Statement of Beth Nolan[1]

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

January 12, 2006

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."[2] 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

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[1] Partner, Crowell & Moring, LLP. The views expressed in this statement are my own.

[2] U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO THE ATTORNEY GENERAL, THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION, at v (Oct. 11, 1988). Later, in its discussion of the Separation of Powers, the Report concluded that the meaning of the Constitution in the future would be determined largely by the individuals who sit on the Supreme Court. *See* id. at 185.

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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.[3]

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*,[4] 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."[5]

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[3] THE FEDERALIST NO. 51 (Alexander Hamilton and James Madison).

[4] *Youngtown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635-38 (1952) (Jackson, J, concurring).

[5] *Hamdi v. Rumsfeld,* 542 U.S. 507, 536 (2004) (O'Connor, J.) (plurality op.).

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,[6] 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."[7] In fact, cases like *Morrison v. Olson*,[8] 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*.[9] What Judge Alito means by

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[6] *E.g.*, Memorandum from Samuel A. Alito, Jr. Deputy Assistant Attorney General, Office of Legal Counsel to The Litigation Strategy Working Group, Using Presidential Signing Statement to Make Fuller Use of the President's Constitutionally Assigned Role in the Process of Enacting Law (Feb. 5, 1986), *available at* http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf).

[7] Samuel A. Alito, Administrative Law & Regulation: Presidential Oversight and the Administrative State, Address Before the 2000 Federalist Society's National Lawyers Convention, *in* 2 ENGAGE 11, 12-13 (Nov. 2001).

[8] 487 U.S. 654 (1988).

[9] *See Hamdi*, 542 U.S. at 580 (Thomas, J., dissenting) (referring to "unitary Executive" theory).

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."[10] 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

[10] Dana Millbank, In Cheney's Shadow, Counsel Pushes the Conservative Cause, WASH. POST, Oct. 11, 2004, A21; *see also* Christopher S. Kelley, Rethinking Presidential Power—The Unitary Executive and the George W. Bush Presidency, Paper Prepared for the 63rd Annual Meeting of the Midwest Political Science Association, April 7-10, Chicago, IL 1 (April 2005) (available at http://www.users.muohio.edu/kelleycs/paper.pdf).

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."[11] 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."[12] 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.[13] 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,[14] and the domestic surveillance

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[11] The President's Compliance with the "Timely Notification" Requirement of Section 501(b) of the National Security Act, 10 Op. Off. Legal Counsel, 159, 164 (1986). This opinion was signed by the head of OLC at the time, Charles Cooper. Mr. Cooper has disclosed that Samuel Alito helped craft the administration's legal defense of its Iran-Contra operations. See http://www.washingtonpost.com/wp-dyn/content/article/2006/01/08/AR2006010801165_3.html. This opinion was one aspect of the administration's defense, and it would not have been unusual for a Deputy in Samuel Alito's position to have been substantially involved in its formulation.

[12] *Id.* at 161.

[13] *Id.* at 161 n.4.

[14] President George W. Bush's Statement on Signing of H.R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006" (Dec. 30, 2005) ("The executive branch shall

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."[15] 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.[16] To

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construe Title X in Division A of the Act, relating to detainees, 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, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks.").

[15] Memorandum from John C. Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, to the Deputy Counsel to the President, Re: The President's Constitutional Authority To Conduct Military Operations Against Terrorists And Nations Supporting Them (Sept. 25, 2001), *available at* www.usdoj.gov/olc/warpowers925.htm (emphasis added).

[16] *Youngstown Sheet & Tube*, 343 U.S. at 635-38 (Jackson, J., concurring).

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.[17] 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?[18] Judge Alito's statements about Executive power raise legitimate and serious questions that should be explored.

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[17] Samuel A. Alito, 1985 Personal Qualification Statement, Application for Deputy Assistant Attorney General.

[18] *See Hamdi*, (O'Connor, J.) (plurality op.) ("Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake").