Johnson. I myself appointed as deputies people who I knew to be Democrats, liberal Democrats. None of that bothered me or bothered them because we were a professional office and they understood that their work was professional work. That is exactly how Judge Alito viewed his work.

If I look at the two examples that have been much featured in these discussions, his memo to me in the *Thornburgh* case on *Roe* v. *Wade*—it is said that he argued that *Roe* v. *Wade* should be over-