

January 12, 2006 Thursday

TYPE: COMMITTEE HEARING

LENGTH: 21141 words

COMMITTEE: SENATE JUDICIARY COMMITTEE

HEADLINE: U.S. SENATOR ARLEN SPECTER (R-PA) HOLDS A HEARING ON THE NOMINATION OF JUDGE SAMUEL ALITO TO THE U.S. SUPREME COURT

SPEAKER:

U.S. SENATOR ARLEN SPECTER (R-PA), CHAIRMAN

LOCATION: WASHINGTON, D.C.

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U.S. REPRESENTATIVE DEBBIE WASSERMAN SCHULTZ (D-FL)

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MARNA TUCKER, ABA D.C. CIRCUIT REPRESENTATIVE

JOHN PAYTON, ABA FEDERAL CIRCUIT REPRESENTATIVE

EDWARD BECKER, JUDGE, U.S. COURT OF APPEALS

ANTHONY SCIRICA, CHIEF JUDGE OF THE U.S. COURT OF APPEALS, FOR THE 3RD CIRCUIT

MARYANN BARRY, JUDGE, U.S. COURT OF APPEALS

RUGGERI ALDISERT, JUDGE, U.S. COURT OF APPEALS

LEONARD GARTH, JUDGE, U.S. COURT OF APPEALS

JOHN GIBBONS, RETIRED U.S. COURT OF APPEALS JUDGE

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BODY:

U.S. SENATE JUDICIARY COMMITTEE HOLDS A HEARING ON THE
NOMINATION OF JUDGE SAMUEL ALITO TO THE U.S. SUPREME COURT

JANUARY 12, 2005

SPEAKERS:

U.S. SENATOR ARLEN SPECTER (R-PA)
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U.S. SENATOR CHARLES E. GRASSLEY (R-IA)
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U.S. SENATOR RICHARD J. DURBIN (D-IL)

SPECTER: The Judiciary Committee will now proceed with the confirmation hearing on Judge Samuel Alito for the Supreme Court of the United States.

After our morning session, the committee met in executive session and reviewed confidential data on the background of Judge Alito. And it was all found to be in order.

We're now proceeding with the witnesses, the tradition of the outside witnesses, the independent witnesses. The tradition is to hear first from the American Bar Association and their evaluation of the judicial nominee.

We have structured this portion of our hearing differently from what had been done prior to last year, and that is where the majority took most of the outside witnesses. The tradition has been to have 30 witnesses and the majority party had taken 18 and the minority party 12. And it seemed that it would be more appropriate to have an even split, 15 and 15, and that is the practice we are following. And, of course, the ABA representatives are not witnesses called by either Democrats or Republicans.

And we have really done our best to proceed in a nonpolitical way in the selection of a Supreme Court justice. There can be different evaluations as to how successful we are in that, but that has been our effort.

We have limited testimony to five minutes for outside witnesses. The next witness already nods in agreement. He was here not too long ago for Chief Justice Roberts.

And we have established the five-minute rule because we have 31 witnesses.

And the Senate is not in session and all the members of the committee have other commitments. And it is projected that we will finish today, but we'll have to keep on schedule.

We turn now to the American Bar Association panel. And we welcome Mr. Steve Tober, Ms. Marna Tucker and Mr. John Payton.

In accordance with the practice, the testimony will be given by Mr. Tober, who is the chairman of the American Bar Association Standing Committee on the Federal Judiciary. He's an attorney with the law firm bearing his name; experienced in civil litigation, professional negligence and domestic relations; undergraduate and law degree from

Syracuse University; of the board of the Law Review; deeply involved in New Hampshire and New England legal communities; former chairman of the committee to redraft New Hampshire's rule on professional conduct.

We know the laborious job involved, Mr. Tober, which you're about to describe in reaching evaluation of a Supreme Court nominee and the importance of your judgments. So we thank you and Mr. Payton and Ms. Tucker for your public service.

Now, Mr. Tober, the floor is yours.

TOBER: Thank you, Your Honor.

Thank you, Mr. Chairman, members of the committee.

My name is Stephen L. Tober of Portsmouth, New Hampshire. It is my privilege to chair the American Bar Association's Standing Committee on Federal Judiciary.

I am, indeed, joined today by Marna Tucker, our D.C. circuit representative, and by John Payton, our federal circuit representative.

For well over 50 years, the ABA Standing Committee has provided a unique and comprehensive examination of the professional qualifications of candidates for the federal bench. It is composed of 15 distinguished lawyers who represent every judicial circuit in the United States and who annually volunteer hundreds of hours of public service.

TOBER: Our committee conducts a thorough, nonpartisan, non-ideological peer review using well-established standards that measure a nominee's integrity, professional competence and judicial temperament.

