SEN. PATRICK J. LEAHY HOLDS A HEARING ON THE NOMINATION OF JUDGE SONIA SOTOMAYOR TO BE AN ASSOCIATE JUSTICE OF THE U.S. SUPREME COURT

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LOCATION: WASHINGTON, D.C.

COMMITTEE: SENATE COMMITTEE ON THE JUDICIARY

SPEAKER: SEN. PATRICK J. LEAHY, CHAIRMAN

WITNESSES:

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WITNESSES: JUDGE SONIA SOTOMAYOR, NOMINATED TO BE AN ASSOCIATE JUSTICE OF THE U.S. ***SUPREME COURT***

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LEAHY: Judge, thank you. Judge Sotomayor, welcome back to the committee for a fourth day. If this seems long, it is a day more than either Chief Justice Roberts or Justice Alito was called upon to testify, but you seem to have weathered it well, and I hope the senators have, too.

Yesterday, we completed the extended first round of questions for an additional eight senators that are approximately halfway through a follow-up round. This morning, we can continue and, hopefully, conclude.

Senator Kyl is recognized next for 20 minutes. And -- or as I say with hope springing eternal -- I keep saying up to 20 minutes. Nobody is required to use the full 20 minutes, but they -- I would hasten to add if everybody is certainly entitled to it.

Senator Kyl?

KYL: Mr. Chairman, before I begin, for those who are watching this on television, I would just note that I don't think we put Judge Sotomayor on the hot seat with our questions, but we certainly did with the temperature in this room yesterday.

(LAUGHTER)

And for that, I apologize. And I note that it could get a little steamy this morning, too. I know it's cold back there, but it's not at all cool where we are.

LEAHY: If I can respond to...

KYL: If there's ever a question about Judge Sotomayor's stamina in a very hot room, that question has been dispelled without any doubt whatsoever.

(LAUGHTER)

LEAHY: If I might -- and I'll have to set the clock back for 20 minutes so this doesn't go into your time -- but it -- it is really an interesting thing because anybody that's gone up where the press are, it's like an icebox up there. And I'm hoping we can get this -- at least the microphone is working. I want to thank Senator Sessions for offering me his microphone yesterday, but that didn't work.

And I want to thank Senator Franken for letting me use his. So if we start clock back over so I don't take this out of Senator Kyl's time.

Senator Kyl, please go ahead.

KYL: Thank you, and good morning, Judge.

SOTOMAYOR: Good morning.

KYL: If response to one of Senator Sessions' questions on Tuesday about the Ricci ***case***, you stated that your actions in the ***case*** where controlled by established ***Supreme Court*** precedent. You also said that a variety of different judges on the appellate ***court*** were looking at the ***case*** in light of stabled ***Supreme Court*** and Second Circuit precedent.

And you said that the ***Supreme Court*** was the only body that had the discretion and the power to decide how these tough issues should be decided. Those are all quotations from you.

Now, I've carefully reviewed the decision, and I think the reality is different. No ***Supreme Court*** ***case*** had decided whether rejecting an employment test because of its racial results would violate the civil ***rights*** laws.

Neither the ***Supreme Court***'s majority in Ricci nor the four dissenting judges discussed or even cited any ***cases*** that addressed the question. In fact, the ***court***, in its opinion, even noted -- and I'm quoting here -- that this action presents two provisions of Title 7 to be interpreted and reconciled with few, if any, precedents in the ***court*** of appeals discussing the issue.

KYL: In other words, not only did the ***Supreme Court*** not identify any ***Supreme Court*** ***cases*** that were on point, it found few, if any, lower ***court*** opinions that even addressed the issue.

Isn't it true that you were incorrect in your earlier statement that you were bound by established ***Supreme Court*** and Second Circuit precedent when you voted each time to reject the firefighters' civil ***rights*** complaint?

SOTOMAYOR: Senator, I was -- let me place the Ricci decision back in context. The issue was whether or not employees who had -- were a member of a disparately impacted group had a ***right*** under existing precedent to bring a lawsuit, that they have a ***right*** to bring a lawsuit on the basis of a prima facie ***case***, and what would that consist of?

That was established Second Circuit precedent and had been -- at least up to that point -- been concluded from ***Supreme Court*** precedents describing the initial burden that employees had.

KYL: Well...

SOTOMAYOR: That was...

KYL: Are you speaking here now -- I mean, you said the ***right*** to bring the lawsuit. It's not a question of standing. There was a question of summary judgment.

SOTOMAYOR: Exactly. Of -- exactly, which is when you speak about a ***right*** to bring a lawsuit, I mean, what's the minimum amount of good-faith evidence do they have to actually file the complaint?

An established precedent said, you can make out an employee a prima facie ***case*** of a violation of Title VII under just merely by -- not merely -- that's denigrating it -- by showing a disparate impact. Then, the city was faced with the choice of, OK, we're now facing two claims, one...

KYL: If I could just interrupt, we only have 20 minutes here, and I'm aware of the facts of the ***case***. I know what the claims were. The question I asked was very simple. You said that you were bound by ***Supreme Court*** and Second Circuit precedent. What was it? There is no ***Supreme Court*** precedent. And as the ***court*** itself noted, they could find few, if any, Second Circuit precedents.

SOTOMAYOR: The question was, the precedent that existed and whether viewing it, one would view this as the city discriminating on the basis of race or the city concluding that because it was unsure that its test actually avoided disparate impact, but still tested for necessary qualifications, was it discriminating on the basis of race by not certifying the test?

KYL: Well, so you disagree with the ***Supreme Court***'s characterization of the precedents available to decide the ***case***?

SOTOMAYOR: It's not that I disagree. The question was a more focused one that the ***court*** was looking at, which was saying -- not more focused. It was a different look.

It was saying, OK, you got these precedents. It says employees can sue the city. The city -- the city is now facing liability. It's unsure whether it can defeat that liability. It's -- and so it decides not to certify the test and see if it could come up with one that would still measure the necessary qualifications.

KYL: Let me interrupt again, because you're not getting to the point of my question. And I know, as a good judge, if I were arguing a ***case*** before you, you would say, "That's all fine and dandy, counsel, but answer my question."

Isn't it true that -- two things -- first, the result of your decision was to grant summary judgment against these parties? In other words, it wasn't just a question of whether they had the ***right*** to sue; you actually granted a summary judgment against the parties.

KYL: And, secondly, that there was no ***Supreme Court*** precedent that required that result. And I'm not sure what the 2nd Circuit precedent is. The ***Supreme Court*** said few, if any. And I -- I -- I don't know what the precedent would be. I mean, I'm not necessarily going to ask you to cite the ***case***. But was there a ***case***? And if so, what is it?

SOTOMAYOR: It was the ones that we discussed yesterday, the bushy line of ***cases*** that talked about the prima facie ***case*** and the obligations of the city in terms of defending lawsuits claiming disparate impact. And so, the question then became how do you view the city's action. Was it a -- and that's what the district ***court*** had done in its 78-page opinion to say you've got a city facing liability...

KYL: OK, all ***right***. So -- so you contend that there was 2nd Circuit precedent. Now, on the en banc review, of course, the question there is different because you're not bound by any three- judge panel decision in your circuit. So what precedent would have bound -- and yet, you took the same position in the en banc review.

For -- for those who aren't familiar, a three-judge ***court*** decides the ***case*** in the first instance. In some situations, if the ***case*** is important enough, judges on -- the other judges on the circuit -- there may be nine or 10 or 20. I think in the 9th Circuit there are like 28 judges in the circuit. And you can request an en banc review. The entire circuit would sit.

And in that ***case***, of course, they're not bound by a three-judge decision because it's the entire circuit sitting of 10 or 12 or 20 judges. So what precedent then would have bound in -- bound the ***court*** in the en banc review?

SOTOMAYOR: The panel acted in accordance with its views by setting forth and incorporating the district ***court***'s analysis of the ***case***. Those who disagreed with the opinion made their arguments. Those who agreed that en banc certification wasn't necessary voted their way. And the majority of the ***court*** decided not to ***hear*** the ***case*** en banc.

I can't speak for why the others did or did not take the positions they did. They -- some of them have issued opinions. Others joined opinions.

KYL: But you felt you were bound by precedent?

SOTOMAYOR: That was what we did in terms of the decision, which was to accept the rule -- the -- not accept, but incorporate the district ***court***'s decision analyzing the ***case*** and saying we agreed with it.

KYL: Understood. But the district ***court***'s decision is not binding on the circuit ***court***. And the en banc review means that the ***court*** should look at it in light of precedents that are stronger than a three-judge decision. So I'm still baffled as to what precedent you're -- you're -- you're speaking of.

SOTOMAYOR: Perhaps it's -- just one bit of background needs to be explained. When a ***court*** incorporates as we did in a purcurean (ph), a district ***court*** decision below, it does become the ***court***'s precedent. And, in fact, the...

KYL: The three judges?

SOTOMAYOR: Yes, but when I was on the district ***court***, I issued also a lengthy decision on an issue, a constitutional issue, direct constitutional issue that the circuit had not addressed and very other few ***courts*** had addressed on the question of whether etbus (ph) statute of limitations on habeas (ph)...

KYL: OK. If you excuse me, we're -- I apologize for interrupting, but I've now used half of my time. And you -- you ***will*** not acknowledge that even though the ***Supreme Court*** said there was no precedent, even though the district ***court*** judgment and a three-judge panel judgment cannot be considered precedent binding the en banc panel of the ***court***, you still insist that somehow there was precedent there that you were bound by.

SOTOMAYOR: As I explained, when the circuit ***court*** incorporated the district ***court***'s opinion, that became the ***court***'s holding.

KYL: Of course.

SOTOMAYOR: So, it did become circuit holding. With respect ...

KYL: By three judges.

SOTOMAYOR: With respect -- yes, sir. I'm sorry.

With respect to the question of precedent, it must be remembered that what the ***Supreme Court*** did in Ricci was say, "There isn't much law on how to approach this should we adopt a standard different than the circuit did," because it is a question that we must decide how to approach this issue to ensure that two provisions of Title VII are consistent with each other.

That argument of adopting a different test was not the one that was raised before us, but that was raised clearly before the ***Supreme Court***. And so that approach is different than saying that the outcome that we came to was not based on our understanding of what it make out a prima facie ***case***.

KYL: Well, if it's a matter of first impression, do judges on the Second Circuit typically disposed of important ***cases*** of first impression by a summary one-paragraph order per curiam opinion?

SOTOMAYOR: Actually, they did in one ***case*** I handled when I was a district ***court*** judge.

KYL: Would that be typical?

SOTOMAYOR: I don't know how you define typical, but if the district ***court*** opinion, in the judgment of the panel, is adequate and fulsome and persuasive, they do. In my Rodriguez v. Artus (ph) ***case***, when I was at district ***court*** on the constitutionality of an act by Congress with respect to the suspension clause of the habeas provision, the ***court*** did it in less than a paragraph. They just incorporated my decision as the law of the circuit, or the holding of the circuit.

KYL: Well, let me quote from Judge Cabranas' dissent. He said, "The use of pro curiam opinions of this sort, adopting in full the reasoning of a district ***court*** without further elaboration, is normally reserved for ***cases*** that present straightforward questions that do not require exploration or elaboration by the ***court*** of appeals. The questions raised in this appeal cannot be classified as such, as they are indisputably complex and far from well settled."

I guess legal analysis -- analysts are simply going to have to research and debate the question of whether or not the ***cases*** of first impression or complex important ***cases*** are ordinarily dispensed of that way.

Let me just say that the implications -- the reason I address this is the implications of the decision are far-reaching. I think we would all agree with that. It's an important decision, and it can have far-reaching implications.

Let me tell you what three writers, in effect, said about it and get your reaction to it. Here is what the ***Supreme Court*** said in Ricci about the decision, about the rule that the -- that your ***court*** endorsed.

It said that the rule that you endorsed, and I'm quoting now, "Allowing employers to violate the disparate treatment prohibition based on a mere good-faith fear of disparate impact liability would encourage race-based action at the slightest hint of disparate impact." This is the ***Supreme Court***. "Such a rule," it said, "Would amount to a de facto quota system in which a focus on statistics could put undue pressure on employers to make hiring decisions on the basis of race. Even worse, an employer could discard test results or other employment practices with the intent of obtaining the employer's preferred racial balance."

KYL: Your colleague on the Second Circuit, Judge Cabranas, said, that, under the logic of your decision -- I quote again -- "municipal employers could reject the results of an employment examination whenever those results failed to yield a desirable racial income." In other words, failed to satisfy a racial quota.

That's why the ***case*** is so important. I mean, I would imagine you would hope that that result would not pertain. I guess I can just ask you that, that you would not have rendered this decision if you felt that that would be the result.

SOTOMAYOR: As I argued -- argued -- as I stated earlier, the issue for us, no, we weren't endorsing that result. We were just talking about what the ***Supreme Court*** recognized, which was that there was a good-faith basis for the city to act. It set a standard that was new, not argued before us below, and that set forth how to balance those considerations.

That is part of what the ***court*** does is in the absence of a ***case*** previously decided that sets forth the test. And what the ***court*** there said is good faith is not enough.

KYL: Understood.

SOTOMAYOR: Substantial evidence is what the city has to rely on. Those are different types of questions.

KYL: Of course. And the point is you don't endorse the result that either Judge Cabranes or the ***Supreme Court*** predicted would occur had your decision remained in effect. I'm sure that you would hope that result would not pertain.

SOTOMAYOR: Yes. But I didn't -- that wasn't the question we were looking at. We were looking at a more narrow question which was could a city, in good faith, say we're trying to comply with the law. We don't know what standard to use. We have good faith for believing that we should not certify.

Now, the ***Supreme Court*** has made clear what standard they should apply. Those are different issues.

KYL: Well, I'm just quoting from the ***Supreme Court*** about the rule that was -- that you endorsed in your decision and, again, it said the ***Supreme Court*** said about your rule that such a rule would amount to a de facto quote system in which a focus on statistics could put undue pressure on employers to make hiring decisions on the basis of race. Even worse, an employer could disregard test results or other employment practices with the intent of obtaining an employer's preferred racial balance.

I guess we both agree that that is not a good result. Let me ask you about a comment you made about the dissent in the ***case***. A lot of legal commentators have noted that, while the basic decision was five to four, that all nine of the justices disagreed with your panel's decision to grant some rejudgment; that all nine of the judges believed that the ***court*** should have been -- that the district ***court*** should have found the facts in the ***case*** that would allow it to apply a test. Your panel had one test. The ***Supreme Court*** had a different test. The dissent had yet a different test.

But in any ***case***, whatever the test was, all nine of the justices believed that the lower ***court*** should have ***heard*** the facts of the ***case*** before some rejudgment was granted. I ***heard*** you to say that you disagreed with that assessment. Do you agree that the way I stated it is essentially correct?

SOTOMAYOR: It's difficult because there were a lot of opinions in that ***case***. But the engagement among the judges was varied on different levels. And the first engagement that the dissent did with the majority was saying if you're going to apply this new test, this new standard, then you should give the circuit ***court*** an opportunity to evaluate the evidence...

KYL: Judge, I have to interrupt you there. The ***court*** didn't say, "If you're going to apply a new standard, you need to send it back." All nine justices said that summary judgment was inappropriate, that the ***case*** should have been decided on the facts.

There were three different tests: the test from your ***court***, the test of the majority of the ***Supreme Court***, and the test of the dissent. Irrespective of what test it was, they said that the ***case*** should not have been decided on summary judgment. All nine justices agreed with that, did they not?

SOTOMAYOR: I don't believe that's how I read the dissent. It may have to speak for itself, but I -- Justice Ginsburg took the position that the Second Circuit's panel opinion should be affirmed. And she took it by saying that, no matter how you looked at this ***case***, it should be affirmed. And so I don't believe that that was my conclusion reading the dissent, but obviously, it ***will*** speak for itself.

KYL: Well, it -- it -- it ***will***. And I guess commentators can -- can opine on it.

I could read commentary from people like Stuart Taylor, for example, who have an opinion different from yours. But let me ask you one final question in the minute-and-a-half that I have remaining.

I was struck by your response to a question that Senator Hatch asked you about yet another speech that you gave in which you made a distinction between the justice of a district ***court*** and the justice of a circuit ***court***, saying that the district ***court*** provides justice for the parties, the circuit ***court*** provides justice for society.

Now, for a couple of days here, you've testified to us that you believe that not only do district and circuit ***courts*** have to follow precedent, but that the ***Supreme Court*** should follow precedent.

So it's striking to me that you would suggest -- and this goes back to another comment you made perhaps flippantly about ***courts*** of appeals making law -- but it -- it would lead one to believe that you think the circuit ***court*** has some higher calling to create precedent for society.

In all of my experience, you have Smith v. Jones in a district ***court***. The ***court*** says, "The way we read the law, Smith wins." It goes to the ***court*** of appeals. The ***court*** has only one job to decide: Does Smith win or does Jones win?

It doesn't matter what the effect of the ***case*** is on society; that's for legislators to decide. You have one job: Who wins, Smith or Jones, based on the law? And you decide, "Yes, lower ***court*** was ***right***. Smith wins."

You're applying precedent, and you're deciding the ***case*** between those parties. You're not creating justice for society, except in the most indirect sense, that any ***court*** that follows precedent and follows the rule of law helps to build on this country's reliance on the rule of law.

SOTOMAYOR: I think we're in full agreement. When precedent is set, it's set -- it follows the rule of law. And in all of the speeches where I've discussed this issue, I've described the differences between the two ***courts*** as one where precedents are set, that those precedents have policy ramifications, but not in the meaning that the legislature gives to it.

The legislature gives it a meaning in terms of making law. When I'm using that term, it's very clear that I'm talking about having a holding, it becomes precedent, and it binds other ***courts***. You're following the rule of law when you're doing that.

KYL: Mr. Chairman, I'm over the time, but just a final follow-up question, if I could.

You yourself noted that you have created precedent as a district ***court*** judge. Both district ***courts*** and circuit ***courts*** create precedent simply by deciding a ***case***, but they're both required to follow precedent, isn't that correct?

SOTOMAYOR: Yes.

LEAHY: Only because the -- the senator went over I would note the district ***court*** in that ***case*** did cite the Rees (ph) ***case***, which is 2000 ***Supreme Court*** -- year 2000 ***Supreme Court case*** as -- as precedent and a binding 2nd Circuit ***court case***, the Hayden ***case*** as precedent. And as the judge has noted, she incorporated the district ***court***, as they often do in per curiam decision, incorporated the district ***court*** decision.

Senator Feinstein?

FEINSTEIN: Thank you very much, Mr. Chairman.

I have great respect for Senator Kyl. I've worked with him, I guess, for about 12 years now on the subcommittee of this committee. But I think there is a fundamental misreading of the ***Supreme Court*** decision, if I understand it.

It's my understanding that the ***court*** was five-to-four. Is that correct?

SOTOMAYOR: It was.

FEINSTEIN: And that the four dissenters indicated that they would have reached the same conclusion as the 2nd Circuit did. Is that correct?

SOTOMAYOR: That was my understanding.

FEINSTEIN: Thank you. Let me clear one thing up. I'm not a lawyer. And I've had a lot of people ask me, particularly from the West Coast who are watching this, what is per curiam. Would you please in common, every day English explain what through the ***court*** means?

SOTOMAYOR: It's essentially a unanimous opinion where the ***court*** is taking an act that -- where it's not saying more than what either incorporating a decision by the ***court*** below because it's not adding anything to it.

FEINSTEIN: ***Right***.

SOTOMAYOR: In some ***cases***, it's when there's, as Judge Cabranes in his dissent pointed out, in some ***cases***, it's simply used to denote that an issue is so clear and unambiguous that we're just going to state the rule of law. It can be used in a variety of different ways. But it's generally where some -- where you're doing something fairly -- in a very cursory fashion, either because a district ***court*** judge has done a thorough job...

FEINSTEIN: Which was the ***case*** in this ***case***.

SOTOMAYOR: Yes.

FEINSTEIN: It was a very voluminous opinion that, I believe, was over 50 pages long. Is that correct?

SOTOMAYOR: I keep saying 78 because that's what I reviewed.

FEINSTEIN: ***Right***, well, over 50, in any event.

SOTOMAYOR: But -- and as I said, my circuit did that in a ***case*** where I addressed as a district ***court*** judge a ***case*** of first impression on a constitutional, direct constitutional issue, the suspension clause. Or it can have -- one of the meanings can be that given by Judge Cabranes.

FEINSTEIN: ***Right***. Now, my understanding also is that there is precedent in other ***courts***. I'm looking at a decision, Oakley v. the City of Memphis written by the circuit ***court***. And essentially what it does is uphold the lower ***court*** that did exactly the same thing. Are you familiar with that ***case***?

SOTOMAYOR: I am.

FEINSTEIN: It's an unpublished opinion, I believe. Is that correct?

SOTOMAYOR: Yes.

FEINSTEIN: And it was a racially mixed group of male and female lieutenants, took the test. The results came in. The test was canceled. And the ***court*** upheld the cancellation.

SOTOMAYOR: Yes.

FEINSTEIN: So this -- your ***case*** is not starkly out of the mainstream. And the reason I say this is going back to my days of mayor, particularly in the 1980s when there were many ***courts*** and many decisions involving both our police and fire departments. And it was a very controversial area of the law.

FEINSTEIN: But the point I wanted to make is there is precedent, and this is certainly one of them.

SOTOMAYOR: I would agree that it was precedent. I won't choose to quarrel with the ***Supreme Court***'s decision.

FEINSTEIN: ***Right***. I'm not asking you to. ***Right***.

Now, many have made comments regarding your Latina -- "wise Latina" comment. And I'd like to just take a moment to put your comments in the context of the experiences of women. And this country is built on very great accomplishments. We forged a new country. We broke away from the British. We wrote documents that have stood the test of time. The Declaration of Independence, the Constitution, the Bill of ***Rights***.

But we also have a history of slavery, segregated schools, of employment discrimination, of hate crimes, and unspoken prejudices that can make it very hard for individuals to be treated fairly or even to believe that they can do well in this society.

So I understand empowerment and the role that it plays. And everything has been hard fought. We, as women, didn't have the ***right*** to vote until 1920. And that was after a tremendous battle waged by a group of very brave women called suffragettes. And when you graduated law school in 1979, there had never been a woman on the ***Supreme Court***.

Today, women represent 50.7 percent of the population, 47 percent of law school graduates, and 30 percent of American lawyers. But there are only 17 women senators, and only one woman is currently serving on the ***Supreme Court***, and we still make only $0.78 on the dollar that a man makes.

So we're making progress, but we're not there yet, and we should not lose sight of that. My question is, as you have seen this -- and you must have seen how widely broadcast this is -- that you become an instant role model for women. And how do you look at this -- your appointment to the ***court*** -- affecting empowerment for women? And I'd be very interested in any comments you might make. And this has nothing to do with the law.

SOTOMAYOR: I chose the law because it's more suited to that part of me that's never sought the kind of attention that public figures -- other public figures -- get. When I was in law school, some of my friends thought I would go into the political arena not knowing that what I sought was more the life of a judge, thinking, involved in that, and the process of the rule of law.

My career as a judge has shown me that, regardless of what my desires were, that my life, what I have accomplished, does serve as an inspiration for others. It's a sort of awesome sense of responsibility. It's one of the reasons that I do so many activities with people in the community, not just Latinos but all groups because I understand that it is women. It's Latinos, it's ***immigrants***. It's Americans of all kinds and all backgrounds.

SOTOMAYOR: Each one of us faces challenges in our life. Whether you were born rich or poor, of any color or background, life's challenges place hurdles every day. And one of the wonderful parts of the courage of America is that we overcome them. And I think that people have taken that sense that, on some levels, I've done some of that at various stages in my life.

And so, for me, I understand my responsibility. That's why I understand and have tried as much as I can to reach out to all different kinds of groups and to make myself as available as much as I can.

Often, I have to say no; otherwise I'd never work. But I meet my responsibilities and work very hard at my job, but I also know I have a responsibility to reach out.

FEINSTEIN: Well, for whatever it's worth, I think you're a walking, talking example of the best part of the United States of America. And I just want to say how very proud I am that you are here today.

And it is my belief that you are going to be a great ***Supreme Court*** justice. And I just wanted to say that to you directly and publicly.

Thank you.

Thank you, Mr. Chairman.

LEAHY: Thank you. That was great.

FEINSTEIN: Thank you.

LEAHY: Senator Graham?

GRAHAM: Thank you, Mr. Chairman.

And something I would like to say to you directly and publicly and with admiration for -- for your life's story is that a lot of the wrongs that have been mentioned, some have been ***righted***, some have yet to come, Judge, I hope you understand the difference between petitioning one's government, and having a say in the electoral process, and voting for people that if you don't like, you can get rid of, and the difference of society being changed by nine unelected people who have a lifetime appointment.

Do you understand the difference in how those two systems work?

SOTOMAYOR: Absolutely, sir. I understand the Constitution.

GRAHAM: And the one thing I can tell you -- this ***will*** probably be the last time we get to talk in this fashion. I hope to have a chance to get to know you better, and we'll see what your future holds, but I think it's going to be pretty bright.

The bottom line is, one of the problems the ***court*** has now is that Mr. Ricci has a story to tell, too. There are all kinds of stories to tell in this country, and the ***court*** has, in the opinion of many of us, gone into the business of societal change not based on the plain language of the Constitution, but based on motivations that can never be checked at the ballot box.

Brown v. Board of Education is instructive in the sense that the ***court*** pushed the country to do something politicians were not brave enough to do, certainly were not brave enough in my state. And if I had been elected as

a senator from South Carolina in 1955, the year I was born, I would be amazed if I would have had the courage of a Judge Johnson in the political arena.

But the ***court*** went through an analysis that separate was not equal. It had a basis in the Constitution after fact-finding to reach a reasoned conclusion in the law and the courage to implement that decision. And society had the wisdom to accept the ***court***'s opinion, even though it was contentious and literally people died.

We're going to talk about some very difficult societal changes that are percolating in America today, like who should get married, and what boundaries are on the definition of marriage, and who's best able or the most capable of making those fundamental decisions?

GRAHAM: The full faith and credit clause, in essence, says that when a valid enactment of one state is entered into, the sister states have to accept it. But there's a public policy exception in the full faith and credit clause. Are you aware of that?

SOTOMAYOR: I am. Applied in different situations.

GRAHAM: Some states have different age limits for marriage. Some states treat marriage differently than others. And the ***court*** defer based on public policy. The reason these speeches matter and the reasons elections matter is because people now understand the role of the ***court*** in modern society when it comes to social change.

That's why we fight so hard to put on the ***court*** people who see the world like us. That's true from the left, and that's true from the ***right***. And let me give you an example of why that's important.

We've talked a lot about the Second Amendment, whether or not it is a fundamental ***right***. We all know agree it is an individual ***right***. Is that correct?

SOTOMAYOR: Correct.

GRAHAM: Well, that's groundbreaking precedent in the sense that just until a few months ago, or last year I guess, that was not the ***case***. But it is today. It is the law of the land by the ***Supreme Court*** that the Second Amendment is an individual ***right***. And you acknowledge that, that's correct?

SOTOMAYOR: That was...

GRAHAM: The Heller ***case***.

SOTOMAYOR: ... the decision. And it is what the ***court*** has held, and so it is unquestionably an individual ***right***.

GRAHAM: But here's the next step for the ***court***. You ***will*** have to, if you get on the ***court***, with your fellow justices, sit down and discuss whether or not it is a fundamental ***right*** to the point that it is incorporated through the due process clause of the 14th Amendment and applied to every state.

Isn't it fair to say, Judge, that when you do that, not only ***will*** you listen to your colleagues, you ***will*** read whatever ***case*** law is available, you're going to come down based on what you think America is all about?

SOTOMAYOR: No, sir.

GRAHAM: So what binds you when it comes to a fundamental ***right***?

SOTOMAYOR: The rule of law. And...

GRAHAM: Isn't the rule of law, when it comes to what you consider to be a fundamental ***right***, your opinion as to what is fundamental among all of us?

SOTOMAYOR: No. In fact the question that you raise is it fundamental in the sense of the law.

GRAHAM: ***Right***.

SOTOMAYOR: That's a legal term. It's very different. And it is important to remember that the ***Supreme Court***'s precedent on the Second Amendment predated its...

GRAHAM: I hate to interrupt, but we have -- is there sort of a legal cookbook that you can go to and say this is a fundamental ***right***, A, and B is not?

SOTOMAYOR: Well, there's not a cookbook, but there's precedent that was established after the older precedent that has talked and described that doctrine of incorporation. That's a set of precedents that...

GRAHAM: Are you talking about the 1890 ***case***?

SOTOMAYOR: Yes. Well, no. The 1890 ***case*** was the ***Supreme Court***'s holding on this issue. But since that time, there has been a number of decisions discussing the incorporation doctrine applying it to different provisions of the Constitution.

GRAHAM: Is there any personal judgment to be relied upon by a ***Supreme Court*** justice in deciding whether or not the Second Amendment is a fundamental ***right***?

SOTOMAYOR: Well, you hire judges for their judgment, not their personal views or what their sense of what the outcome should be. You hire your point judges for the purpose of understanding whether they respect law, whether they respect precedent and apply it in a ...

GRAHAM: I don't doubt that you respect the law, but you're going to be asked, along with eight other colleagues, if you get on the ***court***, to render a decision as to whether or not the Second Amendment is a fundamental ***right*** shared by the American people. There is no subjective judgment there?

SOTOMAYOR: The issue ***will*** be controlled by the ***court***'s analysis of that question in the ***case***, fundamental as defined by incorporation in -- likely ***will*** be looked at by the ***court*** in a ***case*** that challenges a state regulation. At that ...

GRAHAM: I have -- go ahead.

SOTOMAYOR: I'm sorry.

At that point, I would presume that the ***court*** ***will*** look at its older precedent in the way it did in Heller, consider whether it controls the issue or not. It ***will*** decide, even if it controls it, whether it should be revisited under the doctrine of stare decisis. It could decide it doesn't control it, and that would be its decision. It could decide it does control, but it should revisit it.

In revisiting it, it ***will*** look at a variety of different factors, among them have there been changes in related areas of law that would counsel questioning this. As I've indicated, there was a lot of law after the older ***cases*** on incorporation. I suspect, but I don't know, because I can't prejudge the issue that the ***court*** ***will*** consider that with all of the other arguments that the parties ***will*** make.

GRAHAM: Well, maybe I've got it wrong, then. Maybe I'm off base here. Maybe you've got the Seventh Circuit talking about the Heller ***case*** did not decide the issue of whether it should be incorporated to the states, because it's only dealt with the District of Columbia.

You've got the Ninth Circuit -- and I never thought I'd live to ***hear*** myself say this -- look at the Ninth Circuit. They have a pretty good rationale as to why the Second Amendment should be considered a fundamental ***right***. And they talked about the longstanding relationship of the English man -- and they should have put woman. At least in South Carolina that would have applied -- to gun ownership.

They talked about it was this ***right*** to bear arms that led to our independence. It was this ***right*** to bear arms that put down a rebellion in this country. And they talked about who we are as a people and our history as a people.

And Judge, that's why the ***Supreme Court*** matters. I do believe, at the end of the day, you're not going to find a law book that tells you whether or not a fundamental ***right*** exists vis-a-vis the Second Amendment, that you're going to have to rely upon your view of America, who we are, how far we've come and where we're going to go in our relationship to gun ownership. That's why these choices are so important.

And here's what I'll say about you. And you may not agree with that, but I believe that's what you're going to do, and I believe that's what every other justice is going to do.

GRAHAM: And here's what I ***will*** say about you. I don't know how you're going to come out on that ***case***, because I think fundamentally, Judge, you're able, after all these years of being a judge, to embrace a ***right*** that you may not want for yourself, to allow others to do things that are not comfortable to you, but for the group, they're necessary. That is my hope for you.

That's what makes you, to me, more acceptable as a judge and not a activist, because an activist would be a judge who would be champing at the bit to use this wonderful opportunity to change America through the ***Supreme Court*** by taking their view of life and imposing it on the rest of us.

I think and believe, based on what I know about you so far, that you're broad-minded enough to understand that America is bigger than the Bronx, it's bigger than South Carolina.

Now, during your time as an advocate, do you understand identity politics? What is identity politics?

SOTOMAYOR: Politics based simply on a person's characteristics, generally referred to either race or ethnicity or gender, religion. It is politics based on...

GRAHAM: Do you embrace identity politics personally?

SOTOMAYOR: Personally, I don't as a judge in any way embrace it with respect to judging. As a person, I do believe that certain groups have and should express their views on whatever social issues may be out there. But as I understand the word "identity politics," it's usually denigrated because it suggests that individuals are not considering what's best for America.

GRAHAM: Do you think...

SOTOMAYOR: That's my -- and that I don't believe in. I think that whatever a group advocates, obviously, it advocates on behalf of its interests and what the group thinks it needs, but I would never endorse a group advocating something that was contrary to some basic constitutional ***right*** as it was known at the time...

GRAHAM: Do you...

SOTOMAYOR: ... although people advocate changes in the law all the time.

GRAHAM: Do you believe that your speeches properly read embrace identity politics?

SOTOMAYOR: I think my speeches embrace the concept that I just described, which is, groups, you have interests that you should seek to promote, what you're doing is important in helping the community develop, participate, participate in the process of your community, participate in the process of helping to change the conditions you live in.

I don't describe it as identity policies, because -- politics -- because it's not that I'm advocating the groups do something illegal.

GRAHAM: Well, Judge, to be honest with you, your record as a judge has not been radical by any means. It's, to me, left of ***center***. But your speeches are disturbing, particularly to -- to conservatives, quite frankly, because they don't talk about, "Get involved. Go to the ballot box. Make sure you understand that America can be whatever you'd like it to be. There's a place for all of us."

It really did, to suggest -- those speeches to me suggested gender and racial affiliations in a way that a lot of us wonder, ***will*** you take that line of thinking to the ***Supreme Court*** in these ***cases*** of first precedent?

GRAHAM: You have been very reassuring here today and throughout this ***hearing*** that you're going to try to understand the difference between judging and whatever political feelings you have about groups or gender.

Now, when you were a lawyer, what was the mission statement of the Puerto Rican Legal Defense Fund?

SOTOMAYOR: To promote the civil ***rights*** and equal opportunity of Hispanics in the United States.

GRAHAM: During your time on the board -- and you had about every job a board member could have -- is it a fair statement to say that all of the ***cases*** embraced by this group on abortion advocated the woman's ***right*** to choose and argued against restrictions by state and federal government on abortion ***rights***?

SOTOMAYOR: I didn't -- I can't answer that question because I didn't review the briefs. I did know that the fund had a health care docket...

GRAHAM: Judge?

SOTOMAYOR: ... that included challenges to certain limitations on a woman's ***right*** to terminate her pregnancy under certain circumstances.

GRAHAM: Judge, I -- I may be wrong, but every ***case*** I've seen by the Puerto Rican Legal Defense Fund advocated against restrictions on abortion, advocated federal taxpayer funding of abortion for low- income women. Across the board when it came to the death penalty, it advocated against the death penalty. When it came to employment law, it advocated against testing and for quotas.

I mean, that's just the record of this organization. And the point I'm trying to make is that whether or not you advocate those positions and how you ***will*** judge can be two different things. I haven't seen in your judging this advocate that I saw or this board member. But when it came to the death penalty, you filed a memorandum with the Puerto Rican Legal Defense Fund in 1981 -- and I would like to submit this to the record -- where you signed this memorandum.

LEAHY: Without objection.

GRAHAM: And you basically said that the death penalty should not be allowed in America because it created a racial bias and it was undue burden on the perpetrator and their family. What led you to that conclusion in 1981?

SOTOMAYOR: The question in 1991...

GRAHAM: '81.

SOTOMAYOR: I misspoke about the year -- was an advocacy by the fund taking a position on whether legislation by the state of New York outlawing or permitting the death penalty should be adopted by the state. I thank you for recognizing that my decisions have not shown me to be an advocate on behalf of any group. That's a different, dramatically different question than what -- whether I follow the law. And in the one ***case*** I had as a district ***court*** judge, I followed the law completely.

GRAHAM: The only reason we -- I mention this is when Alito and Roberts were before this panel, they were asked about memos they wrote in the Reagan administration, clients they represented. A lot to try to suggest that if you wrote a memo about this area of the law to your boss, Ronald Reagan, you must not be fit to judge. Well, they

were able to explain the difference between being a lawyer in the Reagan administration and being a judge. And to the credit of many of my Democratic colleagues, they understood that.

GRAHAM: I'm just trying to make the point that when you are an advocate, when you are on this board, the board took positions that I think are left of ***center***. And you have every ***right*** to do it. Have you ever known a low-income Latina woman who was devoutly pro-life?

SOTOMAYOR: Yes.

GRAHAM: Have you ever known a low-income Latina family who supported the death penalty?

SOTOMAYOR: Yes.

GRAHAM: So the point is there are many points of view within groups based on income. You have, I think, consistently, as an advocate, took a point of view that was left of ***center***. You have, as a judge, been generally in the mainstream.

The Ricci ***case***, you missed one of the biggest issues in the country or you took a pass. I don't know what it is. But I am going to say this, that, as Senator Feinstein said, you have come a long way. You have worked very hard. You have earned the respect of Ken Starr. And I would like to put his statement in the record.

And you have said some things that just bugged the hell out of me.

SOTOMAYOR: May I...

GRAHAM: The last question on the "wise Latina woman" comment. To those who may be bothered by that, what do you say?

SOTOMAYOR: I regret that I have offended some people. I believe that my life demonstrates that that was not my intent to leave the impression that some have taken from my words.

GRAHAM: You know what, Judge? I agree with you. Good luck.

LEAHY: Thank you.

Senator Durbin has actually responded to my so far vain request that senators may want to pass on the basis that all questions may have been asked, not everybody has asked them, but Senator Klobuchar, yesterday, had some very serious and succinct areas that she was asking. I know time ran out, and I'd like to yield to Senator Klobuchar because she may want to follow on those.

KLOBUCHAR: Thank you very much, Mr. Chair.

And thank you again, Judge. I think they've turned the air conditioning on, so this is good.

(LAUGHTER)

I just had two quick follow-ups following Senator Graham's question. The first is that the only death penalty ***case*** that I know of -- there may be another one that you ruled on -- the Heatley ***case*** -- you, in fact, sustained the death penalty in that ***case***. Is that correct?

SOTOMAYOR: I sustained -- or a rejected the challenges of the defendant that the application of the death penalty to him was based on race, yes.

KLOBUCHAR: OK. Thank you. And then just the second one, Senator Graham mentioned the issues of Justice Roberts and the difference between an advocate and a judge. And I just came across the quote that Justice Roberts gave about his work during the Reagan administration.

And he said I can give the commitment that I appreciate that my role as a judge is different than my role as a staff lawyer for an administration. As a judge, I have no agenda. I have a guide in the Constitution and the laws and the precedents of the ***court***. And those are what I would apply with an open mind after fully and fairly considering the arguments and assessing the considered views of my colleagues on the bench.

Would you agree with that statement?

SOTOMAYOR: Wholeheartedly.

KLOBUCHAR: All ***right***. Thank you.

There were some letters that have not yet been put on the record, and there are quite a collection of letters. I considered reading them all on the record but thought better of that. I thought I would ask the chair if I could put these letters on the record.

And these are letters of support for you from, first of all, the National Fraternal Order of Police, in support of your nomination, the Police Executive Research Forum, the national enforcement of black law enforcement executives, the National Latino Peace Officers Association, the New York State Law Enforcement Council, the National District Attorneys Association, the Association of Prosecuting Attorneys, the National Association of Police Organizations, the National Sheriffs' Association, the Major City Chiefs Association, the Detectives Endowment Association, and then also a letter from 40 of your past colleagues in the Manhattan D.A.'s office, former district attorney colleagues.

And all of these groups have given you their support. And I did want to note just two very brief portions from the letter.

The one from the Police Executive Research Forum reads, "Sonia Sotomayor went out of her way to stand shoulder to shoulder with those of us in public safety at a time when New York City needed strong, tough and fair prosecutors."

And then, also, the letter from your colleagues I found very enlightening. It was much more personal. It said that, "She began as a rookie in 1979, working long hours, prosecuting an enormous caseload of misdemeanors before judges managing overwhelming dockets. Sonia so distinguished herself in this challenging assignment that she was among the very first in her starting class to be selected to handle felonies."

"She prosecuted a wide variety of felony ***cases***, including serving as co-counsel at a notorious murder trial. She developed a specialty in the investigation and prosecution of child pornography ***case***. Throughout all of this, she impressed us as one who was singularly determined in fighting crime and violence."

"For Sonia, service as a prosecutor was a way to bring order to the streets of a city she dearly loved. We are proud to have served with Sonia Sotomayor. She solemnly adheres to the rule of law and believes that it should be applied equally and fairly to all Americans."

"As a group," your former colleagues say, "we have different world views, and political affiliations, but our support for Sonia is entirely nonpartisan. And the fact that so many of us have remained friends with Sonia over three decades speaks well, we think, of her warmth and collegiality." Pretty nice letter.

In reading these letters from these law enforcement groups, there was just one follow-up ***case*** that you had that I wanted to allow you to enlighten the country about. And this is one that a former New York police detective, Chris Monino (ph) spoke about recently in an article, and he spoke about a ***case*** you worked on as district attorney.

He talked about the child pornography ***case***, how he had gone to various prosecutors to try to get them interested in the ***case***, and he couldn't get them interested. And I have some guesses. Some of these ***cases***, as you know, can be very involved with a lot of evidence and sometimes computer forensics and things like that. But he wasn't able to interest them in taking on the ***case***.

But you were the one that was ***willing*** to take on the ***case***, and it led to the prosecution of two perpetrators. Could you talk a little bit about that ***case***, why you think others didn't and why you decided to take on the ***case***?

SOTOMAYOR: Well, I can't speak to why others decided to pass on the ***case***. I can talk to you about my views at the time.

The New York ***Court*** of Appeals had invalidated the New York statute on child pornography on the grounds of a constitutional violation, federal constitutional violation, that the statute did not comport with the federal Constitution. ***Supreme Court*** took that ***case*** directly from the ***Court*** of Appeals, as is its ***right*** to review all issues of federal constitutional law, and reversed the New York ***Court*** of Appeals and reinstated the statute.

My sense is, because there were still so many open questions about both the legality of the statute and the question of the difficulty in proving the particular crime at issue, that involved two men who worked in a change of -- chain of adult bookstores in the then-Times Square area. Times Square has changed dramatically since that time.

It was mostly circumstantial. We had some tapes, but their knowledge of what those tapes contained, their intent to sell and distribute child pornography involving children below a certain age, it was a difficult, difficult legal and factual ***case***, but it was clear that it was a serious ***case***. We're talking about the distribution of films that show children who were anywhere from 8 years old to 12 years old being explicitly sexually abused.

And it seemed to me that, regardless of the outcome of the ***case***, whether I secured the convictions or not, whether it was held up on appeal or not, that the issues it raised had to be presented in ***court*** because of the importance of the crime.

And so I brought the prosecution. I had a co-counsel in that ***case*** who was second-seating me in that ***case***, meaning she was assisting me. And the ***case*** took a while at trial, because, as I said, it was circumstantial. The jury returned a verdict against both defendants. They were sentenced quite severely, and the ***cases*** held up on appeal.

It was an enormously complicated ***case***. I assisted in the appeal because it was so complicated that one of the heads of the Appeals division of the New York County District Attorney's Office had to become involved in it. But the convictions were sustained.

And so the effort resulted in a conviction of two men who were distributing films that had the vilest of sexual acts portrayed against children.

KLOBUCHAR: And one last ***case*** I wanted to ask you about, which the chairman had briefly mentioned in his opening, and it was a troubling ***case*** because it involved an elected official. It was U.S. v. Giordano, and this ***case*** when you -- happened when you were a judge.

And it involved very troubling facts with the mayor of Waterbury, Connecticut in a variety of crimes stemming from his repeated sexual abuse of a minor daughter and a niece and of a prostitute. And you wrote for the majority in that ***case***. There was actually a dissent from one of your fellow judges on the Second Circuit.

KLOBUCHAR: And you held, in part, that the mayor could, in fact, be charged with the separate crime of violating the young girl's civil ***rights*** under color of state law. And I think -- and I don't want to put words in your mouth, but the reason you were able to use that theory is that you note how frequently the mayor reiterated to his young victims that they would be in trouble with law enforcement if they didn't submit to what he wanted them to do.

Could you talk about how that ***case*** fits in to your overall approach to judging?

SOTOMAYOR: As I have indicated, the role of a judge is to look at Congress' words in a statute and discern its intent. And in ***cases*** that present you facts, you must take existing precedents and apply the teachings of those precedents to those new facts.

In the Giordano ***case***, that had been another situation quite like this one. This was a mayor who, working through a woman, secured sexual acts by very young girls that were taking place in his office. And through the woman he was working with and also through his own exhortations, don't tell anybody or you'll get into trouble, and the woman's exhortations to the child, the person he was conspiring with, that they would get in trouble with the police because the police wouldn't believe them. They would believe him because he was a mayor.

The question for the ***court*** became is that acting under color the state law. Is he using his office to promote this illegal activity against these young girls? The majority viewing these facts said yes, that's the principles we discern from precedent about what the use of state law -- of acting color of state law means.

The dissent disagreed, and it disagreed using its own rationale about why the law should not be read that way. But these are ***cases*** that rely upon an understanding both of what the words say and how precedent has interpreted them. And that's what the majority of the panel did in that ***case***.

KLOBUCHAR: Thank you very much. And I think it's been enlightening for people to ***hear*** about some of your views on these criminal ***cases***. And I'd just like to ask one last question then. It's the exact question that my friend and colleague, Senator Graham, asked Chief Justice Roberts as his confirmation ***hearing***.

And he asked: What would be like history to say about you when all is said and done?

SOTOMAYOR: I can't live my life to write history's story. That ***will*** be the job of historians long after I'm going. Some of them start now, but long after I'm gone.

(LAUGHTER)

In the end, I hope it ***will*** say I'm a fair judge, that I was a caring person, and that I lived my life serving my country.

KLOBUCHAR: I think you can't say much more that thank you. Thank you very much, Judge.

LEAHY: Thank you, Judge. I appreciate that.

Thank you, Senator Klobuchar.

Senator Cornyn, who, as I mentioned yesterday, is a former ***Supreme Court*** justice of Texas as well as former attorney general, valued member of this committee.

Senator Cornyn?

CORNYN: Thank you, Mr. Chairman.

Good morning, Judge.

SOTOMAYOR: Good morning, Senator.

CORNYN: Judge, when we met the first time, as I believe I recounted earlier, I made a pledge to you that I would do my best to make sure you were treated respectfully and this would be a fair process. I just want to ask you upfront: Do you feel like you've been given a chance to explain your record and your judicial philosophy to the American people?

SOTOMAYOR: I have, sir. And every senator on both sides of the aisle that have made that promise to me have kept it fully.

CORNYN: And, Judge, you know, the test is not whether Judge Sonia Sotomayor is intelligent. You are. The test is not whether we like you. I think, speaking personally, I think we all do. The test is not even whether we admire you or we respect you, although we do admire you and respect what you've accomplished.

The test is really, what kind of justice ***will*** you be if confirmed to the ***Supreme Court*** of the United States? ***Will*** you be one that adheres to a written Constitution and written laws, that -- and respect the ***right*** of the people to make their laws through their elected representatives, or ***will*** you pursue a -- some other agenda, personal, political, ideological, that is something other than enforcing the law?

I think those are the -- that is really the question.

And, of course, the purpose of these hearings is -- as you've gone through these tedious rounds of questioning, is to allow us to clear up any confusion about your record and about your judicial philosophy, yet so far I find there's still some confusion.

For example, in 1996, you said the idea of a stable, quote, "capital L Law" was a public myth. This week, you said that fidelity to the law is your only concern.

In 1996, you argued that indefiniteness in the law was a good thing because it allowed judges to change the law. Today you characterized that argument as being only that ambiguity can't exist and that it is Congress's job to change the law.

In 2001, you said that innate physiological differences of judges would or could impact their decisions. Yesterday, you characterized that argument as being only that innate physiological differences of litigants could change decisions.

In 2001, you disagreed explicitly with Justice O'Connor's view of whether a wise man and wise woman would reach the same decision. Yet, during these hearings, you characterized your argument as being that you agreed with her.

A few weeks ago, in your speech on foreign law to the American Civil Liberties Union, you rejected the approach of Justices Alito and Thomas with regard to foreign law, and yet it seems to me, during these hearings, you have agreed with them.

So, Judge, what should I tell my constituents who are watching these hearings and saying to themselves, "In Berkeley and other places around the country, she says one thing, but at these hearings, you are saying something which sounds contradictory, if not diametrically opposed, to some of the things you've said in speeches around the country"?

SOTOMAYOR: I would tell them to look at my decisions for 17 years and note that, in every one of them, I have done what I say that I so firmly believe in. I prove my fidelity to the law, the fact that I do not permit personal views, sympathies or prejudices to influence the outcome of ***cases***, rejecting the challenges of numerous plaintiffs with undisputably sympathetic claims, but ruling the way I have on the basis of law rejecting those claims, I would ask them to look at the speeches completely, to read what their context was and to understand the background of those issues that are being discussed.

I didn't disagree with what I understood was the basic premise that Justice O'Connor was making, which was that being a man or a woman doesn't affect the capacity of someone to judge fairly or wisely. What I disagreed was with the literal meaning of her words because neither of us meant the literal meaning of our words. My use of her words was pretty bad in terms of leaving a bad impression. But both of us were talking about the value of experience and the fact that it gives you equal capacity.