With respect to a nomination to the United States Supreme Court, the standing committee's investigation is based upon the premise that such a nominee must possess exceptional professional qualifications. The significance, range and complexity of issues that will be confronted on that court demands no less.

As such, our investigation of a Supreme Court nominee is more extensive and is procedurally different from others in two principal ways.

First, all circuit members on the standing committee reach out to a wide range of individuals within their respective circuits who are most likely to have information regarding the nominee's professional qualifications.

And second, reading groups of scholars and distinguished practitioners have formed to review the nominee's legal writings and advise the standing committee.

The reading groups assist in evaluating the nominee's analytical skills, knowledge of the law, application of the facts to the law, and the ability to communicate effectively.

In the case of Judge Alito, circuit members combined to contact well over 2,000 individuals throughout this nation. Those contacts cut across virtually every demographic consideration and it included judges, lawyers and members of the general community.

Thereafter, circuit members interviewed more than 300 people who knew, had worked with, or had substantial knowledge of the nominee.

All interviews regarding the nominee were fully confidential to assure the most candid of assessments.

Judge Alito has created a substantial written record over his years of public service. Our three reading groups worked collaboratively to read and evaluate nearly 350 of his published opinions, several dozen of his unpublished opinions, a number of his Supreme Court oral argument transcripts and corresponding briefs, and other articles and legal memos.

TOBER: The academic reading groups were composed of distinguished faculty from the Syracuse University College of Law and from the Georgetown University Law Center.

The practitioners group was composed of nationally recognized lawyers intimately familiar with demands of appellate practice at the highest level.

Finally, as we do in any standing committee investigation, a personal interview was conducted with this nominee. Judge Alito met with the three of us on December 12th and he provided us a full opportunity to review matters with him in detail.

After the comprehensive investigation was completed, the findings were assembled into a detailed confidential report. Each member of the standing committee reviewed that final report thoroughly and individually evaluated that nominee using three rating categories: well-qualified, qualified and not qualified.

Needless to say, to merit a evaluation of well-qualified, the nominee must possess professional qualifications and achievements of the highest standing.

During our investigation, questions were raised concerning the nominee's recusal practice and also concerning some aspects of his judicial temperament. We have carefully reviewed and resolved those questions to our satisfaction as we have detailed in our accompanying correspondence to your committee which, Mr. Chairman, we ask to be made part of this record.

SPECTER: Without objection, they will be made part of the record.

TOBER: Thank you, sir.

We are ultimately persuaded that Judge Alito has, throughout his 15 years on the federal bench, established a record of both proper judicial conduct and even-handed application in seeking to do what is fundamentally fair.

As such, on the basis of its comprehensive investigation and with one recusal, the standing committee unanimously concluded that Judge Samuel A. Alito Jr. is well qualified to serve as associate justice on the United States Supreme Court.

TOBER: His integrity, his professional competence and his judicial temperament are, indeed, found to be of the highest standard.

Mr. Chairman, let me say once again what we noted here back in September. The goal of the ABA Standing Committee has always been and remains in concert with the goal of your committee: to assure a qualified and independent judiciary for the American people.

And with that, thank you for the opportunity to present these remarks.

SPECTER: Thank you very much, Mr. Tober for your work and for ending right on the button, five minutes to a T.

TOBER: I worked on that, sir.

(LAUGHTER)

SPECTER: That quality of yours would recommend you for a Supreme Court argument where Chief Justice Rehnquist stopped the speaker in mid-sentence.

A word from Judge Becker, who will testify later. He was looking for an opportunity -- he stopped me in mid-sentence one day. He was looking for an opportunity to stop the speaker in the middle of the word "if." I didn't give him that chance.

(LAUGHTER)

Before proceeding to questions, I want to yield to Senator Leahy to see if he has any opening comments that he wants to make.

LEAHY: I don't, Mr. Chairman. I don't. Thank you, though.

SPECTER: We have five-minute rounds for each of the members of the committee.

Mr. Tober, picking up on your testimony that you found Judge Alito to have even-handed application of the law, how would you amplify that with respect to what kind of materials you looked at, what your evaluation was and what led you to that conclusion?

TOBER: Be happy to, Mr. Chairman.

The conclusion was reached in large measure in interviews with, as I said, well over 300 individuals around this country, over 130 of whom were federal judges, many were state judges, many were colleagues, co-counsel, opposing counsel,

who almost uniformly talked in terms of his evenhandedness, of his open-mindedness, of his willingness to be fair. He's called "a judge's judge" more than once in those interviews.