In the end, I would tell your constituents, Senators, look at my record and understand that my record talks about who I am as a person, what I believe in and my judgment and my opinion. But following the rule of law is the foundation of our system of justice.

CORNYN: Thank you for that -- for your answer, Judge. You know, I actually agree that your judicial record strikes me as pretty much in the mainstream of -- of judicial decision making by district ***court*** judges and by ***court*** of appeals judges on the federal bench. And while I think what is creating this cognitive dissidence for many of us and

for many of my constituents who I've been ***hearing*** from is that you appear to be a different person almost in your speeches and in some of the comments that you've made. So I guess part of what we need to do is to try to reconcile those, as I said earlier.

You said that -- I want to pivot to a slightly different subject and go back to your statement that the ***courts*** should not make law. You've also said that the ***Supreme Court*** decisions that a lot of us believe made law actually were an interpretation of the law.

So I'm -- I would like for you to clarify that. If the ***Supreme Court*** in the next few years holds that there is a constitutional ***right*** to same-sex marriage, would that be making the law? Or would that be interpreting the law? I'm not asking you to classify -- excuse me. I'm not asking you to prejudge that ***case*** or the merits of the arguments, but just to characterize whether that would be interpreting the law or whether that would be making the law.

SOTOMAYOR: Senator, that question is so embedded with its answer, isn't it? Meaning if the ***court*** rules one way and I say that's making law, then it forecasts that I have a particular view of whatever arguments may be made on this issue, suggesting that it's interpreting the Constitution. I understand the seriousness of this question. I understand the seriousness of same-sex marriage.

SOTOMAYOR: But I also know, as I think all America knows, that this issue is being hotly debated on every level of our three branches of government. It's being debated in Congress. And Congress has passed an act relating to same-sex marriage. It's being debated in various ***courts*** on the state level. Certain higher ***courts*** have made rulings.

This is the type of situation where even the characterizing of whatever the ***court*** may do as one way or another suggests that I have both prejudged an issue and that I come to that issue with my own personal views suggesting an outcome. And neither is true. I would look at that issue in the context of the ***case*** that came before me with a completely open mind.

CORNYN: Forget the same-sex marriage hypothetical. Is there a difference, in your mind, between making the law and interpreting the law? Or is this a distinction without a difference?

SOTOMAYOR: Oh, no. It's a very important distinction. Laws are written by Congress. If has -- it makes factual findings. In determines, in its judgment, what the fit is between the law it's passing and the remedy. It's -- that its giving as a ***right***.

The ***courts***, when they're interpreting, always have to start with what does the Constitution say, what is the words of the Constitution, how has precedent interpreting those, what are the principles that it has discussed govern a particular situation.

CORNYN: How do you reconcile that answer with your statement that ***courts*** of appeals make policy?

SOTOMAYOR: In both ***cases*** in which I've used that word in two different speeches -- one was a speech, one was a remark to students -- this is almost like the discussion fundamental -- what does it mean to a non-lawyer and fundamental, what it means in the context of ***Supreme Court*** legal theory.

CORNYN: Are you saying it's only a discussion that lawyers could lot of?

SOTOMAYOR: Not love. But in the context in both contexts, it's very, very clear that I'm talking about completely the difference between the two judgings and that circuit ***courts***, when they issue a holding, it becomes precedent on all similar ***cases***.

In both comments, those -- that statement was made absolutely expressly that that was the context of the kind of policy I was talking about, which is the ramifications of a precedent on all similar ***cases***. When Congress talks about policy, it's talking about someone totally different. It's talking about making law, what are the choices that I'm going to make in law -- in making the law.

Those are two different things. I wasn't talking about ***courts*** making law. In fact, in the Duke speech, I said -- I used making policy in terms of its ramifications on existing ***cases***. But I never said in either speech we make law in the sense that Congress would.

CORNYN: Let me turn to another topic. In 1996, when you -- after you'd been on the federal bench for four years, you wrote a law review article -- the Suffolk University Law Review. And this pertains to campaign financing.

You said, quote, "Our system of election financing permits extensive private, including corporate, financing of candidates' campaigns raising again and again the question of whether -- of what the difference is between contributions and bribes and how legislators or other officials can operate objectively on behalf of the electorate."

CORNYN: You said, "Can elected officials say with credibility that they're carrying out the mandate of a democratic society representing only the generally public good when private money plays such a large role in their campaigns?"

Judge Sotomayor, what is the difference, to your mind, between a political contribution and a bribe?

SOTOMAYOR: The context of that statement was a question about what was perking through the legal system at the time and has been, as you know, before the ***Supreme Court*** since Buckley v. Vallejo. In Buckley...

CORNYN: I -- I agree, Your Honor. But what -- my question is, what, in your mind, is the difference between a political contribution and a bribe?

SOTOMAYOR: The question is, is a contributor seeking to influence or to buy someone's vote? And there are situations in which elected officials have been convicted of taking a bribe because they have agreed in exchange for a sum of money to vote on a particular legislation in a particular way. That is -- violates the federal law.

The question that was discussed there was a much broader question as to, where do you draw that line as a society? What choices do you think about in terms of what -- what Congress ***will*** do, what politicians ***will*** do?

I've often spoken about the difference between what the law permits and what individuals should use to guide their conduct. The fact that the law says you can do this doesn't always mean that you as a person should choose to do this.

And, in fact, we operate within the law. You don't -- you should not be a lawbreaker. But you should act in situations according to that sense of what's ***right*** or wrong.

We had the recent ***case*** that the ***Supreme Court*** considered of the judge who was given an extraordinary amount of money by a campaign contributor, dwarfing everything else in his campaign in terms of contributions, funding a very expensive campaign.

CORNYN: In fact -- in fact -- in fact, that was not a direct contribution to the judge, was it?

SOTOMAYOR: Well, it wasn't a direct contribution, but it was a question there where the ***Supreme Court*** said, the appearance of impropriety in this ***case*** would have counseled the judge to get off, because...

CORNYN: Let's get back to my question, if I can, and let me ask you this. Last year, President Obama set a record in fundraising from private sources, raising an unprecedented amount of campaign contributions. Do you think, given your law review article, that President Obama can say with credibility that he's carrying out the mandate of a democratic society?

SOTOMAYOR: That wasn't what I was talking about in that speech. I don't -- I don't know...

CORNYN: Well, I realize he wasn't elected in 1996, but what I'm -- what I'm getting at is, are you basically painting with such a broad brush when it comes to people's ***rights*** under the First Amendment to participate in the political

process, either to volunteer their time, make in-kind contributions, make financial contributions? Do you consider that a form of bribery or in any way improper?

SOTOMAYOR: No, sir.

CORNYN: OK. Thank you.

SOTOMAYOR: No, sir.

CORNYN: Thank you for your answer.

In the short time we have remaining, let me return to -- to the New Haven firefighter ***case*** briefly. As you know, two witnesses, I believe, ***will*** testify after you're through, and I'm sure you ***will*** welcome being finished with this period of questioning.

A lot of attention has been given to the lead plaintiff, Frank Ricci, who is a dyslexic and the hardship he's endured in order to prepare for this competitive examination only to see the competitive examination results thrown out.

CORNYN: But I was struck on July the 3rd in the New York Times, when they featured another firefighter, who ***will*** testify here today, and that was Benjamin Vargas. Benjamin Vargas is the son of Puerto Rican parents, as you probably know, and he found himself in the odd position, to say the least, of being discriminated against based on his race, based on the decisions by the circuit ***court*** panel that you sat on.

The closing of the article, because Lieutenant Vargas -- who hopes to be Captain Vargas as a result of the ***Supreme Court*** decision because he scored sixth on the comprehensive examination -- at the very last paragraph in this article, he -- it says, "Gesturing toward his three sons, Lieutenant Vargas explained why he had no regrets. He said, 'I want to give them a fair shake. To get a job on the merits, not because they're Hispanic or to fill a quota.' He said, 'What a lousy way to live.'" That's his testimony.

So I want to ask you, in conclusion, do you agree with Chief Justice John Roberts when he says, "The best way to stop discriminating based on race is to stop discriminating based on race"?

SOTOMAYOR: The best way to live in our society is to follow the command of the Constitution, provide equal opportunity for all. And I follow what the Constitution says, that is, how the law should be structured and how it should be applied to whatever individual circumstances come before the ***court***.

CORNYN: With respect, Judge, my question was do you agree with Chief Justice John Roberts's statement, or do you disagree?

SOTOMAYOR: The question of agreeing or disagreeing suggests an opinion on what the ruling was in the ***case*** he used it in, and I accept the ***court***'s ruling in that ***case***. And that was a very recent ***case***.

There is no quarrel that I have, no disagreement. I don't accept that, in that situation, that statement the ***court*** found applied. I just said the issue is a constitutional one - equal opportunity for all under the law.

CORNYN: I understand that you might not want to comment on what Chief Justice John Roberts wrote in an opinion, even though I don't think he was speaking of a specific ***case*** but rather an approach to the law which would treat us all as individuals with equal dignity and equal ***rights***.

But let me ask you whether you agree with Martin Luther King when he said he dreamed of a day when his children would be judged not by the color of their skin, but by the content of their character. Do you agree with that?

SOTOMAYOR: I think every American agrees with that (inaudible).

CORNYN: Amen.

Yield back, Mr. Chairman.

LEAHY: Thank you, Senator Cornyn.

Just so we'll note for the schedule, we're going to go to Senator Specter, who is a long-time member of this committee and one of the most senior members here. And I would, once Senator Specter's questions are finished, we ***will*** take a very short break. And does that work for you, Judge? I...

SOTOMAYOR: It most certainly does.

LEAHY: OK. So...

SOTOMAYOR: Thank you.

LEAHY: Senator Specter is recognized for up to 20 minutes.

SPECTER: Thank you, Mr. Chairman.

Judge Sotomayor, you have been characterized as running a hot courtroom, asking tough questions. What we see popping out of the ***Supreme Court*** opinions from time to time, statements about pretty tough ideological battles in their conference room. Justice Scalia was quoted as saying, "The ***court*** must be living in another world. Day by day, ***case*** by ***case*** it is busy designing a Constitution for a country I do not recognize."

Referring to a woman's ***right*** to choose in Roe v. Wade, he said this, quote, "Justice O'Connor's assertion that a fundamental rule of judicial restraint requires us to avoid reconsidering Roe to not be taken seriously." Do you think it possible that, if confirmed, you ***will*** be a litigator in that conference room, take on the ideological battles which pop out from time to time from what we read in their opinions?

SOTOMAYOR: I don't judge on the basis of ideology. I judge on the basis of the law and my reasoning. That's how I have comported myself in the circuit ***court***. When my colleagues and I, in many ***cases***, have initially come to disagreeing positions, we've discussed them and either persuaded each other, changed each other's minds and worked from the starting point of arguing, discussing, exchanging perspectives on what the law commands.

SPECTER: Well, perhaps you'll be tempted to be a tough litigator in the ***court***. Time ***will*** tell, if you are confirmed, if you have some of those provocative statements.

Let me move on to a ***case*** which you have decided. You have been reluctant to make comments about what other people have said. But I want to ask you about your view as to what you have said. In the ***case*** of Entergy v. Riverkeeper, which involved the question which is very important to matters now being considered by Congress on climate control and global warming, you ruled in the 2nd Circuit that the best technology should be employed, not the cost-benefit.

The ***Supreme Court*** reversed five-to-four saying it was cost benefit. Could we expect you to stand by your interpretation of the Clean Water Act when, if confirmed, you get to the ***Supreme Court*** and could make that kind of a judgment because you're not bound by precedent?

SOTOMAYOR: Well, I am bound by precedent to the extent that all precedents is entitled to the respect it -- to respect under the doctrine of stare decisis. And to the extent that the ***Supreme Court*** has addressed this issue of cost benefit and its permissibility under the Clean Water Act, that's the holding I would apply to any new ***case*** that came. And the framework it established is the framework I would employ to new ***cases***.

SPECTER: Let me return to a subject I raised yesterday but from a different perspective. And that is the issue of the ***Supreme Court*** taking on more ***cases***. In 1886, there were 451 ***cases*** decided by the ***Supreme Court***, in

1985, 161 signed opinion, in 2007, only 67 signed opinions. The ***court*** has not undertaken ***cases*** involving circuit splits.

In the letter I wrote to you, which ***will*** be made a part of the record, listing a great many circuit splits and the problems that that brings when one circuit decides one day, another circuit another, and the other circuits are undecided and the ***Supreme Court*** declines to take ***cases***.

Do you agree with what Justice Scalia said, dissenting in (inaudible), where the ***court*** refers to take a key circuit split that when the ***court*** decides not to, quote, "it seems to me, quite irresponsible to let the current chaos prevail with other ***courts*** not knowing what to do"?

Or stated differently, do you think the ***Supreme Court*** has time to and should take up more circuit splits?

SOTOMAYOR: It does appear that the ***Supreme Court***'s docket has lessened over time, its decisions that it's addressing. Because of that, is certainly does appear that it has the capacity to accept more ***cases***. And the issue of circuit splits is one of the factors that the ***court***'s own local rules set out as a consideration for justices to think about in the cert process.

So in answer to your question, the direct answer is, yes, it does appear that it has the capacity.

SPECTER: The current rule in the ***Supreme Court*** is that petition for certiorari are applied, and there is a so-called cert pool where the -- seven of the nine justices, excluding only Justice Stevens and Justice Alito, do not participate in the cert pool so that they -- people applying for cert don't have the independent judgments.

When Chief Justice Roberts was -- before he became chief justice, he said that the cert pool's powers of little disquieting. Would you join the cert pool? Or would you maintain an independent status as Justice Stevens and Justice Alito do in having their own clerks and their own individual review as to whether cert ought to be granted?

SOTOMAYOR: I would probably do what Justice Alito did, although, I haven't decided if I'm given the honor of becoming a member of the ***Supreme Court***. I haven't decided anything. I'm not even sure where I would live in New York if this were to happen -- in Washington.

But putting that aside, Senator, my approach would probably be similar to Justice Alito, which is experience the process, take, for a period of time, consider its costs and benefits, and then decide whether to try the alternative or not and figure out what I think works best in terms of the functioning my chambers and the ***court***.

I can't give a definitive answer because I generally try to keep an open mind until I experience something and can then speak from knowledge about whether to change it or not.

SPECTER: Judge Sotomayor, you have had some experience on the pilot program conducted by the judicial -- federal judicial conference. And these were the conclusions reached by the pilot program. They said, quote, "Attitudes of judges toward electronic media coverage of civil proceedings were initially neutral and became more favorable after experience under the pilot program."

Quote, "Judges and attorneys who had experience with electronic media coverage under the program generally reported observing a small or no effects of the camera presence on participants in the proceedings, courtroom decorum, or the administration of justice." Would you agree with that based on your own personal experience having television in your courtroom?

SOTOMAYOR: My experience was limited, so I can't speak to the more broad conclusion of that report. I can say that as I -- as we discussed when I met with you, Senator, mine was positive.

In the two ***cases*** -- I believe I only had two ***cases*** where the camera -- where the media asked to record a proceeding. I may not remember others, but I do remember two. And on the circuit ***court***, we do provide tapes upon request, and some -- some media have asked to record our oral arguments.

But my experience has generally been positive, and I would certainly be able to recount that.

SPECTER: C-SPAN has conducted a survey which shows that 61 percent of the American people would like to see the ***Supreme Court*** televised. And in the survey, it disclosed how little the American public knows about the ***Supreme Court***.

Mr. Chairman, I'd ask consent this be included in the record.

LEAHY: Without objection, it ***will*** be included in the record.

SPECTER: The interest that has been generated by this confirmation proceeding, encouraged by the television, shows the enormous interest that people have in what the ***court*** does. And there has been a fair amount of coverage by the justices on television, as I cited yesterday. Many have appeared on television. Justice Kennedy says he believes the television is inevitable.

Everybody has said who's testified that there's a grave concern about the collegiality, and people do not want to make a judgment before talking to their colleagues. And the sense has been derived that if anybody really has a strong objection -- and Justice Souter has expressed that view, as noted on his widespread comment that if cameras -- if TV cameras were to come to the ***court***, they'd have to come in over his dead body.

And if confirmed, Justice Souter's body won't be there at all. Would you tell your colleagues the favorable expression -- experience that you've had with television in your courtroom and perhaps take a role in encouraging your colleagues to follow that experience for the ***Supreme Court***?

SOTOMAYOR: I would certainly relay my experiences. To the extent some of them may not know about the pilot study in many ***courts***, I would share that with them, although I do suspect they do know, and ***will*** participate in discussions with them on this issue. And those things I would do, Senator.

SPECTER: Some of my colleagues have questioned whether, as you stated, your panel in the Maloney ***case*** was really bound by ***Supreme Court*** precedent. The Seventh Circuit reached the same decision your panel did.

And in that opinion written by a highly respected Republican judge, Frank Easterbrook, the Seventh Circuit pointed out that Heller specifically declined to reconsider older ***Supreme Court cases*** which have held that the Second Amendment applies only to the federal government. Judge Easterbrook wrote, quote, "That does not license the inferior ***courts*** to go their own way. It just notes that the older precedent is open to reexamination by the justices themselves when the time comes."

That was your ***court***'s conclusion also, wasn't it?

SOTOMAYOR: It was. And I understand, having reviews Justice Easterbrook's opinion, that he agreed with the reasoning of Maloney on that point.

SPECTER: I want to return to the issue of basic authority, responsibility of the ***Supreme Court*** to decide the major ***cases*** on separation of power. There was a ***case*** which the ***Supreme Court*** denied certiorari just a couple of weeks ago involving claims for damages brought by survivors of victims of September 11th against certain individuals in Saudi Arabia. And this ***case*** posed a classical conflict between executive and legislative responsibilities.

Congress had legislated under sovereign immunity in 1976 that tort claims like flying an airplane into the World Trade ***Center*** were an exception of sovereign immunity, and the executive branch interposed objections to having that ***case*** decided because of the sensitivity of matters with Saudi Arabia. And the ***case*** involved circuit splits and very, very important matters in that tragedy which you've commented reached you, being very close to the incident.

Don't you think that that's the kind of a ***case*** the ***Supreme Court*** should have ***heard*** to decide that kind of a very basic conflict between Article I powers of the Congress and Article II powers of the executive?

SOTOMAYOR: Senator, obviously issues related to September 11th and national security are very important issues to the country as a whole. For the reasons I mentioned earlier, I lived through September 11th, so I understand its great tragedy and effect on America.

The question you ask me, though, is one that asks me to make judgment about an act the ***Supreme Court*** has done. And I didn't participate in their discussions. I didn't review the cert petitions. I didn't talk about with them their reasons. It would seem, and is, inappropriate to me to comment on a question that I wasn't a party to in making the decision.

SPECTER: Well, wouldn't you at least agree with the proposition that conflicts between the Congress and the executive branch are of the highest duty for the ***Supreme Court*** to consider and to decide?

SOTOMAYOR: The -- all conflicts under the Constitution, all issues arising from the Constitution are important.

SPECTER: Well, I know that, but that's a pretty easy question to answer. I'm not asking you to agree with Justice Roberts that the ***court*** ought to take more ***cases***, which seemed to me to be pretty easy, or a question about Justice Scalia saying that there's turmoil when the circuit split.

And you don't have the ***Supreme Court*** taking cert, but isn't that of the highest magnitude? Our discussions here have involved a great many issues, but I would suggest to you that, on separation of powers and when you undertake the role of the Congress contrasting with the role of the president, Congress is Article I. It was placed with primacy, because we're closest to the people.

And when you have a question which you wouldn't comment on yesterday, like the terrorist surveillance program, which flatly contradicts the congressional enactment on Foreign Intelligence Surveillance Act, that the only way you'd get a wiretap is with ***court*** approval, and the ***case*** is declared unconstitutional in the Detroit district ***court***, and the Sixth Circuit dodges the ***case*** on standing with very questionable grounds, and the ***Supreme Court*** won't even ***hear*** it, and you have a ***case*** involving September 11th and a very blatant conflict between Congress powers expressed under Article I with the sovereign immunities act, and the president is stepping in under foreign powers, isn't -- isn't that a category of the highest magnitude?

SOTOMAYOR: It is so difficult to answer that question in the abstract. For the reason I've just explained, the issue is much, much more complicated than an absolute that says, if a ***case*** presents this question, I'm always going to take it.

That's not how a judge looks at the issue of granting or not granting certiorari, I assume, because the fact is weighing so many different factors at the time that decision is made. I...

SPECTER: Judge, I don't want to interrupt you, but I've got a minute-and-a-half left and a couple of comments I want to make in conclusion.

I would ask you to rethink that. And I would also ask you to rethink the issues you didn't want to answer yesterday about conflict between the Congress and the ***court***.

Even though the Constitution made Congress Article I and the president Article II, the ***Supreme Court*** has really reversed the order. The judiciary is now really in Article I, if the powers were to be redefined.

And I'd ask you to take a look -- you have said repeatedly that the job of the ***court*** is to apply the law, not to make the law. And take a look again at the standard of proportional and congruent and see if you don't agree with Justice Scalia that that's another way for the ***court*** to make law.

And take a look, too, at what Justice Roberts said here in the confirmation hearings, that there would be deference and respect for congressional fact-finding, how that is not done in the Garrett ***case*** and in the voting ***rights*** ***case***.

SPECTER: And out of consideration for the people who are going to appear here later on, I'm not prepared yet to announce my own vote, but it is my hope that -- and the conventional wisdom is very strong for your confirmation -- that you'll use some of those characteristics of your litigation experience to battle out the ideas that you believe in, because I have a strong hunch that they're closer to the ones that I would like to see adopted to the ***court***.

And don't let the issues of separation of powers skip by. The Congress is entitled to deference on these big issues, and at least they ought to be decided by the ***court***.

Thank you very much, Judge Sotomayor. You've done quite an outstanding job as a witness.

Thank you, Mr. Chairman.

LEAHY: Thank you, Senator Specter.

And, Judge, we're going to take a -- we're going to take a short break. And thank you for all this. When we come back, we'll go to -- we'll recognize Senator Coburn, who's next. Thank you.

(RECESS)

LEAHY: Judge, thank you. And I do want to -- I do want to thank the press for cooperating. We've tried to make it as possible for TV and print and Congress.

And, Your Honor, you've been very gracious in that regard. And now I think we're coming close to the end of this round.

LEAHY: Whether it ***will*** be the last round or not ***will*** be up to the Republican side. But I would yield now to Senator Coburn, who's been waiting patiently.

Senator Coburn?

COBURN: Thank you, Mr. Chairman, and good morning again.

SOTOMAYOR: Good morning, sir.

COBURN: Yesterday, you -- when I was asking you about foreign law, you said I should read your speech, so I did. I read your speech. So I want to come back to that for a minute, because I want to ask you the same question I've asked the only other two ***Supreme Court*** nominees that have come before the committee while I've sat on this committee.

And I want to ask you the same question. I -- my first statements yesterday was asking about whether you disagreed with Alito and Thomas, and you said basically you agree. So on the basis of that agreement, ***will*** you affirm to this committee and the American public that, outside of where you are directed to do so through statute or through treaty, refrain from using foreign law in making the decisions that you make that affect this country and the opinions that you write?

SOTOMAYOR: I ***will*** not use foreign law to interpret the Constitution or American statutes. I ***will*** use American law, constitutional law to interpret those laws except in the situations where American law directs the ***court***.

COBURN: Thank you.

I want to ask you, also, another question that I asked both Justice Alito and Justice Thomas, and it's a problem I have with my colleagues here in the Senate. You've written extensively about some of the ambiguity that is in law. Would it be your opinion that we could do a much better job, maybe much clearer about what our intent is, when we write statutes?

And feel free to offend us all, because we sorely need it.

(LAUGHTER)

(UNKNOWN): Senator Coburn, speak for yourself.

(LAUGHTER)

COBURN: I'm speaking for the vast majority of American people. We do not do a thorough job in making clear our intent or the background of our intent when we send it.

And I'll give you an example, then. Two hundred and twenty times in the bill that just came out of the HELP Committee, we gave full shrift to the Secretary of HHS to write all the regulations without our intent, none of our intent. So you're -- as you sit -- if you sit -- on the ***Supreme Court***, I'm sure many of those are going to come before you without our intent, but with a bureaucracy's intent or an executive branch intent.

So the question I'm -- ask you, in your experience, since you've noted the ambiguity that's in the law, would you make it a recommendation to your friends you've now established, all 19 of us on the Judiciary Committee, that we might do a better job of being much more clear in what we intend?

SOTOMAYOR: It would be presumptuous of me to tell you how to do your job, but I do know, in my conversations virtually with all 89 senators, perhaps not all of them, but the vast majority of them, somewhere in the conversation, there was reference to their feelings like yours that a better job could be done by Congress in making its intent clearer.

I think that that's a question that senators think about, or at least the ones that I've spoken to. And I think that the process is always bettered for a ***court*** when Congress's intent is more clearly stated.

COBURN: Yes.

And there's no doubt in your mind that, if we were much more clear, guidance would be better given to the ***Supreme Court*** as conflicts over the statutes and laws come forward.

SOTOMAYOR: When Congress's intent is clear, the ***court*** applies that clear intent.

COBURN: Thank you. I want to go back to a couple of other areas that we talked about. One is -- is some answers to questions that you gave to -- questions from Senator Hatch.

Senator Hatch asked you to describe your understanding of the test or standard that the ***Supreme Court*** uses to determine whether a ***right*** should be considered fundamental. Specifically, he noted that, when determining whether a ***right*** is fundamental, the ***Supreme Court*** determined whether the ***right*** is deeply rooted in our nation's history and tradition, that it is necessary to an Anglo-American regime of ordered liberty, or that it is an enduring American tradition.

You refused to answer him, asserting that you responded that you haven't examined that framework in a while to know if that language is precise or not. "I'm not suggesting it's not," you said, "Senator. I just can't affirm that description."

Similarly, you refused to describe to me the test the ***court*** used to determine whether a ***right*** is a fundamental ***right***.

But in contrast to that, when Senator Kaufman asked you to give a very detailed description of the factor the ***courts*** consider when determining the doctrines of stare decisis, you stated and went through a long litany of the items with which the ***court*** uses with which to determine stare decisis. And you gave a fairly detailed analysis of that process and the doctrine of stare decisis.

And so I ask you again: Why can't you give us your description of what you think the parameters are that the ***court*** uses to determine a fundamental ***right***, in light of the 14th Amendment, incorporation ***right***?

SOTOMAYOR: All ***right***. That language has been used in certain ***cases*** respecting the question of the incorporation of certain amendments. The question of -- and the general framework ***will*** be used with respect to any consideration of -- of incorporation.

That wasn't, I thought, the question that was being asked of me. I don't remember that being the specific question. All I'm saying to you is that the framework has been discussed by the ***court***. In jurisprudence, it's developed over the last hundred years, subsequent to its established precedents on the Second Circuit.

One of the questions that the ***court*** ***will*** address, if it decides to address the incorporation of the Second Amendment, is whether, in those related areas, it ***will*** use or not use the doctrines or framework of that precedent. There may be arguments on one side why, on another side why not. What I'm trying to do is not prejudge an issue...

COBURN: Well, I'm not...

SOTOMAYOR: ... that is still pending before the ***court***.

COBURN: ... asking you to prejudge the issue. I'm asking you under what basis -- what is the -- what are the steps and the considerations, not the details of the ***case*** -- but, in other words, you can describe that for us in terms of stare decisis, but you can't describe that for us in terms of a fundamental ***right***.

And to me, that's concerning, because we should understand -- and that should be transparent to the people in this country, how that works.

SOTOMAYOR: Because that's the very issue the ***court***'s going to look at. The question of stare decisis is a general framework that one uses not in a particular context of a ***case*** I'm going to choose always to look at the outcome of the ***case*** in this way. It's...

COBURN: Your Honor, I understand that. If I can't get you to go there, I want to quit and go on to something else, if I can.

COBURN: I also asked you yesterday -- I want you to understand. You were raised in the Bronx. I was born in Wyoming and raised in Oklahoma. They're really geographically and culturally. Different areas. And so I want you to understand why I'm spending so much time talking with you about the Second Amendment.

My constituents in Oklahoma understand, as do most Americans, that the ***right*** to own guns hangs in the balance. It may very well hang in the balance with your ascendancy to the ***Supreme Court***. For us, one wrong vote on what we consider -- regardless of what you consider -- but what we consider a fundamental ***right*** could get the holding of Heller.

And I have some serious concerns on that issue. And I want to ask you a few more questions.

Yesterday, you said that, clearly, a constitutional ***right*** only works if you can enforce it. And I agree. Tell me how American citizens would be able to enforce their individual constitutional ***right*** to bear arms if you're holding that it does not apply to the states in your previous ***case*** as the appellate level becomes the law of the land?

SOTOMAYOR: The only statement I can start with is Maloney was decided on the basis of precedent. It was decided on precedent the ***Supreme Court***, in Heller, recognized as its precedent. It was based on Second Circuit precedent that had interpreted the constitutional -- the ***Supreme Court***'s prior precedent. It may well be, may not be, that Senator Hatch was ***right*** that the old precedent should be distinguished in a certain way. Others may be ***right*** that it shouldn't.

That issue was not the one the Maloney ***court*** decided Maloney on. It decided it on the rule of law. It was the rule of law that led Judge Easterbrook in the Seventh Circuit decision to say not what we should be doing, it's what the ***Supreme Court*** should do is to reexamine a precedent that's directly on point.

I can assure your constituents that I have a completely open mind on this question. I do not close my mind to the fact and the understanding that there were developments after the ***Supreme Court***'s rulings on incorporation that ***will*** apply to this question or be considered. I have a completely open mind.

COBURN: Do you not consider it ironic that the majority of the debate about the 14th Amendment in this country was about the taking of guns from freed slaves? Is that not ironic that we now have some kind of conflict that we're going to say that the whole reason in the debate about the 14th Amendment originated from states taking away the ***rights*** of people's fundamental ***right*** to defend themselves? Is that not an irony to you?

SOTOMAYOR: Senator, would you want a judge or a nominee who came in here and said, I agree with you; this is unconstitutional before I had a ***case*** before me, before I had both sides discussing the issues with me, before I spent the time that the ***Supreme Court*** spent on the Heller decision -- and that decision was mighty long. It went through two years of history, did a very thorough analysis and discussion back and forth on the prior opinions of the ***court***.

I don't know that that's a justice that I can be.

COBURN: Well...

SOTOMAYOR: I can only come to this...

COBURN: I agree with you, your honor. I don't want you to tell us how you're going to rule. But I asked you, isn't it ironic that in this country where our law comes from Blackstone forward, comes from English law, which our founding was perpetrated and carried out under this fundamental ***right***, and that we have the 14th Amendment ***right***, and that we have through legal -- what I would consider as a physician -- schizophrenia have decided that we can't decide whether this is a fundamental ***right***.

I'll finish with that point, other than to note the Presser reference was to privilege and immunity, not due process.

SOTOMAYOR: I understand the importance of the ***right***. It was recognized in Heller. And all I can continue to say, Senator, is I keep an open mind on the incorporation doctrine.

COBURN: I appreciate that, your honor. Thank you very much.

Let me go back to an area that I know is -- not everybody wants to ***hear*** about, but I think it's important. I asked you about where we were in terms of settled law on Roe and Doe, and -- and today I only want to focus on Roe and Doe, not Casey.

What was the state the law, say, in 1974, one year after Roe? What was -- where did we stand in that issue?

SOTOMAYOR: That women have the ***right*** to terminate their pregnancy in some situations without government regulation, and in others there would be permissible government regulation.

COBURN: Let me -- did any of the...

SOTOMAYOR: That's generally, because the ***court*** did look at other questions in terms of government regulation.

COBURN: Then let me ask you this. Did any of the laws of the 50 states regulating abortion survive the decision in Roe?

SOTOMAYOR: I don't know that I could answer that question, because I don't...

COBURN: OK. That's -- that's fair. They didn't. Was there any limit to the ***right*** to abortion either in the age of the child in the womb or the reasons for electing that surgery? And if so, what are those limits, according to Roe and Doe?

SOTOMAYOR: I -- Senator, I don't actually remember the ***court*** addressing that, because my studies have been on the undue burden test established in Casey. So my experience in this area or my knowledge, really, has been most particularly concentrated on the Casey standard, which is...

COBURN: I understand that.

SOTOMAYOR: ... what Casey did was change the Roe standard.

COBURN: Which goes back to why I asked you those two hypothetical -- not abstract, but hypothetical ***cases*** yesterday, the 28-week and a 38-week infant, for the -- the truth is, ever since January 22, 1973, you can have an abortion for any reason you want in this country. And even though Carhart II has now been ruled, that's -- a procedure that ***will*** eliminate that pregnancy is still legal and viable everywhere in this country.

COBURN: And so what I was trying to draw out to you is, where do we stand in this country, when 80 percent of the rest of the world allows abortion only before 12 weeks, only before 12 weeks? And yet we allow it for any reason at any time for any inconvenience under the health-of-the-woman aspect.

And that's the other reason why I raised the viability because technology and the state's interest under the ***Supreme Court*** ruling starts with viability. That's when a state can have interest. It's guaranteed, and there's limited ability states can have to control that after that.

Is the Casey ruling, the undue burden ruling test, is that a policy choice? I know it's the ***supreme*** law of the land today, but in your mind, would that represent a policy choice?

SOTOMAYOR: I understood that that was the ***court***'s framework for addressing both the woman's ***right*** to terminate her pregnancy under the Constitution and the state's ***rights*** to legislate and regulate in areas within its jurisdiction. So it was the ***court***'s way of attempting to address those two interests.

COBURN: And Justice Ginsberg's not real happy with those tests and neither was -- neither are several other members on the ***court***.

I want to end up. Our conversation, when we had a private conversation, I approached you about the importance of the ***cases*** that you decide to take if you're on the ***court***. Let me ask you a few questions, and I just want your opinion, and I'm not trying -- this is not to put you in any box, and if you think it is, please say so -- you're trying to put me in a box.

Do you believe that the ***court***'s abortion rulings have ended the national controversy over this issue?

SOTOMAYOR: No.

COBURN: OK. You don't have to name them, but do you think there are other similarly divisive issues that could be decided by the ***court*** in the future?

SOTOMAYOR: That, I can't answer.

COBURN: I don't want you to name any. I'm just saying, as you think through your mind, do you think there are other similarly divisive issues that are -- that we could have that would divide the country so remarkably?

You know, assisted suicide, euthanasia...

SOTOMAYOR: I can only answer what exists. People are very passionate about the issues they believe in. And so almost any issue could find an audience or a part of our population that's fervent about it.

COBURN: Which is a great answer because, on these divisive issues, is it better that the ***court*** decides them or elected representatives? If you find a preference, if you were king tomorrow and you said we're going to decide this

either in the ***Supreme Court*** or make -- force Congress to make the decision, which would you think would be better for us?

SOTOMAYOR: In the first instance, it's always Congress or a state passing regulation that the ***court*** is reviewing and determining whether it complies with constitutional limits. So it's not a choice of either or.

It's always Congress' first interest or the state legislators' first interest with the non-veto of a...

COBURN: I've got 30 seconds left. I want to ask you another question. You said just a minute ago people are passionate about what they believe in. And I've read your speeches and your publications, and I believe you're passionate. And I believe your speeches reflect your passions.

I look at myself. And when I give a speech, you know, I let it all go, what I really believe. I'm more measured -- some people wouldn't believe that -- up here, but I am more measured when I'm here, but when I give a speech.

And the problem I'm having is, I really see a dissonance about what you said outside of your jurisprudence. And the only thing -- the only -- the only ability we have to judge is what that passion has relayed in the past and your statements here, in combination with your judicial practice.

And so you are an admirable judge, an admirable woman. You have very high esteem in my eyes for both your accomplishments and your intellect. I have yet to decide where I'm going on this, because I am still deeply troubled because of the answers that I couldn't get in the 50 minutes that I've been able to ask and also deeply troubled because I believe what you've spoken to the law students, what you've spoken in your writings truly reflect your real passions, which I sometimes find run in conflict with what I think the Constitution has to say.

But I thank you for giving us such a cordial response, and I am mightily impressed.

Thank you, Mr. Chairman.

LEAHY: Thank you, Senator.

SOTOMAYOR: Thank you, Senator.

LEAHY: Senator Coburn, the Republican side has asked for a third round of those who want to have another 10 minutes, and so you ***will*** have a chance for more questions if you wish, because I'm trying to be fair to both sides, and I'll allow that.

Before we go to Senator Franken, though, and -- and while you're still here, Senator Coburn, I had reserved about 10 minutes of my time, just used a minute or so of it.

You spoke about the Second Amendment, which is a significant issue. And it is one people care about. You spoke about gun owners out west and your life in both Wyoming and in Oklahoma.

I look at that, of course, because both Wyoming and Oklahoma have more restrictive gun laws than my own state of Vermont. I could say that virtually every state has more restrictive gun laws than we do in Vermont.

I've been a gun owner since my early teens. I have -- I target shoot at my home in Vermont as a way of relaxation all the time, own numerous weapons, handguns and long guns.

I have not ***heard*** anything or read anything in the judge's writings or speeches that would indicate to me that in any way I have to worry that Vermont gun owners -- and many Vermonters are gun owners, it's just a way of life -- that that's going to change.

It's not going to change for me. It's not going to change for weapons my two sons, one a former Marine, own. And I ***will*** still be -- if Judge Sotomayor is on the ***Supreme Court***, I expect I'll still be back at my home, and you're welcome any time you'd like to come, and go target shooting -- and go target shooting with me there.

SESSIONS: Mr. Chairman, I would just say briefly that -- but it is a real pivotal time we are in, because if the decision by Judge Sotomayor becomes law, any city -- maybe not Vermont -- but any city or state in America could virtually, I believe, fully ban all firearms, and that's just the way we are, and you may -- we can discuss how much precedent had to bound you to reach that conclusion.

But this is not a little bitty issue. It's very important ***right*** now.

LEAHY: But states made laws that they've gone along. Vermont has decided not to have the restrictive laws that you have in Alabama, and -- but states have made up their mind.

Senator Franken?

FRANKEN: Thank you, Mr. Chairman.

I have a letter here from several former U.S. attorneys from the Southern District of New York, some of them Republican-appointed and supporting the Judge's confirmation, and I'll read a little bit from it.

She -- says that each had personal experience, including appearing before Judge Sotomayor. "She came to our ***cases*** without any apparent bias, probed counsel actively with insightful and, at times, tough questions, and demonstrated time and again that she not only listens but is often persuaded by counsel. In our matters, Judge Sotomayor's opinions reflect clear discipline and" -- you know, it's great. It's a great letter. And I would ask that it be entered into the record.

Sir, can I enter into the record?

LEAHY: (OFF-MIKE)

FRANKEN: OK. Thank you.

Thank you, Judge Sotomayor, for your patience and your terrific answers. We've ***heard*** a lot about your thoughts on specific ***cases*** and on principles of jurisprudence. I'd like to ask a much more general question, and one that I think is a really good question in job interviews. And that is, "Why do you want to be a ***Supreme Court*** justice?"

SOTOMAYOR: You're going to hate me for taking a few minutes, but can I tell you a story?

FRANKEN: I would love it.

SOTOMAYOR: Because it ***will*** explain who I am and why.

When Senator Moynihan first told me that he would consider sending my name to Senator D'Amato for consideration as a district ***court*** judge, he asked me to keep it quiet for a little bit of time, and I asked permission to tell my mom and Omar. He said, "Sure."

So, they were visiting, and I told them, and mom was very, very excited. And she then said, "How much more money are you going to earn?" And I stopped and I said, "I'm going to take a big pay cut."

Then, she stopped and she stopped, and she said, "Are you going to do as much foreign travel as you do now," because I was flying all over the U.S. and abroad as part of my private practice work. And I said, "Probably not, because I'm going to live in a courthouse in Lower Manhattan near where I used to work as a Manhattan D.A."

Now, the pause was a little longer, and she said, "OK." Then, she said, "Now, all the fascinating clients that you work with," and you may have ***heard*** yesterday I had some fairly well known clients, "You're going to be able to go traveling with them and with the new people you meet, ***right***?" And I said, "No. Most of them are going to come before me as litigants to the ***cases*** I'm ***hearing***, and I can't become friends with them."

SOTOMAYOR: Now the pause was really long, and she finally looked and she says, "Why do you want this job?" And Omar, who was sitting next to her, said, "Celina, you know your daughter"-- this is in Spanish -- "You know your daughter." This is in Spanish. "You know your daughter and her stuff with public service." That really has always been the answer.

Given who I am, my love of the law, my sense of importance about the rule of law, how central it is to the functioning of our society, how it sets us apart, as many senators have noted, from the rest of the world, have always created a passion in me, and that passion led me to want to be a -- a lawyer first and now to be a judge, because I can't think of any greater service that I can give to the country than to be permitted the privilege of being a justice of the ***Supreme Court***.

FRANKEN: Thank you.

Well, I, for one, have been very impressed with you, Judge. And I certainly intend to support your confirmation for the ***court***.

I guess there is another round. I thought I was going to be the only thing between you and the door, so I -- I -- I plan to just yield my -- all the rest of my time. But since I'm not, I'd like to ask you some -- no, I'm going to yield the rest of my time, if that's OK.

LEAHY: Thank you. Thank you very much, Senator Franken.

I ***will*** reserve my time. We'll have -- as Senator Sessions has asked us -- 10-minute rounds. I think they'll be primarily on the Republican side. I may speak again when they finish.

But we'll begin with you, Senator Sessions.

SESSIONS: Thank you. Thank you, Chairman Leahy.

I believe we've tried to meet our goal. I had a goal at the beginning that people would say this is one of the most fair and effective hearings we've ever had. I hope that has been the ***case***.

It's a great issue, the choice of putting someone on the United States ***Supreme Court***. And our nominee has a wonderful group of friends and a long and distinguished record, but a number of questions arose that are important.

The American people rightly are concerned that on important social issues that are not clearly stated in the Constitution, on important legal issues not clearly stated in our law, seem to be decided by unelected, lifetime-appointed ***courts***. Those are big, big issues that we've discussed here today I hope in a way that's healthy and positive.

Judge, one thing I ***will*** ask you -- I asked Justice Roberts. I'm not sure how much good it did, because he came back asking for a pay raise the next week, I think. But can you live on that salary that you're paid? We have the largest deficit in the history of the republic. A lot of people are going to have to tighten their belts. And are you prepared to do so, also?

SOTOMAYOR: I've been living on the salary for 17 years, so I -- I ***will*** suffer through more of it. It is difficult for many judges. The pay question is a significant one for judges who haven't received pay raises -- I think it's more than 20 years now, if I'm not mistaken.

SESSIONS: Well, you're saying pay raises based on -- they're getting pay raises almost every year, really, and the cost of living and that kind of thing. There was a big pay raise about 20 years ago.

I think that it's about four times the average family income in America.

I hope that you can live on it. If not, you probably shouldn't take the job.

All judges, whether they're activists or not, if asked, are going to say they follow the law. They just have a different view of the law; they just have a little -- a more looser interpretation of the law. So that's why we've pressed some of these issues. We want to determine as best we can just how tightly you believe you're bound by the law and how much flexibility you might think that you have as a judge to expand the law to suit, perhaps, a predilection in some policy area or another.

Attorney General Holder recently said that he thought we lacked courage in discussing the race issue, and I think that's something that we should take seriously. That was a valid comment.

In my opinion, we've had a higher level of discussion of that issue than -- since I've been in this committee. And I hope we've done it in a way that's correct, because this is so sensitive, and it's so important, and we need to get it ***right***, and we must be fair to everybody.

We know that there are ***cases*** when people have been discriminated against. They are entitled to a remedy. And the ***Supreme Court*** has been quite clear that, when you can show a history of discrimination -- and we've had that not just in the South, but in the South -- the jurisprudence has developed that it's appropriate for a judge to have a remedy that would encourage a move forward to a better opportunity those who've been held back. So that's good.

But the ***Supreme Court*** has also said that this is a dangerous philosophy, because, when you do that, you've identified one racial group and you've given them a preference over another. So it can be done in a legitimate way that's remedial.

And we still have vestiges of discrimination still in our society, and there ***will*** still be needs for remedial remedies. But I do think, as Justice Roberts said, the best way to end discrimination is quit doing it, and a lot of our orders in ***court*** decisions are such that they benefit one race over another solely because of their race. And it has to be tied to a remedy.

And that's why the ***Supreme Court*** has made clear that, when you do that, it must meet the highest scrutiny. The ***courts*** are supposed to review that very carefully, and the language they use is strict scrutiny. You don't favor one group over another without meeting that high standard.

So I'm -- I'm glad we've begun to discuss that, and we'll have the firefighters, and they'll be able to express their view on it in a little bit.

And, Judge, let me just say, before I go forward, that you've done a good job. You've had a good humor. You've been direct in your answers, and we appreciate that.

I ***will*** not support and I don't think any member of this side ***will*** support a filibuster or any attempt to block a vote on your nomination. It's a very important vote. We all need to take our time and think it through and cast it honestly, as the occasion demands. But I look forward to you getting that vote before we recess in August.

SESSIONS: Let me discuss -- Judge, I'll just express this as we go forward.

In your handling of the Ricci ***case***, I think it's fair to say that it was not handled in the regular order. You said in your opening statement that the "process of judging is enhanced when the arguments and concerns of the parties to the litigation are understood and acknowledged. That is why I generally structure my opinions by setting out what the law requires and then by explaining why a contrary position sympathetic or not is accepted or rejected. And that is how I seek to strengthen both the rule of law and faith in the impartially of our justice system," close quote.

I think that's a good statement, but I think what the panel did in this ***case*** did not meet that standard. I think it was action -- I would conclude, fairly I think -- contrary to the rules of the Second Circuit. Rule 32.1 says that summary orders are only appropriate where, quote, "a decision is unanimous and each judge of the panel believes no jurisprudential purpose would be served by an opinion."

And your clerk of your ***court*** there to the New York Times said this order, quote, "ordinarily issues when determination of the ***case*** revolves around well-settled principles of law."

And I would note that it was not a per curiam opinion at first. It was a summary order, which is even less of an impactful decision than the other.

But I think the ***Supreme Court*** made clear and I think most Americans understand that the firefighters ***case*** was more than that. It was a -- it had tremendous jurisprudential impact. And I think you were wrong to attempt to use the summary order, which, because it was objected to within your circuit, which resulted in a pretty roaring debate and discussion, and that you went forward, that you then did it in a per curium way, which at least gave it a little higher credence, but you did not write the -- an in-depth opinion at all. In fact, it was still a per curiam and short opinion.

And I understand, according to some of the writers, that Judge Sack, New York Times, I believe, quoted by Stuart Taylor in National Journal, that -- that he was the most reluctant to join the opinion. Judge Pooler was in the middle. And I guess it didn't reference the third judge, but apparently you were the third judge they were pushing for this kind of result.

Did you fail to show the courage that Attorney General Holder has asked us to show and discuss this issue openly with an in-depth opinion? And wouldn't we have been better off if the ***case*** had been handled in that fashion?

SOTOMAYOR: Sir, no, I didn't show a lack of courage. The ***court***'s decision was clear in both instances on the basis for the decision. It was a thorough, complete discussion of the issues as presented to the district ***court***. The circuit ***court***'s ruling was clear in both instances.

No, I did not lack courage.

SESSIONS: Well, I don't think it was a great district ***court*** opinion, but it was -- so I would disagree on that.

But, Mr. Chairman, you have been fair to us throughout. I don't know that every member of our side would use the time that they are allotted, and -- but I'm glad that you're allowing them the opportunity to do so.

LEAHY: Well, thank you. Thank you for that compliment, Senator.

I -- and I should compliment Senator Specter here. When he was chairman, I was ranking member, and we had to ***Supreme Court*** nominations. We tried to work out a time to (inaudible) everybody, and we did, and it was -- we were told by both Republicans and Democrats that nobody had complained about the amount of time. I've tried to do the same thing. It is a lifetime appointment. Been very impressed, of course, with our nominee, and that's been obvious.

Incidentally, she was originally nominated by President George H.W. Bush, and then by President Bill Clinton, now by President Barack Obama. President Clinton nominated her to the Second Circuit, and I have a letter addressed to the members of the committee -- well, actually to you and I, Senator Sessions, from former President Clinton.

And he speaks of her being able to make a unique contribution through her experience as a prosecutor and trial judge to the bench and hopes that we ***will*** have a speedy confirmation for her. And I ***will*** put that in the record.

One of the things is in -- also in trying to make sure everybody gets balanced time, but we've had -- a lot of us have served as either chairmen and ranking member of this committee. We know how important that is. And I use that to yield to Senator Hatch, who has had also the problem of having to schedule how things go. And I'll yield to you.

But thank you, Jeff. I appreciate that.

HATCH: Well, thank you, Mr. Chairman, and I echo Jeff's statement here.

Judge, you've been great throughout this process, and I appreciate it. But I have some questions I'd like to ask, but I think you can answer yes or no. Of course, you can qualify if you feel like it. But I would like to get through these, because they're important questions to me and millions of other people that I represent.

Judge, from 1980 to 1992, you were actively involved with the Puerto Rican Legal Defense and Education Fund. That's a well-known civil ***rights*** organization in our country.

Among many other activities, this group files briefs in ***Supreme Court cases***. You served in nearly a dozen different leadership positions there, including serving on and chairing the Litigation Committee.

The New York Times has described you as a, quote, "Top policymaker," unquote, with the group, and said that you would meet frequently with the legal staff, review the status of ***cases***, and played an active role in the fund's litigation. Lawyers at the fund described you as, quote, "An involved and ardent supporter of their various legal efforts during your time with the group," unquote.