When we interviewed him, we had questions that would have been on that issue. And we discussed that issue with him, to get his own personal perspective on it. We were satisfied with what we heard at that time.

And perhaps it's best reflected in his writings, which, again, I indicated the body of that work was read by our three reading groups collaboratively. And the conclusion that was reached, if you will, the overarching conclusion that was reached, is that this is a judge who brings pragmatic skills to his decision-making.

We discussed that with him in that interview that we had on December 12th. He tries to do what he thinks is right with respect to the application of the law that's before him. He took us through how he analyzes that approach, up to the point that when he is just about ready to release his decision, he looks back once again at the law to make sure he hasn't misapprehended something in the first instance; and secondly, to make sure that the outcome is fair.

That, to me, suggests...

SPECTER: So he came back to you twice?

TOBER: I'm sorry?

SPECTER: Was your testimony that he came back to you? What did you mean he came back and took another look?

TOBER: He would look at his draft opinion, Mr. Chairman, before it would be issued. And he would look back at the law that he was applying in that opinion and the outcome that was occurring in that opinion, just to justify in his mind one more time that the outcome would be fair.

SPECTER: Did your group study all of his opinions?

TOBER: The reading groups read 350 of his published opinions, scores of his unpublished opinions, and other materials, yes.

SPECTER: And did they make any analysis?

An issue has been raised as to whether Judge Alito unduly favored the powerful or the government. Did your ABA analysis reach that issue?

TOBER: That issue is one that we looked at. And we discuss it in our letter of evaluation. And I gave some examples of the some of the disparate results that we were told about.

TOBER: One of the reading groups reported to us that they could not reach a full conclusion on whether or not there was some attempt to favor one outcome for a group of litigants over another. And while there were a couple of members in a couple other reading groups that may have said the same thing in so many words, there were a significant number of other individuals in the reading groups who said they couldn't find any such evidence of that. It was inconclusive with respect to the reading groups.

What was of interest in the reading group reports to us was a comment that was echoed by others, which is that in looking for a sense of partiality in the opinions, the conclusion that was left very often was one of pragmatism.

SPECTER: Let me interrupt you, because my time is almost up, to ask you to clarify. What was inconclusive in your studies?

TOBER: It was inconclusive whether or not there were certain categories of parties who might have come out at the wrong end of Judge Alito's opinions.

SPECTER: Did some of those readers find that he was impartial and some find the contrary?

TOBER: My understanding is it was inconclusive. We did not receive any clarion call at one point that he was representing or suggesting to have a bias against any particular group of litigants before him.

SPECTER: Considerable amount of attention has been paid in these hearings to the recusal issue of Vanguard. Would you comment on what your committee found there?

TOBER: I'm going to defer to Mr. Payton who took the lead on the Vanguard-related issues, if that is OK with the chairman.

SPECTER: Mr. Payton?

PAYTON: We certainly looked into all of the recusal issues. We asked Judge Alito in some detail about how the Vanguard and the other recusal issues came about.

But let me put this in some context which I think will be helpful. In the materials that Judge Alito submitted to this committee, he attached a list of all of the cases from which he had been recused over his 15-year tenure. And that is 40 pages long with about 30 to 35 cases per page. It's well over 1,000 cases from which he was recused.

Among those cases that he was recused from were cases involving Vanguard in 1992, cases involving his sister's law firm throughout the tenure, cases involving U.S. attorney's office throughout the tenure, cases involving the other entities that he had identified in his representation to this committee back in 1990.

A few cases, in fact, slipped through. And that has been the subject of our inquiries and some of the testimony before this committee.

PAYTON: We asked him how that came about. He explained how he thought it came about. But I think it's fair to say he was not certain how they slipped through -- whether it was through the screen, whether it was because they were pro se cases.

In the end, he did acknowledge that it was his responsibility that a mistake and error had been made. Those cases should have been caught and he should have not heard those cases.

We listened quite carefully to all of that. And in the context in which we understood how this came about, we accepted his explanation that he simply had made a mistake. These cases should not have slipped through the screen just like the other thousand or so cases that were captured by the screen and the process, but they did; they shouldn't have. And we think that did not reflect in any significant degree on his integrity.

Let me tell you something else we did that goes to both of your questions, Mr. Chairman. We also interviewed an incredibly broad array of judges -- virtually all of the members of the 3rd Circuit, virtually all of the district judges that were in New Jersey and were in Philadelphia. We interviewed a number of the other judges in the 3rd Circuit who were on the district court who had contact with Judge Alito.

PAYTON: And what we learned from them almost unanimously was that he is held in incredibly high regard with respect to the issues that this committee, the ABA's committee, looks at: his integrity, his judicial competence and his judicial temperament.

And on the issue of the recusals, everyone thought that he has the highest integrity and that these few cases that slipped through do not diminish his integrity.

SPECTER: Thank you, Mr. Payton.

The red light went on during the course of your testimony, so I will terminate and yield to my colleague Senator Leahy.

LEAHY: Just to follow up on that, on Vanguard, the only reason I even mention this, when the initial explanation was from Judge Alito and the White House after his nomination was a computer glitch had precipitated Vanguard case.

But then he answered some questions from Senator Feingold. He said in the Monga case it wasn't a computer glitch -- his failure to submit Vanguard to the clerk of the court. And he said when it came before him he was not focused.

Since your report, checking the dates here, we've learned that Judge Alito did not have Vanguard on his recusal list as far back as 1993, notwithstanding the fact that in 1990 he'd given a sworn statement to the committee that he would recuse.

LEAHY: Some of that information came after your report. Would it change anything in the conclusion?

PAYTON: Like I said, from the interview with him, I'm not sure we figured out what caused these cases to slip through. I'm not sure Judge Alito knew the precise answer to that. But he did acknowledge that it was a mistake.

On what was on his standing recusal list, I don't know what was on his standing recusal list. But I just note, in the materials that were submitted to this committee, there is a 1992 entry of an entity that has the name Vanguard in it -- and it's Vanguard -- that says "recusal because on standing recusal list."

I don't know what happened in 1993. I don't know if things went on and went off. Something went wrong here. And these cases came before him. And they shouldn't have. But they are a very small number in a huge universe of cases from which he was recused.

TOBER: Senator, may I add to that very briefly?

LEAHY: Yes.

TOBER: We did not find, in the vast number of our interviews and the review with the nominee, and any other extrinsic information we could look at, any pattern of intentional effort to try and have Judge Alito impose himself in cases in which he did not belong.

We are persuaded that some errors were made, some mistakes were made. And they total up to a small handful. In the course of the numbers that he's been sitting on, and I believe Senator Hatch suggested yesterday some 4,000 or 5,000 cases have been adjudicated involving Judge Alito.

We took that into context, particularly in light of the comments from individuals who know him and work with him with respect to the ethics he brings to the position.

LEAHY: You understand, the reason it became an issue here is because it was based on a sworn statement that he'd recuse?

TOBER: Yes, sir.

LEAHY: You also looked into his open-mindedness, his commitment to equal justice. I'm just asking, in doing that -- I've never served on one of these committees that you're on -- there's been a number of studies of the judge's record -- the Knight Ridder, The Washington Post, Cass Sunstein and others. And they have concluded that he had a much more likelihood of siding against discrimination plaintiffs than other circuit judges.

Knight Ridder reviewed 311 of his published opinions, found that he seldom sided with a criminal defendant, a foreign national facing deportation, an employee alleging discrimination or consumers suing big business. And his record stood out significantly from others in the circuit.

Did this question come in on the issue of whether he was compassionate or...

TOBER: The answer is yes. We looked at that. Our reading groups looked at it for us. We discussed it with the nominee in our interview on December 12th.

We are not immune from the media stories that have been available. I suggest everybody on my committee has been watching the last three days very carefully.

We are where we started with that issue. And that is over 300 people we spoke with who know this person as a judge, as an individual, are convinced that he has an open mind; that he does not bring any bias to this decision-making.

LEAHY: And lastly, on the issue of CAP, nobody is suggesting a bias on his part. But what bothers me, while you're doing a job application in 1985, we know Judge Alito's a very careful person, and I mean that as a compliment -- carefully put together job application. He proudly proclaims his membership in CAP, a group that was very much dedicated to keeping minorities and women out of Princeton: one that would probably look unkindly to either Judge Alito's Italian ancestors or my Italian ancestors.

LEAHY: Was this just pandering to the Meese and the Reagan administration, or is this just a total screw-up?

TOBER: May I defer to Ms. Tucker with that?

LEAHY: Sure.

TUCKER: We looked at that question, Senator. We were very concerned about that listing, knowing that membership in that organization would put him, perhaps, on an extreme that we would be uncomfortable with.

His answers to our committee were very similar, if not identical, to the answers to your committee. He did not recall when he became a member or even what he did. He didn't recall ever attending any meetings or reading any publications.

He did recall that he joined the organization because of the university's attempt to remove ROTC.

LEAHY: But that's not really my question. Was there any question of why was he so proud of this that he would put it in 1985 when everybody -- everybody knew what kind of an organization it was, where Senator Bill Frist had condemned it and Senator Bill Bradley -- quite the extreme political poles I suppose you might go.

LEAHY: Did you ask why he proudly put that on his...