The Associated Press looked at documents from your service with the fund that showed that you were, quote, "Involved in making sure that the ***cases***, the fund's ***cases***, handled were in keeping with its mission statement and were having an impact."

And when Senator Gillibrand introduced you to this committee on Monday, she compared your leadership role with the fund to Justice Ruth Bader Ginsburg's participation in the ACLU Women's ***Rights*** project or Justice Thurgood Marshall's participation on behalf of the NAACP Legal Defense and Education Fund.

So let me ask you just about a few abortion ***cases*** in which the fund filed briefs. And I do believe you're going to answer these yes or no, but again, certainly qualify if you feel like it.

I'm not asking for your present views, either personal or legal, let's get that straight, on these issues, nor am I asking how you might rule on these issues in the future. I just want to make that clear.

HATCH: I might say that -- like I say, these are important issues. In one ***case***, Williams v. Zbaraz and Harris v. McRae, the fund joined an amicus brief asking the ***Supreme Court*** to overturn restrictions on taxpayer funding for abortions.

The brief compared refusing to use Medicaid funds to pay for abortions to the Dred Scott ***case***, the Dred Scott v. Sandford decision that refused citizenship to black people in our society and -- and treated them terribly.

At the time, did you know that the fund was filing this brief? At the time, did you -- well, let me ask you each one. At the time, did you know the fund was filing this brief?

SOTOMAYOR: No, sir.

HATCH: OK. At the time, did you know that the brief made this argument?

SOTOMAYOR: No, sir.

HATCH: At the time, did you support the fund filing this brief that made this argument?

SOTOMAYOR: No.

HATCH: At the time, did you voice any concern, objection, disagreement or doubt about the fund filing this brief or making this argument?

SOTOMAYOR: I was not like Justice Ginsburg or Justice Marshall. I was not a lawyer on the fund as they were, with respect to the organizations they belonged to. I was a board member.

And it was not my practice and not that I know of, of any board member, although maybe one with civil ***rights*** experience would have. I didn't have any in this area, so I never reviewed the briefs.

HATCH: All ***right***. In another ***case***, Ohio v. Akron ***Center*** for Reproductive Health, the fund argued that the First Amendment ***right*** to freely exercise religion undermines laws requiring parental notification for minors getting abortions. Now, at the time, did you know that the fund was filing this brief?

SOTOMAYOR: No, no specific brief. Obviously, it was involved in litigation, so I knew generally they were filing briefs, but I wouldn't know until after the fact that a brief was actually filed. But I wouldn't review it.

HATCH: The same questions on this. At the time, did you know that the brief made this argument? At the time, did you support the fund filing this brief that made this argument? And at the time, did you voice any concern, objection, disagreement, or doubt about the fund filing this brief or making this argument?

SOTOMAYOR: No, because I never reviewed the brief.

HATCH: That's fine. I'm just going to establish this.

In another ***case***, Planned Parenthood v. Casey, the fund argued against a 24-hour waiting period for obtaining an abortion. So, again, those questions. At the time, did you know that the fund was filing this brief? Did you know that the brief made this argument? Did you support the fund filing this brief that made this argument? And did you voice any concern, objection, disagreement or doubt about the fund filing this brief or making this argument?

SOTOMAYOR: For the same reason, no.

HATCH: OK.

Now, Judge, I'm going to be very easy on you now, because I -- I invited constituents in Utah to submit questions and got an overwhelming response. Many of them submitted questions about the Second Amendment and other issues that have already been discussed.

But one constituent asked whether you see the ***courts***, especially the ***Supreme Court***, as an institution for resolving perceived social injustices, inequities and disadvantages. Now, please address this both in terms of the justices' intention and the effect of their decisions.

That was the question. And I thought it was an interesting question.

SOTOMAYOR: No, that's not the role of the ***courts***. The role of the ***courts*** is to interpret the law as Congress writes it. It may be the effect in a particular situation that, in the ***court*** doing that, in giving effect to Congress's intent, it has that outcome, but it's not the role of the judge to create that outcome. It's to interpret what Congress is doing and do what Congress wants.

HATCH: Great.

One final question, Judge. You have described your judicial philosophy in terms of the phrase "fidelity to the law." Would you agree with me that both majority and dissenting justices in last year's gun ***rights*** decision in District of Columbia v. Heller were doing -- doing their best to be faithful to the text and history of the Second Amendment?

SOTOMAYOR: Text and history, how precedent had analyzed it, yes.

HATCH: OK. In other words, do you believe that they were exhibiting fidelity to the law as they understood it?

SOTOMAYOR: Yes. Yes.

HATCH: OK. Then I take it that you would agree that the justices in the majority were not engaging in some kind of ***right***-wing judicial activism that some have characterized the decision? Is that fair to say?

SOTOMAYOR: It is fair for me to say that I don't view what a ***court*** does as activism. I view it as each judge principally interpreting the issue before them on the basis of the law.

HATCH: Great. Well, let me just ask you one other constituent question. It's a short one. Another constituent asked, which is more important or deserves more weight, the Constitution as it was originally intended or newer legal precedent?

SOTOMAYOR: What governs always is the Constitution...

HATCH: Yes, which -- which -- which is more important or deserves more weight, the actual wording of the Constitution as it was originally intended or newer legal precedent? That's a tough question.

SOTOMAYOR: The intent of the founders was set forth in the Constitution. They created the words; they created the document. It is their words that is the most important aspect of judging. You follow what they said in their words, and you apply it to the facts you're looking at.

HATCH: Well, thank you, Judge.

I'll give back the remainder of my time, Mr. Chairman.

LEAHY: Thank you. Thank you, Senator Hatch.

And I just would note, we do have this letter in the -- in the record from PRLDEF, the Puerto Rican Legal Defense and Education Fund, in which they say, "Neither the board as a whole nor any individual member selects litigation to be undertaken or controls ongoing litigation." I just think that should be very, very clear here. Probably why they get support from the United Way and a number of other organizations.

Senator Grassley?

GRASSLEY: Good morning, Justice -- Judge Sotomayor. Yesterday, you said you would take a look at Baker v. Nelson, so I ask this question. You said you hadn't read Baker in a long time and would report back. You added that if Baker was precedent, you would uphold it based upon stare decisis, consistent with your stance in ***cases*** like Keyhole (ph), Roe v. Wade, Griswold, many others that you mentioned this week.

Baker involved an appeal from the Minnesota ***Supreme Court*** which held that a Minnesota law prohibiting same-sex marriage did not violate the 1st, the 8th, the 9th or the 14th Amendment to the Constitution. The ***Supreme Court***, in a very short ruling, concluded on its merits that, quote, "The appeal is dismissed for want of substantial federal question."

Baker remains on the books as precedent. ***Will*** you respect the ***court***'s decision in Baker based upon stare decisis? And if not, why not?

SOTOMAYOR: As I indicated yesterday, I didn't remember Baker. And if I had studied it, it would have been in law school. You raised the question, and I did go back to look at Baker. In fact, I don't think I ever read it, even in law school.

Baker was decided at the time where jurisdiction over federal questions was mandatory before the ***Supreme Court***. And the disposition by the ***Supreme Court***, I believe, was what you related, Senator, which is a dismissal of the appeal raised on the Minnesota statute.

What I have learned is the question of -- it's what the meaning of that dismissal is is actually an issue that's being debated in existing litigation. As I indicated yesterday, I ***will*** follow precedent according to the doctrine of stare decisis. I can't prejudge what the precedent means in the issue comes before -- what a prior decision of the

court means and its applicability to a particular issue is until that question is before me as a judge or a justice, if that should happen.

So at bottom, because the question is pending before a number of ***courts***, the ABA would not permit me to comment on the merits of that. But as I indicated, I affirm that, with each holding of the ***court*** to the extent it is pertinent to the issues before the ***court***, it has to be given the effects of stare decisis.

GRASSLEY: Am I supposed to interpret what you just said as anything different than what you said over the last three days in regard to Kelo or Roe or Griswold or any other precedents you said or precedents? Or would it be exactly in the same tone as you mentioned in previous days are previous precedents under stare decisis?

SOTOMAYOR: Well, those ***cases*** have holdings that are not open to dispute. The holdings are what they are. Their application to a particular situation ***will*** differ on what facts those situations present.

The same thing with the Nelson ***case*** which is what does the holding me. And that's what I understand is being litigated because it was a one-line decision by the ***Supreme Court*** and how it applies to a new situation is what's also -- would come before a ***court***.

GRASSLEY: OK. My last question for your appearance before your committee involves a word I don't think that's showed up here yet -- vacuums. And it's a question that I asked Judge Roberts and Justice Alito. And it comes from a conversation I had -- a dialogue I had at a December ***hearing*** when Judge Souter was before us, now Justice Souter, involving the term "vacuums in law."

And I think the term "vacuums in law" comes from Souter himself as I'll read to you in just a moment. I probed Judge Souter about how he would interpret the Constitution and statutory law. In his response, Justice Souter talked about the ***court*** filling vacuums left by Congress. And there's several quotes that I can give you from 19 -- I guess it was 1990. But I ***will*** just read four or five lines of Judge Souter speaking to this committee.

GRASSLEY: Because if, in fact, the Congress ***will*** face the responsibility that goes with the 14th Amendment powers, then by definition, there, to that extent, not going to be a kind of vacuum of responsibility created in which the ***courts*** are going to be forced to take on problems which sometimes in the first instance might be better addressed by the political branches of government.

Both prior to that and after that, Judge Souter talked a lot about maybe the ***courts*** needed to fill vacuums. Do you agree with Justice Souter? Is it appropriate for the ***courts*** to fill vacuums in the law?

And let me quickly follow it up. Do you expect that you ***will*** fill in vacuums in the law left by Congress if you're confirmed to be an associate justice?

SOTOMAYOR: Senator Grassley, one of the things I say to my students when I'm teaching, brief writing, I start by saying to them, it's very dangerous to use analogies, because they're always imperfect. I wouldn't ever use Justice Souter's words, because they are his words, not mine.

I try always to use -- and this is what I tell my students to do -- is use simple words. Explain what you're doing without analogy. Just tell them what you're doing. And what I do is not described in the way -- or I wouldn't describe it in the way Justice Souter did.

Judges apply the law. They apply the holdings of precedent. And they look at how that fits into the new facts before them.

But you're not creating law. If that was an intent that Justice Souter was expressing -- and I doubt it -- that's not what judges do. Judges do what I just described, and that's not, in my mind, acting for Congress. It is interpreting Congress's intent as expressed in a statute and applying it to the new situation.

GRASSLEY: Thank you.

I'm done, Mr. Chairman.

LEAHY: Thank you very much, Senator Grassley.

Senator Kyl, did you want another round?

KYL: Yes, thank you, Mr. Chairman. I'm not sure how long this ***will*** take.

But, Judge, I think maybe we're, to use the president's analogy that we talked about in my very first question to you, we may be in about the 25th mile of the marathon, and I might even be persuaded to have a little empathy for this last mile here. I think you're just about done.

I wanted to go over three quick things, if I could. The first is the exchange that we had this morning regarding the decision in Ricci in which you insisted that you were bound by ***Supreme Court*** and Second Circuit precedent. I quoted from the ***Supreme Court*** decision to the effect that I -- I believe that that contradicted your answer.

If you have anything different to say than what you said this morning, I wanted to give you another opportunity to say it. We don't need to re-plow the same ground. But is there anything different that you would like to offer on that?

SOTOMAYOR: Senator, after each round, I go to the next moment. Without actually looking at the transcript, I couldn't answer that question. It's just impossible to ***right*** now. I'm glad you're giving me the opportunity, but I would need a specific question as to something I said and what I meant before I could respond.

KYL: All ***right***. Since we ***will*** probably have a few questions as follow up in writing and you'll be providing us answers to those, maybe the best thing is just to ask a general question or, if there is something specific that I can relate it to, and then you can respond in that way.

SOTOMAYOR: Thank you, sir.

KYL: You're very welcome.

Now, the second question has to do with the Second Amendment. In the Maloney ***case***, you held that it was not incorporated into the 14th Amendment. And what -- well, maybe I should ask you what that means. Let me ask you in two separate situations, as a practical matter.

If the ***Supreme Court*** does not review that issue, then is it the ***case*** that, at least in the Second Circuit and the Seventh Circuit, the states that are in the Seventh and Second Circuit, those states could pass laws that restrict, or even prohibit, people from owning firearms?

SOTOMAYOR: I do not hold -- it was not incorporated. I was on a panel that viewed ***Supreme Court*** precedent and Second Circuit precedent as holding that fact.

KYL: ***Right***.

SOTOMAYOR: You can't talk in an absolute. There always has to be a reason for why a state acts. And you -- also has to be a reason for the extent of the regulation the state passes.

And so the question in Maloney for us was a very narrow question, which was are these nunchuck sticks, and I have described them previously as these martial arts sticks tied together by a belt that, when you swing them, if somebody comes by, there could be -- it's not serious deadly force in some situations -- whether the state had a reason recognized in law for determining that it was illegal to own those sticks.

The next issue that would come up by someone who challenged the regulation would be what's the nature of the regulation, and how does it comport with the reason the state gives for the actions it did. So it -- absolute regulation, it's not what I would answer. I would answer with the regulation...

KYL: Let me -- I -- excuse me. I appreciate your answer.

What would be the test that would be applied by a ***court*** in the event that a state said because of the danger that firearms to present to others, we're going to require that only law enforcement personnel can own firearms in our state, and someone challenged that as an affront to their ***rights***, they would say the federal government can't take that ***right*** away from us because of the Second Amendment.

What would the test be that the ***court*** would apply to analyze the regulation of the state?

SOTOMAYOR: Well, that's very similar, although not exactly, if I understood it, to the Heller, the facts in Heller. And the ***court*** there said that the regulation in D.C. was broader than the interest asserted.

That question in a different state would depend on the circumstances of it's barring...

KYL: Well, is -- excuse me for interrupting.

Is there no standard to -- I mean, we're familiar with strict scrutiny, the reasonable basis test, and so on. Is there a standard of which you're aware that the ***court*** would use to examine the state's ***right*** to impose such a restriction, given that the Second Amendment would be deemed not incorporated?

SOTOMAYOR: In Maloney, the ***court*** addressed whether there was a violation of the equal protection statute of -- equal protection of the 14th Amendment and determined that rational basis review. Now that I understand that you were asking about a standard...

KYL: Sure. I'm sorry. I didn't (inaudible)...

SOTOMAYOR: Of review that's...

KYL: Now, of the tests that the ***court*** applies traditionally, the rational basis is the least difficult of states to meet in justifying a regulation, is it not?

SOTOMAYOR: I'm not going to be difficult with you. It's the one where you don't need a -- an exact fit between the exact injury that you're seeking to remedy in the legislation...

KYL: Could I...

SOTOMAYOR: So it does have more...

KYL: Flexibility for the...

SOTOMAYOR: Well, flexibility is the wrong -- more a deference to congressional findings about what...

KYL: Or -- or state law.

SOTOMAYOR: Exactly.

KYL: ***Right***. You -- you know that the -- the general rule that the rational basis test is the least intrusive on a state's ability to regulate, whereas strict scrutiny is -- is the most intrusive on the state's ability. Is that a fair characterization?

SOTOMAYOR: It's a fair characterization that when you have strict scrutiny, the government's legislation must be very narrowly tailored.

KYL: ***Right***. So...

SOTOMAYOR: When a rational basis, there is a broader breadth for the states to act.

KYL: So wouldn't it be correct to say that as between the application of the Second Amendment to the District of Columbia, for example, compared to a situation in which a state or city imposed a regulation on the control of firearms, that it would be much more likely that the ***court*** would uphold the state's ability or the city's ability to regulate that than it would -- in the abstract, I'm talking about here -- than it would a federal attempt to regulate it under the Second Amendment?

SOTOMAYOR: That's a problem within the abstract, because what the ***court*** would look at is whatever legislatures -- state legislative findings there are and the fit -- I'm -- fit between those findings and the legislation.

KYL: ***Right***. And -- and I appreciate that you're not going to -- without knowing the facts of every ***case***, you can't opine. But just as a general proposition, obviously, if the amendment is incorporated, it ***will*** be much more difficult for a government to impose a standard than if it is not incorporated.

SOTOMAYOR: Well, the standard of review, even under the incorporation doctrine, was actually not decided in Heller. And that issue wasn't resolved, so what that answer ***will*** be is actually an open question that I couldn't even discuss in a broad term, other than to just explain that...

KYL: All ***right***. Let -- let me ask you -- again to interrupt, because we're less than two minutes now -- if Senator Leahy says, gee, in Vermont he's not worried about the fact that the Second Amendment isn't incorporated. Maybe if I lived in New York or Massachusetts or some other state, I would be worried.

The question, I do, I would ask here is can you understand why someone who would like to own a gun would be concerned that if the amendment is not deemed incorporated into the 14th Amendment as a fundamental ***right***, that it would be much more likely that the state or the city in which that individual lived could regulate his ***right*** to own a firearm?

SOTOMAYOR: Very clear to me from the public discussions on this issue that that is a concern for many people.

KYL: Final question. You're familiar -- this goes to the foreign law issue -- you're familiar with the difference in the treatment of foreign law by the U.S. ***Supreme Court*** in Kennedy v. Louisiana on the one hand and in Roper v. Simmons on the other.

In Roper the ***court*** ruled it was cruel and unusual to apply the death penalty and drew substantially on foreign law. In Kennedy v. Louisiana, an adult was convicted of raping an 8-year-old child, and the same five justices who wrote the opinion in Roper ruled that it was cruel and unusual to sentence the individual to death, but cited no foreign law whatsoever.

Some have said that a discussion of foreign law was left out of the Kennedy ***case*** because it actually cut against the majority's opinion. What do you think?

SOTOMAYOR: I can't speak for why they did. I can only do what you did, which is to describe what the ***courts*** did in what they said. It's impossible for me to speak about why a particular ***court*** acted in a particular way or why a particular justice analyzed an issue outside of what the opinion says.

KYL: I'll just tell you, my view is it kind of tells me that if the ***court*** can find some foreign law that supports its opinion, it might use it. If the opinion is on the other side, then it doesn't.

In my view, that's one of the problems with using foreign law. And I gather from what you said earlier, you don't think the ***court*** should use foreign law, either, except in ***cases*** of treaty and other similarly appropriate ***cases***.

SOTOMAYOR: I do not believe that foreign law should be used to -- to determine the result under constitutional law or American law, except where American law directs.

KYL: Thank you very much. Thank you, Judge.

LEAHY: Thank you.

Senator Graham?

GRAHAM: Thank you, Judge. I guess we do get to talk again.

When you look at the fundamental ***right*** aspect of the Second Amendment, you'll be looking at precedent, you ***will*** be looking in our history, you ***will*** be looking at a lot of things. Hopefully, you've talked to your godchild, who's an NRA member. You can be -- you can assimilate your view of what America is all about when it comes to Second Amendment.

But one thing I want you to know, that Russ Feingold and Lindsey Graham have reached the same conclusion, so that speaks strong of the Second Amendment, because we don't reach the same conclusion a lot. So I just want you to realize that this fundamental ***right*** issue of the Second Amendment is very important to people throughout the country, whether you own a gun or not, and it's one of those things that I think, when you look at, you'll find that America, unlike other countries, has a unique relationship to the Second Amendment.

Today, Khalid Sheikh Mohammed is appearing in a military tribunal at Guantanamo Bay, Cuba. He ***will*** be appearing before a military judge, and he'll be represented by military lawyers and there ***will*** be a military prosecutor.

And the one thing I want to -- to say here, that I've been a judge advocate, a member of the military legal community for well over 25 years. And to America and the world who may be watching this, I have nothing but great admiration and respect for those men and women who serve in our Judge Advocate Corps who ***will*** be given the obligation by our nation to render justice against people like Khalid Sheikh Mohammed.

And I just want to say this, also, on this historic day. To those who wonder why we do this, why do we give him a trial? Why are we so concerned about him having his day in ***court***? Why do we give him a lawyer when we know what he would do to our people in his hands?

I would just like to say that it makes us better than him. It makes us stronger for us to give the mastermind of 9/11 his day in ***court***, represented by counsel. And any verdict that comes his way won't be based on prejudice or passion or religious bigotry; it ***will*** be based on facts.

Now, let's talk about what this nation is facing. This Congress, Judge, is trying to reauthorize the Military Commission Act, trying to find a way to bring justice to the enemies of this country in a way that ***will*** make us better in the eyes of the world and also make us safer here at home. Have you had an opportunity to look at the Boumediene, Hamdan, Hamdi decisions at the ***Supreme*** -- Rasul ***cases***?

SOTOMAYOR: I have, sir.

GRAHAM: OK. You ***will*** be called upon in the future, if you get on the ***court***, to pass some judgment over the enactments of the Congress. When it comes to civilian criminal law, do you know of any concept in civilian law that would allow someone be held in criminal law indefinitely without trial?

SOTOMAYOR: When you're talking about civilian criminal law, you're talking about...

GRAHAM: Domestic criminal law.

SOTOMAYOR: Domestic criminal prosecutions.

GRAHAM: ***Right***.

SOTOMAYOR: After conviction, defendants are often sentenced...

GRAHAM: I'm talking about you're held in jail without a trial.

SOTOMAYOR: The speedy trial act, and there are constitutional principles that require a speedy trial, so in answer to -- no, there is no...

GRAHAM: That is a correct statement of the law, Judge, in my opinion. You cannot hold someone in domestic criminal settings indefinitely without trial.

Under military law, the law of armed conflict, is there any requirement to try in a ***court*** of law every enemy prisoner?

SOTOMAYOR: There, you have an advantage on me.

GRAHAM: Well, I...

SOTOMAYOR: Because I -- I -- I'm sorry.

GRAHAM: Fair enough. The point I'm trying to make, and check if I'm wrong. You'll have some time to do this. As I understand military law, if we, as a nation, one of our airmen is downed in a foreign land, held by an adversary, it's my understanding we can't demand under the Geneva Convention that that airman or American soldier go to a civilian port.

That's not the law. If we have a pilot in the hands of the enemy, there is no requirement of the detaining force to take that airman before a civilian judge. I think that's the law. There is no requirement under military or the law of armed conflict to have civilian judges review the status of our prisoner. That's a ***right*** that we do not possess.

The question for the country and the world, if people who operate outside the law of armed conflict that don't wear uniforms, are they going to a better deal than people that play by the rules? And as we discuss these matters, I hope you take into account that there is no requirement to try everyone held as an enemy prisoner, and do you believe that there's a requirement in the law that, as a certain point in time, that a prisoner has to be released -- an enemy prisoner -- just through the passage of time?

SOTOMAYOR: I can only answer that question narrowly. And narrowly because the ***court***'s holdings have been narrow in this area. First, military commissions and proceedings under them have been a part of the country's history.

GRAHAM: ***Right***.

SOTOMAYOR: And so there's no question that they are appropriate in certain circumstances.

GRAHAM: And, Judge, they ***will*** have to render justice, they ***will*** have to meet the standards of who we are. My point to some critics on the ***right*** who've objected to my view that we ought to provide more capacity is that whatever the flag flies and whatever courtroom, there's something attached to that flag. So we're going to work hard to create a military commission consistent with the values of this country.

But I just want to let you know that, under traditional military law, it is not required to let someone go who is properly detained as part of the enemy force because of the passage of time. Judge, it would be crazy for us to capture someone, give them adequate due process, independent judicial review, and the judges agree with the military you're part of Al Qaida, you represent a danger, and say at a magic point in time, "Good luck. You can go now."

The people that we're fighting, if some of them are let go, they're going to try to kill us all. And it doesn't make us a better nation to put a burden upon ourselves that no one else has ever accepted.

So what my goal, working with my colleagues, is to have a rational system of justice that ***will*** make sure that every detainee has a chance to make the argument, "I'm being improperly held," have a day in ***court***, have a

review by an independent judiciary, but we do not take it so far as that we can't keep an Al Qaida member in jail until they die, because some of them deserve to be in jail until they die.

And I want the world to understand that America is not a bad place because we ***will*** hold Al Qaida members under a process that is fair, transparent until they die.

My message to those who want to join this organization or are thinking about joining it is that you can get killed if you join and you may wind up dying in jail.

As this country and this Congress comes to grips with how to deal with an enemy that doesn't wear a uniform, that doesn't follow any rules, that would kill everybody they could get their hands on in the name of religion, that not only we focus, Senator Whitehouse, on upholding our values, that we focus on the threat that this country faces in an unprecedented manner.

So, Judge, my last words to you ***will*** be: If you get on this ***court*** and you look at the Military Commission Act that the Congress is about to pass, when you look at whether or not habeas should be applied to a wartime battle-filled prison, please remember, Judge, that we're not talking about domestic criminals who robbed a liquor store.

We're talking about people who have signed up for a cause that's every bit as dangerous as any enemy this country has ever faced and that this Congress, the voice of the American people who stand for re- election, has a very difficult assignment on its hands.

There are lanes for the executive branch, the judicial brand, and the congressional branch, even in a time of war. Please, Judge, understand that 535 members of Congress cannot be the commander-in- chief and that unelected judges can't run the war.

Thank you, and Godspeed.

SOTOMAYOR: Thank you, Senator.

LEAHY: Senator Cornyn?

CORNYN: You're almost through, Judge. I just want to ask three relatively quick items just to -- that I was not able to get to earlier just for your brief comment.

You wrote in 2001 that neutrality and objectivity in the law are a myth. You said that you agreed that, quote, "there is no objective stance, but only a series of perspectives, no neutrality, no escape from choice in judging." Would you explain what that means?

SOTOMAYOR: In every single ***case***, and Senator Graham gave the example in his opening statement, there are two parties arguing different perspectives on what the law means. That's what litigation is about. And what the judge has to do is choose the perspective that's going to apply to that outcome.

So there is a choice. You're going to rule in someone's favor. You're going to rule against someone's favor. That's the perspective of the lack of neutrality. It's that you can't just throw up your hands and say, "I'm not going to rule." Judges have to choose the answer to the question presented to them.

And so that's what that part of my talking was about, that there is choice in judging. You have to rule.

CORNYN: You characterized in your opening statement that your judicial philosophy is one of fidelity to the law. Would you agree that both the majority and the dissenting justices in last year's landmark gun ***rights*** ***case***, the D.C. v. Heller ***case***, were each doing their best to be faithful to the text and the history of the Second Amendment? In other words, do you believe that they were exhibiting fidelity to the law?

SOTOMAYOR: I think both were looking at the legal issue before them, looking at the text of the Second Amendment, looking at its history, looking at the ***court***'s precedent over time and trying to answer the question that was before them.

CORNYN: Do you think it's fair to characterize the five justices who affirmed the ***right*** to keep and bear arms as engaged in ***right***-wing judicial activism?

SOTOMAYOR: It's -- that -- I don't use that word for judging. I eschew labels of any kind. That's why I don't like analogies and why I prefer, in brief writing, to talk about judges interpreting the law.

CORNYN: What about the 10 Democratic senators, including Senator Feingold, who's been mentioned earlier, who joined the brief, the amicus brief to the U.S. ***Supreme Court*** urging the ***court*** to recognize the individual ***right*** to keep and bear arms? Do you think, by encouraging an individual ***right*** to keep and bear arms, that somehow these senators were encouraging the ***court*** to engage in ***right***-wing judicial activism?

SOTOMAYOR: I don't describe people's actions with those labels.

CORNYN: I appreciate that.

You testified earlier today that you would not use foreign law in interpreting the Constitution statues. I'd like to contrast that statement with an earlier statement that you made back in April. And I quote, "International law and foreign law ***will*** be very important in the discussion of how to think about unsettled issues in our legal system. It is my hope that judges everywhere ***will*** continue to do this," close quote.

Let me repeat the words that you used three months ago. You said, "Very important," and you said, "Judges everywhere." This suggests to me that you consider the use of foreign law to be broader than you indicated in your testimony earlier today. Do you stand by the testimony you gave earlier today? Is it -- or do you stand by the speech you gave three months ago, or can you reconcile those for us?

SOTOMAYOR: Stand by both, because the speech made very clear in any number of places where I said you can't use it to interpret the Constitution or American law, and I went through -- not a lengthy because it was a shorter speech -- but I described the situations in which American law looks to foreign law by its terms, meaning, it's counseled by American law.

My part of the speech said people misunderstand what the word "use" means. And I noted that use appears to be -- to people to mean if you cite a foreign decision, that's means it's controlling an outcome or that you are using it to control an outcome. And I said, no. You think about foreign law as a -- and I believe my words said this -- you think about a foreign law the way judges think about all sources of information, ideas. And you think about them as ideas both from law review articles and from state ***court*** decisions and from all the sources, including, Wikipedia, that people think about ideas. OK?

They don't control the outcome of the ***case***. The law compels that outcome. And you have to follow the law. But judges think. We engage in academic discussions. We talk about ideas. Sometimes, you'll see judges who choose -- I haven't -- it's not my style, OK? But there are judges who ***will*** drop a footnote and talk about an idea. I'm not thinking that they're using that idea to compel a result. It's an engagement of thought.

But the outcome, as in, you know, you could always find an exception, I assume if I looked hard enough. But in my review, judges are applying American law.

CORNYN: Well, Your Honor, why would a judge cite foreign law unless it somehow had an impact on their decision on their decision making process?

SOTOMAYOR: I don't know why other judges do it. As I explained, I haven't. But I look at the structure of what the judge has done and explained and go by what that judge tells me. There are situations -- that's as far as I can go.

CORNYN: You said at another occasion that you find foreign law useful because it, quote, "gets the creative juices flowing," close quote. What does that mean?

SOTOMAYOR: To me, I am a part academic. Please don't forget that I taught at two law schools. I do speak more than I should.

(LAUGHTER)

And I think about ideas all the time. And so, for me, it's fun to think about ideas. You sit at a lunchroom among judges, and you'll often ***hear*** them saying, did you see what that law school professor said. Or did you see what some other judge wrote and what do you think about it and -- but it's just talking. It's just sharing ideas.

What you're doing in each ***case*** -- and that's what my speech said, you can't use foreign law to determine the American Constitution. It can't be used neither as a holding or precedent.

CORNYN: Do you agree with me that if the American people want to change the Constitution, that is a ***right*** reserved to them under the Constitution to amend it and change it rather than to have judges, under the guise of interpreting the law, in effect, change the Constitution by judicial fiat?

SOTOMAYOR: In that regard, the Constitution is abundantly clear. There is amendment process set forth there. It controls how you change the Constitution.

CORNYN: And I would just say, if academics or legislators or anybody else who's got creative juices flowing from the invocation of foreign law, if they want to change the Constitution, my contention is the most appropriate way to do that is for the American people to do it through the amendment process, rather than for judges to do it by relying on foreign law.

SOTOMAYOR: We have no disagreement.

CORNYN: Thank you very much, your honor.

LEAHY: Thank you.

Senator Coburn?

COBURN: Thank you, Mr. Chairman.

I'm going to go into an area that we have not covered, no one has covered yet. And I'm reminded of Senator Sessions talking to you about pay. You know, I would predict to you, in about 15 -- 15 or 18 years -- I'm sorry?

(UNKNOWN): (OFF-MIKE)

COBURN: ... pay, in 10 or 15 years -- judicial pay -- we may not be able to pay your salary, if you look -- 9 years from now, we're going to have $1 trillion worth of interest on the national debt. It's not very funny. What it does is it undermines the freedom and security of our children and our grandchildren.

And I want to go to -- to Madison. Madison's the father of our Constitution, and I want to get your take on three issues: one, the commerce clause; two, the general welfare clause; and, number three, the 10th Amendment.

And I don't know if you've read the Federalist Papers, but I find them very interesting to give insight into what our founders meant, what they said when they wrote our Constitution.

In Federalist 51, Madison expressed the importance of a restrained government by stating, "In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed and, in the next place, oblige it to control itself."

Do you believe that our federal ***courts*** enable the federal government to exceed its intended boundaries by interpreting Article I's commerce clause and necessary and proper clause to delicate virtual unlimited authority to the federal government?

SOTOMAYOR: The ***Supreme Court***, in at least two rules or one, has said there are limits to all powers set forth in the Constitution. And -- and the question for the ***court*** in any particular situation is -- is to determine whether whatever branch of government or state is acting within the limits of the Constitution.

COBURN: So you would say -- but let me read you another Madison quote, again, the father of our Constitution. "If Congress can employ money indefinitely to the general welfare and are the sole and ***supreme*** judges of general welfare, they may take the care of religion into their own hands. They may appoint teachers in every state, county and parish and pay them out of the public treasury."

"They may take into their hands -- their own hands the education of our children, establishing like-manner schools throughout the union. They may assume the provision for the poor. They may undertake the regulation of all roads other than post roads. In short, everything from the highest object of state legislation down to the most minute object of police would be thrown under the power of Congress."

"Were the power of Congress to be established in the latitude contended for, it would subvert the very foundations and transmute the very nature of the limited government established by this Constitution and the American people."

COBURN: I guess my question to you is, do -- do you have any concerns, as we now have a $3.6 trillion budget, $11.4 trillion worth of debt, $90 trillion worth of unfunded obligations that are going to be placed on the back of our children, that maybe some reining in of Congress in terms of the general welfare clause, the commerce clause, and reinforcement of the 10th Amendment under its intended purposes by our founders, which said that everything that was not specifically listed in the enumerated powers was left to the states and the people -- do you have any concerns about where we're heading in this nation and the obligations of the ***Supreme Court*** may be to re-look at what Madison and our founders intended as they wrote these clauses into our Constitution?

SOTOMAYOR: One of the beauties of our Constitution is the very question that you asked me: Is the dialogue that's left in the first instance to this body and the House of Representatives?

The answer to that question is not mine in the abstract. The answer to that question is a discussion that this legislative body ***will*** come to an answer about as reflected in the laws it ***will*** pass. And once it passes those laws, there may be individuals who have ***rights*** to challenge those laws and ***will*** come to us and ask us to examine what the Constitution says about what Congress did.

But it is the great beauty of this nation that we do leave those lawmaking to our elected branches and that we expect our ***courts*** to understand its limited role, but important role, in ensuring that the Constitution is upheld in every situation...

COBURN: So...

SOTOMAYOR: ... that's presented to it.

COBURN: I believe our founders thought that the ***Supreme Court*** would be the check and balance on the commerce clause, the general welfare clause, and the insurance of the 10th Amendment, and that's the reason I raised those issues with you.

I wonder if you think we've honored the plain language of the Constitution and the intent of the founders with regard to the limited power granted to the federal government.

SOTOMAYOR: That's almost a judgment call. I don't know how to answer your question, because it would seem like it would lead to the natural question: Did the ***courts*** do this in this ***case***? And that would be opining on a

particular view of a ***case***, and that ***case*** would have a holding, and I would have to look at that holding in the context of another ***case***.

I'm attempting to answer your question, Senator, but our roles and the ones we choose to serve -- your job is wonderful. It is so, so important. But I love that you're doing your job, and I love that I'm doing my job as a judge. I like mine better.

COBURN: I think I would like yours better as well, although I doubt that I could ever get to the stage of a confirmation process.

Well, let me just end up with this.

(CROSSTALK)

(LAUGHTER)

COBURN: It would be entertaining, wouldn't it?

(UNKNOWN): (OFF-MIKE), I'll preside over it.

COBURN: Well, now, it's not likely to happen.

Let me -- let me just end with this. You know, I -- people call me simple, because I really believe this document is the genesis of our success as a country. And I believe these words are plainly written, and I believe we ignore them at our peril. And my hope is is that the ***Supreme Court*** ***will*** re-look at the intent of our founders and the 10th Amendment, where they guaranteed that everything that wasn't spelled out specifically for the Congress to do was explicitly reserved to the states and to the people. To do less than that undermines our future.

And all we have to do is take a little snapshot of where we are today, economically, financially and leadership-wise, to understand we ignored their plain words. And we find ourselves near bankruptcy because of them.

I thank you, Mr. Chairman.

LEAHY: Thank you.

When I -- and this -- it is almost over -- there was one question, and I've withheld the balance of my time before, and I want to make sure I ask this question, because I asked it of Chief Justice Roberts and Justice Alito when they were before this committee.

As you know, in death penalty ***cases***, it takes five justices to stay an execution but only four to grant certiorari to ***hear*** a ***case***. You could grant certiorari to ***hear*** a ***case***, but the execution is not stayed. It could become a moot point. The person could be executed in between.

So usually, if those four justices wanted to ***hear*** a ***case***, somebody agrees to the fifth vote to stay an execution just as a matter of courtesy, so the cert does not become moot, so the person is not executed in the few weeks that might be between granting a cert and the ***hearing*** of the ***case***.

Both Chief Justice Roberts and Justice Alito agreed that this was -- rule was sensible, the rule of five, or a courtesy fifth. It appears, according to a study done by the New York Times, that very reasonable rule and the rule that both Chief Justice Roberts and Justice Alito said it was very reasonable, and I think the majority of us on the committee thought it was reasonable.

They said that -- suggest that that rule has not been adhered to, the rule of four, because there have been number of ***cases*** where four justices voted to the -- for cert, but -- and wanted to stay the execution, but the fifth would not, and the person was executed before the ***case*** was ***heard***.

If you were on the ***Supreme Court***, and this is basically the same thing I asked Justice Roberts and Justice Alito, if you were on the ***Supreme Court***, four of your fellow justices said they'd like to consider a death penalty ***case***, and they asked you to be a fifth vote to stay the execution, even though you didn't necessarily plan to vote for cert, how would you approach that issue?

SOTOMAYOR: I answer the way that those two justices did, which is I would consider the rule of the fifth route (ph) vote in the way it has been practiced by the ***court***. It has a sensible basis, which is that, if you don't grant the stay, an execution can happen before you reach the question of whether to grant certiorari or not.

LEAHY: Well, I thank you.

And I applauded both Chief Justice Roberts and Justice Alito for their answer. It appears that perhaps somewhere between the ***hearing*** room and the ***Supreme Court*** their minds changed.

Now, in 2007, Christopher Scott Emmett was executed, even when four justices had voted for stay of execution. Justice Stevens wrote a statement and joined by Justice Ginsberg calling for a routine practice of staying executions scheduled in advance of our review of the denial of a capital defendant's first application -- first application for a federal writ of habeas corpus.

I'm not asking for a commitment on what Justices Stevens and Ginsburg said, but is that something that ought to at least be considered?

SOTOMAYOR: Unquestionably. As I said, there is an underlying reason for that practice.

LEAHY: And there's an understanding that the -- when the ***case*** is reviewed, it may very well end up -- the sentence below may well be upheld and the execution ***will*** go forward, but this is on the various steps for that ***hearing***.

SOTOMAYOR: Yes, sir.

LEAHY: Thank you.

Senator Sessions, did you want to...

SESSIONS: Well, just briefly, I'd thank you again for your testimony. And I know judges come before these committees, and they make promises, and they mean those things, and then they're lucky. They get a lifetime appointment.

And I think most likely the judicial philosophy ***will*** take over as the years go by, the 10, 20, 30 years on the bench. And so it's an important decision for to us reach and to consider. And we'll all do our best.

I hope you've felt that it's been a fairly conducted ***hearing***. That's been my goal.

SOTOMAYOR: Thank you, Senators, to all senators. I have received all the graciousness and fair ***hearing*** that I could have asked for.

And I thank you, Senator, for your participation in this process and in ensuring that.

SESSIONS: Thank you. You're very courteous.

I think, for the record, a number of significant articles should be in the record. One...

LEAHY: Without objection.

SESSIONS: ... the Washington Post on July 9th, "Uncommon Detail"; Wall Street Journal, "Defining Activism Down"; July 15th, New York Times, "New Scrutiny of Judge's Most Controversial ***Case***" by Adam Liptak; New York

Times, "Nominee's Rulings are Exhaustive but Often Narrow"; Ninth Justice, "How Ricci Almost Disappeared"; the Ninth Justice, "Justices Reject Sotomayor Position 9-0"; and the Wall Street Journal, "The Wise Latina" article of June 15th, which is an important analysis.

Mr. Chairman, for the record, I'd also offer a letter from Sandra Froman, former president of the National Rifle Association, and a series of other people who co-signed that letter making this point. I think it's important, Sandra Froman herself a lawyer.

"Surprisingly, Heller was a 5-4 decision with some justices arguing that the Second Amendment does not apply to private citizens or, if it does, even a total gun ban could be upheld if a legitimate government interest could be found."

"The dissenting justices also found D.C.'s absolute ban on handguns within the home to be a reasonable restriction. In this -- if this had been the majority view, then any gun ban could be upheld and the Second Amendment would be meaningless."

SESSIONS: It goes on to say, "The Second Amendment survives today by a single vote in the ***Supreme Court***. Both its application to the states and whether there ***will*** be a meaningful strict standard of review remain to be decided. Justice Sotomayor has revealed her views on these issues, and we believe they are contrary to the intent and purposes of the Second Amendment and the Bill of ***Rights***. As Second Amendment leaders, we are deeply concerned about preserving all fundamental ***rights*** for current and future generations. We strongly oppose this nominee."

I offer that and a letter from Americans United for Life, the 60- Plus Association North Carolina Property Association.

LEAHY: We ***will*** hold the record open to the -- to 5 o'clock tonight for any other materials people wish to submit to the record.

SESSIONS: Thank you, Mr. Chairman. And thank you for your courtesy throughout.

LEAHY: Thank you.

We ***will*** also hold the record open until 5 o'clock tomorrow for additional questions that senators wish to ask.

And now, Judge Sotomayor, this ***hearing*** has extended over four days. And the first day you listen to our opening statements rather extensively. You shared with us a very concise statement about your own fidelity to the law. I suspect it ***will*** be in law school text in years to come.

Over the last three days, you've answered our questions from senators on both sides of the aisle. And I hope I speak for all the senators, both Republican and Democratic, on this committee when I thank you for answering with such intelligence, grace and patience.

I also thank the members of your family for sitting here also for such intelligence, grace, and especially patience.

During the course of this week, almost 2,000 people have attended this ***hearing*** in person -- 2,000. Millions more have seen it, ***heard*** it, or read about it, thanks to newspapers, blogs, television, cable, webcasting.

I think through these proceedings, the American people have gotten to know you. Even though I sat on two different confirmation hearings for you over the past 17 years, I feel I've gotten to know you even better.

The president told the American people in his Internet address back in May as a justice of the ***Supreme Court***, you would, quote, "bring not only the experience acquired over the course of a brilliant legal career, but the wisdom

accumulated over the course of an extraordinary journey, a journey defined by hard work, fierce intelligence and enduring faith in America. All things are possible."

We bore witness of that this week. Experience and wisdom ***will*** benefit all Americans. And when you walk under that piece of Vermont marble over the door of the ***Supreme Court***, speaking of equal justice under law, I know that ***will*** guide you.

Judge Sotomayor, thank you. Godspeed.

SOTOMAYOR: Thank you all.

(UNKNOWN): Thank you.

LEAHY: We stand recessed for 10 minutes.

(RECESS)

ACTING CHAIRMAN: Good afternoon, everyone. The ranking member has joined us, and the ***hearing*** ***will*** now come to order.

We have a considerable number of witnesses to get through today, so I would ask Ms. Askew and Ms. Boies and the witnesses who ***will*** follow them to please be scrupulous about keeping your oral statements to five minutes or under. Your full written statement ***will*** be put in the record, and senators ***will*** each have five minutes to ask questions of each panel.

Along with Ranking Member Sessions, I am very glad to welcome ABA witnesses Kim Askew and Mary Boies. Kim Askew is the chair of the ABA Standing Committee on the Federal Judiciary, and Mary Boies the ABA Standing Committee's lead evaluator on its investigation into Judge Sotomayor's qualifications to be an associate justice on the ***Supreme Court*** of the United States.

The ranking member and I both look forward to their testimony. And if I could ask them please to stand and be sworn, we ***will*** begin.

Do you affirm that the testimony you are about to bring before the committee ***will*** be the truth, the whole truth and nothing but the truth, so help you God?

Please be seated. You may proceed with your statements.

ASKEW: Thank you. Good afternoon and thank you for having us. I'm Kim Askew of Dallas, Texas, chair of the Standing Committee on the Federal Judiciary. This is Mary Boies. Mary Boies is our Second Circuit representative, and as you mentioned, she was the lead evaluator on the investigation of Judge Sonia Sotomayor.

We are honored to appear here today to explain the Standing Committee's evaluation of this nominee. The Standing Committee gave her its highest rating and unanimously found that she was well qualified.

For 60 years the Standing Committee has conducted a thorough, nonpartisan peer review in which we did not consider the ideology of the nominee, and we have done that with every federal judicial nominee. We evaluate the integrity, the professional competence of the judicial temperament of the nominee.

ASKEW: The Standing Committee does not proposal, endorse or recommend nominees. Our sole function is to evaluate the professional qualifications of a nominee and then rate the nominee either well qualified, qualified or not qualified.

A nominee to the ***Supreme Court*** of the United States must possess exceptional professional qualifications. That is, a high degree of scholarship, academic talent, analytical and writing ability, and overall excellence. And

because of that, our investigations of ***Supreme Court*** nominees is more extensive than the nominations to the lower federal ***courts***.

And they're procedurally different in two ways. First, all circuit members participate in the evaluations. An investigation is conducted in every circuit, not just the circuit in which the nominee resides. Second, in addition to the Standing Committee reading the writings of the nominee, we commission three reading groups of distinguished scholars and practitioners who also review the nominee's legal writings and advise the Standing Committee.

Georgetown University Law ***Center*** and Syracuse University School of Law formed reading groups this year, and these groups were comprised of professors who are all recognized experts in their substantive areas of law. A practitioner's reading group was also formed, and that group was also comprised of nationally recognized lawyers with substantial trial and appellate practices. All of them are familiar with ***Supreme Court*** practices, and many have clerked for justices on the U.S. ***Supreme Court***.

In connection with Judge Sotomayor's evaluation, we initially contacted some 2600 persons who were likely to have relevant knowledge of her professional qualifications. This included every United States federal judge, state judges, lawyers, law professors and deans, and, of course, members of the community and bar representatives. We received 850 responses to our contracts, and we personally interviewed or received detailed letters or e-mails from over 500 judges, lawyers, and others in the community who knew Judge Sotomayor or who had appeared before her.

We also analyzed transcripts, speeches, other materials, and, of course, Ms. Boies and I interviewed her, and it is on that basis that we reached the unanimous conclusion as a Standing Committee that she was well qualified.

Her record is known to this distinguished committee. She has been successful as a prosecutor, a lawyer in private practice, judge, a legal lecturer. She has served with distinction for almost 17 years on a federal bench both as a trial ***court*** judge and an appellate judge. She has taught in two of the nation's leading law schools, and her work in the community is well known.

She has a reputation for integrity and outstanding character. She is universally praised for her diligence in industry. She has an outstanding intellect, strong analytical abilities, sound judgment, an exceptional work ethic, and is known for her courtroom preparation.

Her judicial temperament meets the high standards for appointment to the ***court***. The Standing Committee fully addressed the concerns raised regarding her writings and some aspect of her judicial temperament. Those are set forth in detail in our correspondence on this committee, and we ask that they be made a part of the record.

In determining that these concerns did not detract from the highest rating of well qualified for the judge, the Standing Committee was persuaded by the overwhelming responses of lawyers and judges who praised her writings and overall temperament.

ASKEW: On behalf of the Standing Committee, Ms. Boies and I thank you for the opportunity to be present today and present these remarks, and we are certainly available to answer any questions you may have.

ACTING CHAIRMAN: Thank you so much.

Ms. Boies, do you have a separate statement you wish to make?

BOIES: I do not, Senator. We're happy to answer your questions.

ACTING CHAIRMAN: Very good. I appreciate it.

I just want to summarize a few conclusions from the report, and then ask you a little bit about the scope of the effort that went into it in terms of the numbers of people who were interviewed and the duration and non-partisan nature of the effort, if you would.

On page six, you conclude that, "Judge Sotomayor has earned and enjoys an excellent reputation for integrity and outstanding character. Lawyers and judges uniformly praised the nominee's integrity."

On page 11, you report that, "Judge Sotomayor's opinions show an adherence to precedent and an absence of attempts to set policy based on the Judge's personal views. Her opinions are narrow in scope, address only the issues presented, do no revisit settled areas of law, and are devoid of broad or sweeping pronouncements."

On page 13, you report that, "The overwhelming weight of opinion shared by judges, lawyers, courtroom observers and former law clerks is that Judge Sotomayor's style on the bench is, A consistent with the active questioning style that is well known on the Second Circuit" -- and which, on a personal aside, I ***will*** say I liked as a practitioner -- B, directed at the weak points in the arguments of parties to the ***case***, even though it may not always seem that way to the lawyer then being questioned; C designed to ferret out relative strengths and shortcomings of the arguments presented; and, D, within the appropriate bounds of judging."

And finally, "The committee unanimously found an absence of any bias in the nominee's extensive work. Lawyers and judges overwhelmingly agree" -- this is your quote -- "That she is an absolutely fair judge. None, including those many lawyers who lost ***cases*** before her, reported to the Standing Committee that they have ever discerned any racial, gender, cultural or other bias in her opinions or in any aspect of her judicial performance. Lawyers and judges commented that she is open-minded, thoroughly examines a record in far more detail than many circuit judges, and listens to all sides of the argument."

Could you tell us a little bit about the scope of the review that took place that enabled you to reach those firm conclusions?

BOIES: Unlike with most federal judicial nominees, in the ***case*** of a ***Supreme Court*** nominee, the entire 15-member committee writes letters to the entire judiciary throughout the country, and also to lawyers throughout the country. We go through her opinions, and we look to see what lawyers appeared in front of her, and we write many letters to those people.