TUCKER: We asked him why he put that on there. We didn't ask him why he proudly put that on there.

But he stated that he recalled he was a member.

We specifically asked him if this was to -- since it was a job application, that was he pandering. And he said it would be improper to not tell the truth on an application, that he was a member of that organization.

But there were only two organizations that he listed, as I recall, on that application. One was the Federalist Society. The other was the Concerned Alumni for Princeton. He did not have a long list of activities at that time.

But I should say, in fairness, we were very concerned about the membership of that and what happened. And all of the people we spoke to on the courts, women and minorities, people who he had worked with, people who had sat on panels with him side by side in issuing judicial opinions, almost universally said that they saw no bigotry, no prejudice.

TUCKER: They thought he was a fair man. And they felt that if he did put that -- they were shocked when they heard that that was listed on his application. And they said, "That is not the Sam Alito we know." And we heard that time and time again.

LEAHY: Thank you very much.

Thank you, Mr. Chairman.

SPECTER: Thank you very much, Mr. Tober.

Thank you, Ms. Tucker.

Thank you, Mr. Payton.

Senator Hatch?

HATCH: I'll reserve my time, thank you.

SPECTER: Thank you.

Senator Kennedy?

KENNEDY: Thank you very much.

Did you know, Mr. Tober, that the Vanguard Ventron (ph), which is the case of 1992, actually involved the carpentiers (ph) -- that names the carpentiers (ph) which were on the Alito list for recusal.

TOBER: We weren't...

KENNEDY: And I think for the most -- Mr. Payton, maybe this should be directed to you -- in that most of the people that have looked through there in detail feel that reason that that was actually recused is because the carpentiers (ph) -- at least I think it's spelled carpentiers (ph). Yes. C-A-R-P-E-N -- carpentier (ph). And that was the reason it was under the name of the Vanguard.

You're familiar with that?

PAYTON: Yes. I simply thought that it was unclear whether or not what would have caused that to be kicked off because of the standing recusal list was any hit with Vanguard or something else.

It's unclear. You cannot tell from what is there.

KENNEDY: Did the committee know when it inquired of the nominee that the Judge Alito had made a promise to the committee under oath that he was going to recuse himself from Vanguard?

PAYTON: Yes.

(CROSSTALK)

PAYTON: And we asked him about that.

KENNEDY: And did he indicate -- what was his response?

PAYTON: His response was that it was a mistake for those cases to have slipped through. That was not just a question about what the code said but also what his representation to this committee encompassed, that it was a mistake.

KENNEDY: And was the mistake, did you understand it, is because he didn't for one reason or another, neglected to put Vanguard on his recusal list?

PAYTON: No, I don't think I could say it that concretely. The mistake was that it got through. Why it got through, I think it was not completely clear to us. I'm not sure it was clear to Judge Alito. It got through.

KENNEDY: Well, it wasn't on his '93, '94, '95, '96 list, and the '93 says no changes were made from '92. And he got on the bench -- so there's just one year, a year and a half...

PAYTON: Don't know...

(CROSSTALK)

KENNEDY: I don't have the record on it. And I was just wondering, in your inquiry and review of that case, since that is the principle source, as I understand it, of revenue -- I mean, it's had sizable increases in the revenue from the time he took that oath till the more recent years. So that's one of the factors on it.

And I was just interested when you said it was a mistake -- that you made a determination detection, because we have not been able to find that it was ever put on. And, quite frankly, at least as a member of the committee, we've heard a number of reasons for it. We've heard computer glitch.

KENNEDY: We've heard that it was an interim pledge and a commitment. We have heard that it was a pro se case and therefore we didn't have -- the computers don't exist in the 3rd Circuit the way they do in law firms here in Washington, D.C. (inaudible).

And I'm just trying to find out what was told to you.

I think, to be very honest about it, if it had been said it was a mistake in the very beginning, I don't even think this issue would have taken more than 30 seconds of the committee's time.

But since we've had so many different reasons for it which we've been trying to ascertain exactly what had happened, and particularly since it was a pledge to the committee and it was a sworn statement to the committee that we were wondering what the Bar Association in its...

(CROSSTALK)

PAYTON: Senator Kennedy, I don't know the answer to your question.

I don't believe that what you just said about what was on the list in 1993-'94 was known then. I was unaware of that. And I'm not sure Judge Alito knew that.

But in our discussion with him, we actually cut right through that and simply wanted him to tell us if he agreed this was a mistake -- "Did you just miss it?"

"Yes, I just missed it. It was a mistake."

And the why, then, sort of became less significant.

KENNEDY: Well, of course, Mr. Payton, he did. During that same period of time he took a name off the list, so he must have been familiar with it. He took the U.S. attorney name's off the list.

We went through this. I'd be glad to make available to you -- just you've indicated that you'd gone through the hearings on this and I'd welcome the opportunity just to make available to you the same material and to get your response.

PAYTON: Senator, we indicated in our letter of explanation, as we always do, that we continue to monitor these proceedings.

KENNEDY: Thank you.

PAYTON: And we'll be happy to revisit anything the committee wishes us to look at.

KENNEDY: I want to join in thanking you for the service of the Bar Association. This is a very challenging and, in many senses, thankless job. But I think the country's much better off and so is the judiciary. And I thank you for your service.

PAYTON: Thank you.

(UNKNOWN): They're all billable hours, Mr. Chairman.

SPECTER: Thank you, Senator Kennedy.

Senator Hatch has stated an interest in regaining some of his reserved time.

HATCH: Well, just shortly.

We appreciate the efforts that you made. We appreciate what the Bar Association is doing. And we appreciate what you've done in this particular case as well.

Now, you're aware that -- and, frankly, he did state right off the bat, early in his testimony, that he had made a mistake with regard to the Vanguard matter.

On the other hand, are you aware that, not only did he recuse himself once he realized he'd made a mistake, but he asked the succeeding panel to retry the case. Are you aware of that?

PAYTON: Yes.

HATCH: Was that an appropriate thing to do?

PAYTON: He asked that the chief judge identify a new panel. And I think that was the appropriate thing to do.

HATCH: And that's what an honest, decent judge would do, isn't it?

PAYTON: Sure, of course.

HATCH: You're all aware of 28 USC, the U.S. Code statute on this -- am I correct?

PAYTON: Correct.

HATCH: I mean, that statute defines a financial interest for the courts that says, financial interest means ownership of a legal or equitable interest, however small or a relationship as director, adviser or other active participant in the affairs of the party except that ownership in a mutual or common investment fund that holds securities is not a, quote, "financial interest," unquote, in such securities, unless the judge participates in the management of the fund.

HATCH: Are you aware of that? Now, did he participate in the management of the fund?

PAYTON: The answer is no.

HATCH: Then, if he didn't participate in the management of the fund, would he have had, under normal circumstances, to recuse himself?

PAYTON: Well, I think the normal circumstances is, you know, amplified by the representation to this committee, which he acknowledged, independent of the obligation that you're talking about, would have caused him to not want these cases to come before him.

HATCH: Right. But he made it clear that once he did realize that there was a mistake, even though he did not, according to this U.S. Code, which is the basis, did not have to recuse himself, he did so because he had said in his statement that he would?

PAYTON: Yes.

HATCH: And you knew that? And so, I take it you don't find any real fault in the way he handled the Vanguard matter?

PAYTON: That's correct.

HATCH: That's correct?

PAYTON: That is correct.

HATCH: Thank you so much.

SPECTER: Thank you, Senator Hatch.

Senator Feinstein?

FEINSTEIN: Thank you very much for your service. Have you heard anything in these hearings that would cause you any concern or reason to change any of your views?

PAYTON: Well, the hearings are still going and I'm still listening.

But to the moment, Senator, I have been looking for any kind of material or discordant statement that would have been inconsistent with anything that we have learned or heard either through our interviews or our meeting with the nominee.

And to the moment, I'm still comfortable that we understood the judicial and legal profile of Judge Alito when we reached our rating.

FEINSTEIN: Thank you.

Thank you, Mr. Chairman.

SPECTER: Thank you very much, Senator Feinstein.

Senator Kyl?

KYL: Mr. Chairman, I don't have any questions, but I would like to thank the panel and the Bar Association for its -- I wonder how many hours of work put into verifying the qualifications of the nominees, not just for the Supreme Court but the other nominations, and particularly, Mr. Payton, your explanation of the matters that you testified to here.

Thank you very, very much.

SPECTER: Senator DeWine?

DEWINE: No questions, Mr. Chairman.

SPECTER: Senator Sessions?

SESSIONS: Mr. Tober, you have 15 members of your committee that goes out and they divide up the work and interview now 300 individuals, is that what you...

TOBER: As it turned out, Senator, the chair just gets to do a lot of marshalling. And the 3rd Circuit representative had to recuse herself because she had argued a case before a panel that Judge Alito served on before he'd been nominated. And the decision had yet to come down.

So she, by our standards, removed herself. So I had 13 people out in the field interviewing well over 200 people, contacting over 2,000 people, putting together their own written reports, marshaling the information from every corner and putting in what turned out to be an 11-pound report.

And when I first received it, as I told Ms. Tucker, I didn't know whether to read it or send out birth announcements.