In addition, we write to -- as Chair Askew said, to law school deans and law professors. And as she mentioned, we commissioned three reading groups of professors and practitioners. There were 25 law professors from Syracuse Law School and from Georgetown Law ***Center*** who read her opinions, as did 11 practitioners, many of whom themselves were former ***Supreme Court*** law clerks.

And the standards that we look at, and the only standards, are the professional competence, judicial temperament, and integrity. And each circuit member interviews all of the judges and lawyers who respond to our letters or whom they identify as someone who knows, or has worked with, Judge Sotomayor.

BOIES: Those interviews are then collected. I review them. The chair and I had a personal interview with Judge Sotomayor in her chambers in New York. We met for over three hours, and we discussed with her in detail every criticism that we had ***heard*** of her judging and the factors that we look at.

And following that, we received the reading group reports which were each one hundreds and hundreds of page that went through her opinions one by one. They didn't merely give an overall summary. We read those. In addition, I read every opinion that she wrote on the Second Circuit and many that she wrote on the district ***court***.

In addition, we took many of her leave of Standing Committee, took many of her opinions, and we divided them up among themselves so that we, too, read those opinions not merely the reading groups.

And I think that is a snapshot of the scope of our review, but I'll give you one example, if I may, of how we operate. And that is, we received a critical review from a lawyer about her conduct at a particular oral argument. We identified the date of that argument and the ***case***. We then went through the ***court*** records and the opinions that were written, and we identified all of the lawyers who were involved in that ***case***. We identified the docket street from the Second Circuit for that date so that we could identify any other lawyers who might have been

present in the courtroom even though they were not there for that particular ***case***. And we identified all of the lawyers who had any argument that day because maybe they would have a view of the panel.

And then, finally, we talked to the other members of the panel to ask what their view was on her judicial temperament because we had received a fairly important criticism. And so we not only reviewed that criticism, but we look to see how others viewed the same conduct.

Now, you may say that this is stacking the deck against her because we know we have a critical comment and maybe she was having a very bad day and maybe she wasn't up to her -- the way she normally would be on the bench.

But we talked to at least 10 other lawyers and another member of the panel.

(UNKNOWN): And that's what the peer review process is. Much of what you ***will*** read anecdotally, if you talk to, you know, the legal press, you may not have personal knowledge necessarily of what the judge does or you may not have been the lawyer who actually participated in that argument.

The reason we talk to lawyers is because we examine whether you have personal knowledge of what you're telling us. We ***will*** ask you about the ***case*** that you are in because then we can go forward and investigate. So we talked to all the lawyers. We talked to the judges. In some instances, we even had the pleasure of listening to the transcript because one of the allegations here was a lack of temperament.

That cannot always be picked up from the written record. Luckily, we were able to find out there so we could ***hear*** the tone and the tenor of the hot courtroom that has been described before this committee. And so when we come to this distinguished committee and say that this was in keeping with the practice of the Second Circuit, we have looked at it in every way that we possibly can to ensure what took place.

ACTING CHAIRMAN: Well, let me conclude by thanking you for the thoroughness of your evaluation. And as I understand it, the ultimate conclusion was to evaluate her as well qualified, which is the highest available ranking, which was unanimous, and you considered her conduct as a judge over 17 years to be -- and I quote -- "exemplary"?

(UNKNOWN): That's correct.

ACTING CHAIRMAN: Thank you very much.

The ranking member?

SESSIONS: Thank you. Thank you, Mr. New Chairman. Good to be with you.

The American Bar Association was critical of former President Bush -- well, former former President Bush -- for not asking for evaluations before the nomination was made. President Obama followed that same process.

Since that time, have you changed your view about the viability or the advisability of conducting or asking the president to give the names -- name or names that -- before final decision is made?

ASKEW: As chair of the committee, let me answer that. The committee does not take a stand on that. The ABA may take a stand on whether it thinks it is a better idea for a president to nominate on a pre- or post-nomination basis, but the Standing Committee is divorced of the policy side of the ABA.

It is our position, and always has been, that we ***will*** conduct a neutral, nonpartisan peer review whenever the president gives us that information.

SESSIONS: With regard to the temperament question, there were some questions here asked about that, and they add to the almanac on whatever had the chief -- Judge Sotomayor -- turned out they have quite a much more negative feedback from lawyers -- a terror on the bench, a bit of a bully, a lot of statements like that.

And yet you still gave her the highest rating. You -- so you talked to those people, and you -- you're OK with that?

ASKEW: We absolutely are. And just to give you a sense, we talked to over 500 lawyers. And not to minimize any comments, because sometimes one criticism can be the most important comment that we get on a nominee, but of the 500 lawyers that we spoke to, we received comment on the temperament issue from less than 10 lawyers.

They were mostly lawyers and judges who were outside of the 2nd Circuit and were not as familiar with 2nd Circuit precedent.

SESSIONS: Well, you know, I hope the 2nd Circuit doesn't approve of beating up lawyers too much.

ASKEW: Well, they do not.

SESSIONS: They like...

(UNKNOWN): Just enough.

SESSIONS: Let me ask you. Did you -- I was troubled by the handling of the Ricci ***case***. That was a summary order at first, until other judges on the panel objected, and then was a pro curiam opinion. But I think the -- the process of making that a summary opinion was to me pretty much takes you back. Did -- how did you conclude? Did you look at that precisely?

ASKEW: We did look at that ***case***, Senator. We do not take a position on whether an opinion is ***right*** or is wrong. That's not what our function is.

However, we did look at the procedure that was followed in the Ricci ***case***. And that is the ***case*** in which the 2nd Circuit panel ***heard*** full briefing and oral argument, and following which the panel, which was not presided over by Judge Sotomayor, but the panel decided to adopt in effect the District ***Court*** ruling, because they affirmed the ruling, and they agreed with its reasoning.

SESSIONS: Well, that's...

ASKEW: And they did not...

SESSIONS: ... basically true. However, one judge was quite reluctant, and another one moderated, and a judge apparently wanted to do it this way and -- and prevail. But the only thing I was asking about, and if you're prepared to make an expression of opinion, is the decision to decide it as a summary matter, not even a per curiam opinion. Did you deal with that issue?

(UNKNOWN): We are aware of how the Second Circuit handles summary opinions. We did not talk to her about that. We did not believe that was within the criteria that we evaluate with judges.

We did read the opinion in great detail. Members of the reading groups, all three reading groups, indeed. We were very lucky to receive the ***Supreme Court*** opinion on this before our report was finalized. So we got a complete briefing on that ***case***.

SESSIONS: Well, one more thing. A recent group of political scientists did a study of the ABA nomination process from '85 to 2008 and found that the ABA must take affirmative steps to change its system for rating nominees to avoid favor and bias in favor of liberal nominees.

Do you take that seriously? ***Will*** you ***willing*** to look at how you handle these things?

(UNKNOWN): We take any critique of our process seriously. I can tell you that we judge every nominee based on the record that is presented to us and the background and experience of a nominee.

SESSIONS: Well, let me just say this. I think it is a valuable contribution to the process.

(UNKNOWN): Thank you.

SESSIONS: It is -- when you talk to lawyers and sometimes -- most people are very -- tend very much to be supportive of any nominee, especially if -- you know, they just tend to be supportive and minimize problems.

But sometimes, I think so, you could pick up things that other people wouldn't, and it would be valuable to this process. And I thank you.

(UNKNOWN): Thank you.

BOIES (?): Senator, if I may, I'd like just to go back briefly to the Ricci decision. And one thing that I did look at is that, in calendar year 2008, the Second Circuit issued 1,482 opinions not counting the non-argued asylum ***cases***. And of those 1,482, the 1,081 were decided by summary order.

Only 401 full opinions were issued. And as I read the record, the -- one of the reasons the panel believed it could proceed by summary order is because it believed that there was controlling Second Circuit precedent which a panel is not in a position to change.

So I don't mean to open the issue, but I would like to put it into some context as to how the Second Circuit normally operates.

SESSIONS: That's a nice way to say it. But this is a -- the rules said if it has jurisprudential importance, you should have an opinion. I think it was in violation of the rules. I don't know why they did it, but it was in violation of the rule, in my judgment, as a practicing lawyer.

I would have thought you would have agreed, Ms. Boies.

ACTING CHAIRMAN: We ***will hear*** next from the distinguished senator from Pennsylvania, Senator Specter.

SPECTER: Thank you, Mr. Chairman.

No questions. Just a comment to thank you for your service. There have been occasions when the American Bar Association was not consulted, and I think that the ABA has a special status.

SPECTER: The Judiciary Committee is ***hearing*** from all interested parties, not possible to invite all interested parties to appear in person, but we welcome comments from anyone in a free society to tell us what they think of the nominee, but the ABA performs this function with -- regularly with all federal judges, and you interview a lot of people who are knowledgeable and have had contact, and I think it is very, very useful. So thank you for your service.

I have no questions, Mr. Chairman, on the substance (ph).

(UNKNOWN): Thank you.

ACTING CHAIRMAN: And we ***will*** turn to Senator Cardin of Maryland.

CARDIN: I also do not have any questions, but I do want to make an observation, because I very much respect the opinions of the American Bar Association and fellow lawyers. I think it's the highest compliment when your peers give you the highest rating. They're your toughest critics. I know that lawyers who are selecting a jury ***will*** almost always strike lawyers from that jury list because they're the toughest audience that you have. And so this is -- I think speaks to the nominee.

And as I understand it, the manner in which you go about rating a judge is not only her experience, but also the way that she's gone about reaching her decisions from the point of view of the appropriate role of a judge, her

judicial temperament, and the absence of biased in rendering those decisions. And they're exactly what we are looking for for the next justice on the ***Supreme Court***.

So I just really wanted to thank you for giving us this information and participating in the process.

(UNKNOWN): Thank you, Senator.

ACTING CHAIRMAN: Senator Cornyn?

CORNYN: Thank you, Mr. Chairman.

I just want to welcome our two witnesses and thank you for your assistance to the committee, and particularly to say how good it is to see Kim Askew, my constituent from Dallas, Texas, and she does great work as chair of the committee, and welcome. Thank you for your assistance to the committee and performing its constitutional function.

ASKEW: Thank you.

ACTING CHAIRMAN: There being no further questions, the panel is excused with our gratitude for a commendable and very diligent effort.

SESSIONS: Thank you very much.

ASKEW: Thank you.

ACTING CHAIRMAN: We ***will*** take a five-minute recess while the next panel assembles.

(RECESS)

ACTING CHAIRMAN: The ***hearing*** of the Judiciary Committee ***will*** come back to order.

We are awaiting the arrival of Mayor Bloomberg and District Attorney Morgenthau, who are coming down from New York. I am told that they are five minutes away, but the five minutes that people are away can be a longer five minutes than a regular five minutes. So in the interest of the time of the proceeding and of the other witnesses, we ***will*** proceed and come to them when they arrive and have a chance to take their seats.

SESSIONS: Well, in -- in the mayor's defense, he probably thought we would be operating under Senate time, and we would certainly be late, and he could have a little extra time.

ACTING CHAIRMAN: That is our custom.

SESSIONS: We're moving along well. Thank you, Mr. Chairman.

ACTING CHAIRMAN: Our first witness, then, ***will*** be Dustin McDaniel. He is the attorney general for the state of Arkansas and the southern chair of the National Association of Attorneys General. Previous to his election as attorney general, he worked in private practice in Jonesboro, Arkansas. Prior to taking office, Mr. McDaniel also served as a uniform patrol officer in his hometown of Jonesboro, Arkansas. He is a graduate of the University of Arkansas Little Rock Law School.

Attorney General McDaniel, would you please stand to be sworn? Do you affirm that the testimony you're about to give before the committee ***will*** be the truth, the whole truth and nothing but the truth, so help you God?

MCDANIEL: I do.

ACTING CHAIRMAN: Please be seated.

Attorney General McDaniel, please proceed with your statement

MCDANIEL: Thank you, Mr. Chairman and Ranking Member Sessions.

My name is Dustin McDaniel, and I'm the attorney general of the state of Arkansas. I am here today to speak in support of the nomination of Judge Sonia Sotomayor to the ***Supreme Court*** of the United States.

You've all ***heard*** all week about her compelling life story and impressive accomplishment. I have the highest respect and admiration for her, and I'm proud to testify on behalf of this person, who was first appointed by President George H.W. Bush, and then by my most famous predecessor in the Arkansas attorney general's office, President Bill Clinton.

More specifically, I'm here to rebut any assertion that her participation in the matter of Ricci v. DeStefano in any way reflects upon her qualifications or abilities to serve as a justice of the United States ***Supreme Court***.

When the ***Supreme Court*** granted certiorari in the Ricci ***case***, I, on behalf of the state of Arkansas, joined with five other attorneys general in support of the Second Circuit. Before I address the ***case*** in the brief, let me adjust the parties and their issues.

I entered the world of public service long before I became an elected official. After college I turned down my admission into law school and took a civil service exam in my hometown of Jonesboro, Arkansas. I became a police officer, and I saw firsthand the heroism and dedication of the men and women who protect and serve our communities every day.

Firefighters like Frank Ricci and his colleagues run into homes and buildings when everyone else is running out. I have the highest respect and gratitude for all who serve our communities, states and nation. They are heroes among us, and they deserve to be treated fairly by our system.

My personal experience with a civil service exam was a favorable one, but not all are so lucky. I understand the frustration that the firefighters felt with this process. I also understand the cities fear of litigation and unfair results. I am for a process that is fair. No one should be given an unfair advantage, but no one should be subject to an unfair disadvantage either.

As attorney general, I represent hundreds of state agencies, boards and commissions in matters of employment law. My job is to allow my clients to do their job without fear of unreasonable litigation. The law had, until recently, allowed for flexibility necessary for public employers. The ***Supreme Court***'s ruling in this ***case*** ***will*** likely increase costly litigation, and the taxpayers ***will*** ultimately pay the bill.

All who have commented on the nomination process in recent years have been critical of those who have been labeled an activist judge. It's important to note that the Second Circuit's ruling in this ***case*** was not judicial activism at work. To the contrary, they followed existing law.

MCDANIEL: In Ricci, the panel adopted the lengthy analysis of the district ***courts***, which they called "thorough," "thoughtful," and "well-reasoned." The district ***court*** cited ***cases*** dating back some 28 years. The ruling was consistent with the law, and the doctrine of stare decisis.

Granted, the ***Supreme Court***, in a closely divided opinion, ruled differently. But in doing so, it set new precedent.

It's also important to note that the 2nd Circuit's ruling was supported by many prestigious groups, including the EEOC, the Department of Justice, the National League of Cities, the National Association of Counties, International Municipal Lawyers Association and the Republican and Democratic attorneys general of Alaska, Iowa, Arkansas, Maryland, Nevada and Utah.

There's a large body of research available on Judge Sotomayor's record. No allegation that she rules based on anything other than the law can stand, when cast in the light of her actual record.

The Congressional Research Service concluded, quote, "Perhaps the most consistent characteristic of her approach as an appellate judge could be described as an adherence to the doctrine of stare decisis, that is upholding of past judicial precedents."

One only has to look so far as to her own words. In Hayden v. Pataki she wrote in a dissent, quote, "It is the duty of a judge to follow the law, not question its plain terms."

She concluded by saying, quote, "Congress would prefer to make any needed changes itself, rather than have ***courts*** do so for it."

In my opinion, Judge Sotomayor is abundantly qualified and is an excellent nominee. I believe that the people of the United States would be well-served by her presence on the ***court***.

It is my great honor and privilege to be here at this committee, and I thank you ever so much for the opportunity to appear here today.

ACTING CHAIRMAN: Thank you ever so much, Attorney General McDaniel.

We ***will*** do a round of questions for the attorney general, and then once the panel is completely assembled, I ***will*** have all the witnesses sworn. And then we ***will*** proceed to Mayor Bloomberg, to District Attorney Morgenthau and on across the panel, with one brief interruption to allow the distinguished senator from the state of New York, Senator Schumer, to introduce Mayor Bloomberg.

Attorney General McDaniel, as a -- as an experienced lawyer, let me ask you, is it not the ***case*** that it's the ***Supreme Court***'s task very frequently to resolve conflicts between the circuit ***courts*** of appeal?

MCDANIEL: Yes, of course it is, Senator.

ACTING CHAIRMAN: And if a circuit ***court*** is bound by its own prior precedent and therefore the doctrine of stare decisis controls a particular decision, that does not in any way inhibit the ***Supreme Court*** from reviewing that second decision against conflicting decisions from other circuits in its task in resolving those conflicts. Correct?

MCDANIEL: That is correct.

ACTING CHAIRMAN: Is it your sense that that is what occurred in this ***case***, that the 2nd Circuit in Ricci felt itself bound by stare decisis, as a result of its prior precedent, but that the ***Supreme Court*** took the ***case*** to resolve issues of conflict with other circuits?

MCDANIEL: Well, it certainly seems clear that the -- the binding law from the ***Supreme Court***, which dated back up to 28 years, made it clear that remedial actions, although race-conscious but race-neutral, were permissible.

I think that that is precisely what the ***case*** demonstrated and how the ***court*** ruled and why the states that participated, Arkansas included, thought that it was important to preserve for our clients the ability to try to avoid litigation, if they think they cannot defend an existing practice. If they cannot defend it, no lawyer would tell their client, "Oh, go do it, anyway."

MCDANIEL: But clearly the ***Supreme Court*** thought that it was ripe for review, and they also thought that it was ripe to change the law, which is their purview.

WHITEHOUSE: That's an interesting point, and many observers, including prominent observers who have had their views expressed in the public media about this, have indicated that that decision changed the landscape of civil ***rights*** law.

If a judge is a cautious and small "c" conservative jurist on a circuit ***court***, do you believe it's appropriate for the circuit ***court*** to change the landscape of civil ***rights*** law?

MCDANIEL: Absolutely not. I don't think that the 2nd Circuit did anything short of what it had to do, which was to apply the existing law.

The fact that the majority, a bare majority in the United States ***Supreme Court*** decided to change existing law, frankly, that would have been inappropriate for the 2nd Circuit to take that responsibility on itself.

WHITEHOUSE: Thank you, Attorney General.

SESSIONS: Thank you.

Mr. McDaniel (inaudible) attorney general, and it was a great honor.

With regard to the Ricci ***case***, are you aware that the panel attempted to decide this ***case*** on a summary order, writing no opinion, not even a per curiam opinion?

MCDANIEL: I am aware of that.

SESSIONS: And are you aware that, by chance, one of the other members of the circuit found out about that and an uproar of sorts occurred because the people -- the other members -- other members of the circuit were very concerned about the opinion and thought it was an important opinion? Are you aware of that?

MCDANIEL: I know that the -- I know that the panel, or at least the body of judges chose to review the matter and they voted not to meet en banc and that there was a per curiam that was issued...

(CROSSTALK)

SESSIONS: That's correct. That's correct.

Now, you say that there was 2nd Circuit opinion and authority to uphold this ***case***. But -- but on rehearing, the slate is wiped clean and the panel can develop or formulate new authority or determine clearly whether or not that previous ***case*** may have applied.

And are you aware that when they voted, the vote was 6-6, and Judge Sotomayor was the key vote in deciding not to rehear the ***case***? And therefore we can conclude that not only did she decide this ***case***, but it's really not accurate to say she was just following authority since it was her vote that didn't allow that authority to be reevaluated.

MCDANIEL: Well, Senator, she was in the majority, so it's fair to say that any one of those judges could be the deciding vote...

(CROSSTALK)

SESSIONS: That is correct. But it's not fair, I think, to say that she didn't have an opportunity to reevaluate it. She was simply applying law that she was bound to follow when she could have, if she felt differently, she could have allowed it to have been rediscussed.

MCDANIEL: I also think that there were ***Supreme Court cases***, not just 2nd Circuit ***cases***.

SESSIONS: Well, are you aware the ***Supreme Court*** says there were not. Are you aware the ***Supreme Court***, in their opinion, said there was no ***Supreme Court*** authority on this matter?

MCDANIEL: I have read their opinion and I tend to agree with the minority that this was, in fact, squarely within the...

(CROSSTALK)

SESSIONS: Now, you filed, which I give you credit for, and I did some of these things when I was attorney general, you -- you joined with 32 other state attorneys general in submitting an amicus brief to the U.S. ***Supreme Court*** on the Heller ***case***.

GRAHAM: You took the provision -- the brief argues that the ***right*** to keep and bear arms is among the most fundamental of ***rights*** because it is essential to securing all other liberties, close quote.

I see the mayor not happily listening to that.

(LAUGHTER)

You -- but -- so you believe that the Second Amendment is a fundamental ***right***.

Are you aware that Sandy Froman, the former president of the NRA -- you're probably not familiar with this letter, but she's a lawyer and pointed out that Heller was just a 5-4 opinion, with some justices arguing that the Second Amendment does not apply to private citizens or that, if it does, even a total gun ban would be upheld if a legitimate government interest could be found.

The dissenting justices also found that D.C.'s absolute gun ban on handguns within the home a reasonable restriction. That wouldn't play too well in Alabama; probably not Arkansas, Oklahoma or Texas. But most places.

So I guess I'm saying, are you concerned that -- and are you aware, of course, the Maloney ***case***, in which Judge Sotomayor -- and I think she can contend there was authority in that ***case*** that justified her concluding the Second Amendment does not apply to the states. But I was disappointed in the -- and the way she wrote it gave me concern.

So are you aware that one vote on the ***Supreme Court*** could make the difference on the question of whether or not the ***right*** to keep and bear arms is protected against mayors or legislatures of states who disagree?

MCDANIEL: Well, I was proud to join Arkansas into the brief on Heller v. The District of Columbia. I intend to join again in the NRA v. Chicago in the attempt to have the ***Supreme Court*** review and take up the question, which I believe is ripe, as to whether or not the Second Amendment is applied to the states, as incorporated by the Fourteenth Amendment.

I do believe that the Second Amendment is a fundamental ***right***, and I do believe that it is an individual ***right***, not one tied to participation in a militia.

The attorney general -- the current attorney general in Texas, Senator Cornyn's successor and I have spent some time on that issue, even recently, and I am not, nonetheless, concerned with Judge Sotomayor's position. I am confident that her answers that she's provided to this committee and her record are consistent with one another, and I do not believe that the ***right*** to keep and bear arms is at risk with this nominee or, frankly, I wouldn't testify for her.

SESSIONS: Well, thank you. And I think it is.

WHITEHOUSE: Now that the panel is assembled, I ***will*** swear the entire panel in. We ***will*** return to regular order. You can all give your opening statements, and then questioning ***will*** begin at the conclusion of those opening statements.

Would you please stand to be sworn?

Do you affirm that the testimony you're about to give before the committee ***will*** be the truth, the whole truth and nothing but the truth, so help you God?

Please be seated.

I ***will*** recognize Senator Schumer for a moment to welcome his constituent and the mayor of New York City, Michael Bloomberg.

SCHUMER: Well, it's my honor to welcome two very distinguished constituents here. I want to thank every witness for coming, but particularly extend a welcome to two of New York's greatest public servants, Mayor Bloomberg and District Attorney Morgenthau.

SCHUMER: As you know, this nomination is a source of enormous pride to all New Yorkers. And your support for Judge Sotomayor has been extremely helpful to this committee, to the Senate as a whole, and to the nation, in understanding what kind of justice she ***will*** be, and very much appreciate your being here.

Thank you, Mr. Chairman.

Welcome.

(UNKNOWN): Mayor Bloomberg is the mayor of New York City. He is currently serving in his third term as mayor. He founded Bloomberg, L.P., a New York City company that now has employees in more than 100 cities.

Mayor Bloomberg's a graduate of Johns Hopkins University, located in Baltimore, Maryland, and Harvard Business School. We look forward to your testimony.

BLOOMBERG: Mr. Chairman, thank you. Ranking Member Sessions, thank you very much. Senator, Senator, Senator.

Senator Sessions, I must say, as a former gun owner, a former member of the NRA, and also a staunch defender of the second amendment, we probably don't disagree very much, if we really had a chance to talk.

In any ***case***, I wanted to thank everyone for the opportunity to testify before you today.

I'm Mike Bloomberg, and I'm here not only as the mayor of New York City, the city where Judge Sonia Sotomayor has spent her entire career, but also as someone who has appointed or reappointed more than 140 judges to New York City's criminal and family ***courts***.

So I do appreciate the job before you.

About three months ago, when President Obama invited Governor Schwarzenegger and Rendell and me to the White House to discuss infrastructure policy, I did find an opportunity to tell him what many of the best legal minds in New York were telling me: Judge Sonia Sotomayor would be a superb ***Supreme Court*** justice.

I strongly believe that she should be supported by Republicans, Democrats and independents. And I should know because I've been all three.

(LAUGHTER)

Judge Sotomayor has all of the key qualities that I look for when I appoint a judge. First she is someone with a sharp and agile mind, as he distinguished record and her testimony, I think, made clear.

And as a former prosecutor, commercial litigator, district ***court*** judge and appellate judge, she certainly brings a wealth of unique experience.

Second, she is an independent jurist who does not fit squarely into an ideological box. A review of her rulings by New York University's Brennan ***Center*** found that judges on the second circuit ***court*** (ph) who were appointed by Republicans agreed with her more than 90 percent of the time when overruling a lower ***court*** decision and when ruling a governmental action unconstitutional.

So this is clearly someone whose decisions have cut across party lines, which is something I think the ***Supreme Court*** could use more of.

And, third, whether you agree or disagree with her on particular ***cases***, she has a record of sound reasoning.

In interviewing judicial candidates, I like to ask questions that have no easy answers and then listen to how they develop their responses. I want to know that they are open-minded enough to change their views if they ***hear*** compelling evidence and to see if they can provide a strong rationale for their legal conclusions, even if I disagree with it.

The fact is, you are never going to agree with a judicial candidate on every issue. I have appointed plenty of judges whose answers I don't agree with at all. And I should point that includes times when Judge Sotomayor has ruled against New York City, as she has done on a number of ***cases***.

So I'm not here as someone who agrees with the outcome of her decisions 100 percent of the time. And I don't think that that should be the standard.

Now, I'm not a lawyer or a constitutional scholar, but I think the standard should be, does she apply the law based on rational legal reasoning, and is she within the bounds of mainstream thinking on issues of basic civil ***rights***?

BLOOMBERG: And on both questions, I think the answer is unequivocally yes.

It's impossible to know how she ***will*** rule on ***cases*** in the future, or even what those ***cases*** might be. Given that a ***Supreme Court*** judge is likely to serve for decades, focusing on the issues du jour rather than intellectual capacity, analytical ability and just plain common sense would miss what this country clearly needs -- someone who has the ability to provide us with the legal reasoning and guidance that ***will*** be necessary to navigate the uncharted waters of tomorrow's great debate. And I'm very confident that Judge Sotomayor has that ability.

Finally, as the mayor of her hometown, I would just like to make two brief points. First, on the issue of diversity, the ***Supreme Court*** currently includes one member who grew up in Brooklyn and one who grew up in Queens. And so there's no doubt that having someone who comes from the Bronx would improve the diversity of this ***court***.

(LAUGHTER)

And if you disagree with me, you haven't been to Brooklyn, Queens and the Bronx.

(LAUGHTER)

But seriously, Sonia Sotomayor is the quintessential New York success story. She has beaten all the odds and rose to the top. If that's not the American dream, I don't know what is. And however, I don't believe she should be confirmed on the strength of her biography, but I do think that her life story tells an awful lot about her character and ability.

And second, I just want to add a caution against those who would suggest that Judge Sotomayor's service to the Puerto Rican Legal Defense and Education Fund is somehow a negative.

That's an organization that is well respected for its civil ***rights*** work in New York City, and although I certainly have not always seen eye-to-eye on every issue with them, there is no question that they make countless contributions to our city. And Judge Sotomayor should be based solely on her record, and not on the record of -- of others in the group.

So thank you very much for the opportunity to testify. And I urge you to confirm Sonia Sotomayor as a justice of the United States ***Supreme Court***.

ACTING CHAIRMAN: Mayor Bloomberg, thank you very much for your testimony.

We'll now ***hear*** from Robert Morgenthau. Mr. Morgenthau has been the district attorney of New York County since 1975 and is the longest-serving incumbent of that position. During his nine terms in office, his staff has conducted about 3.5 million criminal prosecutions in homicides in Manhattan and has been -- and has a rate of 90 percent success. A graduate of Yale Law School, District Attorney Morgenthau served aboard a naval destroyer through World War II.

It's a real pleasure to have you before our committee.

MORGENTHAU: Thank you, Mr. Chairman. I appreciate the opportunity of testifying today. I am pleased to join those who endorse the nomination of Judge Sotomayor to the United States ***Supreme Court***.

I first came to know Judge Sotomayor when I was on a recruiting trip for the Yale Law School. At that time, Jose Febrenes (ph) was Yale's general counsel, and he also tailored the law school.

I asked him if he knew anyone special I should speak with, and he said, yes. He said the remarkable student named Sonia Sotomayor was deciding where to work. And while he did not know whether she'd given any thought to being a prosecutor, it would be well worth my while to meet her. He was decidedly correct.

I'm happy to be able to say that the judge joined my office and remained with us for five years. In my conversations with her, I learned about the compelling story of her life, with which you are now familiar.

MORGENTHAU: In a nutshell, she was raised by a mother in a working-class home in South Bronx and as a teenager worked the evening shift in a garment factory to help make ends meet. She went on through hard work, force of ***will*** to overcome her initial difficulties with English composition to win Princeton University's highest undergraduate honor, the Pine Prize and to graduate with honors from the Yale Law School.

In the district attorney's office, the Judge was immediately recognized by trial (inaudible) supervisors as someone a step ahead of her colleagues, one of the brightest and most mature, hard-working, standout who was marked for rapid advancement. Ultimately, she took on every kind of criminal ***case*** that comes into an urban courthouse, from turnstile-jumping to homicide.

One of those ***cases***, the Tarzan murder ***case***, involved an addicted burglar named Richard Maddicks, who would terrorize the neighborhood during a crime spree that left three dead and involved his swinging into apartment windows from rooftops, shooting anyone in his way. He is now serving 137 years to life sentence.

Another ***case*** prosecuted by Assistant D.A. Sotomayor in 1983 involved a Times Square child pornography operation. That was the first child prosecution in New York after a landmark 1982 ***Supreme Court*** decision, People v. Ferber, upholding New York's new child pornography laws. Assistant D.A. Sotomayor left the jurors in tears over what the defendants had done to child victims.

These ***cases*** happened to grab the public's attention. But Judge Sotomayor -- Assistant D.A. Sotomayor understood that every ***case*** is important to the victim and appropriately gave undivided attention to the proper disposition of all of them.

Assistant District Attorney Sotomayor soon developed a reputation. Unlike many prosecutors, she simply would not be pushed around by judges or by attorneys. Some judges were eager to dispose of ***cases*** cheaply to clear their calendars. ADA Sotomayor instead fought for the ***right*** conclusion in each ***case***. Maybe that experience from the criminal ***court*** in New York City helped her prepare for these hearings.

After leaving my office, Judge Sotomayor joined a prominent law firm and also accepted a part-time appointment as a member of the New York City Campaign Finance. While there, she continued to earn a reputation for being tough, fair, non-political in an arena where those characteristics were sorely needed. And she has taken those characteristics with her to the federal bench, where they are equally important.

Judge Sotomayor's career in the law spans three decades, and she has worked in almost every level of our judicial system -- prosecutor, private litigator, trial ***court*** judge, and an appellate ***court*** judge, and what I think is the second-most important ***court*** in the world. She has been an able champion of the law, and her depth of experience ***will*** be invaluable on our highest ***court***.

Judge Sotomayor is highly qualified for any position in which a first-rate intellect, common sense, collegiality and good character would be assets. I might add that the judge ***will*** be the only member of the ***Supreme Court*** with experience trying criminal ***cases*** in the state ***courts***. The overwhelming majority of American prosecutions occur in state ***courts***.

MORGENTHAU: Judge Sotomayor ***will*** bring to the ***court*** a full understanding of the problems faced by prosecutors in those ***cases*** as well as a firsthand knowledge of the trauma faced by victims and of the legitimate needs of police officials that work in the state law enforcement system.

She ***will*** also understand the impact of federal judicial decisions on state prosecutions. In short, the judge is uniquely qualified by until that, experience and commitment to the rule of law to be an outstanding -- and I repeat outstanding -- member of the ***court***.

President Obama, and for that matter the United States, should be proud to see once more the realization of that central American credo that in this country a hard-working person with talent can rise from humble beginnings to one of the highest positions in the land.

Thank you, Mr. Chairman, for the opportunity to testify today.

ACTING CHAIRMAN: Thank you very much for your testimony.

We'll now ***hear*** from Wade Henderson, a familiar person to this committee. Wade Henderson is the president and CEO of the Leadership Conference on Civil ***Rights*** and counsel to the Leadership Conference Education Fund. He is a professor of public interest law at the University of the District of Columbia. Prior to his role with the Leadership Conference, Mr. Henderson was the Washington Bureau director of the NAACP. Mr. Henderson is a graduate from Rutgers University School of Law.

Mr. Henderson?

HENDERSON: Thank you, Mr. Chairman, Ranking Member Sessions, members of the committee.

I have the privilege of representing the views of the Leadership Conference, the nation's leading civil and human ***rights*** coalition, consisting of more than 200 organizations working to build an America that's as good as its ideals.

This afternoon I ***will*** briefly address four of the points that have figured in the debate about Judge Sotomayor's nomination: first, her qualifications for serving on the nation's highest ***court***; second, her personal background and her empathy for others who have had to work hard to succeed; third, her role in the unanimous ruling by a three-judge panel in the ***case*** of Ricci vs. DeStefano; and fourth, her past membership on the board of one of the Leadership Conference's member organizations, the Puerto Rico Legal Defense and Education Fund.

First, let me rejoice in what is self-evident. The nomination of Judge Sotomayor to be an associate justice on our nation's highest ***court*** is a milestone by many standards. The nation's first African- American president has nominated the first Hispanic-American, only the third woman, and only the third person of color to serve on the ***Supreme Court***.

While great challenges remain on our nation's quest for equal opportunity, we have truly reached an historic marker on the journey toward our goal of equal justice for all, the phrase inscribed not far from here on the front of the ***Supreme Court*** building.

But hopeful and historic as her nomination has been, Judge Sotomayor should herself be judged not by who she is, but by what she has done. Now, let me be as clear as I can. There is no question that she is qualified.

Judge Sotomayor's eloquent and thoughtful testimony before this committee speaks for itself. Her distinguished career at Princeton and Yale Law School have been much stated.

HENDERSON: She then spent five years as a prosecutor, as we've ***heard***, in Manhattan, working for the legendary district attorney, Robert Morgenthau -- pleased to have him here today -- and eight years as a corporate litigator, 17 years as a federal district ***court*** judge and appellate ***court*** judge add up to an individual who was one of the most qualified to have overcome before this committee.

Second, as with other nominees across the philosophical spectrum, including Justices Thomas and Alito, Judge Sotomayor has spoken of her family history and her personal struggles. These experiences help her to understand others and to do justice. They further qualify her for the highest ***court***, and she has said and done nothing that could reasonably be understood otherwise.

Third, Judge Sotomayor has participated in thousands of ***cases*** and authored hundreds of opinions, but much of the debate about her nomination has concentrated on the difficult ***case*** of Ricci v. Destefano. Whatever one may feel about the facts of this ***case***, we all agree that the ***Supreme Court***, in its Ricci decision, set a new standard for interpreting Title VII of the '64 Civil ***Rights*** Act. Using this one decision to negate Judge Sotomayor's 17 years on the bench does a disservice to her record and to this country.

Fourth, I must speak to the attacks on Judge Sotomayor because of her service on the board of one of our nation's leading civil ***rights*** organizations. These attacks do an injustice not only to Judge Sotomayor and to the Puerto Rican Legal Defense and Education Fund, but also to the entire civil ***rights*** community and to all those who look to us for a measure of justice.

Make no mistake - legal defense funds play an indispensable role in American life. They are private attorneys general that assist individuals, often those with few resources and no other representation, to become full shareholders in the American dream. When Justice Thurgood Marshall was nominated, there were those who questioned his role with the NAACP Legal Defense Fund. But history does not remember their quibbles kindly.

Judge Sotomayor has lived the American dream, and she understands all who aspire to it. Her qualifications are unquestioned, and the lessons that she has learned in her life, as well as in libraries, ***will*** serve her and our country well in the years ahead. All those who walk through the entrance to the ***Supreme Court*** seeking what is inscribed above its door, "Equal Justice Under Law," can be confident that a Justice Sotomayor ***will*** continue to do her part to keep the promise of our ***courts*** and our country.

Thank you very much.

ACTING CHAIR: Well, thank you very much for your testimony.

We'll now ***hear*** from Frank Ricci, a name that's been mentioned second only to Sotomayor during this ***hearing***. Frank Ricci has over a decade of experience as a firefighter with the New Haven Fire Department, and was the plaintiff in the ***case*** of Ricci v. Destefano. He's a contributing author of two books on firefighting.

It's a pleasure to have you before the committee.

RICCI: Thank you, Senator.

Thank you for the opportunity to appear before this distinguished committee. I accepted, with honor, the invitation to tell my story. Many others have a similar story, and I feel I'm speaking for them, as well.

The New Haven firefighters were not alone in their struggle. Firefighters across the country have had to resort to the federal ***courts*** to vindicate their civil ***rights***.

Technology and modern threats have challenged our profession. We have become more effective and efficient, but not safer. The structures we respond to today are more dangerous, constructed with lightweight components that are prone to early collapse, and we face fires that can double in size every 30 to 60 seconds.

Too many think that firefighters just fight fires. Officers are also responsible for mitigating vehicle accidents, hazardous material incidents, and handling complicated rescues.

RICCI: Rescue works can be very technical. All of these things require a great deal of knowledge and skill. Lieutenants and captains must understand the dynamic fire environment and the critical boundaries we operate in. They are forced to make stressful decisions based on imperfect information and coordinate tactics that support our operational objectives.

Almost all our tasks are time-sensitive. When your house is on fire or your life is in jeopardy, there are no time for do-overs.

The lieutenant's test that I took was without a doubt a job- related exam that was based on skills, knowledge and abilities needed to ensure public and the firefighters' safety.

We all had an equal opportunity to succeed as individuals, and we were all provided a road map to prepare for the exam.

Achievement is neither limited nor determined by one's race but by one's skills, dedication, commitment and character. Ours is not a job that can be handed out without regard to merit and qualifications.

For this reason, I and many others prepared for these positions throughout our careers. I studied harder than I ever had before, reading, making flash cards, highlighting, reading again, all while listening to prepared tapes.

I went before numerous panels to prepare for the oral assessment. I was a virtual absentee father and husband for months because of it.

In 2004 the City (ph) of New Haven felt not enough minorities would be promoted and that the political price for complying with Title VII (ph), the city civil service rules, and the charter, would be too high.

Therefore they chose not to fill the vacancies. Such action deprived all of us the process set forth by the rule of law. Firefighters who earned promotions were denied them.

Despite the important civil ***rights*** and constitutional claims we raised, the ***Court*** of Appeals panel disposed of our ***case*** in an unsigned, unpublished summary order that consisted of a single paragraph that made mention of my dyslexia and thus led many to think that this was a ***case*** about me and a disability.

This ***case*** had nothing to do with that. It had everything to do with ensuring our command officers were competent to answer the call and our ***right*** to advance in our profession based on merit, regardless of race.

Americans have the ***right*** to go into our federal ***courts*** and have their ***cases*** judged based on the Constitution and our laws, not on politics or personal feelings.

The lower ***court***'s belief that citizens should be reduced to racial statistics is flawed. It only divides people who don't wish to be divided along racial lines. The very reason we have civil service rules is to root out politics, discrimination and nepotism.

Our ***case*** demonstrates that these ills ***will*** exist if the rules of merit and the law are not followed.

Our ***courts*** are the last resorts for Americans whose ***rights*** are violated. Making decisions on who should have command positions solely based on statistics and politics, where the outcome of the decision could result in injury or death, is contrary to sound public policy.

RICCI: The more attention our ***case*** got, the more some people tried to distort it. It bothered us greatly that some perceived this ***case*** as involving a testing process that resulted in minorities being completely excluded from promotions.

That was entirely false, as minority firefighters were victimized by the city's decision as well. As a result of our ***case***, they should now enjoy the career advancement that they've earned and deserve.

Enduring over five years of ***court*** proceedings took its toll on us and our families. That ***case*** was longer -- was no longer just about as, but about so many Americans who have lost faith in the ***court*** system.

When we finally won our ***case*** and saw the messages we received from every corner of the country, we understood that we did something important together. We sought basic fairness and evenhanded enforcement of the laws, something all Americans believe in.

Again, thank you for the honor and privilege of speaking to you today.

ACTING CHAIRMAN: Mr. Ricci, thank you very much for your testimony.

We'll now ***hear*** from Lieutenant Ben Vargas. Ben -- Benjamin Vargas is a lieutenant in the New Haven Fire Department and was a plaintiff in the ***case*** of Ricci vs. DeStefano. He also worked part- time as a consultant for a company that sells equipment to firefighters.

Mr. Vargas?

VARGAS: Thank you. Members of this committee, it is truly an honor to be invited here today.

Notably, since our ***case*** was summarily dismissed by both the District ***Court*** and the ***Court*** of Appeals panel, this is the first time I am being given the opportunity to sit and testify before a body and tell my story. I thank for this -- thank you to this committee for the opportunity.

Senators of both parties have noted the importance of this proceeding, because decisions of the United States ***Supreme Court*** Greatly impact the everyday lives of ordinary Americans. I suppose that I and my fellow plaintiffs have shown how true that is.

I never envisioned being a plaintiff in a ***Supreme Court*** ***case***, much less one that generated so much media and public interest. I am Hispanic and proud of their heritage and background that Judge Sotomayor and I share. And I congratulate Judge Sotomayor on her nomination.

But the focus should not have been on me being Hispanic. The focus should have been on what I did to our new promotion to captain and how my own government and some ***courts*** responded to that. In short, they didn't care. I think it important for you to know what I did, that I played by the rules and then endured a long process of asking the ***courts*** to enforce those rules.

I am the proud father of three young sons. For them I sought to better my life, and so I spent three months in daily study, preparing for an exam that was unquestionably job-related. My wife, a special education teacher, took time off from work to see me and our children through this process.

I knew we would see little of my sons during these months, when I studied every day at a desk in our basement, so I placed photographs of my boys in front of me. When I would get tired and wanted to stop -- wanted to stop, I would look at the pictures, realize that their own future depended on mine, and I would keep going. At one point I packed up and went to a hotel for a day to avoid any distractions, and those pictures came with me.

I was shocked when I was not rewarded for this hard work and sacrifice, but I actually was penalized for it. I became not Ben Vargas, the fire lieutenant who proved themselves qualified to be captain, but a racist statistic. I

had to make decisions whether to join those who wanted promotions to be based on race and ethnicity or join those who would insist on being judged solely on their qualifications and the content of their character.

RICCI: I am proud of the decision I made and proud of the principle that our group vindicated together.

In our profession, we do not have the luxury of being wrong or having long debates. We must be correct the first time and make quick decisions under the pressure of time and rapidly unfolding events. Those who make these decisions must have the knowledge necessary to get it ***right*** the first time.

Unlike the judicial system, there are no continuances, motions or appeals. Errors and delays can cost people their lives. In our profession, the racial and ethnic makeup of my crew is the least important thing to us and to the public we serve. I believe the countless Americans who had something to say about our ***case*** understand that now.

Firefighters and their leaders stand between their fellow citizens and catastrophe. Americans want those who are the most knowledgeable and qualified to do the task. I am ***willing*** to risk and even lay down my life for fellow citizens, but I was not ***willing*** to go along with those who place racial identity over these more critical considerations.

I am not a lawyer, but I quickly learned about the law as it applies to this ***case***. Studying it as much I studied for my exam, I thought it clear that we were denied our fundamental civil ***rights***. I expected Lady Justice with the blindfold on, and a reasoned ***court*** from a federal ***court*** of appeals telling me, my fellow plaintiffs and the public that the ***court***'s view on the law -- what the ***court***'s view on the law was and do it in an open and transparent way.

Instead, we were devastated to see a one paragraph unpublished order summarily dismissing our ***case***, and indeed even the notion that we had presented important legal issues to that ***court*** of appeals. I expected the judges who ***heard*** my ***case*** along the way to make the ***right*** decisions, the ones required by the rule of law.

Of all that has been written about our ***case***, it was Justice Alito who best captured our own feelings. We did not ask for sympathy or empathy. We asked only for even-handed enforcement of the law and prior to the majority justice opinion in our ***case***, we were denied just that.

Thank you.

CARDIN (?): Thank you for your testimony.

We'll now ***hear*** from Peter Kirsanow. Peter Kirsanow serves on the U.S. Commission on Civil ***Rights***. He's a member of the National Labor Relations Board where he received a recess appointment from President George W. Bush. Previously, he was a partner with the Cleveland law firm of Benesch, Friedlander, Coplan and Aronoff. Mr. Kirsanow received his law degree from Cleveland State University.

KIRSANOW: Thank you, Mr. Chairman, Senator Sessions, members of the committee, I am Peter Kirsanow, a member of the U.S. Commission on Civil ***rights***. I am currently back at Benesch, Friedlander in the legal employment practice group. I am here in my personal capacity.

The U.S. Commission on Civil ***Rights*** was established...

SESSIONS (?): Is that microphone on?

KIRSANOW: The U.S. Commission on Civil ***Rights*** was established by the 1957 Civil ***Rights*** Act to, among other things, act as a national clearinghouse for information related to denials of equal protection and discrimination, and in furtherance of the clearinghouse process, my assistant and I reviewed the opinions in civil ***rights cases*** in which Judge Sotomayor participated while on the 2nd Circuit in the context of prevailing civil ***rights*** jurisprudence and with particular attention to the ***case*** of Ricci v. DiStefano.

Our review revealed at least three significant concerns with respect to the manner in which the three-judge panel that included Judge Sotomayor handled the ***case***. The first concern was, as you've ***heard***, the summary disposition of this particular ***case***. The Ricci ***case*** contained constitutional issues of extraordinary importance and impact. For example, the issues of -- that are very controversial and volatile -- racial quotas and racial discrimination.

This was a ***case*** of first impression. No 2nd Circuit or ***Supreme Court*** precedent on point.

KIRSANOW: Indeed, to the extent there were any ***cases*** that could provide guidance, such as Wigant (ph), Crosen (ph), Aderant (ph), even private sector ***cases***, such as Johnson (ph) Transportation, Frank v. Xerox, Weather (ph) v. Steelworkers (ph), would dictate or suggest a result opposite of that reached by the Sotomayor panel.

The ***case*** contained a host of critical issues for review, yet the three-judge panel summarily disposed of the ***case***, as you've ***heard***, in an unpublished, one-paragraph, per curium opinion that's usually reserved for ***cases*** that are relatively simple, straightforward and inconsequential.

The second concern is that the Sotomayor panel's order would inevitably result in the proliferation of de facto racial and ethnic quotas. The standard endorsed by the Sotomayor panel was lower than that adopted by the ***Supreme Court***'s test of strong basis in evidence.

Essentially, any race-based employment decision invoked to avoid a disparate impact lawsuit would provide immunity from Title VII review. Under this standard, employers who fear the prospect or expense of litigation, regardless of the merits of the ***case***, would have a green light to resort to racial quotas.

But even more invidious is the use of quotas due to racial politics, and, as Judge Alito's concurrence showed, there was glaringly abundant evidence of racial politics in the Ricci ***case***.

Had the Sotomayor panel decision prevailed, employers would have license to use racial preferences and quotas on an expansive scale. Evidence adduced before the Civil ***Rights*** Committee shows that when ***courts*** open the door to preferences just a crack, preferences expand exponentially.

For example, evidence adduced before hearings of the Civil ***Rights*** Commission in 2005 and 2006 show that despite the fact that Aderant (ph) was passed more than -- or decided more than 10 years ago, federal agencies persist in using race conscious programs in federal contracting, governmental contracting, as opposed to race-neutral alternatives.

Moreover, even though the ***Supreme Court*** had struck down the use of raw numerical weighting in college admissions in Gratz v. Bollinger, thereby requiring that race be only a mere plus factor, a thumb on the scale in the admissions process, powerful preferences show no signs of abating.

A study by the ***Center*** for Equal Opportunity showed that in a major university preferences were so great that the odds that a minority applicant would be admitted over a similarly situated white comparative were 250-1. At another major university, 1,115-1. That's not a thumb on the scale, that's an anvil.

And had the reasoning of the Ricci ***case*** in the lower ***court*** prevailed, what happened to Firefighter Ricci and Lieutenant Vargas would happen to innumerably more Americans of every race throughout the country.

The third concern is that the lower ***court***'s decision that would permit racial engineering by employers would actually harm minorities who were the purported beneficiaries of that particular decision.

Evidence adduced at a 2006 Civil ***Rights*** Commission ***hearing*** shows that there's increasing data that preferences create mismatch effects that actually increase the probabilities that minorities ***will*** fail if they receive beneficial treatment or preferential treatment.

For example, black law students who were admitted in preferences are two and a half times more likely not to graduate than their similarly situated white or Asian comparatives; four times as likely not to pass the bar exam on the first try; and six times as likely never to pass the bar exam, despite multiple attempts.

KIRSANOW: Mr. Chairman, it's respectfully submitted that, if a nominee's interpretative factoring permits an employer to treat one group preferentially today, there's nothing that prevents them from treating another group or shifting their preferences to another group tomorrow.

And it's contrary to the color-blind ideal contemplated by the 1964 Civil ***Rights*** Act, Title VII, which was the issue decided in the Ricci ***case***.

Thank you, Mr. Chairman.

WHITEHOUSE: And thank you for your testimony.

We'll now from Linda Chavez, who's chairman of the ***Center*** for Equal Opportunity and a political analyst for Fox News Channel.

She's held a number of appointed positions, among them White House director of public liaison and staff director of U.S. Commission on Civil ***Rights***.

CHAVEZ: Thank you, Mr. Chairman and members of the committee.

I testify today not as a wise Latina woman but an American who believes that skin color and national origin should not determine who gets a job, a promotion or a public contract or who gets into college or receives a fellowship.

My message today is straightforward. Mr. Chairman, do not vote to confirm this nominee. I say this with some regret, because I believe Judge Sotomayor's personal story is an inspiring one, which proves that this is truly a land of opportunity, where circumstances of birth and class do not determine whether you can succeeded.

Unfortunately, based on her statements both on and off the bench, I do not believe Judge Sotomayor shares that view. It is clear from her record that she has drunk deep from the well of identity politics.

I know a lot about that well, and I can tell you that it is dark and poisonous. It is, in my view, impossible to be a fair judge and also believe that one's race, ethnicity and sex should determine how someone ***will*** rule as a judge.

Despite her assurances to this committee over the last few days that her "wise Latina woman" statement was simply a, quote, "rhetorical flourish fell flat," nothing could be further from the truth.

All of us in public life have, at one time or another, misspoken. But Judge Sotomayor's words weren't uttered off the cuff. They were carefully crafted, repeated, not just once or twice, but at least seven times over several years.

As others have pointed out, if Judge Sotomayor were a white man who suggested that whites or males made better judges, again, to use Judge Sotomayor's words, quote, "Whether born from experience or inherent physiological or cultural differences," end quote, "we would not be having this discussion. Because the nominee would have been forced to withdraw once those words became public."

But, of course, Judge Sotomayor's offensive words are just a reflection of her much greater body of work as an ethnic activist and judge.

Identity politics is at the core of who this woman is. And let me be clear here. I'm not talking about the understandable pride in one's ancestry or ethnic roots, which is both common and natural in a country as diverse and pluralistic as ours.

CHAVEZ: Identity politics involves a sense of grievance against the majority, a feeling that racism permeates American society and its institutions and the belief that members of one's own group are victims in a perpetual power struggle with the majority.

From her earliest days at Princeton University, and later, Yale Law School, to her 12-year involvement with the Puerto Rican Legal Defense and Education Fund, to her speeches and writings, including her jurisprudence, Judge Sotomayor has consistently displayed an affinity for such views.

I have outlined at much greater length in my prepared testimony, which I ask permission be included in the record in full, the way in which I believe identity politics has permeated Judge Sotomayor's life's work. But let me briefly outline a few examples.

As an undergraduate, she actively pushed for race-based goals and timetables for faculty hiring. In a much-praised senior thesis, she refused to identify the United States Congress by its proper name, instead referring to it as the North American Congress or the Mainland Congress.

During her tenure as chair of the Puerto Rican Legal Defense and Education Fund's Director Litigation Committee, she urged (inaudible) seeking lawsuits challenging the civil service exams, seeking race- conscious decision-making similar to that used by the city of New Haven in Ricci.

She opposed the death penalty as racist. She supported race- based government contracting. She made dubious arguments in support of bilingual education and more broadly in trying to equate English language requirements as a form of national origin discrimination. As a judge she dissented from an opinion that the Voting ***Rights*** Act does not give prison inmates the ***right*** to vote.

And she has said that as a witness -- eyewitnesses' identification of an assailant may be unconstitutional racial profiling in violation of the equal protection clause, if race is an element of that identification. Finally, she has shown a willingness to let her policy preferences guide her in the Ricci ***case***.

Although she has attempted this week to back away from some of her own intemperate words and has accused her critics of taking them out of context, the record is clear. Identity politics is at the core of Judge Sotomayor's self-definition. It has guided her involvement in advocacy groups, been the topic of much of our public writing and speeches, and influenced her interpretation of law.

There is no reason to believe that her elevation to the ***Supreme Court*** ***will*** temper this inclination, and much reason to fear that it ***will*** play an important role in how she approaches the ***cases*** that ***will*** come before her, if she is confirmed.

I therefore respectfully urge you not to confirm Judge Sotomayor as an associate Justice of the ***Supreme Court***. Thank you.

CARDIN: Thank you for your testimony.

Let me first recognize our chairman, Chairman Leahy, who I understand wants to reserve his place.

LEAHY: Thank you, Senator Cardin. I wanted to thank you and the other senators who have filled in on this prior to -- I was here throughout the -- throughout all the testimony by Judge Sotomayor, and the questions asked by both Republicans and Democrats are reserved by time.

I do welcome all the witnesses, who are both for and against the nominee. They -- Senator Sessions and I joined together to make sure that everybody was invited, everybody was given a chance to testify. And if any of you wish to add to your testimony, the record ***will*** be open for -- for 24 hours for you to do that.

Thank you very much.

CARDIN: Thank you, Mr. Chairman.

Mayor Bloomberg, let me start with you, if I might, in my questioning. There's been a lot of discussion about the Puerto Rican Legal Defense and Education Fund, including during this panel discussion. And Judge Sotomayor served on the board and had nothing to do with the selection of individual ***cases*** from the point of view of its content, but served in a voluntary capacity with that board.

CARDIN: And first I'm going to quote from you, and then give you a chance perhaps to expand upon it, where you have been quoted as saying, "Only in Washington could someone's many years of volunteer service to a highly regarded nonprofit organization that has done so much good for so many, be twisted into a negative, and that group has made countless important contributions to New York City."

I just want to give you a chance to respond to Judge Sotomayor's service on the Puerto Rican Legal Defense and Education Fund.

(UNKNOWN): Well, this is an organization that has defended people who don't have the wherewithal to get private counsel or don't have traditions of understanding the law, and it happens to focus on people mainly who come from Puerto Rico and have language problems, in addition to a lack of perhaps understanding of how our ***court*** system works.

And it provides the kind of representation that we all, I think, believe that everybody that appears before a judge and before the law deserves. They raise money privately to pay lawyers to defend. I don't agree with some of their positions and I agree with other ones. But having more of these organizations is a lot better than having less. At least people do have the option of getting good representation.

CARDIN: Thank you.

Mr. Henderson, during the ***hearing*** of Judge Sotomayor, we had a chance to talk a little bit about the voting ***rights*** and the recent ***case*** before the ***Supreme Court***, and the fact that one justice questioned the constitutionality, in fact pretty well determined the constitutionality of the -- of the Voting ***Rights*** Renewal Act, saying it was no longer relevant.

Judge Sotomayor, during her testimony, talked about deference to Congress, the fact that it was passed by a 93 to 0 vote in the United States Senate and by a lopsided vote in the House of Representatives, the 25-year extension. I just want to get your comments as to whether the Voting ***Rights*** Act is relevant today and your confidence level of Judge Sotomayor as it relates to advancing civil ***rights*** for the people of our nation.

HENDERSON: Thank you, Mr. Chairman, for your question.

Let me back up for just a minute and say that these hearings have really been a testament to the wisdom of the founding fathers in setting up a three-part system of government, with the president making a nomination for an associate justice on the ***Supreme Court***, and the Senate Judiciary Committee providing its advice and consent.

Under our system of government, the Senate and the House have a particular responsibility to delve deeply into the constitutional ***rights*** of all Americans, particularly around the ***right*** to vote. Voting really is the language of democracy. If you can't vote, you don't count. And the truth is that notwithstanding the 15th Amendment to the Constitution, the 13th and 14th Amendments, African Americans, Latinos, women, other people of color were often denied their ***right*** to vote well into the 20th century.

It took not just those amendments, but actually a statute enacted by this Congress to ensure that the ***rights*** of Americans to vote indeed could be preserved, and it was only in the aftermath of the '65 Voting ***Rights*** Act that we have seen the expansion of the franchise and democratization -- small "d" -- of our, you know, republic in a way that serves the interests of the founders.

Having said that, Congress reached a decision in reauthorizing the Voting ***Rights*** Act in 2006 that this law was necessary. Sixteen- thousand pages of the Congressional Record speak eloquently to that important interest. The fact that this issue was held both with congressional review and also a national commission set up by the Lawyers Committee for Civil ***Rights*** and others in the civil ***rights*** community, holding hearings around the country added to the record that was created.

HENDERSON: The fact that this bill passed -- rather the reauthorization of the Voting ***Rights*** Act -- 390-33 in the House and 98-0 in the Senate, speaks eloquently about the important need of this act and the continuing need for it.

So the fact that some on the ***Supreme Court*** found otherwise doesn't disturb me at all. There is a need for it; that need continues, and notwithstanding evidence.

CARDIN: Well, thank you for correcting my numbers on the number that had voted. I appreciate that.

I just want to ask Mr. McDaniel a quick question, and that is, during the confirmation hearings both Democratic and Republican senators have been urging from our nominee that you need to look at what the law is, and you can't judge based upon emotion. You have to do -- you have to follow the precedents of the ***court***.

And I have a simple question to you in the Ricci ***case***. Do you believe that the Sotomayor decision with the three-judge panel was within the mainstream of judicial decision-making when that decision was reached?

MCDANIEL: Senator, I do believe that. And to ***hear*** the stories of these firefighters in person, I -- I don't have any reason not to use the word empathy. I have a great deal of empathy for the circumstances that they have described, and I don't know that I have a great deal for how the city fathers handled the matter.

But by the time it made it to the 2nd Circuit I believe that the panel did what the law required, and I don't think that there is a just legal criticism for the way that the panel handled the matter. And the fact that the ***Supreme Court*** chose to change the law in a bare majority also is their prerogative.

CARDIN: Thank you very much.

Senator Sessions?

SESSIONS: Thank you.

Thank all of you. It's a very important panel. And actually much of your testimony was moving, and I appreciate it. And I think you're calling us to a higher level of discussion on these issues because they go to the core of who we are as Americans. And I just want to share that.

We are worried about the Second Amendment. I ***will*** just ask the mayor that you signed a brief in favor of the D.C. gun ban, which would bar even a handgun in someone's home. So I would assume you would be agreeable with the opinion of Judge Sotomayor and her view.

We've got different views about these things.

Mayor, I want to tell you, I appreciate your leadership. It's a tough job to be mayor of New York. You're showing strength and integrity.

Mr. Morgenthau, you're the dean of prosecutors. I ***hear*** many people over the years that have worked for you and they're very complimentary of you, and I know you're proud of this protege of yours who's moved forward.

MORGENTHAU: Senator, may I tell you that my grandmother was born in Montgomery, Alabama.

SESSIONS: I am impressed to ***hear*** that.

(LAUGHTER)

I feel better already. That's good.

(LAUGHTER)

Mr. Attorney General, thank you for your able comments.

And, Mr. Henderson, it's good to work with you.

Senator Leahy and I are talking, during these ***hearing***, we're going to do that crack cocaine thing that you and I have talked about before. We got to...

(LAUGHTER)

HENDERSON: Thank you, Senator. I appreciate it.

(CROSSTALK)

SESSIONS: Let me correct the record.

(UNKNOWN): You need to rephrase it, Senator.

(LAUGHTER)

Please rephrase.

SESSIONS: I misspoke.

HENDERSON: No. Quite all ***right***.

SESSIONS: We're going to reduce the burden of penalties in some of the crack cocaine ***cases*** and make them fair.

So, Mr. Ricci, thank you for your work.

I would say, Mr. Henderson, that I said the PRLDEF legal defense fund is a good organization in my opening statement.

And I think it has -- it has every ***right*** to advocate those positions that it does, but the nominee was on the board for a long time, and I did take some positions that she rightly was asked about, whether or not she agreed to it, especially during some of those times she was chairman of the litigation committee.

But I value the -- these -- I value that groups can come together and file lawsuits and take the matter to the ***court***.

Just briefly, Mr. Kirsanow, on a slightly different subject than you started -- I think you probably know this answer -- but could tell us for the purpose of this ***hearing***, as briefly as you can, what the concern is in the Voting ***Rights*** Act?

It's not that we're against -- anybody's against the voting act. I -- I voted for it. But there are some constitutional concerns. Could you share precisely what that is?

KIRSANOW: Sure. And specifically, with respect to the latest ***Supreme Court*** decision related to that, what was articulated is that the pre-clearance provisions of the Voting ***Rights*** Act pertain to a legacy of discrimination that occurred in many states where poll taxes and literacy tests were being imposed on black citizens.

However, in this particular ***case***, the often critical subdivision came into existence after all of the -- the legacy of this administration had actually occurred or even after the Voting ***Rights*** Act itself had been passed. And the question is, how could it be that you've got a pre-existing law that is almost -- for lack of a better term -- ex post facto applying to an organization that came into existence after the law was in effect.

There was no history of discrimination or denials of equal protection or denial of voter ***rights*** by this particular political subdivision. So it was peculiar in that regard, and I think there were several justices who evinced some concern about the approach in that particular ***case***.

SESSIONS: Thank you. It's just -- there are two sides to that story. And we passed the bill, and we extended it, and all of it had some angst and worry.

I'd said I wanted to vote for it, and we did. We extended it for probably longer than we should have, and not that it would ever end. Huge portions of it may never end, but some portions of it may not be needed to continue.

Let's -- Lieutenant Vargas, that was a moving story you gave us. Let me just ask you this. Do you think that other members of the fire department, had they studied as hard as you and mastered the subject matter as well as you did, could have passed the test -- more of them would have passed if they'd studied as hard as you?

VARGAS: Absolutely.

SESSIONS: You think you...

VARGAS: Absolutely. I studied with a group of them, and they all supported me and what I was doing, because they knew the effort that I put in. And -- and they were ***right*** there. We really weren't all that far behind.

And, you know, minorities would have been promoted. That's something that -- that continues to get left out. There would have been minorities promoted to captain, minorities promoted to -- to lieutenant, as well.

And, you know, when you take these exams, sometimes you have winners and sometimes -- you know, but you go into that situation knowing that that's going to be the ***case***.

SESSIONS: Mr. Kirsanow, you indicated that all the judges -- I believe your phrase was -- on the ***Supreme Court*** rejected the standard of review that the panel -- Judge Sotomayor's panel set for the firefighter exam. Is that ***right***?

KIRSANOW: Senator, even the dissent had a different standard. It was good cause standard, which was given a little bit more definitiveness to the approach that defendants could take in defending.

As you know, Title VII has a safe harbor of job-related consistent with business necessity. If you can establish that, in fact, the -- that the firefighters took were job-related, consistent with business necessity, then only under those -- the only way you could show a disparate impact is if those tests weren't made. Even the dissent said it should have been sent back on remand.

SESSIONS: Thank you.

And, Ms. Chavez, I noticed one thing. According to the ABA statistics, only 3.5 percent of lawyers in America in 2000 were Hispanic, yet they -- Hispanics make up 5 percent of the federal district ***court*** judges and 6 percent of circuit ***court*** judges. Would you comment on that?

CHAVEZ: Well, first of all, I think it's important -- you know, there's been a lot of attention focused on the phrase a "wise, Latina woman." I used it myself, obviously, ironically, in testifying today.

But I think it's important to read Judge Sotomayor's entire speech, because, in fact, it wasn't just that she was saying a wise, Latina woman would make a better judge. What she was saying was that the race, ethnicity and gender of judges would and should make a difference in their judging.

And she says in the speech itself -- she says she doesn't know always how that's going to happen, but she even cites some studies, sociological studies that take a look at the way in which women judges have handed down decisions and makes the ***case*** that women judges decide ***cases*** differently than men do, and she speaks of this approvingly.

And she talks about statistics and how few Latinos there are on the bench. And the statistics that you just cited come from an article that I wrote in retort (ph) to the -- the statistics that she used.

I bring that up because inherent in that analysis of hers is the notion that there ought to be proportional representation on judicial panels, that we ought to be selecting judges based on race, ethnicity and gender, and that we ought to have more or less proportional representation.

And I have to say that, you know, that really, I think, comes very close to arguing for quotas, a position, by the way, that she has taken with -- when she was with the Puerto Rican Legal Defense and Education Fund. By the way, she was not just on the board; she actually signed some memorandum. Those are in the record, and I've cited some instances of that in my written testimony.

And the point is that, if there is so-called under-representation of some groups, it means there's over-representation of others. And I said in my testimony that, if we are concerned about the number of Latino judges, first thing you need to be a judge is a college degree and a law degree. And, in fact, if just using Judge Sotomayor's own statistics, if anything, if you look at the number of attorneys who are Latino at the time that she was writing, Hispanics were actually somewhat over-represented on the judicial bench.

I reject all of that. That doesn't bother me in the least that they are over-represented. I think we should not be making ethnicity and race or gender a qualification for sitting on the bench or being a firefighter or being a captain or lieutenant on a firefighting team. I think we ought to take race, ethnicity and gender out of the equation.

SESSIONS: Thank you.

WHITEHOUSE: Senator Durbin?

DURBIN: Ms. Chavez, do you think that Judge Sotomayor's being awarded the Pyne award at Princeton for high academic achievement and good character being summa cum laude and Phi Beta Kappa was because it was a quota, that they wanted to make sure there was a Latina who received that?

CHAVEZ: No, I don't. And in fact, what is interesting about Judge Sotomayor's tenure at Princeton University is that she has said that she was admitted as an affirmative action admittee because her test scores were not comparable to that of her peers.

But she has also has talked about what happened to her when she got there, and that she recognized that, in fact, she was not particularly well-prepared, that she did not write well and that one of her professors pulled her aside and said she had to work on her writing skills.

(UNKNOWN): So that would...

CHAVEZ: I admire...

(UNKNOWN): Excuse me. That would make it a pretty amazing story, then...

CHAVEZ: That's ***right***. And I wish that that was the story that she was telling Latinos, that she...

(UNKNOWN): I think the story of her life that I'm describing...

CHAVEZ: Well, I wish that what she was telling Latinos is that, if you do what Ben Vargas has done; if you do what Frank Ricci has done; if you take home the books and you study them, and you memorize what you need to know

so that you can pass the test like I did when I took home grammar books and learned how to write standard English, that that should be the story, not that she should be insisting on racial quotas and racial preferences.

(UNKNOWN): Ms. Chavez, I think that the story of her life is one of achievement, overcoming some odds that many people have never faced, in her family life and personal life.

Mr. Morgenthau, when you were alerted about her skills in law school, did they tell you that they had an opportunity, here, for you to hire a "wise Latina lawyer"?

Is that what you were the market for?

MORGENTHAU: Absolutely not. I mean, I took one look at her resume, you know, summa cum laude at Princeton, Yale Law Journal, and I said -- and then I talked to her, and I thought she was common-sense and judgment and willingness to work. The fact that was Latina or Latino had absolutely nothing to do with it.

And may I just use this opportunity to say that I was one of the founding directors of the Puerto Rican Legal Defense Fund. And the reason I did that was I thought it was important for what was then a way-underrepresented minority. You know, you're looking back 35, 40 years -- to have an organization which was dedicated to help people in housing ***court***, discrimination ***cases***.

So I urged her to join the Puerto Rican Legal Defense Fund. And, I mean, I had become a life member of the NAACP in 1951. I'd been on the National Commission of the Anti-Defamation League.

I think that, you know, one of the great strengths of the United States is its diversity. And -- but we've got to help people from the various minority groups make their way and advance.

And I must say I'm very critical of some of my friends and relatives who want to forget where they came from. And it's to her credit that she remembers where she came from.

(UNKNOWN): And, Mayor Bloomberg, I believe you had a quote that I read about Washington being, maybe, the only place -- would you recall that quote on the Puerto Rican Legal Defense Fund?

BLOOMBERG: Yes, I think that public service is something that, certainly, you, Senator, know the value of and the satisfaction when you do it. And in New York City, we value those who are wiling to give their time and help others. They walk away, in many ***cases***, from lucrative careers to serve as public defenders or outside of the legal profession in myriad other ways.

And the fact that the organizations that they work for sometimes do things that you or I disagree with doesn't take away from the value that they provide in other things that they do.

(UNKNOWN): I just made a note the other day. This is my third nomination for the ***Supreme Court***. I've been honored to serve on this committee and consider three nominees. The two previous nominees, Chief Justice Roberts, Justice Alito, both white males, and the questioning really came to this central point. "Do you as a white male," to each of these nominees we asked, "have sensitivity to those unlike yourself"? Minorities, disadvantaged people. And those questions were asked over and over again.

In this ***case*** where we have a minority woman seeking a position on the ***Supreme Court*** it seems the question is, are you going to go too far on the side of minorities and not really use the law in a fair fashion?

BLOOMBERG: Senator, isn't the reason that the founding fathers, at least I assume the reason the founding fathers said nine justices is that they wanted a diverse group of people with different life experiences who could work collaboratively and collectively to understand what the founding fathers meant generations later on. And so the fact that I said before in my testimony I do not think that no matter how compelling Justice Sotomayor's life experience and biography is, that's not the reason to appoint her. Certainly we benefit from having a diverse group of people on the ***Court*** in the same way as my city benefits from a diverse group of citizens.

(UNKNOWN): Mr. Chairman, if I could ask one last question. I might say, Mr. Mayor, you're getting dangerously close to empathy. But I happen to agree with you.

Mr. Morgenthau, when Judge Sotomayor worked in your office did you notice whether or not she treated minorities any differently in...

MORGENTHAU: She was ***right*** down the middle, Senator. She didn't treat minorities any differently than she treated anybody else. ***Right*** down the middle. Looked at the law. Tough but fair.

(UNKNOWN): Thank you very much. Thank you, Mr. Chairman.

LEAHY: Thank you. Senator Sessions indicated that Senator Graham ***will*** be next to inquire.

GRAHAM: I'd like to thank my colleagues for the courtesy here. I've got to run back and do some things. This has been a very good panel by the way. I think we're sort of grappling with issues ***right*** here in the Senate the country is grappling with, and I'll try to put it in perspective the best I can.

Now Ms. Chavez, identity politics I think I know what you're talking about. I asked the Judge about it. It's a -- a practice of politics I don't agree with and I think overall is not the ***right*** way to go. But having said that I've tried to look at the Judge in totality.

The well-qualified and ready from the ABA when it was given to Judge Alito and Roberts, we all embraced it, and I used it a couple of times to say that if you thought this person had a rigid view of life or the law it'd been very hard for the ABA to give them a well- qualified rating. Does that impress you at all that the ABA had a different view in terms of how she might use identity politics on the bench?

CHAVEZ: Well I'm not sure they dealt with that question. I think they did deal with her record as a judge and the decisions that she has made as a judge. The ABA and I often disagree on...

GRAHAM: Ma'am, I totally understand.

(CROSSTALK)

CHAVEZ: (inaudible).

GRAHAM: I totally understand, but I guess the point I'm making, I don't want to sit here and try to have it both ways. You know say the ABA's a great thing one day and means nothing the next.

Have you ever known a Republican political leader to actively try to seek putting a minority in a position of responsibility to help the party?

CHAVEZ: I think that the idea of giving due deference to making sure that people are representative in -- in diverse ways is a standard way of operating -- in political circles. I don't...

(UNKNOWN): Well, the only reason I mentioned that is the statement you made, the way we pick our judges should be based on merit, the way we pick our firefighters. I totally agree with that. I mean, it's -- but politics is politics in the sense that I know that Republicans sit down and think, OK, we've got some power now. Let's make sure that we let the whole country know the Republican Party is just not a party of short white guys.

(UNKNOWN): I think that's different, though, Senator, then, as she suggested in her speech that there are to be some sort of proportion...

(UNKNOWN): Yes, that's ***right***. You can go -- that's ***right***. I -- I totally agree.

(UNKNOWN): I -- I -- and I think that's farther. And I also think it matters that we're not just doing that because we want to see diverse opinions. But it seems to me that what she was saying in her speech was that we do that

because blacks, Latinos and women are different, think differently, and ***will*** behave differently. I mean, she said that explicitly, that it...

(UNKNOWN): Yes, I...

(UNKNOWN): ... maybe as a result of physiological differences. I think any white man that said such a thing about minorities or women would be laughed out of this room.

(UNKNOWN): Well, since I'm the white guy that said that, I agree with you.

(LAUGHTER)

But the point is that I'm trying to get the country in a spot where you're not judged by one thing, that we just can't look at her and say that's it. You know, when I looked at her, I'd see speeches that bugged the hell out of me, as I said before, but I'll also see something that very much impresses me.

And the ADA apparently sees something, and Louis Freeh sees something, and Ken Starr sees something. And, you know, what I want to tell the country is that Republicans very much do sit down and think about political picks and appointments in a political sense to try to show that we're a party that looks at all Americans and intends to give an opportunity. And that's just life, and that's not a bad thing.

Now, Mr. Ricci, I would want you to come to my house, if it was on fire.

(LAUGHTER)

And I appreciate how difficult this must have been for you to bust your ass and to study so hard and -- and to have it all stripped at the end. I just want you to know if the country that we're probably one generation removed to where no matter how hard you study, based on your last name or the color of your skin, you'd have no -- no shot. And we're trying to find some balance.

And in your ***case*** I think you were poorly treated, and you did not get the day in ***court*** you deserve, but all turned out well. It was a five-four decision, and maybe we can learn something through your experience. But please don't lose sight of the fact not so very long ago, the test was rigged a different way.

Mr. Vargas, you're one generation removed from where your last name would have been it. Do you understand that?

VARGAS: Yes, sir.

(UNKNOWN): What did you go through personally to stand with Mr. Ricci? What came your way? Does anybody criticize you?

VARGAS: I received lots of criticism.

(UNKNOWN): Well, tell me the kind of criticisms you had.

VARGAS: But I have -- I have a thick skin. I believe that I'm a person with thick skin.

(UNKNOWN): Well, did people call you an Uncle Tom?

VARGAS: Yes, sir.

(UNKNOWN): People thought you were disloyal to the Hispanic community?

VARGAS: Absolutely, yes.

(UNKNOWN): Well, quite frankly, my friend, I think you've done a lot for American-Hispanic community. My hat's off to you.

VARGAS: Thank you, Senator.

(UNKNOWN): Finally, Mayor, having to govern a city as diverse as New York must be very, very difficult. It is also a pleasure?

BLOOMBERG: It is a pleasure, and we -- I said before you came in that some of Judge Sotomayor's views I don't happen to agree with some of her decisions. I think on Ricci, for example, I disagreed with what the city of New Haven did.

BLOOMBERG: In New York City, you should know that our city is a defendant in a ***case***, a class action suit in the Justice Department where the challenge is to entry-level tests for our fire department, one given in 1999 before I became mayor, and one afterwards in 2002. And we're defending it on the grounds -- the suit alleges that the written portions of the test were not germane to the job and had a disparate impact.

I've chosen to fight this. I think that in fact the tests were job-related and were consistent with business necessity. This is a ***case*** that's going to go to trial sometime later this year. What we've tried to do is to approach it from a different point of view, aggressive recruiting to try to get more minorities to apply to be firefighters. And we have revised our test. We've had a substantial increase in the number of minorities taking the test, passing the test, and joining our fire department.

I really do believe that that's a better way to solve the diversity problem, which does affect an awful lot of fire departments around this country, rather than throwing out tests and thereby penalizing those who pass the test.

CARDIN: Senator Klobuchar?

KLOBUCHAR: Thank you. I'm going to let Senator Specter, who is -- I guess I'm more senior to him only because of a technicality, but also he's been here longer. So I'm going to let him go and then I ***will*** go after.

CARDIN: Senator Specter?

SPECTER: No, no, I'll defer to Senator Klobuchar.

(LAUGHTER)

KLOBUCHAR: OK. Here we go.

I first wanted to thank both firefighters for your service. As a prosecutor, we worked extensively on arson ***cases*** and I just got a little sense of what you go through every day and how dangerous your job is. So thank you for that.

I just wanted to follow up on one thing. Ms. Chavez, when you talked about your clearly know Ms. Sotomayor's history and her record, but when you talked about how she got into Princeton, you didn't point out the one thing that I think Mr. Morgenthau did, and that is that she ended up graduating from there summa cum laude, and that certainly is all about numbers and grades, I would think, and not affirmative action. Would that be correct?

CHAVEZ: That's absolutely ***right***, and I wish that was the message that she was giving to her Hispanic audiences, that she was able to do it; that she was able to overcome adversity; that she was able because she applied herself and worked hard and put in the hours studying to be able to succeed. And that is not the message.

KLOBUCHAR: OK. But she also was valedictorian of her high school class. Where I went to high school, that was all numbers and grades and nothing to do with anything else. Is that true?

CHAVEZ: I am only quoting what she has said herself. I don't have any idea what her test scores were. I don't think anyone but she does. But she has said that she got in to Princeton and also Yale based on the affirmative action programs of those universities.

KLOBUCHAR: OK.

Mr. Morgenthau, it's just an honor to meet you. When I was district attorney, I hired a number of people that learned everything they knew from you and your office, so thank you for that.

KLOBUCHAR: And in fact, when I did my opening statement, I talked about a quote you gave once about how you hired people, and you say, "We want people with good judgment because a lot of the job of a prosecutor is making decisions." You said, "I also want to see some signs of humility in anybody that I hire. We're giving young lawyers a lot of power and we want to make sure that they're going to use that power with good sense and without arrogance."

Could you talk about those two qualities -- the good judgment and the humility, and how you think those qualities may be or may not be reflected in our nominee?

MORGENTHAU: Well, I'm -- I mean, I think she met all those standards. I -- I interviewed her and talked to her, thought she was a hard worker. I thought she would relate to the victims and witnesses. I thought she had humility. I thought she was fair. I thought she'd apply the law.

She met all of those standards that I thought were important to me, and I hired her entirely on the merits, entirely on the merits, nothing to do with her ethnic background or anything else. She was an outstanding candidate on the merits.

KLOBUCHAR: There is also a letter that we received from 40 of her colleagues. And one of the things I've learned is that, well, maybe sometimes someone does well in their workplace by their superiors, sometimes their colleagues think something else. And here you have her colleagues talking about the long hours she worked, how she was among the very first in her starting class to be selected to handle felonies.

Could you describe how your process works in your office and how certain people get to handle felonies sooner than others?

MORGENTHAU: Well, it's (inaudible) we have six trial bureau of about 50, 55 lawyers in each one. And it's up to the bureau chief, the deputies to decide who should move along.

And I know one of the people who wrote that letter had gone to -- to Princeton and to Yale Law School and studied for the bar with Sonia. And I said to him, "I guess she was a little bit ahead of you." And he said, "She was a full step ahead of us."

And she has the judgment, the gravitas, the knowledge of people, the ability to persuade victims and witnesses to testify. We thought she was a natural to move up to the ***Supreme Court***.

KLOBUCHAR: Very good.

Mayor Bloomberg, I noted today earlier that the -- that Judge Sotomayor has the support of so many law enforcement organizations in New York, National District Attorneys Association, could you talk about the -- what that support means and how -- I know you've had success along with Mr. Morgenthau's amazing record of bringing crime down in New York, working with the police, working with the county attorneys as a team and, while our nominee was a small part of that, one -- one assistant district attorney in -- as part of a big effort, what difference that has made to New York?

BLOOMBERG: Well, I think, Senator, the reason that we've been able to bring crime down and improve the schools and the economy and all of these things is because I've never asked anybody or considered their ethnicity,

their marital status, orientation, gender, or religion, or anything else. I just try to get the best that I possibly can to come to work for the city, and I think the results are there.

When I interview for judges -- and I've appointed something like 140 so far in the last seven-and-a-half years, I look for integrity, and professional competence, and judicial temperament, and how well they write, and their appellate records, and their reputation for fairness and impartiality.

But also we extensively talk to members of the bar and the bench to see what professionals who have to work with the candidate day in and day out think. It's very easy to be on your best behavior when you come to Washington and have to testify before a group like this, but the truth of the matter is, your real character comes out when you do it day in and day out over a long period of time. And that's what your contemporaries see.

So the fact that a lot of people who've worked with this judge think that she is eminently qualified to move up carries an awful lot of weight with me. They can -- they know a lot more about her and her abilities than you or I could ever find out with the short period of time that we interact with her or read of -- read about her decisions, sort of out of context of what was going on at the time, and we don't have the ability to do all of the research that her contemporaries have been doing.

KLOBUCHAR: So you're saying that -- you give that a lot more weight than all the questions we've been asking for the last three days?

BLOOMBERG: No, I wouldn't -- I wouldn't go quite that far, but I do think that people who work with somebody for a long period of time really do get to know them. And most importantly, people who are on the other side of the issues, on the other side of the bench, if they think that even though -- and sometimes they win and sometimes they lose -- their views, to me, matter an awful lot more.

KLOBUCHAR: I would agree. Thank you.

WHITEHOUSE: Senator Hatch?

HATCH: Well, thank you, Mr. Chairman.

Mayor, it's always good to see you. I appreciate the joy and the verve of which you run New York City. I know that it's a tough city to run, but you do a great job.

BLOOMBERG: Thank you.

HATCH: And, Mr. Morgenthau, we all respect you. You know that. I know that. And you've given a long public service that is of great distinction.

It's always good to have attorneys general from any state here, and we're grateful to have you here, Mr. McDaniel.

Mr. Henderson and I have been friends for a long time. We sometimes oppose each other, but it's always been with friendship and kindness.

We're grateful to have you two -- you two great people here who do such very important work in the city of New Haven. I know it takes guts to come here, and we appreciate you being here.

Mr. Kirsanow, let me just -- and, certainly, Mr. Kirsanow and Linda Chavez, we -- we recognize your genius, too, and the things that you bring to the table.

Let me just ask you this, Mr. Kirsanow, because I was the one who raised the Ricci ***case*** to begin with. I -- I have two related questions about the Ricci ***case***.

Do you agree with Judge Cabranes and -- and the other five judges who agreed with him that this was a ***case*** of first impression in the Second Circuit, which means that there was no precedent?

KIRSANOW: That's correct, Senator. We took a very strong look as to whether or not there was anything on point. There may have been some peripheral ***cases*** that wouldn't provide any definitive guidance. But as I indicated in my statement, to the extent there were ***cases*** to provide guidance, maybe equal protection clause ***cases*** -- Wygant's one (ph) and so forth -- those were the kind of ***cases*** you'd have to look through, but none -- none under Title VII.

HATCH: Well, explain what was the issue of first impression that these six judges found.

KIRSANOW: It was...

HATCH: They were in the minority 7-6, but they -- they -- Judge Cabranes got very alarmed, because this was a summary order that ordinarily they wouldn't have seen, but he caught it in the newspaper, asked to see it, and then said, "My gosh, this is a ***case*** of first impression. We ought to do more than just a summary order on it," which is something that I've been very critical of.

KIRSANOW: Senator, it was the tension between two provisions of Title VII and...

HATCH: You're talking about disparate treatment and disparate impact?

KIRSANOW: Precisely.

HATCH: And this was...

KIRSANOW: And trying to balance the two. And keep in mind that the 1991 amendments were really a product of Griggs v. Duke Power and its progeny. And remember that Griggs was really a response to the difficulty in demonstrating intentional discrimination so that there was a resort to disparate impact to try to help prove the ***case***.

So whether you give primacy to intentional discrimination or disparate impact was, what was trying to be determined here? Or not necessarily primacy, but trying to evaluate both consistently with the purposes of Title VII.

HATCH: Well, please explain the difference between what the ***Supreme Court*** split 5-4 and what all nine of the justices on the ***Supreme Court***, why they criticized Judge Sotomayor's decision.

(UNKNOWN): Had to do with the process by which the decision was reached. Even the dissent, Justice Ginsburg, noted in (inaudible) 10 that this is something that ordinarily should have been sent back on remand because it was to determine whether -- that is, to determine whether or not there was good cause for taking the decision New Haven took.

The majority, on the other hand, said the city of New Haven had to have a strong basis in evidence before it discarded the test results.

So there are two separate standards by both the majority and the dissent, but neither agreed with the manner in which the Sotomayor panel disposed of the ***case***.

HATCH: So all nine justices on the ***court*** agreed that the appropriate law wasn't followed.

(UNKNOWN): Correct.

HATCH: And five of them said the city of New Haven was wrong.

(UNKNOWN): Correct.

HATCH: So the firefighters won.

(UNKNOWN): Now, Mr. Vargas, I just wanted to make that clear, because I don't think a lot of people realize that, and that's a very, very big thing to me.

Mr. Vargas, your comments about your sons were powerful. What difference does it make for them whether merit or race determines opportunity? And what difference does this ***case*** mean for them?

VARGAS: I believe this is going to be a greater opportunity for them in the future because they're not going to be stigmatized that way, they're not going to be looked at that ways, and they're going to rise and fall on their own merits...

(CROSSTALK)

HATCH: And that's one reason why you brought this ***case***...

VARGAS: That's absolutely ***right***.

HATCH: Mr. Ricci, I only have a few seconds, but let me say this. I want to thank you for your service for protecting your fellow citizens up there.

As I understand it, the city of New Haven went to great lengths to devise this promotion test that was -- the lengths were fair, objective -- the test was fair, objective and not tilted toward or against any demographic group. In fact, I understand the test was not questioned.

They worked on the kind and context of the question so that they were relevant to the job, but would not create a hurdle for anyone. They used both a written and an oral exam format, ***right***?

Is your understanding of how they worked to put together the test and did -- that that's the way they put it together? And did that make you believe that you would be judged on your merits?

RICCI: Yes, Senator. The rules of the game were set up and we have a ***right*** to be judged fairly. And just by taking the test we knew that the test -- we didn't even need to go any further, just by taking the test we knew that the test was job-related and measured the skills, ability and knowledge need for a competent fire officer.

HATCH: Well, did that make you see this as a genuine opportunity that might, indeed, be open to you?

RICCI: Yes, Senator.

HATCH: Now, tell me more about your expectations when you looked at this opportunity. You were no doubt familiar with the racial dynamics that existed in New Haven at the time. Anyone involved in their community anywhere would be aware of that.

Do you think that at all, that because the test was so rigorously and fairly designed that any of those outside racial dynamics would become an obstacle to your future service in the fire department as long as you were qualified for the job?

RICCI: No. Myself and all 20 plaintiffs, including other firefighters that didn't join the suit, including African Americans and Hispanics, I think we all had the expectation when we took the test that the test would be fair and job-related and that it was going to be dictated by one's merit on how well you did you did on the exam, not by the color of your skin.

HATCH: OK.

General, I just have one statement to make. You made the comment that the ***Supreme Court*** changed the law by a majority. They didn't change the law. They actually recognized there was a ***case*** of first impression here that had to be decided, and they decided it. They didn't change any laws.

(UNKNOWN): No.

(UNKNOWN): And it wasn't by their majority. I mean nine of them said the ***case*** should be re-examined. Five of them said that New Haven was wrong. And I just wanted to make that clear so that everybody would understand it because this is not some itty-bitty ***case***. This is one of the most important ***cases*** in the country's history, and that's why it's caused such a furor.

And I want to compliment all of you firemen who have been ***willing*** to stand up in this issue because this is an important issue for people of whatever race or gender or ethnicity. And I -- you know you've taken a lot of flack for it, and you shouldn't.

Thank you, Mr. Chairman.

LEAHY: Thank you. Senator Specter?

SPECTER: Thank you, Mr. Chairman.

Mr. Ricci, I agree with just about everything you said, but you had a ***right*** to go to federal ***court*** and get justice that racial statistics are wrong. What we sought was even-handed justice, and as the ***Court*** finally decided, you have been deprived of your ***rights*** and made a change. The question that I have for you, do you have any reason to think that Judge Sotomayor acted in anything other than good faith in trying to reach a fair decision in the ***case***?

RICCI: That's beyond my legal expertise. I am not an attorney or a legal scholar. I simply welcome an invitation by the United State Senate to come here today, and this is our first time that we've gotten to testify about our story. So I can't comment on...

SPECTER: Well I think that it's very good that you've been here and had a chance to testify. I agree with that totally. And there's enormous appreciation for the work the firefighters do.

I had a lot of association with the firefighters in my day as a city official in Philadelphia, and on the Homeland Security been in the forefront of funding for firefighters. And what the firefighters did on 9/11 was -- words are inadequate: heroism and bravery and the loss of lives and the suffering.

Lieutenant Vargas, again agree with all of your testimony. In your work you have to get it ***right*** the first time. Well, when you have 5-4 decisions it's hard to say which way the ball bounces, especially when they get reversed from time-to-time. But I would ask you the same question I asked of Mr. Ricci whether you have any reason to doubt the good faith of Judge Sotomayor in coming to the conclusion she did.

VARGAS: I would have to defer to pretty much the same response that we were invited here to give our story, and we wanted to focus on that. And I -- I really didn't took much to that, no.

SPECTER: OK. Well that's fair enough. And it's up to the Senate. We hope we get it ***right***. But all anybody can use is their best judgment.

Mr. Boies, when you place so much reliance on Ricci v. Adista Funnel (ph) was a basis for opposing Judge Sotomayor. Isn't that ***case*** just overloaded with subtlety and nuance? Could've gone the other way? Could you really place much reliance on criticism of Judge Sotomayor as a disqualifier?

BOIES: Well first of all, Senator Specter, I think I actually went back to criticize Judge Sotomayor's activities going all the way back to Princeton University, so I don't think I relied exclusively.

I think what -- and I would answer the questions that you asked Mr. Vargas and Mr. Ricci. I do think that Judge Sotomayor, based on her history, her involvement with the Puerto Rican Legal Defense and Education Fund, her writings, her activism, has indicated a preference to eliminate testing. She has fought to -- to get rid of civil service

testing. She has challenged tests as being inherently -- standardized tests as being inherently unequal and as always arriving arriving at a disparate impact.

And I think that activism, that involvement, going back decades, did in fact influence the way she approached this ***case***. So I think it is relevant. And that is the reason I'm criticizing it. It's not just her one decision in one ***case***. It is her whole body of work, her whole life experience and the views that she has expressed over several decades.

SPECTER: Well, we consistently have nominees for the ***Supreme Court*** come to this panel, Justice Alito, Chief Justice Roberts, Justice Thomas, on both sides of the ideological divide, and what they do in an advocacy position is customarily set aside to make an evaluation as to their -- their competency.

When you talk about being a woman or being an Hispanic, it's my view that that, kind of diversity is enormously helpful.

I go back to a question I asked Attorney General Meese more than 25 years ago. If you have -- the debate was raging on affirmative action even more than it is now -- if you have two people of equal competency and one is a minority, Attorney General Meese, not known for being a flaming liberal, took -- took the minority position.

And my own view is that it's time we have more women and we had more diversity. And we have to have qualifications -- have to have qualifications. And I think that's what ultimately determines this nomination.

Attorney General McDaniel, let me ask you a loaded question. You can handle a loaded question.

Do you think, with all of the critical issues we have to face on separation of powers and what the Congress does by way of fact-finding and what is done on the Americans With Disabilities Act and trying to find out about warrantless wiretaps and the Foreign Intelligence Surveillance Act and compensation for the survivors of the victims of 9/11 and the intricate relationship to the State Department influencing the way Congress interprets the foreign (ph) sovereign immunity, that there's a little too much attention paid to the Ricci ***case*** -- not that it's not very important, but there are lot of other matters that are important.

Isn't this a little heavy on one ***case***?

MCDANIEL: Senator, not only do I agree with you about the other issues that should be given ample attention because of their enormous weight, I think that perhaps the wrong focus of attention even on this ***case*** has been applied.

Chief Justice Roberts has said that he would like to "narrow standing analyses" and he would like to be a conservative justice who want to look only at the disagreements between two parties and not go beyond the scope of that.

One of the important issues in the Ricci ***case*** was a standing issue, which was there standing to bring action if one had not been denied promotion?

Senator Hatch's attorney -- own attorney general joined with me in the brief because we thought that that was among the issues that were important and should have been followed under stare decisis. Instead the ***court*** expanded standing to someone who had not been harmed under the legal standard.

I think that that is important to consider. I think that it's important to note that, if they were going to change standing and standards, I think it's somewhat unfair to put emphasis on the footnote -- for instance, footnote 10 of Justice Ginsberg, which said that, if we are going to change the rules of the game, then we should remand the ***case*** back to be reviewed. But that wasn't critical of the second circuit (ph), in and of itself.

SPECTER: I regret...

(CROSSTALK)

MCDANIEL: So I agree with you about your -- your emphasis, or the...

(CROSSTALK)

SPECTER: I regret that there's so little time. Having Mayor Bloomberg and D.A. Morgenthau and (inaudible) Henderson (ph), we'd like to really have a chance to cross-examine...

(LAUGHTER)

... except that I agreed with your testimony.

Thank you, Mr. Chairman.

WHITEHOUSE (?): Thank you, Senator. Senator Cornyn?

CORNYN: Thank you, Mr. Chairman.

I want to extend my appreciation to each of the witnesses for taking your time and -- to be here today. It's very important. These are -- as we need to remind ourselves, this is a historic time and appointment, and these are very important issues that should not be neglected or overlooked because of the press of other activities.

My own position is that I think, by virtue of her training, her experience and her high achievement, Judge Sotomayor is very well- qualified, all other things being equal.

Unfortunately, because of her speeches and other public statements where she said there's no such thing as objectivity in the law, which -- the opposite of objectivity is subjectivity. She said there's no neutrality. And if there's no neutrality, then I guess all that leaves is bias.

And it really strikes a body blow, I think, to -- to the concept of equal justice under the law. Judges are not policymakers and judges should leave that job to the elected representatives of the people, who reserve the time-honored ***right*** to throw the rascals out if they don't like what we're doing as elected members of the legislative branch.

So, you know, my -- my concern is what kind of judge would she be if confirmed to the United States ***Supreme Court***, the kind of judge that follows her speeches or the kind that follows the law?

And -- but I just want to say to these firefighters what I told them earlier today when they were kind enough to come by my office. I think, you know, judges make mistakes. They used to say the only lawyer who hadn't lost a ***case*** is one that hadn't tried one.

And I don't necessarily hold it so much against Judge Sotomayor that she didn't rule your way in the ***case***. Unfortunately, I think she did not give it the proper respect and -- and pay it the sort of attention that she should. Because there were real claims there that needed to be resolved by a ***court***.

Every citizen's entitled to that, to have judges pay attention and not make mistakes by, you know, trying to sweep it under the rug.

And thank goodness that Judge Cabranes found the ***case***, because it almost got slipped through the cracks, and then highlighted it so if you get to the ***Supreme Court*** of the United States and the ***Supreme Court*** could address this very important -- the important issues that you've presented here.

And one of the most important aspects, I think, of this ***hearing*** is this provides an opportunity, and it would not have been provided, I think, in large part unless these firefighters had had the courage to do what they've done, is for us to re-focus our attention on some of these areas like, as Chief Justice Roberts said, he said, "It's sordid business, this divvying up by race, " and looking at people not as an individual human being, but as a member of a group or because of their sex or their ethnicity or their race.

You know, it's time for this nation, I think, I hope we would all agree, to look at everyone as individuals, and to reward hard work, sacrifice and initiative, the kinds of things that I think, particularly you, Frank and Ben, you -- Frank is the lead (inaudible), but all of the firefighters have helped demonstrate the importance of not divvying up by race, not using de facto quotas.

And I think -- I would have felt a lot better if Judge Sotomayor had said, "You know what? This is really an important issue and we should have addressed it, but it slipped through our fingers, but thank goodness it was caught and it was ultimately reviewed." But she didn't. And I think the idea that the city could throw out a test just because the outcome wasn't what they wanted is really pretext for racial discrimination. It's to deny people what they are entitled to because of the color of their skin.

So I just want to ask in the short time I have here, Mr. Vargas, you've -- I read earlier a statement that you made to the New York Times about the reason why you've gone through these five grueling years of litigation and the abuse that you've taken from people who -- who tried to shame you out of standing on your ***rights*** and seeing this thing through. Could you just tell the committee what sacrifices you have made, what your family's made? And why you felt like those sacrifices were so important to vindicate this important ***right***?

VARGAS: Well, let alone the financial sacrifice, but you know, it starts from the moment you get out of the academy. I mean, this was something that I wanted to do. I wanted to advance my career as a firefighter ***right*** through the ranks. And you know, the books came with me to work every single day, you know, from the minute I graduated from the academy, ***right*** up to when I got promoted to lieutenant. And they kept coming with me ***right*** on until I took the captain's exam.

And once I get promoted to captain, they're going to continue to come with me as I go up through the ranks. You know, it's not something that, you know, you can lose sight of. You've got to continue to work hard, and I want to instill that in my kids. I want them to see that and I want them to know that this is what America is all about.

You work hard. This is how America was built -- the greatest country in the world because you -- you, as I said before, you rise and fall on your own merits.

(UNKNOWN): Do you hope for a day for your children what -- we mentioned Martin Luther King's statement previously, that a day when they ***will*** be judged by the content of their character and not the color of their skin?

VARGAS: I think our ***case*** goes a long way to help in the (inaudible) up for them, and they're going to benefit from this, and I think we're going in the ***right*** direction now.

(UNKNOWN): I couldn't agree more.

Thank you, Mr. Chairman.

CARDIN (?): Senator Cornyn (?)

CORNYN (?): Thank you, Mr. Chairman.

Welcome to all of you. One of the things that I think may have gotten lost in all of this is why tests are important. And I particularly wanted to ask the two firefighters here, Mr. Ricci and Mr. Vargas.

What difference does it make how well you perform on the test, whether you pass it or not? What's the big deal? What do you really have to show in those tests? And when you're out performing your duties, what difference does it make whether you pass the test or not?

Mr. Ricci, maybe start with you.

RICCI: Thank you, Senator.