(LAUGHTER)

SESSIONS: Well, we're glad you don't have to do background work on senators.

(LAUGHTER)

PAYTON: We're pleased it's done for the moment.

SESSIONS: Well, one of the things, you know, some of us say -- we've complained about the ABA ratings. But there's so much value to it, it strikes me, because isn't it true that sometimes when you're interviewing a lawyer that's been before the judge who's lost case, a lawyer who's litigated against him, they'll tell you things they may not come forward and say publicly, and that you can get a good -- you feel like you get a better perspective on a nominee's professional qualifications than you can get from reading the newspaper, perhaps?

TOBER: Thank you for that question. Let me try and answer it.

The answer is yes. We have had the experience since 1948, when we started reporting our ratings to this committee, of being able to get comprehensive, confidential information from people who know the nominee directly in the trenches, whether it be a judge, a lawyer, other people in the community.

And we are able to ask them with respect to integrity, professional competence and judicial temperament with the full and complete understanding that there will be no attribution, there will be no embarrassment, that if it's important we need to know. And people indeed give us that kind of information.

So, yes, it is a remarkable process. And if I have the moment, I'd like to say it's a remarkable group of people that I've had the privilege to work with.

SESSIONS: And, Mr. Payton, you used the word, phrase, that they held him in incredibly high regard. I think you are a premier litigator, you've argued before the Supreme Court. I'm sure you used those words carefully.

PAYTON: I did.

SESSIONS: I thank you for your service. And I think it has provided valuable insight to the committee, because you see these things out there, and it's important for the American people to know, what do the people who really know and work with this judge think about him. And we value your comments.

SPECTER: Thank you, Senator Sessions.

Senator Graham?

GRAHAM: Thank you, Mr. Chairman.

I'd just like to echo what my colleagues have said about the service you're providing, not only to the committee, but I think the country, because most people in the country are not lawyers. That's probably a good thing.

The idea of who you're getting as a person is important, and the homework you've done gives us a good picture of this particular man.

But his judicial experience compared to other people that you have reviewed, seems to me that being on the court for 15 years, you had a lot to look at.

TOBER: Well, we don't compare one nominee to another, Senator, as I'm sure you can appreciate. But I will take the direct question, and, indeed, I believe we said in our letter of evaluation that he's created an enormous record of public service, and his writings speak to that. And that's, indeed, what we've reviewed.

GRAHAM: Thank you.

And about your rating, we're all very pleased to the outcome here. But democracy is about a process, not an outcome. The rule of law is about a process, not an outcome. There may be occasion where you'll render a rating I won't agree with, and that's just the way it goes.

But I think the process where you're involved really helps us a lot. I think it helps the country. And I appreciate the time you've taken from your families and your business to do it.

Now, what may take normal people 30 seconds to figure out may take the Senate three days. But we're going to ask one simple question about Vanguard. I've listened, and with this much material to have dealt with and as many cases as he's heard, the first question for me about Judge Alito is: Who am I getting here? And is an innocent mistake OK? I hope so, because I make them all the time.

GRAHAM: What would I not want? I would not want someone who's into self dealing. I would not want someone who skirts the ethical rules and plays as close to the line as they could.

Would it be a fair statement that Judge Alito never plays close to the line, he tries to do it the best he can, to take the highest approach to ethics?

PAYTON: I think that from what his colleagues who know him very well would say is that they hold him in the highest regard with respect to his integrity. And I think that encompasses what you just said.

GRAHAM: Thank you very much.

And one last thought, about Vanguard. What is in it for him to intentionally hear the case, knowing that he shouldn't? I have never found anybody that could give me a reason why this judge would make an intentional decision to avoid recusal when he should. Have you found a reason?

PAYTON: I actually am unaware of anyone who has claimed that he intentionally did this. It was a mistake.

GRAHAM: And there's no benefit one could find for him intentionally doing it, based on the nature of the case?

TOBER: I'm not aware of one.

GRAHAM: Thank you all.

TOBER: Senator, if I could just add, I believe it was Professor Rotunda who submitted a report to this committee. And I think there was a line in there that caught my attention. He said, "Reasonable people can make reasonable mistakes." And I think that captures what we thought we found. And when we spoke to Judge Alito about it, we were convinced that it happened.

GRAHAM: Thank you for your services.

SPECTER: Thank you, Senator Graham.

Senator Schumer?

SCHUMER: Thank you, Mr. Chairman. I just have a brief question because we've heard a lot about the ABA rating, which is something that's prized and important.

Your sheet here that describes it says it describes three qualities: integrity, professional competence, judicial temperament. Is that right?

TOBER: That's correct.

SCHUMER: So it would not get into what somebody's judicial philosophy would be. Is that correct?