It's important to realize that over 100 firefighters die in the line of duty each year and an additional 80,000 are injured. You need to have a command of the knowledge in order to make command decisions. You need to understand the rules and regulations.

Experience is the best teacher, but only a fool learns in that school alone. You have to have a basis to make the ***right*** decisions, because firefighters operate in all different types of environments.

I've had the proud privilege of training the United States Marine Corps sea berth team (ph), and they responded to anthrax attacks in one of these buildings. I mean, firefighters have to be prepared for the regular house fire to the car accident to the hazardous material incident.

You go to work every day, and we're like an insurance policy for the American public that they hope they never have to use. But when someone calls 911, within four to five minutes, there's a fully staffed fire company at your door with no paperwork, and we're there to answer the call.

And when you show up, the officer has to be competent to lead his men and women of this fire service, career and volunteer across the country, to make the ***right*** decision.

KYL: Thank you. That's a great explanation.

Lieutenant Vargas?

VARGAS: There's not much I can add to that.

KYL: That was pretty good. Well, I -- I appreciate it, and I know that everybody here, regardless of party or position on the nominee or anything else, appreciates what you do and what your colleagues do. And -- and I'm sure I speak for all of us in that regard.

One of the things that I wanted to -- to just say briefly is that, I -- I am very proud of our -- I was a lawyer and I practiced law. And -- and I won some, and I lost some, but I always had confidence in our system.

And America is not unique, but there aren't very many countries in the world like us where we willingly volunteer to put our -- our fortunes, our freedom, in the event that we're accused of a crime, maybe even our life, if there could be a death penalty involved, our careers, in the ***case*** of the suits that you all were involved in. We willingly do that.

And the way we do it is interesting. You all may not know this, but the lawyers here certainly know it. When I filed a ***case*** in the U.S. District ***Court*** in Arizona, I didn't know which judge I was going to get. There were about 10. There was one I hoped I didn't get.

But I knew that the other nine, it didn't matter. They would all approach -- there were Democrats. There were Republicans. But I didn't know, because it's the next one in order, and the lawyers don't know the order, so it's almost by lot.

But we had confidence that we could put our client's issue before the ***court*** and that justice would be done, because that's the way our system works, and over 220 years, the rule of law has been established in this country by judges applying the law fairly and impartially. And over time, the precedents have been built up.

And what struck me about what you all had -- and I'm talking about the two of you -- had to go through is, first of all, you were confronted with a judge who, in a very thorough decision, said, "You lose." And then you appealed to the Second Circuit and in a per curiam opinion -- and you all know now what that is all too well -- the ***court*** didn't even write about it, said, "No, you lose again."

And then, the day that you got the results from the ***Supreme Court***, just -- what's the difference between what you felt at the first situation and when you got the news about the ***Supreme Court***, about your confidence in our system?

VARGAS: I -- I tried to say earlier that this is exactly how this country was built. This is why we're so great, because, you know, you can work hard, and you can go after the things that you want in this -- in this country, and -- and, you know, you're going to be successful, you know, but you have to apply yourself.

And those are the things that I try to instill in my kids, and I'll always put that forth, and I'll speak with my actions so that they can see that it's a great country, you know? And -- and that's why you need to work hard.

RICCI: The price of democracy is vigilance. And to be -- to be ***willing*** to participate -- and the original feeling was, you know, we always, through our attorneys, always went back to that process and said, "This is America. If we keep going forward, the process ***will*** work." And that, at the end, to be able to look at my son and say, "You know, I haven't been there for you," but to look at him and say, "This is -- this is an unbelievable civics lesson that, if you participate in democracy, that's how it all works."

And I thank you, Senator.

KYL: Well, and I thank you. And I -- I hope that all of you ***will*** have confidence in our legal system in the future. And everybody here, again, regardless of position, ***will*** really stand in awe at a system which in our country year in, year out has proved to be a very, very good system for our people.

Thank you.

CARDIN: Well, Senator Kyl, I want to thank you for your questions and the responses. I think it was the ***right*** way for the record to reflect the end of this panel, which has been, I think, very, very helpful to us in the record, on the confirmation process for Judge Sotomayor.

I want to thank Chairman Leahy for allowing me to chair this panel. We've had a very distinguished -- all eight of you, we thank you for being here.

I particularly want to thank Mayor Bloomberg for taking the time to come from New York. I mention him because not only he does a great job as mayor, but has had an important role at Johns Hopkins University. And we very much appreciate that.

And to Mr. Morgenthau, you are the model for the nation in the district attorney's office. And it's -- it's a real honor to have you before our committee. And we -- we thank you for your energy and continuation in public service.

And to firefighter Ricci and to Lieutenant Vargas, I personally want to thank you for being here. You put a face on the issues. We -- we look at ***cases***, and we talk about the impact, but it affects real people and real lives and real families. And I think you really have added to today's ***hearing*** by your personal stories.

Each one of us thank you for your public service. And we thank you for your belief in our nation and for the testimony that you have given to this committee. It's been extremely helpful to each one of us on -- on the Judiciary Committee.

And with that, we are going to take a five-minute recess. When we return, Senator Klobuchar ***will*** be chairing the next panel.

(RECESS)

KLOBUCHAR: OK, I think we're going to start our third panel here, if everyone could be seated.

I ***will*** warn those of you out there, anyone that has asked David Cone to sign a baseball, you must ask all seven of our other panelists, as well.

OK. We're going to start by getting sworn in.

Will you please stand and raise your ***right*** hand? Do you affirm that the testimony you are about to give before the committee ***will*** be the truth, the whole truth, and nothing but the truth, so help you God?

Thank you.

We're going to start. I'll introduce each of you, and then you'll give your five minutes of testimony. And then we ***will*** have questions after that.

And we are going to start here with Mr. Freeh. Louis Freeh is the former director of the Federal Bureau of Investigation, whose career in the Department of Justice began in 1975 when he became a special agent in the FBI.

Mr. Freeh has a long and distinguished career as a public servant under both Democratic and Republican presidents. He was appointed by President George H.W. Bush, as a federal district ***court*** judge on the Southern District of New York.

He was also a career federal prosecutor in the United States attorney general's office for the Southern District of New York, serving as chief of the organized crime unit, deputy United States attorney and associate United States attorney. He graduated from Rutgers Law School and has an LLM degree in criminal law from New York University Law School.

I look forward to your testimony, Mr. Freeh.

FREEH: Thank you very much, Senator.

Good afternoon, Senator Sessions. Good afternoon to you.

It's a great privilege to be before the committee, a committee where I've appeared over 100 times. And it's always a pleasure to be here, many friends on the committee who I've seen over the last few days.

So you have a prepared statement from me. And as Senator Sessions knows, I generally don't read my opening statements, which has gotten me in trouble with OMB over the years. But I thought it might be good just to talk and tell you why I'm here.

You know, I've had the privilege to work with great judges and appear before great judges. And let me just mention a couple.

I served on the district ***court*** with Constance Baker Motley, who, before she was a judge, you know, had those qualities of fairness and open-mindedness and commitment to the rule of law that I think we wish to see in our judges.

The last ***case*** I tried as a judge was in the district of Minnesota, before Judge Devitt. And it was a ***case*** which, by the way, Judge Sessions, Senator Sessions and I, worked on together. He was the attorney general of Alabama, a great attorney general, and I was an assistant U.S. attorney working on the ***case***. And it was the murder of a federal judge. It was one of the few tragic times in our history where a federal judge was murdered.

And the ***case*** was tried before Judge Devitt. And Judge Devitt, who many of his peers said was the judge from central casting, was the model of judicial commitment. The instruction book, Devitt and Blackmar, is named after him. There's an award which is probably the most prestigious award that goes to judges named after him. And he was actually one of my mentors when I went on the southern district bench.

I was sworn in as FBI director by Judge Frank Johnson, who, as someone has mentioned here before, was a legendary judicial hero from Winston County, Alabama, who, with a handful of other Republican (inaudible) by their commitment to the law, their fearlessness, and the honesty and integrity with which they took upon their office.

So it's my -- it's my pleasure to recommend to the committee the confirmation of this outstanding judge.

And I want to talk a little bit about her judicial experience. And I think -- and I've been here or listening to these proceedings for the last few days -- I think I may be the only lawyer who's actually been with her in the courtroom.

And since that, in my view and experience, is the best indicator of what someone ***will*** do in the future, is how they've behaved and conducted and written and decided matters as a justice, as been mentioned before, this candidate has an enormous and rich judicial record. Seventeen years. Thousands of opinions. All the things that you want to look for as you make your evaluation.

And the process by which you've come here is quite extensive. You have the president and his reviewers' own investigation. You have bar associations, this committee. You have the FBI that conducted now three background investigations. I was actually director when the second one was done. You have any and all information that's come from the public, from the citizenry, from Americans. You have reputational evidence from other judges, from lawyers who have appeared before her.

My association with her began in 1992. She was a new judge on the Southern District, and we had this tradition where the second newest judge would mentor the new judge.

Some of us didn't think it was the wisest rule to have, since I had about nine months on the bench when she was entrusted to my care, so to speak.

And I actually sat with her in ***court***. I sat with her during trials. I helped review opinions that she asked me to look at. My law clerks were encamped with her law clerks.

And I guess what I want to communicate to you in a very short period remaining is, you know, the enormous judicial integrity and commitment to finding the facts, to being open-minded, to being fair. She struggled and deliberated in making sure she had the facts, making sure she had the ***right*** law, following the law, and being the kind of judge that I think we would all be proud of.

You know, speeches are important, and it's great the way you all have considered that so carefully. But, you know, when you enter the courtroom and you put the bench on, just as you assume the authority when you take your commitment, there's a whole different set of influences and immense power and influence that takes over.

And when she's been on the bench, when she's written, when she's argued, the way she's conducted herself, I think we can very safely predict this is going to be an outstanding judge, with all the qualities I know that you would want. So I urge you all to support her.

Thank you very much.

KLOBUCHAR: Thank you very much. Thank you for your testimony.

Next we have Chuck Canterbury, is the national president of the Fraternal Order of Police, one of the nation's largest and most prominent voices for law enforcement officers.

Mr. Canterbury has served in numerous capacities in the organization, including national vice president and national second vice president. He has 25 years of experience in law enforcement where he worked as a police officer in Horry County, South Carolina.

Maybe you know Lindsey Graham, one of our members here. In only the best ways, I'm sure.

We look very much forward to your testimony. Thank you, Mr. Canterbury.

Thank you, Mr. Canterbury.

CANTERBURY: Thank you, Madam Chair, Ranking Member Sessions, Senator Hatch.

It's a pleasure to be here today to offer the support of 327,000 rank-and-file police officers, my members in the Fraternal Order of Police. It's my pleasure to testify in support of the nomination of Judge Sonia M. Sotomayor to the ***Supreme Court***.

You know, speaking as a law enforcement officer, I think it says a lot about the character of a young person who graduated from Yale and then accepted her first job as a poorly paid prosecutor in the district of Manhattan, yet that is exactly what Judge Sotomayor did, as my members do in every city in America.

She spent five years with that office, prosecuted many criminal ***cases***, including a triple homicide. And she forged an excellent working relationship with the men and women working the beat in Manhattan. She earned their respect and reputation as being tough, which in my profession is a compliment.

As an appellate judge, she has participated in over 3,000 panel decisions and authored roughly 400 opinions, handling difficult issues of constitutional law, complex procedural matters, and lawsuits involving complicated business organizations.

Some of her critics have pounced on a few of those decisions, as well as some of the comments made during speaking engagements, and have engaged in some pretty wild speculation as to what she would do as a ***Supreme Court*** justice. As a law enforcement officer, I prefer to rely on evidence and fact and not speculation to reach those conclusions.

One such area of speculation is on her feelings towards our ***right*** to bear arms as guaranteed by the Second Amendment. I want no mistake to be made: I take a back seat to no one in my reverence for the Second Amendment. In fact, if I thought that Judge Sotomayor's presence on the ***court*** posed a threat to my Second Amendment ***right***, I would not be supporting here her today.

The facts, as some have already pointed out, reflect a brilliant and thoughtful jurist, respectful of the law, and committed to its appropriate enforcement. Over the course of her career, she has analyzed each ***case*** on its merits. To me, that's evidence of strong commitment to duty and to the law, two characteristics that we should expect from all of our judges.

I want to cite a few ***cases*** which I'm familiar with, because they deal with issues that every beat cop in the United States has dealt with. In the United States v. Falso, an offender indicted on 242 counts relating to child pornography sought to have evidence against him thrown out because the search warrant that was thrown out lacked probable cause. Judge Sotomayor's ruling held that the error was committed by the district ***court*** in issuing the warrant, not the officers who executed it. The conviction was upheld.

In the United States v. Santa (ph), she ruled that law enforcement officers executing a search of a suspect based on an arrest warrant they believed to be active and valid should not result in the suppression of evidence, even if that warrant had expired.

In the United States v. Howard, she overturned the district ***court***'s decision to suppress evidence of drug trafficking by finding warrantless automobile searches to be constitutional.

In the United States v. Clarke, she held that the law enforcement officers did not violate the Fourth Amendment by asking to see the VIN pin under the hood of a vehicle after discovering that the VIN plate on the dashboard was missing.

All of these rulings show that Judge Sotomayor got at least as much of her legal education from her five years as a prosecutor as she did at Yale Law School. These five years, in my view, reflect the same kind of commitment to the law that I have seen in the officers that I represent.

She's clearly demonstrated that she understands the fine line that police officers must walk and, in her rulings, reflect a working knowledge, not a theoretical knowledge, of the everyday realities of law enforcement work.

After reviewing her record, I can say that Judge Sotomayor is a jurist in whom any beat cop could have confidence. And it's for that reason that the national executive board of the FOP voted unanimously to support her nomination, and we urge you to do so, as well.

Thank you very much.

KLOBUCHAR: Thank you very much, Mr. Canterbury.

Next is David Cone. David Cone is a former Major League Baseball pitcher who, over an 18-year career, played for five teams in both the American and National Leagues. Mr. Cone won the American League Cy Young Award in 1994 and pitched a perfect game in 1999 as a member of the New York Yankees.

He was a member of the Major League Baseball Players Association throughout his Major League career and was an officer from 1994 through 2000.

Thank you very much for being here, Mr. Cone.

CONE: Thank you, Senator Klobuchar.

Senator Sessions, Senator Hatch, nice to see you again.

On behalf of all Major League players, both former and current, I greatly appreciate the opportunity to acknowledge the unique role that Judge Sonia Sotomayor played in preserving America's pastime.

As you know, I'm not a lawyer, much less a ***Supreme Court*** scholar. I was a professional baseball player from the time I was drafted out of high school in 1981 until the time I retired in 2003. I was also a union member and an officer of the Major League Baseball Players Association.

As is well known, Major League Baseball has a long history of acrimonious labor relations. It was not until the 1970s that players first gained the ***right*** to free agency and salary arbitration. This meant that, for the first time ever, players were able to earn what they were worth and have some choice about where they played.

The next 20 years were quite difficult. There was a lockout or strike at the end of every contract. To the players, every -- every dispute seemed to ***center*** upon the owners' desire to roll back free agency ***rights*** the players had won.

But 1994 was the worst. The owners said that they wanted the salary cap and refused to promise that they would abide by the rules of the just-expired contract after the season ended. Believing we had no choice, the players went on strike in August of 1994.

I should note that this was before Congress passed the Curt Flood Act, authored by Senators Hatch and Leahy, which made it clear that baseball's antitrust exemption could not be used to undermine federal law.

In response, the owners canceled the remainder of the season, which meant that there would be no World Series. Discussions continued through the fall and the early winter, but were fruitless. In December of 1994, the owners unilaterally implemented a salary cap and imposed new rules and conditions on employment which would have made free agency virtually meaningless. And they announced they would start the 1995 season with so-called replacement players instead of major leaguers.

We did not think the owners were negotiating in good faith, as they were required to do under federal law. We went to the National Labor Relations Board. The board agreed with us and went to federal ***court*** to seek an injunction against the owners' unilateral changes.

The United States district judge who drew the ***case*** was Judge Sotomayor. The rest is history, or at least baseball history. Judge Sotomayor found that the owners had engaged in bad-faith bargaining. She -- she issued an injunction. Her decision stopped the owners from imposing new work rules, ended our strike, and got us all back on the field.

The words she wrote cut ***right*** to the heart of the matter, and I quote: "This strike is about more than just whether the players and owners ***will*** resolve their differences. It's also about how the principles embodied by by federal law operate. This strike has placed the entire concept of collective bargaining on trial. Issuing an injunction by opening day is important to ensure that the symbolic value of that day is not tainted by an unfair labor practice and the NLRB's inability to take effective steps against its perpetuation."

Judge Sotomayor grasped not only the complexity of the ***case*** but its importance to our sport. Her decision was upheld by a unanimous ***Court*** of Appeals panel comprised of judges appointed by different presidents from different parties with different juridical philosophies.

On the day he announced her nomination, President Obama observed that some have said Judge Sotomayor saved baseball. Others may think this is an overstatement, but look at it this way. A lot of people, both inside and outside of baseball, tried to settle the dispute.

Presidents, special mediators, secretaries of labor, members of Congress all tried to help but were not successful. With one decision, Judge Sotomayor changed the entire dispute. Her ruling rescued the 1995 baseball season and forced the parties to resume real negotiations.

The negotiations were not easy but ultimately were successful, which in turn led to an improved relationship between the owners and the players. Today baseball is currently enjoying a run of more than 14 years without interruption, a record that would have been inconceivable in the 1990s.

I believe all of us who have loved the game, players, owners and fans, are in her debt. If Judge Sotomayor is confirmed, I hope the rest of the country ***will*** realize, as the players did in 1995, that it can be a good thing to have a judge or a justice on the ***Supreme Court*** who recognizes that the law cannot always be separated from the realities involved and the disputes being decided.

Thank you again, and I would be glad to answer any questions you may have.

(UNKNOWN): Thank you very much, Mr. Cohn (ph).

Our next witness is Kate Stitz (ph). She is the Lafayette S. Foster professor of law at Yale Law School, where she teaches and writes in the areas of criminal law, criminal procedure and constitutional law.

Previously, Professor Stitz (ph) was an assistant U.S. attorney for the Southern District of New York, where she prosecuted white- collar and organized crime ***cases***.

After graduating from Harvard Law School, she clerked for Judge Carl McGowan (ph) of the U.S. ***Court*** of Appeals for the District of Columbia and for Associate Justice Byron White on the ***Supreme Court***.

Thank you for being here, and we look forward to your testimony.

STITZ (ph): I thank you, Senators, for the opportunity to comment on the nomination of Judge Sonia Sotomayor, whom I have known since she became a judge in 1992.

As you noted, before I joined the faculty at Yale Law School in 1985, I was a federal prosecutor in New York and I was also a special assistant at the Department of Justice in Washington.

While a federal prosecutor in New York, I had the pleasure of working of working with Louis Freeh (ph).

It is my judgment that this is an exceptionally strong nomination. My judgment has nothing to do with Judge Sotomayor's sex, ethnicity or personal story. I'm judging her on the same criteria that I used when I was asked by the Yale Daily News, some years ago, whether Samuel Alito would be a strong nomination to the ***Supreme Court***. I answered yes then, and I answer yes now.

Specifically, I am confident that Sonia Sotomayor would serve this nation with powerful intelligence, vigor, rectitude and an abiding commitment to the Constitution.

Moreover, her service as a state prosecutor and as district judge ***will*** make her unique on the ***court*** to which she ***will*** ascend.

My views on her are informed by many sources. First, I have been unusually involved, at least for a professor, with members of the bar and bench within the second circuit (ph).

Among these lawyers and judges who know her best, she is held in the highest repute across the board. My views are also based on my many conversations with her.

Among the most telling are those in which she has described the attributes she is looking for in prospective law clerks. Through these discussions, over more than 15 years, I believe I've gained insight into her view of the role of a judge.

And the bottom line is this: what she wants in her law clerks are the qualities we all want in a judge.

She wants to make sure, first, that they are serious about the law, not about politics or professional opportunities after the clerkship. And they must be serious about all areas of the law. For Judge Sotomayor, there are no favorite areas -- which brings me to a third quality she wants in her clerks. The prospective clerk must be wiling to work his or her fingers to the bone, if necessary, in order to ensure that the opinions Judge Sotomayor writes and those she joins do not miss a relevant precedent and do not get a fact wrong.

And there's an overriding fourth quality that the judge considers critical. Is the prospective clerk ***willing*** to take criticism, work harder, and, where appropriate, rethink her initial assessment, or his initial assessment of the issues?

Over the years, the judge's former clerks have told me, time and again, that they greatly appreciate her devoted commitment to the law, as a result of which they were held to higher standards and learned more than in any other time in their lives.

Her conception of the role of a judge is borne out by her judicial opinions that I have read in the area of criminal law and procedure.

On criminal procedure, let me just note that the usual categories of left and ***right*** do not easily apply. I would say that her decisions, on the whole, reflect more pragmatism and less formalism than those of, say, Justice Souter.

Sometimes this cuts for the government; sometimes it cuts against it.

I want to focus, in particular, on one substantive criminal law ***case***: United States v. George (ph), decided in 2004. Judge Sotomayor's unanimous 16-page opinion in that ***case*** concerns the meaning of the mens reia (ph) term "willfully" in a federal statute that makes it a crime to "willfully falsify a passport application."

Her opinion makes clear that the role of the ***courts*** is not to determine what level of mens reia (ph) they think should apply but what Congress intended when it wrote the word "willfully."

The Iomega then embarks on an heroic effort to figure out what Congress meant in this particular statute. The opinion is so clarifying and insightful that my coauthors and I decided to include a long excerpt from it in our forthcoming federal criminal law casebook.

But the significance of the ***case*** isn't only that it's an excellent opinion. It also resulted from the willingness of Judge Sotomayor and her two colleagues to reconsider their initial decision when additional arguments were brought to their attention, even though this meant that a different party would prevail.

Their aim was neither to affirm the conviction nor to reverse the conviction but to find the best resolution of the complex and conflicting precedents on this mens reia (ph) issue.

In conclusion, I submit that Judge Sotomayor's opinion in the George (ph) ***case*** reveals four juridical qualities that she clearly possesses. First she cared deeply about the issue at hand.

STITH: No matter how minor or word-parsing it may seem even to lawyers. Second, she was ***willing*** to reassess her initial judgment and dig deeper.

Third, her legal analysis was exceptionally clear and astute. And, fourth, she had no agenda other than trying to get the law ***right***. And in a society committed to the rule of law, trying to get the law ***right*** is what it means to be fair and impartial.

This is a great judge. I urge you to vote in favor of her confirmation.

Thank you, Senators.

KLOBUCHAR: Thank you very much.

We next have Dr. Charmaine Yoest, who is the president and CEO of Americans United for Life, the first national pro-life organization in the nation whose legal strategists have been involved in every pro- life ***case*** before the United States ***Supreme Court*** since Roe v. Wade.

Dr. Yoest began her career in the White House during the Reagan administration. She has also worked as the project director of the Family, Gender and Tenure Project at the University of Virginia and as a vice president at the Family Research Council.

Welcome, Dr. Yoest. We look forward to your testimony.

YOEST: Thank you very much, Senator Klobuchar, Ranking Member Sessions, and members of the committee for inviting me to testify before you today.

As you said, I'm here on behalf of Americans United for Life. And we are the nation's oldest pro-life legal organization. Our vision at AUL is a nation where everyone is welcomed in life and protected in law. We've been committed to defending human life through vigorous judicial legislation -- legislative and educational efforts since 1971, and we have been involved in every abortion- related ***case*** before the United States ***Supreme Court***, beginning with Roe v. Wade.

I'm here today because of AUL's deep concern about the nomination of Judge Sonia Sotomayor to the United States ***Supreme Court***. A vote to confirm Judge Sotomayor to our highest ***court*** is a vote for unrestricted abortion on demand and a move towards elevating abortion as a fundamental ***right***, equal to our freedom of religion and freedom of speech.

A nominee's judicial philosophy goes to the heart of his or her qualifications to serve on the United States ***Supreme Court***. And based on Judge Sotomayor's record of prior statements, combined with her over a decade-long service on the board of the Puerto Rican Legal Defense and Education Fund, Judge Sotomayor's judicial philosophy makes her unqualified to serve on the ***Supreme Court***.

When judges fail to respect their limited role under our Constitution by imposing their personal preferences regarding public policy through their decisions, our entire judicial system of equal justice under the law is corrupted.

In a series of speeches, as we've ***heard*** chronicled here this week, Judge Sotomayor has indicated a troubling willingness to celebrate her own personal preferences and characteristics.

Several references have been made during this ***hearing*** to the judge's 2001 "wise Latina" speech. I would note that, in that very same speech, she stated that, quote, "Personal experiences affect the facts that judges choose to see," not just what they do see, but what they choose to see.

Of even greater concern, Judge Sotomayor stated in the same lecture that, "The aspiration to impartiality is just that: It's an aspiration," end quote.

However, impartiality is not merely an aspiration. Impartiality is a discipline, and its necessity is enshrined in the judicial oath. A judge who injects personal experiences into a decision corrupts the very foundations of our judicial system.

Perhaps the clearest example of Judge Sotomayor's problematic philosophy is her April 2009 speech in which she said, "Ideas have no boundaries. Ideas are what set our creative juices flowing. Ideas are ideas. And whatever their source, if it persuades you, then you're going to adopt its reasoning."

We see her here building a ***case*** for judicial activism, yet creativity is the approach Americans want least from a judge. A judge who approaches the bench seeking to, quote, unquote, "implement ideas" is an activist judge by definition. The laboratories of democracy in our system should remain firmly lodged in the state legislatures, not pre-empted from the ***court***.

These troubling speeches did not occur in isolation. Looking at the totality of the judge's record must include her 12 years of service on the board of the Puerto Rican Legal Defense and Education Fund.

During that time, the organization filed not one, but six amicus briefs in five abortion-related ***cases*** before the ***Supreme Court***. Given her particular emphasis on personal viewpoint and jurisprudence, we believe these ***cases*** become uniquely relevant in providing insight into her judicial philosophy.

Judge Sotomayor served the fund as a member and vice president of the board of directors and also as chairperson at the education and litigation committees and has been described as an involved and ardent supporter of their various legal efforts.

What, then, does her tenure with the organization tell us about her judicial philosophy? The fund's briefs consistently argued the position that abortion is a fundamental ***right***, expressing hostility to any regulation of abortion, including parental notification, informed consent, and bans on partial-birth abortion.

For example, in Planned Parenthood v. Casey, the fund compared abortion to the First Amendment ***right*** to free speech and argued that any burden on the ***right*** to abortion was unconstitutional.

In Ohio v. Akron and Casey, the fund asked the ***court*** to strike down parental involvement statutes, insisting that minors should be, quote, "protected against parental involvement that might prevent or obstruct the exercise of their ***right*** to choose."

In Williams v. Zbaraz, the fund argued that failure to publicly fund abortions was "discriminatory."

In Webster v. Reproductive Health Services, the fund argued against -- against -- a requirement that physicians personally counsel patients. They event argued in Webster that strict scrutiny is required because of the "preciousness of the fundamental ***right*** to abortion," end quote, underscoring not just a willingness to engage in creative jurisprudence, but an ideological commitment to advancing an extremist abortion agenda.

In conclusion, I would like to end on a personal note related to the fund briefs. We've ***heard*** quite a bit about settled versus unsettled this week. And the one thing that we do know is that, as we've seen this week, this country is still very unsettled about abortion doctrine.

However, among the American people, there are some elements of abortion-related policy that absolutely do provide common ground. Pre-eminent among these is a core American belief in the bonds between parent and child. I have five children, and the notion -- the notion that my daughters might be taken for a surgical procedure without my knowledge is horrific.

This commonsense commitment to protect our children is overwhelmingly shared among all of those who identify themselves as pro-life and pro-choice. And yet it is precisely these kinds of commonsense policies, like parental notification, that are threatened by this nomination.

In the fund's brief in Ohio v. Akron, they argued that, quote, "The ***court*** would also need to consider whether the state, through giving the parents' confidential information, has enhanced these parents' ability to indoctrinate, control or punish their minor daughters who choose abortion," end quote.

This is a viewpoint far outside the mainstream of American public opinion, and it points to another truth about the fund arguments and their worldview, which the evidence indicates Judge Sotomayor shares. While arguing to promote abortion to a fundamental ***right*** equivalent to the freedom of religion or speech, they actually wish to elevate it even further, placing it singularly alone among ***rights*** beyond the reach of the American public to regulate or even debate.

Thank you very much.

KLOBUCHAR: Thank you very much.

Next we have Sandy Froman. Sandy Froman is the past president of the National Rifle Association of America. Ms. Froman is also currently a member of the NRA board of directors, where she has served since 1992, and in 2007, was unanimously elected to a lifetime appointment on the NRA Council.

A graduate of Stanford University and Harvard Law School, Ms. Froman is a practicing attorney and speaks and writes regularly on the Second Amendment.

Welcome to the committee. We look forward to your testimony.

FROMAN: Thank you, Madam Chair.

Chairman Leahy, Ranking Member Sessions, Senator Hatch, thank you for the opportunity to appear before this committee today to comment on the nomination of Sonia Sotomayor as it relates to her views on the Second Amendment.

It's critical that a ***Supreme Court*** justice understand and appreciate the origin and meaning of the ***right*** of the people to keep and bear arms, a ***right*** exercised and valued by almost 90 million American gun owners. Yet Judge Sotomayor's record on the Second Amendment and her unwillingness or inability to engage in any meaningful analysis of this enumerated ***right*** when twice given the opportunity to do so suggests either a lack of understanding of Second Amendment jurisprudence or hostility to the ***right***.

In 2004, Judge Sotomayor and two colleagues in U.S. v. Sanchez- Villar discussed the Second Amendment claim in a one-sentence footnote, holding without any analysis that the ***right*** to possess a gun is clearly not a fundamental ***right***. Judge Sotomayor reiterated her view earlier this year as part of a panel in Maloney v. Cuomo, holding that the Second Amendment is not a fundamental ***right***, does not apply to the states, and that if an object is designed primarily as a weapon, that is a sufficient basis for total prohibition even in the home.

The Maloney ***court*** ignored directives and precedents from the ***Supreme Court*** in last year's landmark ***case***, District of Columbia v. Heller, which held that the Second Amendment guarantees to all law- abiding responsible citizens the individual ***right*** to arms, particularly for self-defense.

Although the ***Supreme Court*** in Heller warned against applying ***Supreme Court*** incorporation ***cases*** from the late 1800s without conducting a proper 14th Amendment inquiry, Judge Sotomayor's panel in Maloney did just that. They cited the 1886 ***cases*** of Presser v. Illinois, decided under the privileges or immunities clause of the 14th Amendment, for the proposition that the Second Amendment does not limit the states, and they ignored the ***Supreme Court***'s 2008 directive to conduct a 14th Amendment analysis under the modern doctrine of the due process clause to determine if the ***right*** is fundamental and should be incorporated.

By contrast, the 9th Circuit in Norlight v. King (ph), when faced with the same incorporation question earlier this year, did follow the ***Supreme Court***'s directive and correctly concluded that the Second Amendment is a fundamental ***right*** and does apply to the state through the due process clause.

Our Second Amendment ***rights*** are no less deserving of protection against states and local governments than the First, Fourth and Fifth Amendments, all of which have been incorporated. When faced with the most important question remaining after Heller, whether the ***right*** to keep and bear arms is fundamental and applies to the states, Judge Sotomayor dismissed the issue with no substantive analysis.

She and her colleagues also failed to follow ***Supreme Court*** precedent when they held that the New York statute could be upheld if the government had a rational basis for the law. They ignored that the ***Supreme Court*** in Heller rejected the rational basis test for Second Amendment claims.

By failing to conduct a proper 14th Amendment analysis, the Maloney ***court*** evaded its judicial responsibilities, offered no guidance to lower ***courts***, and provided no assistance in framing the issue for resolution by the ***Supreme Court***.

Whenever an appellate judge fails to provide supporting analysis for their conclusion or address serious constitutional issues presented by the ***case***, it is legitimate to ask whether the judge reach that conclusion by application of the constitution and statutes, or based on a political or social agenda.

Judge Sotomayor's view robs the Second Amendment of any real meaning. Under ***hear*** view the city of New Orleans' door-to-door confiscation of firearms from law-abiding, peaceable citizens in the aftermath of Hurricane Katrina was constitutional. Preventing an individual from exercising what the Heller ***court*** said was the second amendment's core lawful purpose of self-defense is no less dangerous when accomplished by a state law than by a federal law.

The Second Amendment survives today by a single vote in the ***Supreme Court***. Both its application to the states and whether there ***will*** be a meaningfully strict standard of review remain to be decided. Judge Sotomayor has already revealed her views, and they are contrary to the text, history, and meaning of the Second and 14th Amendments.

As a circuit ***court*** judge she is constrained by precedent, but as a ***Supreme Court*** justice appointed for life she would be making precedent. A supermajority of Americans believe in an individual's personal ***right*** to arms. They deserve a justice who ***will*** interpret the Second Amendment in a fair and impartial manner, and write well- crafted opinions worthy of respect from those of us who must live by their decisions.

The president who nominated Judge Sotomayor has expressed support for the city of Chicago's gun ban, which is being challenged in NRA v. Chicago, a ***case*** headed to the ***Supreme Court***. Seating a justice on the ***Supreme Court*** who does not treat the Second Amendment as a fundamental ***right*** deserving of protection against cities and states could do far more damage to the ***right*** to keep and bear arms than any legislation passed by Congress. Thank you.

ACTING CHAIR: Thank you very much for your testimony, Ms. Froman.

Our next witness is David Kopel. He is currently the research director of the Independence Institute in Golden, Colorado, and an associate policy analyst at the Cato Institute. He is also a contributor to the National Review Magazine. He graduated from the University of Michigan Law School.

Thank you very much for being here. We look forward to your testimony.

KOPEL: Thank you. The ***case*** of Sonia Sotomayor versus the Second Amendment is not yet found in the record of ***Supreme Court*** decisions. Yet if Judge Sotomayor is confirmed to the ***Supreme Court***, the opinions of the newest justice may soon begin to tell the story of a justice with disregard for the exercise of constitutional ***rights*** by tens of millions of Americans.

New York state is the only state in the Union which completely prohibits the peaceful possession of a nunchaku, a (inaudible) ban enacted after the opening to China in the early 1970s and the growth of interest in the martial arts. In the colloquy with Senator Hatch on July 14, Judge Sotomayor said that there was a rational basis for the ban because a nunchaku could injure or kill someone. The same point could just as accurately be made about bows and arrows, swords or guns. All of them are weapons, and all of them can be used for sporting purposes or for legitimate self-defense.

Judge Sotomayor's approach would allow states to ban archery equipment with no more basis than to claim the obvious, that bows are weapons. Even if there were no issue of fundamental ***rights*** in this ***case***, Judge Sotomayor's application of the rational basis test was shallow and insufficiently reasoned, and it was contrary to ***Supreme Court*** testament showing that the rational basis test is supposed to involve a genuine inquiry, not a mere repetition of a few statements made by prejudice people who impose the law.

The plaintiff in Maloney had argued that even putting aside the Second Amendment the New York prohibition violated his ***rights*** under the 14th Amendment. There was no controlling precedent on whether Mr. Maloney's activity involved an unenumerated ***right*** protected by the 14th Amendment. Accordingly, Judge Sotomayor and her fellow Maloney panelists should have provided a -- a reasoned decision on the issue.

Yet Judge Sotomayor simply presumed, with no legal reasoning, that Mr. Maloney's use of arms in his own home was not part of the exercise of a fundamental ***right***.

Testifying before this committee on July 14, Judge Sotomayor provided further examples of her troubling attitude to the ***right*** to arms. She told Senator Hatch that the -- the Heller decision had authorized gun control laws which could pass the rational basis test. To the contrary, the Heller decision had explicitly rejected the weak standard of review, which Justice Breyer had argued for in his dissent.

Both Judge Sotomayor and some of her advocates have pointed to the Seventh Circuit's decision in NRA v. Chicago as retrospectively validating her actions in Maloney. The argument is unpersuasive. Both the Maloney and the NRA ***courts*** cited 19th century precedents which had said that the 14th Amendment's privileges or immunities clause did not make the Second Amendment enforceable against the states.

However, as the Heller decision itself had pointed out, those ***cases***, quote, "did not engage in the sort of 14th Amendment inquiry required by our later ***cases***." In particular, the later ***cases*** require an analysis under the separate provision of the 14th Amendment, the due process clause.

Notably, the Seventh Circuit addressed this very issue and provided a detailed argument for why the existence of modern incorporation under the due process clause would not change the result in the ***case*** at bar. In contrast, Judge Sotomayor's per curiam opinion in Maloney did not even acknowledge the existence of the issue.

Various advocates have made the argument that, since Maloney and NRA reached the same result, and since two of the judges in NRA v. Chicago were -- were Republican appointees who are often called conservatives, then the Maloney opinion must be all ***right***.

This argument is valid only if one presumes that conservatives and/or Republican appointees always meet the standard of strong protectiveness for constitutional ***rights*** which should be required for any ***Supreme Court*** nominee.

In the ***case*** of the NRA v. Chicago judges, that standard was plainly not met. The Seventh Circuit judges actually made the policy argument that the Second Amendment should not be incorporated because incorporation would prevent states from outlawing self-defense by people who are attacked in their own homes.

A wise judge demonstrates and builds respect for the rule of law by writing opinions which carefully examine the relevant legal issues and which provide careful written explanations for the judge's decisions on those issues.

Judge Sotomayor's record on arms ***right cases*** has been the opposite. Her glib and dismissive attitude toward the ***right*** is manifest in her decisions and has been further demonstrated by her testimony before this committee.

In Sonia Sotomayor's America, the peaceful citizens who possess firearms, bows, or martial arts instruments have no ***rights*** which a state is bound to respect and those citizens are not even worthy of a serious explanation as to why.

Thank you.

KLOBUCHAR: Thank you very much. And did I say your name correctly?

KOPEL: (OFF-MIKE)

KLOBUCHAR: Oh, well, that was good. Thank you.

Next we have Ilya Somin. And Professor Somin is an assistant professor at George Mason University School of Law. His research focuses on constitutional law, property law, and the study of popular political participation and its implications for constitutional democracy.

He currently serves as co-editor of the ***Supreme Court*** Economic Review, one of the country's top-rated law and economic journals. After receiving his M.A. in political science from Harvard University and his law degree from Yale Law School, Professor Somin clerked for Judge Jerry E. Smith of the U.S. ***Court*** of Appeals for the Fifth Circuit.

I look forward to your testimony, Mr. Somin. Thank you for being here.

SOMIN: Thank you very much.

I'd like to thank the committee for the opportunity to testify, and even more importantly, for your interest in the issue of constitutional property ***rights*** that I ***will*** be speaking about.

For the founding fathers, the protection of private property was one of the most important reasons for the establishment of the Constitution in the first place. As President Barack Obama has written, our Constitution places the ownership of private property at the very heart of our system of liberty.

Unfortunately, the ***Supreme Court*** and other federal ***courts*** have often given private property ***rights*** short shrift and have denied them the sort of protection that is routinely extended to other constitutional ***rights***, and I hope that the committee's interest in this issue ***will*** over time help begin to change that.

In my oral testimony today, I ***will*** consider Judge Sotomayor's most well known property decision, Didden v. Village of Port Chester. In my written testimony, which I hope ***will*** be entered into the record, I also discuss her decision in Krimstock v. Kelly.

The important background to the Didden decision is the ***Supreme Court***'s 2005 decision in the ***case*** of Kelo v. City of New London, which addressed the Fifth Amendment's requirement that private property can only be taken by the government if it is for a public use.

Unfortunately, a closely divided 5-4 ***Supreme Court*** ruled in Kelo that it is permissible to take property from one private individual and give it to another solely for purposes of promoting economic development, even if there isn't even any evidence necessarily that the development ***will*** actually occur.

This licensed numerous abuse of takings in many parts of the country. Indeed, since World War II, economic development in other similar takings have displaced hundred of thousands of people, many of them poor or ethnic minorities.

But as broad as the Kelo decision was in upholding a wide range of abusive takings, Judge Sotomayor's decision in the Didden ***case*** went even further than Kelo in doing so.

The facts of the Didden ***case*** are as follows. In 1999, the Village of Port Chester in New York declared a redevelopment area in part of its territory where, therefore, property could be taken by eminent domain in order to promote development there. And they also appointed a person named Greg Wasser (ph), a powerful developer, as the main developer for the area.

In (inaudible) 2003 Bart Didden and Dominic Bologna (ph), two property owners in the area, approached the village for permission to build a CVS on their property, and they were directed by Mr. Wasser (ph) -- they were directed to Mr. Wasser (ph), who told them that they must either pay him $800,000 or give him a 50 percent stake in their business, otherwise he threatened he would have the village condemn their property.

When they refused his demand, the property was condemned almost immediately after that.

Now, in her decision, with two other members of the 2nd Circuit, the panel that Judge Sotomayor was on upheld this condemnation in a very short, cursory summary order that included almost no analysis.

Now, it is true that they cited the Kelo decision. However, they made no mention of the fact that the Kelo decision actually stated that pretexual takings are still forbidden under the Constitution, pretexual takings being defined as takings where the official rationale for the condemnation was merely a pretext for a plan to benefit a powerful private party of some sort.

Now, there is some controversy over what counts as a pretexual taking and what doesn't. But if anything does count as a pretexual taking, it is surely a ***case*** like Didden where essentially the property would not have been condemned but for the owner's refusal to pay a private party $800,000.

Surely, if anything is a pretexual, it is a ***case*** where property is condemned as part of a scheme for leverage to enable a private individual to extort money from the property owner.

Now, in her oral testimony before this committee, Judge Sotomayor did say that her decision was based in part on a belief that the property owners had filed their ***case*** too late. I think the important thing to remember about this statement is that in her own decision, she actually specifically wrote that she would have ruled the same way, quote, "Even if the appellant's claims were not time-barred." So she claimed that even regardless of when they filed their ***case***, she would have come out the same way.

Moreover, as I discuss in my written testimony, it is actually the ***case*** that her statute of limitations holding was entirely dependent on the substantive property ***rights*** holding as well, and I can discuss that further in questions if the senators are interested.

I think the bottom line about this ***case*** is its extreme nature. If one is not ***willing*** to strike down a condemnation in a situation like this, if one is not ***willing*** to say that this isn't a public use, it's not clear that there are any limits whatsoever on the government's ability to take private property for the benefit of politically powerful individuals.

And on that note, I'm happy to conclude and I thank you very much for the opportunity to testify.

KLOBUCHAR: Thank you very much for your testimony.

We are now going to have each senator ask five minutes of questions, and I ***will*** start with Director Freeh. You're the only panelist who has had the opportunity to sit with Judge Sotomayor as a fellow judge. What did you learn about her and her approach to judging that led you to endorse her?

FREEH: You know, I think all the qualities that we've ***heard*** in this ***hearing*** as the optimal qualities -- mainstream, fair-mindedness, prepared, integrity, knowledge and intellect, patience. Part of being a good judge is listening and makings sure that the parties are all ***heard***, and really, her, you know, her sense of commitment to getting all the facts and then applying the law.

As you said, Senator, I not only served with her, but actually was with her in ***court***, as I mentioned in my opening statement. I what we call "second sat" her in a number of her first trials, where I actually observed her entire conduct of the trial, preparation, motion practice, instruction to juries, how she treated witnesses. And I think of all the things I observed over a six-month period was really, you know, how -- how detailed she was in preparing her written opinions.

This was never a judge that had a predisposition or a pre-notion or a personal agenda, but struggled and committed a lot of time and effort to getting the facts and applying the law. And I think she did that as a brand new judge. She's done it for 17 years, and I think we can be assured she ***will*** do it as a justice.

KLOBUCHAR: As someone who was appointed by President H.W. Bush, do you have any reservations about her ability to be a ***Supreme Court*** justice without activism or an ideological agenda?

FREEH: I'm totally confident that this would be an outstanding judge. Whether it was President Obama or someone else, as you mentioned, Judge Sotomayor was first appointed by George Bush -- the first George Bush. I was also. You know, I think she has all the mainstream, moderate, restrained adherence to the law qualities that we want, and I think we're going to be very proud of her.

KLOBUCHAR: Thank you.

Mr. Canterbury, you spent more than 25 years as an active duty police officer in South Carolina. I know what a difficult job you had. From my previous job, I've been able to see it first-hand. Are you confident if confirmed, Judge Sotomayor has the background and judicial record to be a justice who ***will*** be mindful of the need for law enforcement to protect our nation and have a pragmatic view of law enforcement issues?

(UNKNOWN): We're very confident of that, based on the over 450 criminal ***cases*** that we reviewed. We felt that her judgment was fair, tough and balanced throughout all of the ***cases*** that we reviewed.

And, looking at the totality of her career, we feel very comfortable that she'll make a fine judge.

KLOBUCHAR: Thank you very much. Just as I said, Mr. Freeh was the only one on the panel that served with Judge Sotomayor.

Mr. Cone, you are the only one on the panel that has pitched a perfect game, as far as I know.

(LAUGHTER)

Did you believe her to be fair when she ended the baseball strike?

I have to tell you that I thought your testimony -- people have, for, now, four days now, talked about each specific ***case*** and questioned a lot on different ***cases***, and were very thorough in their questioning and their understanding, but I thought you so -- so succinctly described the effect that her ruling had on many, many people across the country.

And what do you think that this decision says, a little more broadly, about her approach to law, in general, and the impact of her judicial philosophy on the lives of individual Americans?

CONE: Well, thank you, Senator. You know, from my perspective, as I said in my statement, a lot of people tried to end that dispute, including President Clinton -- we were called to the White House -- special mediators, members of Congress.

I spent weeks on end, here in Washington, lobbying Congress on trying to get -- or a partial repeal of the antitrust exemption, which did happen. And Senator Hatch and Senator Leahy certainly sponsored that bill, the Curt Flood Act (ph), which I think had an enormous impact as well.

But Judge Sotomayor is the one who made the tough, courageous call that put the baseball players back on the field. And, you know, from my perspective as a union member, we felt that we were in trouble, that the game was in trouble. It was to the point of almost being irreparably damaged. And she made the courageous decision to put the game back on the field and get the two parties back to the bargaining table and negotiate it in good faith.

KLOBUCHAR: Thank you very much. Senator Sessions?

SESSIONS: Thank you, Madam Chairman. It's good to be with you, and we're glad you're on this committee.

KLOBUCHAR: Thank you.

SESSIONS: Mr. Cone, I was reading a story about statistical stuff the other day. It came to me that, you know, you throw a coin, it can land five times in a row on heads, and -- and so I wonder about that, a little bit, in our effort to have racial harmony on test- taking. Because sometimes it's just statistically so, which makes me think there's the American League could have won, what, 12 out of the last 13 all-star games.

CONE: It makes you wonder, yes.

SESSIONS: Two or three is about all they're worth, ***right***?

No, it is -- thank you for your testimony, and we've enjoyed it.

Judge Freeh, nice to see you. I value your testimony, always do, and I appreciate it very much.

I would note, and I think you would agree with me, but President Bush -- former President Bush -- former, former President Bush nominated Judge Sotomayor as Senator Moynihan's pick. In other words, they had a little deal that President Bush would appoint three judges, I think, and Senator Moynihan would get to pick one. And he nominated -- the recommendation of Senator Moynihan. Is that the way you remember it?

FREEH: I think that's correct. But I also think he's supporting this nomination now.

SESSIONS: OK. Good comment. You did good.

(LAUGHTER)

Madam -- Ms. Stith, thank you for you very insightful comments. I appreciated that very much and it's valuable to us.

Dr. Yoest, I was thinking about this organization Legal -- Puerto Rican Legal Defense Fund, PRLDF, and do board members of your organization know what lawsuits you're -- you're pursuing and generally what the issues are? Push your button.

YOEST: I was asked that question actually ***right*** after Judge Sotomayor was nominated, and it was the day before my Board came to town for one of our annual meetings. And as I listened to the discussion of her relationship with

the Fund as a board member I have found the connection between her association with the ***cases*** and her description to really strain credulity.

The fact of the matter is to -- you don't have to have read an individual ***case***, reviewed a particular point as a board member to be intimately associated with it. The point of being a board member for all of us who've dedicated our lives to the non-profit realm is to have oversight and to have accountability and responsibility for the organization. And so I think it's -- I think it's...

(CROSSTALK)

(UNKNOWN): Well I think that's probably most boards should operate that way at least.

Ms. Froman, is it correct to say that Judge Sotomayor's opinion in Maloney, which said the Second Amendment does not apply to this ***case***, if it is not overruled and if it is followed by the United States ***Supreme Court*** then basically the Second Amendment ***rights*** are eviscerated with regard to cities and states that can eliminate firearms.

FROMAN: That's correct, Senator. The problem is the Heller ***case*** did not have to deal with the incorporation issue because it took place in Washington, D.C., which is a federal enclave and federal law applies directly. But if the Second -- if the Second Circuit decision or the Seventh Circuit decision remains law is approved by the ***Supreme Court***, goes up to the ***Supreme Court*** and is affirmed, then yes, cities and states can ban guns.

(UNKNOWN): Did it worry you that the judge has already ruled on the ***case*** one way and it was a 5-4 ***case*** before now could be deciding -- being deciding vote on how that might turn out?

FROMAN: It's of great concern to me, Senator, and that's why I'm here today to testify. And it's of particular concern to be today because she did not give any reason. She did not explain what the basis was for her holding.

It's kind of like when I was in math class it wasn't enough to get the ***right*** answer. You had to show your work so the professor knew that you actually worked the problem and you didn't cheat. So you know without any explanation of how she reached her conclusion we can't tell whether that was a legitimate application of the Constitution and the statute...

(UNKNOWN): I know your organization officially I see today they said they want to see how the hearings went and what the nominee said. After that what has -- has the National Rifle Association now made an announcement today? And what is it?

FROMAN: Well I -- I of course have been here today, and I'm not here to speak on behalf of the NRA. I'm here to speak on my own behalf, and of course on behalf of other American gun owners. The NRA is the oldest and largest civil ***rights*** organization in the history of this country. They are dedicated to preserving and protecting the Second Amendment, and I think they have been out every day talking about the concerns that the NRA has over...

(CROSSTALK)

(UNKNOWN): Well are you aware that I was just given a document here that said that "therefore the National Rifle Association opposes the confirmation of Judge Sotomayor.

(UNKNOWN): Were you aware that that had happened?

FROMAN: I was told about that while I was here, Senator. Yes, and so I'm -- I'm sure that they have given a full explanation of that position and I'm glad to see that.

(UNKNOWN): Mr. Somin, thank you for your testimony.

Thank you, Mr. Kopel, for yours.

And I'm going to -- I frankly feel now obligated to look more closely at the Didden ***case***. You raised most serious concerns and I realize, in fact I guess I was thinking this is worse than I thought, after ***hearing*** your testimony. I do think that it does impact property ***rights*** of great importance, and thank you for sharing that.

If you want a brief comment, my time is...

SOMIN: Yes, thank you, Senator. I agree with you. It raises very important concerns and that these sorts of takings affect thousands of people around the country, particularly to poor and minorities, as the NAACP actually pointed out in their amicus brief in the Kelo ***case***, where they indicated that the poor and politically vulnerable and ethnic minorities tend to be targeted for these sorts of condemnations.

(UNKNOWN): Thank you.

KLOBUCHAR: Thank you very much.

Senator Kyl?

KYL: Thank you, Madam Chairman.

Firt of all, let me acknowledge those on the panel who I know, but thank all of you for being here.

Louie Freeh, it's great to see you again. I respect your opinions greatly, I want you to know that. I also respected the way David Cone played baseball very, very much, and I used to root for you, as a matter of a fact. I didn't say that an Arizona Diamondbacks fan, but I had another team in the other league.

(UNKNOWN): Did you -- (inaudible) Senator (inaudible) did you (inaudible) -- was his perfect game the last one when you did it?

CONE: No. His was done back in the '60s, but there's only I think 17 perfect games in the history of the game. I'm lucky enough to be one of them.

KYL: And of course, Dr. Yoest. And Sandy Froman is a person with whom I have consulted over many, many years, during -- long before she was the national president of the NRA, but also on legal matters. And I appreciate her because of her distinguished law career, the judgment that she gives on this.

I wish I could ask all of you a question, but let me just ask a couple here.

First of all, Sandy, the question that Senator Sessions asked I think gets ***right*** to the heart of the matter, and I wonder if you could just put a little bit of a legal spin to it. The question is: What would it mean to the gun owners of America if Judge Sotomayor's opinion were to be the controlling law in this country from now on?

She acknowledged under my questioning that it would be more difficult -- I don't have her exact quotation here -- but it would be more difficult for gun owners to challenge the regulations of states or cities, but it was unclear exactly how much more. Could you describe the test that would be used in such a situation? And in your opinion, how much more difficult it would be for gun owners to sustain their ***rights*** as against states and localities?

FROMAN: Yes, thank you, Senator Kyl.

Well, I believe if I ***heard*** you questioning one of the panels earlier, you raised that issue yourself, which is she said the rational basis test would be sufficient to sustain any gun ban that the government wanted to impose, whether it was a city or a state. And the rational basis test is the lowest threshold that the government has to meet to sustain a ban. They can articulate any reason, pretty much, and it ***will*** be sufficient to get past that view.

Now, the ***Supreme Court*** in Heller made it clear that the rational basis test is not allowed when you're interpreting an enumerated ***right*** like the Second Amendment. So -- but she ignored that in the Maloney ***case*** and talked about rational basis anyway.

So that is of great concern to me, and I think to the almost 90 million American gun owners, that, yes, it's fine to say in Heller that we have a ***right*** that's protected against infringement by the federal government, but that doesn't mean -- the Heller ***case*** doesn't mean that cities and states can't ban guns, can't issue whatever regulations they want, as long as they can articulate what ***will*** meet this rational basis test. It's a very, very low threshold.

And as a matter of fact, that's why the District of Columbia had their gun ban. That's why the city of Chicago basically has a gun ban that prevents people from having firearms, even in their home for self-defense.

So that is what we're concerned about as gun owners in America.

KYL: Thank you very much.

Dr. Yoest, in the questioning by Senator Coburn of the nominee, he asked about advances in technology. And as I recall Judge Sotomayor's testimony, she did not want to acknowledge the impact of advances in technology as it relates to the ***Supreme Court***'s evaluation of restrictions on abortion.

Do you believe that advances in technology are important to the viability trimester framework that the ***court*** articulated in Roe, and why?

YOEST: Well, I would reference back to the confirmation hearings of the chief justice in which he went through one of the -- one of the elements that we look at when we reconsider factual -- how things relate to a ***case***, and there has definitely been tremendous advances on the scientific realm as it relates to human life.

So I think it's important to see her, whether or not she's ***willing*** to consider that kind of thing.

And it also goes to Americans United for Life works very focused on pro-life legislation at the state level, and what part of the challenge that we face is this question of how much the American people are going to be allowed to interact with their duly elected representatives at the state level in restricting abortion in a common-sense way that they'd like to see.

KYL: Thank you.

Just to be clear, I have recalled her testimony slightly incorrect. She actually didn't say or wouldn't say how she viewed it. She said it would depend upon the ***case*** that came before her. So I don't want to mischaracterize her testimony. But your point is that it would be very important for a ***court*** in evaluating a restriction imposed by a state.

YOEST: Yes, sir.

KYL: OK. Thank you.

Again, I wish I had more time to -- but we have, I think, one or two panels left here, so we should probably move on.

KLOBUCHAR: Senator, we have two panels left.

KYL: Yes.

But we thank you very much. This is an important event in our country's history. You've contributed to it. And we thank you, all of you for it.

SESSIONS: Thank you, Mr. Canterbury. Appreciate FOPs.

KLOBUCHAR: Yes, I wanted to thank all of you. And you just did a marvelous job in stating your opinions. I think it was helpful for everyone.

And thank you -- thank you very much. Have a very good afternoon. It was one of our shortest panels. You're lucky. You can go home and have dinner.

We're going to take a five-minute break, and then we ***will*** have the next panel join us.

Thank you very much.

(RECESS)

ACTING CHAIR: OK. We're going to get started with our next panel. If you could stand to be sworn in. Raise your ***right*** hand. Do you affirm that the testimony you are about to give before the committee ***will*** be the truth, the whole truth, and nothing but the truth, so help you God?

ROMERO: Yes, I do.

ACTING CHAIR: We're joined here by Senator Sessions. I know Senator Kyle may be joining us and has been with us today, and whoever else stops by. But we want to thank you for coming. We have had a good afternoon, and what I'm going to do is introduce each of you individually and then you ***will*** give your -- your five minutes of testimony. And I know one of our witnesses is a little late so we're going to start here with you, Ms. Romero.

Ramona Romero is the current national president of the Hispanic National Bar Association and the corporate council for logistics and energy at DuPont. She is also a co-founder and former board member of the Dominican-American National Roundtable. She is a graduate of Harvard Law School.

Ms. Romero, we're honored to have you here. Thank you. We look forward to your testimony. Well you can give your testimony because our other witness got a little delayed coming over from the House. So thank you.

ROMERO: Good afternoon. As Madam Chair said, my name is Ramona Romero and I am the national president of the Hispanic National Bar Association, which is known as the HMBA. We're grateful to Chairman Leahy, to you, Senator Sessions, and to all of the members of the committee for affording the HMBA the opportunity and honor of testifying at this ***hearing***.

This is the fifth time that we have appeared before this committee in support of the confirmation of a ***Supreme Court*** justice. We take great pleasure in endorsing Judge Sotomayor, our support of this first and foremost on the merit of her stellar credentials.

The HMBA was founded in 1972. One of its primary goals is to promote equal justice for all Americans by advancing the participation of Hispanics in the legal profession. It is a nonprofit, voluntary bar association. We have 37 affiliates in 22 states. The HNBA is nonpartisan. And it does not represent a particular ideology.

Today, I am accompanied by nine former HNBA national presidents and vice president elect. Like many Americans, we were proud when President Obama announced the nomination of Judge Sotomayor. As many members of this committee know, for decades, the H&A has worked to promote a fair, independent, and, yes, diverse judiciary, one that reflects the rich mosaic of the American people.

There are over 45 million Hispanics in the United States. We represent over 15% of the population. We are the largest, fastest- growing, and youngest segment of the population. Yet Hispanics are underrepresented among lawyers and judges.

The appointment of the first Hispanic to the ***Supreme Court*** is an important, important symbolic milestone for our country, just like Justice Marshall was with respect to African Americans and Justice O'Connor was with respect to women.

The HNBA often reviews the qualifications of judicial candidates regardless of background or politics. We consider a number of factors -- exceptional professional competence, intellect, character, integrity, temperament,

commitment to equal justice, and service the American people and also to Hispanics, the community we serve. Judge Sotomayor more, more than satisfies all of these criteria.

Before her nomination, we were already familiar with Judge Sotomayor's impressive background. We had endorsed her for both of her prior judicial appointments. In 2005, the HNBA also named the judge on a bipartisan short list of eight potential ***Supreme Court*** nominees prepared by a ***Supreme Court*** committee after substantial due diligence.

The HNBA ***Supreme Court*** Committee again performed due diligence on her record after this nomination. As a result, we're confident that Judge Sotomayor is extraordinarily well qualified to serve as a justice of the ***Supreme Court***.

Some have suggested that this confirms the judge would render decisions based on her personal bias. They could not be more wrong. Her extensive judicial record shows that her background and her experiences ***will*** not detract from her ability to adhere to the rule of law.

On the contrary, they are a positive. Her story resonates with all Americans. She is proof that in our country, in our country, there is no limit, even for those of us from the most humble of backgrounds. Her confirmation ***will*** mark another key step in our journey as one nation indivisible.

We are grateful to President Obama for making a wise decision in nominating Judge Sotomayor. Our thanks to all Americans for their interest in one of our country's shining stars. The HNBA thanks this committee and urges the Senate to confirm Judge Sotomayor. Thank you for listening.

(UNKNOWN): Thank you very much, Ms. Romero (ph). And also, welcome to all the many past presidents that are here -- that's quite a number -- as well as vice presidents. We've now been joined by the Honorable Nydia Velazquez, who is the congresswoman here. And I know she is incredibly busy and has joined us in Senator Sessions and I both agreed that you wouldn't have to stay for questions.

She is currently serving her ninth term as representative for New York's 12th Congressional District. She was the first Puerto Rican woman elected to the U.S. House of Representatives and currently serves as the Chairwoman of the Congressional Hispanic Caucus, Chair of the House Small Business Committee, and a senior member of the Financial Services Committee. And because you missed the swearing in, we ***will*** do that now.

This is the Senate Judiciary Committee. So welcome. Could you raise your ***right*** hand? Do you affirm that the testimony that you are about to give before the committee is the truth, the whole truth, and nothing but the truth, so help you God?

VELAZQUEZ: I do.

(UNKNOWN): Thank you. You have five minutes, congresswoman. And we're honored to have you here. Thank you.

VELAZQUEZ: Thank you. Madam Chairman, ranking members, and the members of the committee, I have known Sonia Sotomayor for over 20 years. In fact, when I was first elected to Congress in 1993, I asked her to administer my oath of office.

I can tell you personally that she is a grounded and professional individual. And over the last three and a half days, all of us have been able to see her considerable legal ability impressively displayed.

Hispanics everywhere are proud that such a distinguished legal talent hails from our community. We have all been energized by her nomination. But of course, that is not the reason why she should be confirmed. The ***case*** for Judge Sotomayor's confirmation is built on her vast experience, keen intellect, and tremendous qualifications.

It is not that Judge Sotomayor does not have a compelling life history. She does. As so many have already pointed out, hers is a uniquely American story, one that begins in the Bronx projects and ultimately reaches the highest echelons of our legal system.

This background instilled within her the belief that hard work is rewarded and the knowledge that with the ***right*** combination of talent and effort, anything is possible in America. These core values propel Sonia Sotomayor to remarkable heights. As her career progressed, she managed to reach nearly every level of the legal system. With each new step, she excelled, not only as a prosecutor and a litigator, but also as an appellate judge.

And yet throughout that process of achievement, she never once lost touch with her roots or her Bronx neighborhood. Instead, she augmented her vast legal experience with common-sense understanding of working-class America. That appreciation ***will*** add a valuable perspective to the ***Supreme Court***.

Make no mistake. The stakes are high for Hispanic Americans. The ***Supreme Court*** ***will*** rule on many matters that are critical to our community, from housing policy to voting ***rights***. These are delicate issues. With many of these matters passion runs deep on both sides. Resolving them fairly ***will*** require objectivity, impartiality, and an unwavering commitment to the rule of law.

Judge Sotomayor's record demonstrates this quality. She has the reputation as a non-ideological jurist. Someone who chooses not to spar with those who think differently, but to instead find common ground. When working with Republican appointees, colleagues, Sotomayor's record ***will*** show that 95 percent of the time she managed to forge consensus. She was able to do this because she commands a sophisticated grasp of legal argument and have a keen awareness of the law's affect on every American.

When the Congressional Hispanic Caucus reviewed, it brought range of qualified ***Supreme*** candidates these were the traits we were looking for. We were looking for individuals who upheld constitutional value, exhibited a record of integrity, and had a profound, profound respect for our Constitution. It is our overwhelming belief that Judge Sotomayor meets these criteria. That is why we enthusiastically and unanimously endorse her nomination.

Senators, the decision before the committee today is one of your greatest responsibilities. I know this is something none of you on either side of the aisle take lightly. But I believe Judge Sotomayor's records of judicial integrity, impartiality, and as she puts it, fidelity to the law, is one we can all admire, regardless of party or ideology.

If confirmed, Judge Sotomayor's service on the ***Court*** ***will*** bring great pride on the Hispanic community. That goes without saying. But more importantly, it ***will*** add another objective, disciplined legal talent to that of the body.

Thank you again for the opportunity to testify. I look forward to answering any question. Either you can send it to my office, but we are going ***right*** now, and I really, really appreciate the opportunity you have given me on behalf of the Congressional Hispanic Caucus.

(UNKNOWN): Thank you so much, Congresswoman Vasquez, and that was an eloquent and personal statement. It means a lot to us, and you've contributed much to the ***hearing***.

VASQUEZ: Thank you. I know her well. I know her heart, her soul, her intellect, but most importantly her temperament and integrity. Thank you.

(UNKNOWN): Thank you.

ACTING CHAIR: And thank you so much, Congresswoman Vasquez. We know you have to vote and there's many things going on over in the House. So we appreciate and understand that. Thank you very much.

ACTING CHAIR: Next we have Theodore M. Shaw. Mr. Shaw is a professor at Columbia Law School, and former director council and president of the NAACP Legal Defense Fund. He began his legal career in the Civil ***Rights*** Division of the United States Department of Justice. He's a graduate of Wesleyan University and the Columbia University School of Law.

Thank you very much, Mr. Shaw. We look forward to your testimony.

SHAW: Thank you, Madam Chair. Thank you, Senator Sessions, and in his absence of course, Chairman Leahy.

I have known Sonia Sotomayor for over four years. We first met in 1968 as freshmen at Cardinal Spellman High School in the Bronx. We were among a modest number of black and Latino students. Perhaps 10 percent of that school's population in what was one of the most academically challenging high schools in New York City.

It was a time of great change, great challenge. 1968 was a year that Dr. King was assassinated and also Robert Kennedy, the year of the Chicago Democratic National Convention. And there was much unrest.

Many of the minority students at Spellman, including Sonia and I, came from the public housing projects of Harlem or the Bronx, or the tenement houses that surrounded them. We were shaped by these extraordinary times and by the communities in which we came for better or worse.

During that time the light of opportunity began to shine into corners of society that were long neglected for reasons of race and poverty. Many of us were beneficiaries of what has come to be known as affirmative action. That is the conscious effort to open opportunities to individuals and groups that had been historically discriminated against and excluded from mainstream America.

Some people ***will*** immediately seize upon that description to talk about "unqualified" individual. Affirmative action properly structured and implemented lifts qualified individuals from obscurity rooted in unearned inequality. In spite of her brilliance there was a time when someone like Judge Sotomayor would've been routinely left out of the mainstream opportunity we have come to associate with somebody of her capabilities and accomplishments.

Sonia was at the top of our class at Cardinal Spellman High School. Everyone, white, black, Latino, Asian ranked behind her. She was studious, independent minded, mature beyond her years, thoughtful. She wasn't easily influenced by what was going on around her. She walked her own path.

To be sure Sonia was comfortable in her own skin and proud of her community and her heritage. She did not run from who or what she was and is. Still Sonia was not one to be easily swayed by peer pressure, fad, or the politics of others around her. She approached any issue from the standpoint of fierce intellectual curiosity and integrity. In fact she was an intellectual powerhouse. Sonia was a leader among students at Cardinal Spellman High School. She set the pace at which others wanted to run.

Sonia did not live a life of privilege. She lost her father at a very young age. She had been diagnosed with diabetes even before she came to high school. It was not something I remember her talking about. She simply carried herself with an air of dignity, seriousness, of purpose, and a sense that she was going somewhere.

In my four years of high school I never saw Sonia interact with anyone in a disrespectful or pretentious, antagonistic manner. Her temperament was, well even then judicious. In short, although I never told her then, and although she did not know it, I envied her intellectual capacity, her discipline, her unquestionable integrity. I admired her.

After graduating from the -- from Cardinal Spellman at the top of our class and as valedictorian she was off to Princeton and somewhere further down in the rankings I was off to Wesleyan. I did not stay in touch with her over many of the ensuing years, but we -- we did meet up again some years later. I followed her as one does a star from one's high school orbit.

Eventually of course she went onto Yale Law School after Princeton. She excelled in everything she did. Her qualification for the ***Supreme Court*** would ordinarily be a no-brainer, but for the politics of judicial nominations. I have faith that the Senate and this committee ***will*** not let those politics get in the way.

My career has been as a civil ***rights*** lawyer. I have been in the midst of ideological warfare on contentious issues. I have been unabashed about my points of view. I'm conscious of the fact that as I testify about Sonia

there may be some who project my thoughts and beliefs onto her. Some have already tried to label her as an activist outside of the political mainstream.

To be sure I consider those who work for racial justice and other civil ***rights*** to be a vital part of mainstream America. But Sonia's life has not been lived on the battlefield of ideology or partisanship where many of us who are labeled or who label ourselves as liberal or conservative have locked horns. Indeed her record defies a simplistic label.

She began her legal career as a prosecutor, not ordinarily a job thought of as the bastion of liberal activism. Her service on the Board of the Puerto Rican Legal Defense Fund both speaks to the strength of that organization and the range of her interests from prosecution to civil ***rights***. Her service was commendable. In fact this range of experience and commitment places Judge Sotomayor in a mainstream of middle America for surely Americans are both interested in the prosecution and punishment of those who engage in criminal activities as well as the protection of civil ***rights*** and the elimination of invidious discrimination.

I have much more to say, but it's in my written testimony and I see my time is expiring. I would like to refer you to my comments on this whole notion of experience and what that brings to the bench.

But to conclude I want to say that she's served our nation for 17 years as a federal district ***court*** judge with -- and then as an appellate judge with great distinction. Now she's being considered for an appointment as associate justice to the United States ***Supreme Court***.

Kind of compels me to admit that I swell with pride when I contemplate the possibility that my high school classmate may ascend to the highest ***court*** in the land. But quite aside from this petty and undeserved pride on the part of one who was merely a high school classmate, there are millions of Americans who see for the first time the possibility that someone who looks like them or who comes from a background like theirs may serve on the United States ***Supreme Court***, someone who is supremely qualified by any measure.

It is a great honor for Judge Sotomayor that President Obama has nominated her to the United States ***Supreme Court***. It would be even a greater honor for our nation if she were to be confirmed and were to serve. Thank you.

ACTING CHAIR: Thank you very much. Our next witness -- appreciate it, Mr. Shaw.

Our next witness is Tim Jeffries. Tim Jeffries is the founder of P7 Enterprises, a management consulting practice located in Scottsdale, Arizona. Mr. Jeffries serves on the board of directors of several corporations and non-profit organizations, including the National Organization for Victim Assistance and the Arizona Voice for Crime Victims.

I don't know if you want to add anything, Senator Kyl.

KYL: Well Madam Chairman thank you for that opportunity. I think you'll see when he testifies how the basis for his knowledge and passion about the protection of victims' ***rights***, and I think that ***will*** speak for itself. And I'm anxious to follow-up with a question as well, but I thank you very much.

ACTING CHAIR: Thank you very much.

Welcome to the committee, Mr. Jeffries. We look forward to your testimony.

JEFFRIES: Thank you, Madam Chairman, Senator Sessions, Senator Kyl. I appreciate the humbling invitation to provide my personal testimony in opposition to the Honorable Judge Sotomayor's appointment to the U.S. ***Supreme Court***. The views I express here today are my own and not the views of any organization I may reference.

As my bio shows I come from a blue-collar family. My father's grandfather served in the Union Army during the Civil War and rode for the Pony Express. My mother's grandparents immigrated from Portugal to America in the 1900s with no money in their pocket and no English in their vocabularies.

Similar to thousands of other simple, hard-working Americans, my involvement in the crime victims support movement was borne from unimaginable tragedy. On November 3rd, 1981, my beloved older brother Michael was kidnapped, beaten, tortured, and murdered by a transient gang of street criminals in Colorado Springs, CO.

The two murderers stabbed my dear, defenseless brother 65 times and ultimately killed Michael by slashing his throat and crushing his skull with the heel of a remorseless, blood-soaked boot.

Based on federal crime statistics, 17,000 people are murdered in our country every year. On average, someone is murdered every 31 minutes. On average, every ten weeks, more people are murdered in our country than passed on that brutal, horrible day of September 11th.

In fact, since September 11th, 115,000 people have been murdered in America. This gut-wrenching level of violence in our country exceeds the approximate population of Santa Clara, CA, or Gresham, OR, or Peoria, IL, or Allentown, PA.

Further compounding this epic national crisis, other violent crimes in our country are committed in an appalling rate. Based on the crime clock produced by the Office for Victims of Crime in the Department of Justice, someone is raped in our country every 1.9 minutes. Someone is assaulted in our country every 36.9 seconds. An instance of child abuse or neglect is reported every 34.9 seconds.

Making matters worse, this breathtaking spectrum of heinous violence in our country does not receive the consistent political action it warrants and the constant media focus it deserves. Prior to my testimony, my wife sent me a text. And she asked, "Where are all the senators?" And perhaps that is a metaphor for what vexes and undermines the crime victims support movement.

The true horror and verifiable existence of evil in our country are often minimized if not trivialized with well-intentioned yet sadly misguided equivocations about the troubled lives of guilty criminals in their various personal circumstances.

Unfortunately, based on public statements, Judge Sotomayor has repeatedly offered misplaced sympathy for criminals, despite the fact that justice exists to protect the innocent and to punish the guilty. Forgiveness and mercy are one thing. Punishment and accountability are another.

In four situations, four different events that are noted in my testimony, Judge Sotomayor displayed sympathy and perhaps empathy for criminals that may be well intentioned but I feel is tragically misplaced.

At a Columbia Law School Public Service ***Center***, she stated, "It is all too easy as a prosecutor to feel the pain and suffering of victims and to forget that defendants, despite whatever illegal act they've committed, however despicable their acts may have been, the defendants are human beings."

In January 1995 in receiving the Hogan-Morganthau Award, Judge Sotomayor stated, "The end result of a legal process is to find a winner. However, for every winner, there is a loser. And the loser is himself or herself a victim," forgetting for the fact that when meeting justice, it's not to find a winner; it's to find justice.

In July 12th, 1993, in a federal sentencing ***hearing*** that she provided over, over a cocaine dealer, Judge Sotomayor apologized to the cocaine dealer for having to send him to federal prison. She stated the mandatory five-year sentence was a "great tragedy for our country." She also stated she hoped the cocaine dealer "***will*** appreciate that we all understand that you were a victim of the economic necessities of our society." And then she added, "But unfortunately, there are laws I must impose."

Having viewed the autopsy photos of my massacred brother and ***heard*** the heartbreaking stories of thousands of victims and survivors of violent crimes in America, I believe Judge Sotomayor's sympathy for criminals at the expense of the burdens carried by crime victims is unworthy of our nation's highest ***court***, where public safety and protection of the innocent should be paramount.

Whereas Judge Sotomayor's biography is admirable and compelling, it is a great American story of which as an American I am proud. I am deeply troubled that she has regularly offered well-intentioned yet misguided sympathy to criminals without notable deference to the pain and suffering of victims. These are the very people who need government's protection.

Statistics show that the most egregious crime in our country disproportionately impacts the poor, the disadvantaged, the downtrodden, the defenseless. These are the very people that the justices in our highest ***court*** must have sympathy for, must have empathy for.

Madam Chairman, I appreciate your patience with my testimony that has extended beyond its time.

(CROSSTALK)

(UNKNOWN): And I'd be happy to answer any questions at the appropriate time.

(UNKNOWN): That's fine. And thank you for sharing that tragic story. It must've been very difficult.

Naomi Rowe (ph) is our next witness. And Naomi Rowe (ph) is a professor of law at George Mason University. Previously, she served as Associate Counsel and Special Assistant to President George W. Bush and served as a counsel to the Senate Judiciary Committee. She is a graduate of the University of Chicago Law School. That's something we have in common. Professor Rowe (ph) clerked for ***Supreme Court*** Justice Clarence Thomas and 4th Circuit Judge J. Harvie Wilkinson. I look forward to your testimony. Thank you for being here.

(ROWE): Thank you very much, Madam Chairman, Senator Sessions, and other distinguished members of this committee. It is an honor to testify at these historic hearings, which provide -- which have provided the opportunity to have a respectful public dialogue about the important work of the ***Supreme Court*** and the judicial philosophy of an accomplished nominee.

I have submitted more detailed written testimony. And I should state at the outset that I take no position on the ultimate question of the confirmation of Judge Sotomayor. In my opening remarks, I would like to highlight some points about the judicial role.

During this ***hearing***, Judge Sotomayor has expressed broad principles about fidelity to the law with which we can all agree. But fidelity to the law can mean very different things to different judges.

Although in her testimony she has distanced herself from some of her earlier remarks, her speeches and writings might still be helpful in understanding her view of the judicial process.

First, Judge Sotomayor has explicitly rejected the idea that there can be an objective stance in judging. She has explained that every ***case*** has a series of perspectives and thus requires an individual choice by the judge. This goes beyond recognizing the need to exercise judgment in hard ***cases*** or the idea that reasonable judges may at times disagree. If there is no objective view, one can question whether there is any law at all apart from a judge's personal choices.

Second, there is the related issue of the role of personal experiences in judicial decision making. It would be hard to deny that judges are human and made up of their unique life journeys. Many judges recognize this and explain how they strive to remain impartial by putting aside their personal preferences. Judge Sotomayor's position, however, has suggested that her personal background, her race, gender, and life experiences, should affect judicial decisions.

Throughout her testimony, Judge Sotomayor has reaffirmed that she decides ***cases*** by applying the law to facts and that she does not follow what is in her heart. Of course, all nominees to the ***Supreme Court*** honestly state their fidelity to the law. Nonetheless, this leaves open the question of how a judge chooses to be faithful to the law. And judges go about this task in different ways.

Following the law could mean, as formalists believe, that the judicial role and the privilege of political independence require judges to stick closely to the actual words of statutes and the Constitution. The basic idea is that by focusing on the written law, judges act as fair and impartial arbiters.

Other judges consider that they're following the law when they interpret it to conform to what is rational or coherent or just. They believe that following the law means trying to bring about what they consider to be the best outcome all things considered. These judges may be ruled by pragmatism or personal values, such as empathy.

Even with the sincere purpose of following the law, judges use very different methods for finding what the law requires. For example, some judges are far more likely to determine that the law is ambiguous and therefore requires the judge to fill in the gaps. If the judge finds the law indeterminate, he or she may look to outside sources, such as international law, or to personal values about what is fair or rational.

Pragmatic, flexible interpretation of the law allows significant room for individual assessments of what the law requires, as each judge ***will*** have his or her own conceptions about what is best.

If the law is really a series of perspectives, this suggests a very thin conception of law. Fidelity to law as a series of perspectives is something very different from fidelity to law as binding, written command of the legislature and constitution. If law is simply one's own perspective, the fidelity to law is little more than fidelity to one's own views.

The ***Supreme Court*** gets the final word with regard to constitutional interpretation. A nominee's judicial philosophy is important because on the ***Supreme Court***, the only real restraint is self restraint.

Our constitutional structure does not give judges political power. It gives them the judicial power to decide particular ***cases*** through an even-handed application of the law to fairly interpret statutes and the Constitution for all that they contain, not more, not less.

In our ***courts***, the rule of law should prevail over the rule of what the judge thinks is best.

Thank you for giving me the chance to testify today.

(UNKNOWN): Thank you very much, Ms. Rowe (ph), for your testimony.

Next, we have John McGinnis. John McGinnis is a professor of law at Northwestern University. Previously, he was a deputy assistant attorney general in the Department of Justice's Office of Legal Policy. A graduate of Harvard Law School where he was the editor of the Harvard Law Review, something he has in common with President Obama. That's not true?

MCGINNIS: He was president of the Harvard Law Review. I was just a...

(CROSSTALK)

KLOBUCHAR: You were editor.

MCGINNIS: a humble servant.

KLOBUCHAR: Well we can just pretend for today. Professor McGinnis also clerked on the U.S. ***Court*** of Appeals for the District of Columbia.

Thank you for being here, Professor McGinnis. We look forward to your testimony.

MCGINNIS: Thank you so much, Chairman Klobuchar and Ranking Member Sessions for the opportunity to address you. At the outset I want to make clear that like my colleague I'm not taking any position on Judge Sotomayor's nomination, although I ***will*** say she has my respect and good wishes.

What this ***hearing*** affords is one of the rare opportunities for a constitutional conversation with the American people with the correct constitutional principles can be identified. Ultimately the Constitution rests on the people's confidence in the Constitution and their fidelity to the principles. Only once the correct constitutional principles are identified can the nation measure a nominee's adherence to those principles and so determine whether he or she should be confirmed.

My subject, the use of international and foreign law, is an issue of substantial importance, not least because the ***Supreme Court*** has come to rely on such materials. For instance Lawrence v. Texas the ***Supreme Court*** relied on the European ***Court*** of Human ***Rights*** as part of its decision to strike down a statute of one of our states. In my view such reliance distorts the meaning of our Constitution. It undermines domestic democracy and it threatens to alienate Americans from a document that is their common bond.

So what are the correct principles? I think they can be simply stated. They are that judges should avoid giving any weight to contemporary, foreign or international law unless the language of the Constitution calls for it, and the language of the Constitution generally does not.

If the Constitution, as I believe, should be interpreted according to the meaning it had at the time it was ratified, it follows directly that the use of contemporary and foreign or international law is not proper. The problem with this use in fact is that it's contemporary, not simply the fact that it's foreign or international because the meaning of the Constitution was fixed at the time it was ratified.

But even if one of the self-style pragmatists about constitutional theory the use of contemporary, foreign or international law on constitutional jurisprudence is still objectionable. Pragmatists believe the Constitution should only invalidate our laws if they have bad consequences. But a conflict between our law and foreign law is not appropriately used to create any doubt about the beneficence of our own law.

Foreign law is formulated to be good for that foreign nation, not for ours. Indeed a proposition of foreign law is really only the tip of an iceberg of some complex set of social norms that in another nation. But since the United Nations doesn't share all those norms, importing that single legal proposition into our nation can have very bad consequences for us.

International law differs from foreign law because international law at least purports to have some kind of universality, which foreign law does not. But raw international law also lacks any democratic pedigree and can't cast out our democratically made law.

Indeed international law has multiple democratic feedback. Totalitarian nations have participated in its fabrication. Very unrepresentative groups like law professors still shape its norm. It's also hardly transparent. American citizens have enough trouble trying to figure out what's going on in hearings like this one let alone in diplomatic meetings in Geneva.

As I read Judge Sotomayor's speech on this issue, her position depends on proposition that seem to me in some tension. Judge Sotomayor stated that justices should not use foreign or international law, but they should consider the ideas they find in such materials in their decision-making.

I understand that at this ***hearing*** Judge Sotomayor disavowed that such materials have any influence on jurisprudence, and I welcome that disavow. But she left unexplained to my satisfaction at least, however is her view in the speech that such materials can help us decide our issues. Her praise for the use of such law in Lawrence v. Texas, which expressly relies on that European Human ***Rights*** decision, and perhaps the most puzzling of all, her endorsement and her praise for Justice Ginsberg's view when it's well known that Justice Ginsberg in contrast with

say Justice Scalia believes that such materials are relevant to decision-making. Indeed Justice Ginsberg says that they're nothing less than the basic denominators of fairness between the governors and the governed.

Foreign and international law may well contain good ideas as Justice Sotomayor suggested, but so do many other sources that have no weight, and should not I think routinely be cited as authority. To put the question in perspective undoubtedly the Bible and the Koran have many legal ideas that many people think are good, but we'd be rightly concerned if judges used them as guidance for interpreting the Constitution or even routinely cited them. Depending on what text the judge cited and what she omitted, we might think she was biased in favor of one tradition at the expense of others.

In my view the rule of law itself ultimately is founded on the proposition that only material that is formally relevant should have weight in a judge's decision. And a way a judge can demonstrate adherence to the rule of law in this context is extremely simple. Simply refrain from appealing to the authority of foreign or international law in her opinion.

Thank you very much.

KLOBUCHAR: Thank you very much, Professor McGinnis.

Last but not least we have Professor Rosenkranz. Nicholas Quinn Rosenkranz is an associate professor at Georgetown University Law ***Center***. After graduating from Yale Law School he clerked for Judge Frank Easterbrook on the U.S. ***Court*** of Appeals for the 7th Circuit and for Justice Anthony Kennedy on the U.S. ***Supreme Court***. He then served as an attorney advisor at the Office of Legal Council in the United States Department of Justice.

You should know Mr. Rosenkranz that Judge Easterbrook was my professor at law school and I know that must've been kind of a tough clerkship. I'm sure you had to work very hard. So we look forward -- we look forward to ***hearing*** your testimony. Thank you.

ROSENKRANZ: Madam Chair, thank you. Ranking Member Sessions, members of the committee, I thank you all for the opportunity to testify at this momentous ***hearing***. I too have been asked to comment on the use of contemporary foreign legal materials in the interpretation of the U.S. Constitution.

I agree entirely with Professor McGinnis' analysis. In my remarks I'll try to explain why this sort of reliance on foreign law is intention with fundamental notions of democratic self-governance. I should emphasize that I too take no position on the ultimate question of whether Judge Sotomayor should be confirmed, and I offer my comments with the greatest respect. But I am concerned that her recent speech on this issue may betray a misconception about how to interpret the United States Constitution.

In this room and at the ***Supreme Courts***, and in law schools and throughout the nation we speak of our Constitution in almost metaphysical terms. In the United States we revere our Constitution, and while we should it is the single greatest charter of government in history. But it worth remembering exactly what it is that we revere.

The Constitution is a text. It is comprised of words on parchment. A copy fits comfortably in an inside pocket, but copies don't quite do it justice. The original is just down the street at the National Archives, and it is something to see.

It is in a sealed titanium ***case***, filled with argon gas, and at night it's kept in an underground vault, but during the day, anyone can go, and see it, and read it, and everyone should. The parchment's in remarkably good condition, and the words are still clearly visible.

The most important job of a ***Supreme Court*** justice is to discern what the words on that piece of parchment mean. The job is not to instill the text with meaning; the job is not to declare what the text should mean. It is to discern, using standard tools of legal interpretation, the meaning of the words on that piece of parchment.

Now, sometimes the meaning of the text is not obvious. One might need to turn to other sources to help understand the meaning of the words. One might, for example, turn to the Federalist Papers or to early ***Supreme Court cases*** to see what other wise lawyers thought that those words meant.

What the ***Supreme Court*** has done in two recent controversial ***cases*** is to rely on contemporary foreign law in determining the meaning of the United States Constitution, and this is the practice that Judge Sotomayor seems to endorse in her recent speech.

When one is trying to figure out the meaning of the document down the street at the Archives, it is mysterious why one would need to study other legal documents written in other languages for other purposes in other political circumstances hundreds of years later and thousands of miles away.

To put the point most simply, as a general matter, it is unfathomable how the law of, say, France in 2009 could help one discern the original public meaning of the United States Constitution.

Those who would rely on such sources must be engaged in a different project. They must be trying to update the Constitution, to bring it in line with world opinion.

To put the point most starkly, this sort of reliance on contemporary foreign law must be in essence a mechanism of constitutional change. Foreign law changes all the time, and it has changed continuously since the founding. If modern foreign law is relevant to constitutional interpretation, it follows that a change in foreign law can alter the meaning of the United States Constitution. And that is why this issue is so important.

The notion of the ***court*** updating the Constitution to reflect its own evolving view of good government is troubling enough, but the notion that this evolution may be brought about by changes in foreign law violates basic premises of democratic self-governance.

When the ***Supreme Court*** declares that the Constitution evolves and it declares further that foreign law may affect its evolution, it is declaring nothing less than the power of foreign governments to change the meaning of the United States Constitution.

And even if the ***court*** purports to seek a foreign consensus, a single foreign country might tip the scales. Indeed, foreign governments might attempt this deliberately.

France, for example, has declared that one of its priorities is the abolition of capital punishment in the United States, yet surely the American people would rebel at the thought of the French parliament deciding whether to abolish the death penalty, not just in France, but thereby in America.

After all, foreign control over American law was a primary grievance of the Declaration of Independence. It, too, may be found at the National Archives, and its most resonant protest was that King George III had subjected us to a jurisdiction foreign to our Constitution.

This is exactly what is at stake here: foreign government control over the meaning of our Constitution. Any such control, even at the margin, is inconsistent with our basic founding principles of democracy and self-governance.

I hope that the committee ***will*** continue to explore Judge Sotomayor's views on this important issue.

Thank you.

KLOBUCHAR: Thank you very much to all of you.

And just -- just to clarify, Mr. Rosenkranz, the one ***case*** that Judge Sotomayor considered on the death penalty, she actually sustained it. She rejected a claim that it didn't apply. And I don't think she used foreign law at all to say that it didn't apply. She actually sustained the death penalty.

Are you aware of that ***case***, the Heatley ***case***?

ROSENKRANZ: Yes, I am aware of it. I'm referring primarily to the speech that she gave on this topic.

KLOBUCHAR: OK. Well, I would say that her opinion probably rules if you look at how she actually ruled on this. She didn't say that you couldn't have the death penalty because of French law. Thank you.

Ms. Romero, I had some questions about your testimony. You -- you talked about the fact that Ms. Sotomayor's opinions are characterized by a diligent application of the law, reasoned judgment, and an unwavering commitment to upholding the Constitution and ***Supreme Court*** precedent. Do you want to talk to me about how you reached that conclusion?

ROMERO: We have a ***Supreme Court*** committee, as I mentioned. And the committee conducted a thorough review of her background. In addition to reviewing about 100 of her ***cases***, we commissioned a review by a group of law professors who reviewed about 100 of her ***cases***.

We reviewed many of her speeches and articles and also spoke to dozens of colleagues and people who know her. So we conducted a fair -- fairly extensive due diligence. In terms of -- so our conclusion is based primarily on a review of her ***cases***, which I think is what really should prevail here.

KLOBUCHAR: You also noted in your remarks that the judge's opinions can't be readily associated with a particular political persuasion or judicial philosophy. And I think that may be reflected in the fact that she's been endorsed, in our last panel, Louis Freeh, who had been appointed by George H.W. Bush and also served as the FBI director.

We had the Fraternal Order of Police, the largest police organization in the country. We had -- we've had the National District Attorneys Association that supports her. In fact, a review of her sentences shows that she is ***right*** in the mainstream. I questioned her yesterday about some of her white-collar sentences were actually quite lengthier than some of her colleagues'.

Do you want to talk about what you mean by that her opinions can't be readily associated with a particular political persuasion or judicial philosophy?

ROMERO: Well, she doesn't -- there's no pattern that emerges of an activist judge here. It is quite apparent that her opinions are highly fact-driven and that she relies extensively on the application of the law through the facts that face her.

KLOBUCHAR: OK. Thank you.

Mr. Shaw, do you want to comment a bit about what she was like in high school? You said she was judicious, and I was trying to imagine if I was judicious in high school. But you did know her from cardinal spelling high school, is that correct?

SHAW: Cardinal Spellman High School in the Bronx. And she -- her temperament was even-keeled, calm. She was very thoughtful, fair- minded. She treated all individuals equally. She exhibited many of the qualities that she exhibits now.

Some of the testimony I've ***heard*** here is delivered by people who don't know her and, frankly, who won't let the facts get in the way. It has nothing to do with who she is. But I understand part of what goes on at these hearings.

Her -- her career is one that has been very centrist as a judge. And I cannot tell you that she would rule in the way that I would want her to rule in every ***case*** if she were confirmed to the ***Supreme Court***. She hasn't done that in her career so far.

But I don't think that's a standard. I think that all any of us can expect and hope for and want is that she is fair, open-minded, and that she applies the law to the facts. And, clearly, her record has done that. Her speeches are not how she should be judged. It's her 17-year record on the bench.

KLOBUCHAR: Thank you. In fact, I -- I imagine you might not have agreed with some of the decisions. I think we found out that of the discrimination claims that are brought before her, she'd rejected 81 percent of them and, of course, had found for some of them.

So I think it's a tribute, Mr. Shaw, that you would still be here, knowing that you may not have agreed with her on every single decision that she made. Thank you very much.

SHAW: Thank you.

KLOBUCHAR: Senator Sessions?

SESSIONS: I'll recognize Senator Kyl and let him have my time now, but I would just note, Senator Kyl is a superb lawyer, senior member of this committee, involved in the leadership of the Senate. So I know that's where he's had -- get back over ***right*** now, because a lot of things are happening. He also has argued three ***cases*** before the U.S. ***Supreme Court***, which very few lawyers in this country can have the honor of ever arguing one.

KYL: Thank you, Madam Chairman.

Thank you, Senator Sessions.

Just to give you one idea about what it's like to be in leadership, we're trying to figure out ***right*** now -- and the reason I've been consulting my BlackBerry while listening out of both ears to your testimony -- and I thank all of you for being here -- is we're trying to figure out if we're going to come back here and vote at 1 a.m. tomorrow morning or we're going to try to vote on probably three -- have three different votes here yet this evening and not come back at 1 a.m., the kinds of things senators consider all the time.

Again, let me thank all of you.

First, with regard to the last two panelists, I very much appreciate your discussion of foreign law. It is a subject that I think this committee needs to pay a lot more attention to.

Judge Sotomayor has said two contradictory things, and it ***will*** be up for us to try to square which ***will***, in fact, govern her decisions on the ***Supreme Court***, should she be confirmed.

She said, on the one hand, on numerous occasions, that she thinks that -- that foreign law should be considered and that she agreed with Justice Ginsburg and disagreed with Thomas and Scalia.

And I think, Mr. Rosenkranz, you pointed out what that means in terms of the use of foreign law.

And yet she has said here that -- even, I think, this morning -- that she doesn't think foreign law should be used in interpreting the Constitution or statutes. So we're left to wonder, and I guess we'll just have to try to figure that out.

I -- I also wanted to specifically ask Tim Jeffries a question. I know Tim Jeffries, and I know of his considerable work on behalf of victims of crime. And that's why I think I'm fairly -- why I think you're a good person to answer this question, Tim.

To me, there is one place where empathy does play a role in a judge's decisions, and I can think of only this one situation, and it's at the time of sentencing, when at least some states and the federal government now allows persons who are not parties before the ***court*** to make statements before the ***court*** at the time of sentencing.

And that is a time where, to the extent there is discretion with respect to sentencing a judge can take into account what people tell him about the victim, about the defendant, about other matters, and empathy cannot help but play a role in that.

Could you just remind us from your perspective of having worked for victims' ***rights*** now why it is important for judges to consider the point of view of victims in this particular situation in -- in sentencing statements or in the other situations in which it's appropriate for a victim or a victim's advocate to make an appearance in a given ***case***?

(UNKNOWN): Thank you Madam Chairman, Senator Kyle. As you know in the U.S. Constitution there are over 20 references to defendant's ***rights***. There are no references to victim's ***rights***.

Currently under the Crime Victims ***Right*** Act, which is federal law, there is statutory protections for victims of federal crimes in which those protections provide the ***right*** to be informed, to be present, to be ***heard***. But that is just for federal crimes. If you look at the states in our great union it is a patchwork quilt of victim's protections and in upwards to 15 states there are no victim's protections whatsoever.

It is challenging enough that incomprehensible crime is committed in our country. Fifty people ***will*** be murdered today. Seven hundred and sixty people ***will*** be raped today. Over 3,000 people ***will*** be assaulted. And over 4,000 children ***will*** be abused. It's incomprehensible, and as if that is not tough enough, when people enter the justice system, which should exist to do just things, re- victimization takes place.

Judge Sotomayor is a great American story: valedictorian of her grade school, valedictorian of her high school, the Pyne Prize at Princeton, summa cum laude, Phi Beta Kappa, editor of the Yale Law Journal. She's written over 380 opinions. She's given over 180 speeches. Even today she said "it's important to use simple words," and I quote.

So I can assure everyone here that when a victim, a victim's family is in a courtroom, above and beyond the fact that they're looking for justice that the system should meet, they're looking for the kindness that a just system should provide.

And whereas I continue to be very impressed with the Honorable Judge Sotomayor's story and her record of accomplishment and all the incredible witnesses that have come to support her, I'm extremely concerned that a jurist who understands how important words are through several decades of speeches could be so cavalier as it pertains to victim's feelings. And as I stated in my prepared remarks, forgiveness and mercy are one thing. Justice and accountability are another thing.

And so I am just hopeful. I am prayerful that if Judge Sotomayor is confirmed -- confirmed to our nation's highest ***court*** that she ***will*** never lose sight of what I'm sure were some very hard days she spent as a prosecutor. And that all due respect to the troubled lives of guilty criminals, we should be focused on victims.

KYLE: Thank you. And thank you all panelists.

KLOBUCHAR: Thank you very much. Senator Kaufman?

KAUFMAN: Yes. I just have a few questions. Ms. Romero, can you tell us what Judge Sotomayor's confirmation would mean to your organization in your long struggle for greater diversity in the federal bench?

ROMERO: It's not only about our organization. I think it's about all Americans. It's about all Americans seeing themselves reflected at the highest levels of our profession. It's about public trust in the integrity of the judicial system. It's about public faith of -- and public understanding about the law.

It's not -- when I -- you know on the day that Justice Souter announced his retirement I was in New Mexico speaking to a group of high school students, about 600 high school students primarily Hispanic in an underserved area of New Mexico -- of Albuquerque. And I told them I'm going to speak with you for about five minutes, give me five minutes, and if you want to afterwards I ***will*** answer any questions you want. I spoke to them for five minutes and they asked me questions for 40 minutes.

So I was very proud of the fact that they were enormously interested in the law. But some of the questions were a little bit more than troubling in the sense that they reflected some distrust in their interactions with the judicial system and in how the community interacts with the judicial system. So one of our missions at the Bar Association is to try to educate youngsters about you know the fact that the law really is fair and is just and that it reflects them and that it is accessible to them. It's about that. It's about access.

KAUFMAN: Professor Shaw, can you tell us just from your vast background just a little bit about the function of legal defense funds and how they serve society?

SHAW: Sure. I worked for almost 26 years for the NAACP Legal Defense Fund, ending up being director council and president. The Legal Defense Fund is the organization that was born out of the NAACP, which I consider to be and I think most historians would consider to be the oldest civil ***rights*** organization in this country, even though another claim has been made here today. But the Legal Defense Fund litigated Brown v. Board of Education and many of the major civil ***rights*** ***cases*** on behalf of African Americans but also others.

Pearl death (ph) was modeled after the Legal Defense Fund as were many other legal defense funds, including some of the conservative legal defense funds that now exist in other institutions in other parts of the world. One of the things I would underscore because I listened with great interest with some of the things that some of the witnesses said about Judge Sotomayor's role as a board member.

I know that as deputy director of the Legal Defense Fund and then director council we made sure that the Board understood its role and the staff understood its role. The Board was not responsible for the selection of ***cases*** or responsible for legal strategy. And in fact I worked very hard to make sure that those lines remain drawn. That's not to say that the Board didn't get engaged in policy, but the staff and the lawyers and the leadership of the organization have responsibility for legal strategy and also for deciding what ***cases*** would be filed. And I think that's pretty much the way most legal defense funds, including PRLDEF, operated.

(UNKNOWN): Thank you very much.

And I want to thank the entire panel for being here today.

KLOBUCHAR: Senator Sessions?

SESSIONS: Thank you.

Thank all of you. It's another good panel. And I think it's enriching our discussion. These all ***will*** be part of the record and is reflective of a commitment that the Senate should make, must make onto make sure this process is handled correctly. So thank you all.

I think that foreign law matters a big deal to me. Some people make out like it's nothing to this, this is just talk, but it's baffling to me how a person of discipline would think that foreign opinions or foreign statutes or U.N. resolutions could influence the interpretation of an American statute which may be 1970 or 1776.

And I -- I -- I think you mentioned, Mr. Rosenkranz, that Americans revere the Constitution. I remember the Judicial Conference of the 11th Circuit. Professor Van Osteen (ph) said that, if you respect the Constitution, if you truly respect it, you ***will*** enforce it as its written, whether you like it or not.

And that -- if you don't do that, then you disrespect and you weaken it. And the next judge someday further down the line ***will*** be even more likely to weaken it further. And just because you may like the direction somebody dents the Constitution this year in this ***case*** doesn't mean you're going to like it in the future. And liberties then become greater at risk.

Would you agree with that?

ROSENKRANZ: (OFF-MIKE)

SESSIONS: Ms. Rao, you've discussed some of these philosophies. How do you feel about that?

RAO: (OFF-MIKE)

SESSIONS: (inaudible) your microphone.

Ms. Rao, now, I'm not a legal philosopher, and one of the little thoughts I've had in the back of mind, I think Judge Sotomayor would have been better served to stay away from legal philosophers (inaudible) and remembered how her mama raised her and so forth. But these legal philosophies are another thing.

But she expressed some affirmation of legal realism. Isn't that a more cynical approach to the law in which you -- the theory somewhat to the effect that, well, it's not realistic to be idealistic about words having definite meanings and we all know the judges do differently? Would -- is that a fairly decent summary of that and the danger of that philosophy?

RAO: I think that is one of the dangers of legal realism. I think that there are two parts of legal realism, ***right***? There's one -- one part of it that's largely descriptive, which is that legal realism means that often a judge's viewpoint is going to influence their judging. And I think that everyone recognizes that that's a possibility.

But I think many -- many people go a step beyond that to say, well, a judge's -- you know, a judge's individual views should shape their judging. And I think there's a big step.

SESSIONS: So -- all ***right***, now, so in this law review article -- have you read that? Did you read the law -- the articles she wrote? I'm not sure it's an explicit endorsement, but it's certainly an affirmation of -- of that philosophy in many ways in her references to it. Would you agree?

RAO: It seemed that way to me, as well. And -- and I think it's also supported by her other statements in which she has said that there is no objective stance in judging. I think that that is all part of the same general idea.

SESSIONS: And there was no -- only perspectives? Was that one of the language? Do you remember those words?

RAO: Only -- only a series of perspectives.

SESSIONS: Well, that doesn't mean much to me. I'm not sure I'm comfortable with a judge who thinks things are just a series of perspectives.

The -- have any of you been familiar with the French judicial philosophy that involves single decisions? I'm told it's a technique that the French ***courts*** utilize to have -- my time has...

KLOBUCHAR: Keep going. Just speak in French from now on.

(LAUGHTER)

SESSIONS: I studied it for two years, but I -- well, I -- my understanding is that the French ***courts*** frequently use very short, unsigned opinions without dissents and without discussion and that -- so it's very difficult to understand the principle behind their approach to law.

And so I'd just wonder about that. Are you familiar? I don't see any there. And -- thank you all for your comments and thoughts. We appreciate it very much. This is an important issue, and we value your insight.

KLOBUCHAR: Thank you very much, Senator Sessions.

And I wanted to thank all of you, as well.

And, actually, Mr. Rosenkranz, I did appreciate your testimony. I think it is a valued issue to discuss. But I -- I just wanted to make it clear, when I asked you that question about the ***case*** that, in fact, Judge Sotomayor has written or joined more than 3,000 opinions in her 17 years as a judge and she has never used foreign law to interpret the Constitution or statutes, and including the ***case*** I mentioned. And that does mean that it's not a valid point to discuss.

ROSENKRANZ: She's never -- she's never used it to interpret the Constitution. I think she has to interpret the statutes.

KLOBUCHAR: The point of the -- the issue is that, when you brought up the death penalty and the French system, is that she hadn't used foreign law. In fact, she sustained the death penalty in that ***case***.

Thank you. And then...

SESSIONS: On that subject...

KLOBUCHAR: Go ahead, please.

SESSIONS: ... there is a national debate. Justice Ginsburg favors that. In her speech, she endorsed the Ginsburg model and criticized the Scalia model.

KLOBUCHAR: And then one last thing that I wanted to put on the record, a July 9th New York Times article entitled, "Sotomayor Meted Out Stiff Prison Terms, Report Indicates," in which it states that, "Most striking was the finding that across the board Judge Sotomayor was more likely to send a person to prison than her colleagues. This was true whether the offender was a drug dealer or had been convicted of a white-collar crime."

SESSIONS: Well, on that subject, I would point out that the Washington Post study found that her criminal justice decisions were on the left side of the Democratic judges, which were on the...

KLOBUCHAR: Well, you know what, Senator Sessions? In just of interests, we'll put both articles in...

SESSIONS: Good deal.

KLOBUCHAR: ... in the record.

(CROSSTALK)

SESSIONS: I think that one's already in the record.

KLOBUCHAR: OK, great.

And I just wanted to thank all of you. I know all of your thoughts were heartfelt and well researched.

Especially thank you, Mr. Jeffries, for coming with a difficult situation. I'm so sorry about what happened to your brother.

We are going to break for five minutes. And then Senator Kaufman is going to be taking over this next panel, our last panel. Thank you very much.

SESSIONS: I would note for the record, it's highly unlikely that I would be a ranking member and that Senator Kaufman would be chairing this committee. What a remarkable development that is.

KLOBUCHAR: Exactly. Just for the -- for everyone's knowledge, Senator Kaufman was Senator Biden's chief of staff for many, many years and took over his seat, and so now he is going to be chairing this committee ***hearing***.

ROMERO: Madam Chair, if I may?

KLOBUCHAR: This is just a free-for-all. Go ahead. Ms. Romero, please comment.

ROMERO: No, I'm not commenting. I was just going to ask to ensure that the longer statement the HNBA submitted is inserted into the record.

KLOBUCHAR: Certainly. And everyone's longer statements ***will*** be included in this record for all of the panels.

So thank you very much. We ***will*** recess for five minutes, and we ***will*** return.

(RECESS)

KAUFMAN: We'll now call our final panel, saving the best for last, of consisting Patricia Hynes, Dean Joanne Epps, Mr. David Rivkin, and Dr. Steven Hallberg. Before we start, Michael J. Garcia was supposed to be here today but -- to be here for the ***hearing***. But he thought it was going to be tomorrow. We all thought it was going to be tomorrow. Welcome to the Senate. You never known when things are going to happen. (inaudible) what I'd like to do is put his statement in the record.

And also, Congressman Serrano is going to try to make it. But why don't we do first, you know, with -- as within all the prior panels, all witnesses, as you know, are limited to five minutes for their opening statements. Your full written statement ***will*** be put in the record. Senators ***will*** then have five minutes to ask questions each panel. I now like to ask the witnesses to stand and by sworn.

Do you swear the testimony you're about to give before the committee ***will*** be the truth, the whole truth, and nothing but the truth, so help you God?

(UNKNOWN): I do.

KAUFMAN: Thank you.

Our first witness is Ms. Patricia Hynes. Patricia Hynes is President of the New York City Bar Association, a former chair of the American Bar Association Standing Committee on the Federal Judiciary. She's also senior counsel of Allen & Overy, LLP. She was Assistant U.S. Attorney in the Southern District of New York and clerked for Judge Joseph Zavatt in the U.S. District ***Court*** for the Eastern District of New York. She's a graduate of Fordham Law School. Ms. Hynes, I look forward to your testimony.

HYNES: Thank you. Thank you, Chairman Kaufman, Ranking Member Sessions, and Senator Whitehouse. I am the President -- the current President of the Association of the Bar of the City of New York. And I appreciate the opportunity to speak to you this evening regarding the nomination of Judge Sonia Sotomayor to be the associate -- an associate justice of the U.S. ***Supreme Court***.

I am joined this evening by Lyn Nooner (ph), who is sitting ***right*** behind me, who chaired the subcommittee of our executive committee that conducted the evaluation of Judge Sonia Sotomayor.

As this committee is aware, the Association of the Bar of the City of New York is one of the oldest bar associations in the country and since its founding in 1870 has given priority to the evaluations of candidates for judicial office. As far back as 1874, the association has reviewed and commented on the qualifications of candidates for the U.S. ***Supreme Court***. It is a particular honor for me to participate in this confirmation process for this particular nominee.

In May of 1987, our association adopted a policy that directs the executive committee, our governing body, to evaluate all candidates for appointment to the U.S. ***Supreme Court***. The executive committee has developed an extensive procedure for evaluating ***Supreme Court*** nominees, including a process for conducting research, seeking views of persons with knowledge of the candidate and of our membership of more than 23,000 members of the New York Bar and other bars. We evaluate the information we receive and express a judgment on the qualification of a person nominated to the U.S. ***Supreme Court***.

In 2007, the executive committee of the association moved to a three-tier evaluation system by including a rating of highly qualified. This is the first time the association has used the three- tier rating for a nominee to the ***Supreme Court***.

In evaluating Judge Sotomayor's qualifications, the association reviewed and analyzed information from a variety of sources. We reviewed more than 700 opinions written by Judge Sotomayor over her 17 years on both the Circuit ***Court*** and the District ***Court***. We reviewed her speeches, articles, her prior confirmation testimony, comments received from members of the association and its committees, press reports, blogs, commentaries. And we conducted more than 50 interviews with judicial colleagues, former law clerks, numerous practitioners, as well as an interview with Judge Sotomayor herself.

The executive committee on evaluating the qualifications of Judge Sotomayor passed a resolution at its meeting on June 30th finding Judge Sotomayor highly qualified to be a justice of the ***Supreme Court***. Based upon the committee's affirmative finding that Judge Sotomayor possesses to an exceptionally high degree all of these qualifications enumerated in the association's guidelines for evaluations of nominees to the ***Supreme Court***.

And those guidelines are -- exceptional legal ability, extensive experience and knowledge of the law, outstanding intellectual and analytical talent, maturity of judgment, unquestionable integrity and independence, a temperament reflecting a willingness to search for a fair resolution of each ***case*** before the ***court***, a sympathetic understanding of the ***court***'s role under the Constitution in the protection of personal ***rights*** of individuals, and an appreciation of the meaning of the United States Constitution, including a sensitivity to the respective powers and reciprocal responsibility of Congress and the Executive Branch.

These guidelines establish a very high standard which, in our opinion, Judge Sotomayor clearly meets. Specifically, the association found that Judge Sotomayor demonstrates a formidable intellect, a diligent and careful approach to legal decision-making, exhibiting a firm respect for the doctrine of judicial restraint, separation of powers, and stare decisis, a commitment to unbiased, thoughtful administration of justice, a deep commitment to our judicial system and the counsel and litigants who appear before the ***court***, and an abiding respect for the powers of the legislative and executive branches of our government.

We believe Judge Sotomayor ***will*** be an outstanding justice of the United States ***Supreme Court***. And I am very grateful to this committee to give us the opportunity to express the views of the association of the bar.

KAUFMAN: Thank you, Ms. Hynes.

Our next witness is Dean JoAnne A. Epps. JoAnne Epps is the dean of the Beasley School of Law at Temple University, and she's taught at the International Criminal Tribunal for Rwanda. She is here today to speak on behalf of the National Association of Women Lawyers, where she serves as a co-chair of the ***Supreme Court***.

Dean Epps, I attended Temple for one course. I'm sorry I didn't graduate, but I have enjoyed Temple basketball for over 50 years. So I'm looking forward to your testimony.

EPPS: Thank you very much, Mr. Senator.

Senator Kaufman, Senator Sessions, Senator Whitehouse, I'm really honored to be here this evening on behalf of the National Association for Women Lawyers, whose president, Lisa Horowitz, is seated behind me as I speak. And we are here today to urge your vote in support of the confirmation of Judge Sotomayor to be an associate justice of the ***Supreme Court***.

After careful evaluation of Judge Sotomayor's background and qualifications, the National Association of Women Lawyers, NAWL, has concluded that Judge Sotomayor is highly qualified for this position. She has the intellectual capacity, the appropriate judicial temperament, and respect for established law and process needed to be an effective justice of the ***Supreme Court***.

She's mindful of a range of perspectives that appropriately should be considered in rendering judicial decisions and, if confirmed, ***will*** clearly demonstrate that highly qualified women have a rightful place at the highest levels of our profession. We therefore encourage your vote in favor of her confirmation.

Founded over 100 years ago and with thousands of members from all 50 states, NAWL is committed to supporting and advancing the interests of women lawyers and women's legal ***rights***. We campaigned in the 1900s for women's voting ***rights*** and the ***right*** of women to serve on juries, and we supported most recently this year the Lilly Ledbetter Fair Pay Act.

In all of the intervening years, NAWL has been a supporter of the interests of women. As such, NAWL cares deeply about the composition of the ***Supreme Court*** and ensuring that it includes the perspectives of all Americans, especially those of women, not just because most of our members are women, but because all of our members care about issues that affect women.

NAWL's recommendation today is based on the work of NAWL's committee for the evaluation of ***Supreme Court*** nominees. In evaluating the qualifications of Judge Sotomayor to serve as an associate justice, special emphasis was placed on matters regarding women's ***rights*** or that have a special impact on women.

Eighteen committee members were appointed by the president of NAWL and include law professors and a law dean, appellate practitioners and lawyers concentrating in litigation.

I co-chaired this committee, together with Trish Refo, a partner at Snell & Wilmer in Phoenix, Arizona. We divided our committee work into two categories. Like others who testified here today, we read a large selection of Judge Sotomayor's opinions, and we interviewed more than 50 people who know her in a variety of capacities.

Those who were interviewed described Judge Sotomayor as open- minded, but respectful of precedent, which is consistent with what we found in her judicial opinions. She is courteous and respectful to those with whom she has professional interaction, including those who do not occupy positions of status or influence.

She has treated litigants, attorneys, and ***court*** personnel, and, in particular for our committee's review, women in the ***court*** with the utmost respect and professionalism both in and out of the ***court*** room. Those who had interacted with Judge Sotomayor in other capacities, both before and after she was appointed, described her as a good colleague, a team player, and supportive of institutional goals.

Our review of Judge Sotomayor's writing included her majority opinions, concurrences, dissents, and opinions that she wrote or joined in that were reviewed by the ***Supreme Court***. And from that review, we have concluded that Judge Sotomayor has consistently displayed a superior intellectual capacity, a comprehensive understanding of issues with which she was presented, and a thorough and firm grasp of the legal issues that have come before her.

Looking at the clock, I'd like to move to the final point that we would like to say.

NAWL supports the confirmation of Judge Sotomayor for the important message that it conveys. NAWL does not believe that Judge Sotomayor should be confirmed solely because she is a woman or a Latina, but the fact is that Judge Sotomayor is, as ultimately we all are, a product of her experiences. And for her, those experiences include life as a woman and as a Latina. Both perspectives ***will*** be welcome additions to this ***court***'s deliberations.

As a nation, we have come a long way, but we still have much to do. Women are nearly half of this nation, but a mere one-ninth of the ***Supreme Court***. The disparity in representation is not trivial in effect. In the legal profession, although women have comprised 50 percent or more of graduating law school classes for more than two decades, they continue to be markedly under-represented in leadership roles in the profession.

As of last year, women were only 16 percent of equity partners in the country's largest law firms; 99 percent of the law firms in this country reported that their highest paid lawyer was a man.

Just 23 percent of federal, district and circuit ***court*** judges were women. Just 1.9 percent of all law firm partners were women of color. And 19 percent of the nation's law firms have not one lawyer of color.

Your confirmation of Judge Sotomayor ***will***, therefore, send a strong message to law firms, corporations, government, and academia that we must and can eliminate the persistent barriers to the advancement of women attorneys. It ***will*** reinforce what should be a standard expectation that women of diverse ethnic backgrounds should of course occupy positions of parity with men.

As others have said this week, I long for the day when it wouldn't even occur to anyone to mention Judge Sotomayor's gender or ethnicity, those matters having become non-noteworthy, but that time is not yet here. With this vote, you ***will*** send a message most especially to the wonderful women and girls in your life, telling them not just that they matter, but that issues of concern to them matter.

In summary, NAWL, the National Association of Women Lawyers, found Judge Sotomayor eminently qualified for this position, but not simply because she's a woman. She has the intellectual capacity, the appropriate judicial temperament, and respect for established law and process to be an outstanding ***Supreme Court*** justice.

She's mindful of the human component of law and symbolizes the triumph of intelligence, hard work, and compassion. Accordingly, NAWL strongly supports her confirmation and urges you to vote in favor of her.

Thank you very much for the opportunity to be here today.

KAUFMAN: Thank you, Dean Epps.

Our next witness is the honorable Jose E. Serrano.

Congressman Serrano, ***will*** you please stand and be sworn?

Do you swear the testimony you're about to give before the committee ***will*** be the truth, the whole truth, and nothing but the truth, so held you God?

Thank you.

Representative Jose Serrano represents the 16th Congressional District in New York and the Bronx. He's an active member of the Congressional Hispanic Caucus and now the most senior member of the Congress of Puerto Rican descent.

Previously, Representative Serrano served in the 172nd Support Battalion of the U.S. Army Medical Corps and was a member of the New York State Assembly.

Congressman Serrano, I look forward to your testimony.

SERRANO: Thank you. And before you start the clock running, sorry I'm late. I'm chairman of the Financial Services of the Appropriations Committee. My counterpart is Senator Durbin. And we just passed our bill for 17 amendments, a motion to recommit, and a lot of issues that had nothing to do with my bill being discussed.

KAUFMAN: No one starts a clock on a member of the Appropriations Committee prematurely.

(LAUGHTER)

SERRANO: You're well taken care of, Senator.

(LAUGHTER)

KAUFMAN: Thank you.

SERRANO: Senator Kaufman, thank you.

Senator Whitehouse, Ranking Member Sessions, thank you so much for the honor you have given me by inviting me to testify on behalf to Judge Sonia Sotomayor.

Today, I represent the proudest neighborhood in the nation, the Bronx, New York. I cannot begin to describe the pride and excitement that my community feels to know that one of our own stands on the verge of a historic confirmation to the ***Supreme Court***.

Like you, I'm often greeted by constituents on the street, at diners, after church services, where I cut my hair, at the local bodega, or my favorite cuchifrito stand.

Usually, we talk about a personal or congressional issue or simply a friendly greeting. Now they just talk about Sonia. They speak about her as if she was a member of their own personal family, about their pride in her accomplishments. They show a profound understanding of just how significant this nomination is and how it proves that, in our country, everything is possible.

One of the best examples of the significance of this nomination is the number of people who are watching these hearings. In the Bronx and in many communities around the nation, folks have come together to share this moment. That is the clearest sign of the pride and joy that they feel. Back home, believe me, it's a celebration.

Like the nominee, my family moved from Puerto Rico to New York. Like her, I grew up in a public housing project in the Bronx. Like her family, we also struggled in our new surroundings. It was tough in the Bronx, but we had dignity and our eye on a better future.

One of the proudest moments of my life came when I was first elected to the New York State Assembly with my classmate, Senator Chuck Schumer. As we were being sworn in, a friend said to my father, "Don Pepe, you're a lucky man. You have two children, one is a -- one son as a schoolteacher, and the other's an assemblyman." My pop, with that wonderful accented English, looked at him and replied, "I busted my back to get lucky."

I am sure that Judge Sotomayor and her mother have had many similar moments. We are living our parents' dreams, enabled by their sacrifices and years of hard work.

But our story is not unique to the community we come from. All around our great nation, there are people working day and night, saving, doing without, all in order that their children could live the life that they want for them.

Sonia represents the best of American culture. She comes directly from the strand of our national character that says: You can be anything you want. It says, through hard work, you can reach the top in this country. She is living proof that our dreams for our children are never impossible.

When you invited me to speak, I wondered if my role here today was to tell you about her legal qualifications. Coming before you are many people who ***will*** speak to her work in the legal profession. We know that she is highly regarded and she has a deep understanding of the law and profound respect for the Constitution.

She comes before you with more federal ***court*** experience than any other nominee in the last 100 years. You know, I quickly came to the conclusion that my role is to tell you about where she comes from, how she got to this point, and what this means for our country.

We come from rough neighborhoods. We were surrounded by people making due on little. Sometimes there was desperation and despair. Around us were many distractions that could've taken us down a totally different road, but there was also ambition and people determined to make something of themselves.

We came from a place where family comes first. Where the core values were hard work and looking out for one another. As I moved out into the wider world, first through the Army and then in my political career, I learned that these were not liberal or New York or Puerto Rican or Latino values. They were American values. Rough

neighborhoods may not seem as similar to middle America the values that we hold dear, family, freedom, looking out for the neighbors, all the same.

Everyone watching this nomination this week should know that based upon her background and ideals they're in good hands with Judge Sotomayor. When I walk into the Capitol to work every day I often stop and think how fortunate I am as a kid from a Bronx project to make it here. It's an incredible story that I have lived. But since she was nominated by President Obama I've had to remember that my story pales in comparison to hers.

In conclusion, this proud woman from the Bronx is perhaps the best and the brightest we have. She has risen to the top through her incredible intellect and hard, hard work. I know that her values are your values and those of the people around this country. Her story is my story, but her story is your story or that of your parents or your grandparents. She ***will*** be a brilliant member of the ***Court***, and I urge you to vote for her nomination. And I thank you for allowing me to show up late and for giving me this honor, which is one of the greatest I've ever had, to testify on behalf of this great woman.

(UNKNOWN): Thank you, Congressman (Inaudible). It's an honor to have you here.

KAUFMAN: Congressman, thank you. That was a beautiful statement. We appreciate it very much.

(UNKNOWN): And with your permission, I don't know if it's allowed, I have some statements I made about her in the past in 1998 and '99 that I'd like to submit for the record.

KAUFMAN: Without objection.

(UNKNOWN): Thank you.

KAUFMAN: Our next witness is Mr. David Rivkin. David Rivkin is a partner in a law firm of Baker Hostetler. Previously he was associate executive director and counsel to the President's Council on Competitiveness at the White House. He also worked in both the Department of Justice and the Department of Energy.

Mr. Rivkin, I look forward to your testimony.

RIVKIN: Chairman Kaufman, Ranking Member Sessions, I want to thank you for the opportunity to testify here today. Indeed I'm honored to be here. Let me begin, though, by noting briefly that I'm appearing here on my own account and do not represent the views of my law firm, its clients, or any other organization which I'm affiliated. And I'm also not expressing a view as to how you should discharge ultimately your advice and consent function.

Without a doubt Justice Sotomayor is both an accomplished jurist and an experienced lawyer. It is nevertheless critical that the Senate weigh her understanding of the judiciary's proper role in our constitutional system before consenting her appointment.

In my view it is particularly essential that the Senate probe her views on the proper judicial handling of national security ***cases***. This is the ***case*** for two reasons.

First the United States remains engaged in a protracted global war against Al-Qaeda and Taliban. Winning this war is essential to our country and its conduct presented noble legal challenges rarely seen in previous conflicts.

Second, despite Judge Sotomayor's long and distinguished service on the federal bench, she has not had an occasion to consider many ***cases*** in the national security area. Therefore the central topic of the committee's inquiries should be Judge Sotomayor's understanding of the proper role of Article 3 ports (ph) vis-a-vis the executive and legislative branches air of national defense. To the extent these hearings and your judgment have not produced sufficient information regarding her views in this area I would urge the committee to pose written questions to her.

As you know, Congress and the president have traditionally been accorded neoplenary (ph) authority in the national defense and foreign policy arenas, particularly in the conduct of conflict is involved. In recent years, however, the ***Supreme Court*** has dramatically expanded its role in these areas.

In my view it is significant and negative implications for our government's ability to prevent another devastating attack to the United States and able to win this war. Indeed there can be little doubt that the principle the ***Supreme Court*** has developed since Sundy v. Rosgold (ph) was decided in 2004 make it more difficult for the United States to defeat any enemy if it resorts on international warfare. For example the ***Supreme Court*** has imposed what's proven to be an unworkable habeas corpus regime in regard to detainees now held in Guantanamo Bay, Cuba.

Meanwhile the lower ***courts*** have begun the process of extending this habeas regime individual captured and held in the United States and other parts of the world, particularly the Bagram Air Force Base in Afghanistan. It was developed in my view threatens ability to wage war in Afghan and fear in general, and presents problems of operations of our special forces in particular.

I want to emphasize that this judicial activism was not prompted by, but was exclusively directed at the previous administration's alleged exaggerated view of executive power. To begin with the Bush administration's use of presidential powers in my view was far more modest than that of a previous wartime American president.

Second, in striking the key parts of the Military Commissions Act of 2006 and 2008 the meeting (ph) ***case*** the ***Supreme Court*** invaded the constitution prerogatives of both political branches. The ***Court*** majority did not seem to be particularly troubled by the fact that Congress and the president worked in concert at the very height of their respective Article 1 and Article 2 constitutional perogatives as identified in Justice Jackson's seminal (inaudible) analysis.

The substance of these ***cases*** aside I'm also troubled by some of the stated assumptions that seem to undergird this ongoing wave of judicial activism in the national security area. The assumptions basically are that the ***courts*** are the best guardians of civil liberties, and that the extension of judicial jurisdiction over all national security issues would produce a superior overall policy formation.

In my view this view is both historical (ph) and profoundly at odds with our constitutional fabric. In Article 3 ***courts*** extend jurisdiction over matters that are not properly subject to judicial jurisdiction extraconstitutionally. Such an action by the ***courts*** intercloaked in a high-minded language of individual liberty is no better than any extra-constitutional absorption authority by congressional or executive branch.

As we address those issues today I notice that these concerns are now shared by both sides of the aisle. Despite criticizing President Bush's wartime policy during last year's campaign, President Obama has continued virtually all of them. His administration's litigation strategy on all the pending key national security issues is identical to that of his predecessor. This is especially true in regard to detention of captured enemy from battalions (ph) on trial outside the United States.

His policies continue to be challenged in the ***courts***, and the ***Supreme Court*** is certain to play a central role in determining what these policies should be. If Judge Sotomayor is confirmed her rulings would have immense consequences about country's safety and security.

I believe the Senate owes it to the American people to engage from those issues fully and openly. I thank you for the opportunity to share my views with the committee. I look forward to your questions.

KAUFMAN: Thank you, Mr. Rivkin.

Our final witness in this panel is Dr. Stephen Halbrook. Dr. Stephen Halbrook has practiced law for over 30 years, has authored and edited seven books and numerous articles on the Second Amendment. Most recently he drafted the amicus brief for the ***Supreme Court*** ***case*** District of Columbia v. Heller, which was signed by Vice

President Cheney, 55 Senators, and 250 members of the House of Representatives. He's a graduate of Georgetown University Law ***Center***.

Mr. Halbrook, I look forward to your testimony.

HALBROOK: Thank you, Chairman Kaufman, Ranking Member Sessions, Senator Whitehouse. We've learned that Judge Sotomayor ended the great baseball strike. And we've learned that she was -- she is a fan of the New York Yankees. However in her decision in Maloney v. Cuomo had the state of New York decided to ban baseball bats it would be upheld under the rational basis test.

Al Capone proved that you can bash out the brains of two colleagues with a baseball bat. Instead of banning one big piece of wood called a baseball bat, New York state banned two little pieces of wood connected by cord called a nunchacku, and that's what the ***Court*** upheld in the Maloney ***case***. But for our purposes the issue is the decision in Maloney that the Second Amendment does not apply against the states to the 14th Amendment.

The ***Court*** relied -- the only ***Supreme Court case*** relied on my Maloney was Presser v. Illinois, which simply held that the First and Second Amendments do not apply directly to state action. It was never raised whether the 14th Amendment incorporated the Second Amendment through the due process laws. Presser relied on Cruikshank. Cruikshank relied on three 14th Amendment ***cases*** deciding that the Bill of ***Rights*** did not apply directly against the states.

HALBROOK: But we -- we find out in Heller, the Heller decision, footnote 23, that Cruikshank does not apply because it did not engage in the kind of modern 14th Amendment analysis that's required by the ***Supreme Court cases*** decided primarily in the 20th century that Bill of ***Rights*** guarantees, especially substantive guarantees apply to the states to the due process laws of the 14th Amendment. Despite that admonition in the Heller ***case*** decided a year ago, the panel in the Maloney ***case*** did not say anything about the modern incorporation analysis.

Now Judge Sotomayor did say yesterday that under ***Supreme Court*** precedent the Second Amendment does not apply against the states to the 14th Amendment. That's an inaccurate statement. The ***Supreme Court*** has never decided that issue.

Now there are pending before the ***Supreme Court*** two cert petitions on that issue, NRA v. Chicago, which arose out of the Seventh Circuit upholding the Chicago handgun ban held that incorporation had to be decided by the ***Supreme Court***, that that ***Court*** was not able to do it. And Mr. Maloney has filed his own cert petition, and in fact he's asked that his ***case***, if cert is granted in NRA v. Chicago, he's asked that his ***case*** be consolidated with the NRA ***case***.

Now in her questionnaire in response to this committee's questions Judge Sotomayor stated that conflict of interest would arise from any appeal arising from a decision issued by a panel of the Second Circuit that included me as a member. And she stated that she would recuse herself in that ***case***. She has decided the issue now pending before the ***Supreme Court***, and therefore we would expect and we would hope that she would recuse herself if she is in fact confirmed.

Now a ***case*** that -- another procurium ***case*** that she participated in deciding, Sanchez v. R. (ph) has disturbing concerns involving both Second and Fourth Amendment ***rights***. That ***case*** held that the mere possession of a firearm gave rise to probable cause to search, seize, and arrest the person in possession thereof. Apparently under New York law the crime to possess a firearm, and it's only an affirmative defense that you have a license for it.

In that ***case*** the ***court*** stated that the ***right*** to possess a gun is clearly not a fundamental ***right***. That was -- totally unnecessary to the decision. (inaudible) a conviction of an illegal alien for possession of a firearm. And the correct decision would be to say that illegal aliens don't have Second Amendment ***rights***.

And in fact, the ***court*** disregarded a ***Supreme Court*** decision Verdugo-Urquidez decided in 1990, which explicitly stated that the people -- that term the people in the First, Second, and Fourth Amendments refers to the members of our national community and not to aliens and not to illegal aliens.

A third ***case*** I want to mention briefly, United States v. Cavera, an inbound (ph) decision by the Second Circuit upholding a gun control act prosecution and the sentencing under it, Judge Sotomayor wrote a dissenting opinion that I think is commendable. She made a statement that "arbitrary and subjective considerations, such as the judge's feelings about a particular type of crime, should not form the basis of the sentence." And she explained in great detail the reason for that. And that's exactly the way the law should be interpreted and constitutional ***rights*** should be interpreted as well. I think she made the correct decision in that ***case***.

And the question now is whether she ***will*** also take Second Amendment ***right*** seriously. And that's the big unanswered question. Thank you.

KAUFMAN: Thank you, Mr. Hallberg. Congressman Serrano, you talked about your district and how people feel. How do young people growing up -- are going to be affected by Judge Sotomayor being on the ***Supreme Court***?

SERRANO: It's amazing that you ask that question. And I assure the rest of the panel I did not give him that question. But I was talking to my chief of staff this morning, who was telling me how many watching parties were taking place in my district this week. Watching parties, people come together, you know, covered plates. They bring food. And they watch.

And that the question that seems to be rising out of the young people is what do I do to go to law school? Now I don't know if this country needs more lawyers. You know the jokes about that. And I better stop because I'm not a lawyer. But I believe that what it has done more than anything else -- and it's not just her being on the ***Supreme Court*** but the exchanges between the panel and the judge -- is that people are becoming more aware of law ***cases***, of law issues. And so, number one, I think it ***will*** invite young people to consider a legal profession.

Secondly, the issue of pride is so important in your own life. When I was a young man, there weren't many Puerto Ricans for me to look in New York as successes. So I always led myself of Roberto Clemente, the baseball player, who was such a dignified man and who insisted on being called Roberto and not Bob and then later on said Bob was okay, you know. And I saw that growth. And then his death was part of that dignity of that man.

But now, it's a different story. Now there are some people who look to me. There are people who look to others. There are people who look to other people. But one -- in closing, let me just say this. Nothing that you can accomplish in this country looks bigger than the Presidency or the ***Supreme Court***. And so obviously, it's going to inspire people to say I can do it.

And in fact, she told you here while she was answering some tough questions that in many ***cases*** she was telling people you can make it. You can make it. And there's nothing more pro-American than to say to somebody you can make it.

KAUFMAN: Thank you. Ms. Hynes, how did just an amazing experience as a prosecutor and commercial litigator affect your ruling on the qualifications?

HYNES: Well, it just shows how well rounded she is. I was a prosecutor. Indeed, Bob Morgenthau appointed me in 1967. And in those days, I was the one woman in that office of 100. I have a great picture of a sea of 100 men. And I sit behind Bob, who was the boss, ***right***? And he started my career as he did Judge Sotomayor's. I've had a wonderful career. But I had -- he gave me that opportunity.

And I spent 15 years in the prosecutor's office. And I went up through the ranks and became executive assistant. But when I left the prosecutor's office and went out to practice on the defense side, you really get the appreciation of that there are two sides to an issue you really have to measure and judge.

And so I think it makes her more well rounded that she's seen the prosecution side, those issues, the tensions. You ***heard*** the representative of the police association. You have Louie Freeh who we all worked with in that same office.

So she has the appreciation of those tensions. But she also understands the defense side. And she combines that with the, you know, a commercial litigator, a prosecutor, a trial judge, and an appellate judge. I mean, she is the total package. She is the total package. And she has done it, you know, in the best possible way.

And when I listen, as I've tried to do through all of the testimony, I think you just have to look at what her background is and her record. And after that, your questions should be answered because she has been a terrific example of someone who has very, very carefully applied the law and done what she thought was ***right***.

I mean, she -- we are all proud of her. When I say I'm particularly proud to be here tonight for this candidate, it's because in New York, we know the quality of the judging that we have gotten from Judge Sotomayor.

KAUFMAN: Thank you very much. Dean Epps, based on your analysis of your organization of her record, how would you speak about Judge Sotomayor's judicial temperament?

EPPS: Thank you very much, Senator. We asked a lot of people who had the opportunity to appear before Judge Sotomayor, to appear as opposing counsel, to work with her as co-counsel, to be litigants before her. And we found universally that people thought she had an extraordinarily appropriate judicial temperament.

That doesn't mean that she's not passionate, which we believe that she is. But in all responses, people described her as respectful, considerate, and kind. And so on that particular issue, we were thoroughly satisfied that she has the temperament to be an appropriate associate justice of the ***Supreme Court***.

KAUFMAN: Thank you. Ranking Member Sessions?

SESSIONS: Thank you. Congressman, thank you for your eloquence. I just appreciate that very much. And, Ms. Hynes, your professionalism and approach is worthy of the New York Bar Association. And I agree with you from the beginning that her experience is really the rich kind of experience, almost an ideal experience for any federal appellate judge.

And we wrestle with a lot of issues that are controversial in the legal system today. And a lot of people -- lot of us care deeply about those things. We're worried about some of the things we see in the ***courts***. And so that, you know, affects how you approach a nominee. But her background and her integrity is exceptional. And I appreciate that.

Ms. Epps, thank you for your testimony. Mr. Rivkin, I just want take a minute because certain -- I guess Lindsey Graham asked some questions about national security issues. You note that Congress and the President have traditionally been accorded near plenary authority in national offense areas. That's I think consistent with the heritage of our country up until very recent years, post 9/11 years.

And I call your attention to a ***case*** before the Second Circuit, Gold (ph) v. Mukasey last year -- and that's Attorney General Mukasey, former judge from New York Mukasey -- in which a three-judge panel held -- that included Judge Sotomayor -- ruled in part that certain provisions of the PATRIOT Act were unconstitutional under the First Amendment. Specifically, the panel found unconstitutional the provisions of the PATRIOT Act allowing senior government officials to certify that the release of certain documents would endanger national security.

The panel stated, "The fiat of a government official, though senior in rank and doubtless honorable, cannot displace a judicial obligation to enforce constitutional requirements." So does that give insight into Judge Sotomayor's approach to law? And the opinion went on to state, "Under no circumstances should the judiciary become the handmaiden of the executive."

RIVKIN: Yes, I think it's a troubling opinion, Senator Sessions. It may strike some people as a technical ***case***. The panel was concerned with the fact that the certifications by senior government officials, quite senior about (ph), had to be treated as conclusive absent a showing of bad faith. And the view was that it unduly displaces judicial power. But it made judiciary a rubber stamp.

And I find it surprising in a couple ways. First of all, I don't see how you can read the language as establishing a rubber stamp on the context of a bad-faith inquiry, let's say by director of FBI in making the certification as to the disclosure of this information. You can ask the director how did you make the decision? What facts did you look at? Was that something you did generically? Did you drill down on it? How often have you injected such a question in the past?

So it is a meaningful -- it's a deferential inquiry. But it's a meaningful inquiry. So I don't understand, especially in the face of a challenge why would you dismiss it in a sentence?

Point number two, there's nothing unique about treating governments -- government certifications by government officials as conclusive. There are numerous other criminal justice contexts, including, for example, requests (inaudible) orders arising in the context of grand jury proceedings, requests, for example, for pen register information. They've been treated with enormous deference by the ***court***.

And what's interesting from my perspective, Senator, is that, ironically enough, more deference has been shown over the years to these types of certifications in pure criminal justice ***cases***, drug ***cases***, health fraud ***cases***, than in national security ***cases***, even though to me the (inaudible) public safety is far more palpable in the terrorism.

SESSIONS: I've seen some of that in our committee. Could you briefly give me this answer and see if I'm correct? We've had a lot of people contend that captured enemy combatants are entitled to habeas corpus. And even in our committee, senators have continually denied habeas corpus. We've repealed habeas corpus. It's in the Constitution. Why would you deny it to these captives?

But isn't it true that, when the Constitution was written, made provision for the habeas corpus that it was never thought and never interpreted as applying to enemy combatants that were captured on the battlefield?

RIVKIN: And held overseas, that is absolutely ***right***. That was the teaching of Eisentrager. That was something that happened throughout 200-plus years of American history. And the ***Supreme Court*** in the space of four short years has changed that view...

SESSIONS: So when President Bush actually relied on the historic interpretation, he was criticized because the ***Supreme Court*** basically changed the law later. Is that correct?

RIVKIN: That is correct. And then -- then the Bush administration established its legal architecture, Senator Sessions. Anybody who seriously looked at the ***case*** law, he positions were entirely reasonable. It's ***Supreme Court*** that went away from it.

And very briefly, what's even more difficult from my perspective is that lower ***courts*** are now extending it further. The biggest problem now is, forget about Guantanamo. It's extending constitutional habeas to Bagram.

SESSIONS: And in reading Miranda warnings.

RIVKIN: Miranda warnings.

SESSIONS: Mr. Halbrook, you wrote the brief on behalf of 55 senators in favor of the -- in the Heller ***case***. And your view, I guess, was accepted. And is it true that the decision -- the Maloney decision that Judge Sotomayor was a member of the panel that ruled on it -- and you've expressed concerns about it -- isn't it true that that ***case will*** need to be reversed or the Second Amendment does not apply to the states and any city in the country and state government could completely deny people the ***right*** to keep and bear arms?

HALBROOK: Senator Sessions...

SESSIONS: If that law became -- go ahead.

HALBROOK: The basic issue is, first of all, the meaning of the Second Amendment. In Heller, the ***court*** said it protected an individual ***right*** to keep and bear arms, including a possession of a handgun in your home. And Judge Sotomayor's answers to questions about that decision, by the way, this week have been very noncommittal as to whether she agrees with the decision. She does recognize it as precedent, of course.

And then the next step, though, the next issue is whether the Second Amendment applies to the states through the 14th Amendment's due process clause, like virtually every other Bill of ***Rights*** freedom: assembly, petition, free speech, press, unreasonable search and seizure, ***right*** to counsel, the whole works.

And it's only logical once it's conceded, it's held that it's an individual ***right***, that it would be considered an explicitly guaranteed ***right*** in the Constitution. Being explicitly guaranteed normally means it's a fundamental ***right*** in the -- the test of, instead of rational relations (ph), the compelling state interest tests would apply, like other fundamental ***rights***. And so that's the issue that's before the ***Supreme Court*** ***right*** now.

SESSIONS: Regardless of whether or not the precedent justified the decision in Maloney -- and I think we can argue about that -- just -- but the point is, that decision would eviscerate effectively the protection -- the constitutional protection to keep and bear arms if it became the ***Supreme Court*** opinion.

The ***Supreme Court*** affirmed that approach. It's going to need to reverse that approach or the Second Amendment is -- is severely weakened and really eviscerated.

HALBROOK: Well, most of the...

SESSIONS: Is that ***right***, fundamentally...

(CROSSTALK)

HALBROOK: That's correct. There's 20,000 firearm laws on the books, and most of them are at the state and local level, not federal law. The federal Gun Control Act has expanded greatly in the past years, but most firearms possession issues involve state and local law.

And the -- the ruling in the Seventh Circuit ***case*** in NRA v. Chicago, the ruling in Maloney is that the Second Amendment has no application to states and localities, so you could ban firearms, you could ban anything you wanted to ban, anything that would be an arm. The Second Amendment just doesn't apply.

And it would be a curious doctrine that here you have a fundamental ***right*** protected in the Bill of ***Rights*** to say that it only applies to the federal government the 14th Amendment's framers desire and intended that the Bill of ***Rights*** guarantees apply to the states through the -- through the 14th Amendment.

And one of the big issues of protection was the ***right*** of freed slaves to keep and bear arms, because they were violated by the black codes that were enacted by the Southern states after the Civil War. And to get rid of -- of that kind of discrimination, to allow freed freemen to keep and bear arms, to have free speech, and to have all the other ***rights*** that are set forth in the Bill of ***Rights***, that was the intent of the 14th Amendment, and that's the issue before the ***Supreme Court*** now, and that's the issue that Maloney decided adversely.

SESSIONS: Thank you, Mr. Chairman. You're very kind.

KAUFMAN: Senator Whitehouse?

WHITEHOUSE: Thank you, Chairman.

Here we are with the last panel, last witness, last question, or last questioner, anyway, and I do not want to cause undue trouble, but I would like to react to Dr. Halbrook's testimony, which, first of all, I think was fine.

You are very learned. You are outside counsel for the National Rifle Association. You're knowledgeable about their issues. You've won these ***cases*** in ***court*** before. Your advocacy was ardent, but also very polite and cordial, so I have no problem with what your testimony said.

My concern is this -- and I mentioned this in front of the ranking member, because he's been energetic on this -- on this point. There have been an array of witnesses who've made similar points. And there has been an array of questioning -- really, almost non-stop questioning -- on Heller and Maloney.

And as I understand the history of this, for 220 years, the United States ***Supreme Court*** never recognized any individual ***right*** to bear arms. And just last year, a new conservative majority, by the barest of majorities, discerned for the first time a new constitutional ***right***, individual ***right*** to bear arms, which is fine. That's now the law of the land.

But it applied only in D.C., which is -- so it applied only to federal law, so the ***case*** itself never reached the question of the application of the individual ***right*** that Heller announced in its application to the states or, for that matter, to municipalities.

And that's against the background tradition of fairly extensive regulation of firearms by states and municipalities, restrictions on felons in possession, regulation of permits to carry concealed weapons, sentencing enhancement for armed crimes, prohibitions against unauthorized discharge of firearms in city limits and so forth, all of which are well, well, well established.

Now, it could well be that, when the ***Supreme Court*** is presented with an opportunity to discuss Heller and to evaluate whether it should be extended to apply against states and municipalities, that it may choose to do that, but it strikes me that that is presently an undecided question by the ***Supreme Court***.

And as you yourself said a moment ago, the question of the application of precedent in Maloney is one we can argue about. And what I would hate to have happen here would be to create an atmosphere in which a ***Supreme Court*** candidate feels that he or she is going to walk into a volley of fire if he or she ***will*** not announce in advance or signal in advance an intention to expand Heller beyond where it now is, where the law has never gone before.

Maybe it should go there; maybe it ***will*** go there. But the point of fact is that, at this point in time, it has not gone there. And I believe there is a point at which it verges on unseemly lobbying of the nominee to send signals as to where she ***will*** vote when the inevitable petition to expand Heller gets brought before the ***court***.

I don't think it's appropriate for her to decide that now. I don't think her decision in Maloney is outside of the bounds of normal judicial precedent, particularly in light of the unique circumstances of this, the Heller decision, the 220 years of having never discovered the ***right*** before, the limitation to federal law by virtue of it being a D.C. ***case***, and the long history of state and municipal regulation of firearms without constitutional objection.

So it seems to me that a cautious judge -- small-c conservative judge -- would be inclined not to expand Heller at that point, but to make her decision within what she perceived the law to be at the time, and then if the ***court*** wanted to further expand this new constitutional ***right***, that would be the job of the ***court***.

But I hope that we have not in the course of this ***hearing*** begun to trespass into a point in which the message is being sent to Justice Sotomayor or to subsequent nominees that they need to signal how they ***will*** rule on a ***case*** that the ***Supreme Court*** has not yet decided in order to achieve confirmation, because I think, again, that crosses the boundary between testing the credentials of a candidate in a proper advise and consent and what is, I think unseemly and improper for the advice and consent process, which is to seek commitments in future ***cases*** or to lobby as to outcomes in future ***cases***.

And I know that the ranking member feels very strongly about -- that this ***right*** should be extended. And we ***will*** all have the opportunity in due course to make our views known.

But I just want to point out that I think, in this advice and consent process, there is a point at which making one's point about something does trespass on unseemly lobbying. I'm not sure we've reached that point yet, but I think we're in that neighborhood, anyway.

And I would hope that my colleagues, as they evaluate Judge Sotomayor, would take that into consideration and evaluate her based on her talents, her abilities, and not on her failure to give what I think would be an improper advance signal as to how she might rule as a ***Supreme Court*** justice in Heller II, whatever the ***case*** ***will*** be named.

SESSIONS: Well, that's a good -- you're a good lawyer. And you make a -- a good point. I would say two things. First, it's...

WHITEHOUSE: We're both U.S. attorneys. We argue with each other all the time.

SESSIONS: It's -- he's my chairman of the ***Court*** Subcommittee. But the -- two things I would say about it. Number one, it's been appropriate to ask nominees about ***cases*** they decided. And she has decided this ***case***.

And I think Senator Kyl made a good point. If her ***case*** were the one that goes up to the ***Supreme Court***, certainly she would recuse herself or would have to, I think, under the rules. And maybe even if another one with the very same issue comes up, maybe she should consider it.

Number two, let me tell you what the average American thinks. Just reading the words in the Constitution, it says, "Congress shall make no law respecting the establishment of a religion or free speech." It says Congress. That means the United States Congress. But that applies to the states. That's been incorporated.

The Second Amendment says, "A well-regulated militia, the ***right*** of the people to keep and bear arms shall not be infringed." And so that one -- I don't know how the -- it just seems to apply to the people.

WHITEHOUSE: I think the ranking member is a very good lawyer. And he makes a very good argument. My only point is...

SESSIONS: Maybe we ought to have the expert comment.

WHITEHOUSE: ... the ***Supreme Court*** hasn't accepted that argument yet. And until it does, it is an unanswered question. And, again, I don't want to say that we've trespassed that point at this stage, but I do think that it's worth demarcating, as we go through this advice and consent process, that there does come a point where it begins to look like we're pressuring candidates to reach a particular outcome and to make pledges about a particular outcome, rather than simply evaluating the merit of their decisions.

But your argument is -- is very well made. And it may very well prevail when that ***case*** comes before the ***Supreme Court***.

I thank the panel. I have no further questions.

(LAUGHTER)

(CROSSTALK)

SESSIONS: Mr. Chairman, it's been great to serve under your leadership.

KAUFMAN: This is a great -- this is a great panel.

SESSIONS: Who needs Pat Leahy?

(LAUGHTER)

Don't you tell him I said that.

(LAUGHTER)

KAUFMAN: I need Pat Leahy. All I need is Pat Leahy and a member of the Appropriations Committee, and I could really -- I want to thank the panel. And, frankly, I want to thank all the panels.

I mean, it is -- it is -- this is -- this is an incredible process. The ranking member said, when we first started, that this is an educational experience for the American people. And I've been dealing with this process for a long time, and I really think that's true. People get to stop for a minute, look at our Constitution, look at the way our process works, and this is just a wonderful week in which people came, they argued, they fought. I mean, just this last exchange, everyone could say what they think. We had not just the members of the Congress -- not just the members of the Senate, but members of Congress from the public.

I just think it's a wonderful -- wonderful example of what a great country this is and how our Constitution works.

I'd also like to thank Chairman Leahy and Ranking Member Sessions for doing a very thorough ***hearing***, being very open to letting people go where they go, and yet still getting this -- this whole thing done in record time.

This is an incredibly important process. I -- I believe, as a student of the Congress, outside of the decision to go to war, the decision of who's going to be on the ***Supreme Court*** is the single most important decision that you make as a United States senator.

Because when you pick a member for the ***Supreme Court***, you're picking someone who serves for life. And if Judge Sotomayor is confirmed and serves on the ***court***, she'll probably be here long after this panel of senators is gone.

WHITEHOUSE: Speak for yourself.

KAUFMAN: Except for Senator Whitehouse.

(LAUGHTER)

But I just want to thank everybody for doing that. The chairman's left the record open until 5 p.m.

Senator Sessions, anything you'd like to say?

SESSIONS: Thank you.

KAUFMAN: This ***hearing*** is hereby adjourned.

END

Classification

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