TOBER: That's also correct.

SCHUMER: And so, if somebody were very far right or very far left, as long as they had integrity, professional competence or judicial temperament, you would give them -- that's what you would rate them on.

TOBER: Senator, we don't do politics.

What we do is integrity, professional competence and judicial temperament. They are objective standards. And that's what we bring to this committee.

SCHUMER: And if one standard was -- however one defined it, if somebody was out of the mainstream, again, your rating would not give us any inclination whether that was part of it?

TOBER: If the suggestion was that they were out of the mainstream politically, that's correct.

If they're out of the mainstream in terms of their judicial temperament, we might have a different thought.

SCHUMER: Thank you.

SPECTER: Thank you very much, Mr. Tober.

Ms. Tucker, Mr. Payton, we very much appreciate your service and your being here today.

TOBER: Thank you.

SPECTER: Let's call the next panel -- Judge Becker, Judge Scirica, Judge Barry, Judge Aldisert.

Judge Garth will be coming to us electronically, but he appears on the screen.

Welcome, Judge Garth and Judge Gibbons and Judge Lewis.

Pardon me.

Senator Coburn, do you have questions of the ABA?

(LAUGHTER)

SESSIONS: AMA, he'd like to ask about.

(LAUGHTER)

SPECTER: I begin by welcoming the judges.

By way of a brief introduction, I think it is worthy of comment how this panel came to be invited.

Judge Becker was in my offices because since August of 2003 he has been performing mediation services on asbestos reform litigation -- more than 40 meetings in a very, very tough legislative approach.

SPECTER: And he was in my office last December, at a time when I was being interviewed by Kathy Kiely of USA Today. And I introduced Judge Becker to Ms. Kiely, who asked him about Judge Alito. And without objection, I'd like to make a part of the record the article which Ms. Kiely wrote for USA Today, dated December 14, 2005, which contains Judge Becker's comments about Judge Alito.

After that, I discussed with Judge Becker the possibility of his being a witness for Judge Alito. And after some discussions Judge Becker checked out the various considerations, said he would be willing to do so, if invited by the committee. And then Judge Becker talked to the other judges who are here today, who also stated a willingness to appear if invited by the committee. And I then sent them formal letters of invitation.

Now to the judges. Judge Becker is a graduate of the University of Pennsylvania, 1954; Yale Law School, 1957; appointed by President Reagan to the district court in 1970; and to the Court of Appeals for the 3rd Circuit in 1981.

He's really been performing services as the 101st senator. And by way of a full disclosure, I've known Judge Becker since the fall of 1950 when he was a freshman at the University of Pennsylvania and I was a senior. And we have been good friends ever since.

Judge Becker, thank you for your service to the United States in so many capacities.

BECKER: Thank you, Mr. Chairman.

SPECTER: We have a procedure for five minutes. I don't intend to bang the gavel on any of you judges -- not because you're judges, but because my gavel is almost broken.

(LAUGHTER)

Judge Becker?

BECKER: Mr. Chairman, Senator Leahy and other members of the committee, Sam Alito became my colleague when he joined our court in 1990. Since that time, we have sat on over 1,000 cases together. And I have therefore come to know him well as a judge and as a human being.

Many do not fully understand the intensity of the intellectual and personal relationship among appellate judges. We always sit together in panels of three. And in the course of deciding and writing up cases, engage in the most rigorous dialogue with each other.

BECKER: The great violinist Isaac Stern, describing an afternoon of chamber music, once opined that after such a session, one knows his fellow quartet members better than a man knows his wife after 30 years of marriage. Now this analogy -- hyperbole aside -- vividly describes the intense relationship among appellate judges.

I therefore believe myself to be a good judge of the four matters that I think are the central focus of this committee as it decides whether to consent to this nomination: Sam Alito's temperament, his integrity, his intellect and his approach to the law.

First, temperament. Sam Alito is a wonderful human being. He's gentle, considerate, unfailingly polite, decent, kind, patient and generous. He's modest and self-effacing. He shuns praise.

When he had completed his 10th year of service on our court, Sam declined my offer extended as chief judge -- I was then the chief judge of the court -- to arrange the usual party to observe 10-year anniversaries. Sam was uncomfortable at the prospect of encomiums to his service.

Sam has never succumbed to the lure of big city lights. He has a sense of place, which, for him, is not nearby New York City, but New Jersey, which to him has always been home.

Finally, there is an aspect of appellate judging that no one gets to see -- no one -- but the judges themselves: How they behave in conference after oral argument, at which point the case is decided, and which, I submit, is the most critically important phase of the appellate judicial process.

In hundreds of conferences, I had never once heard Sam raise his voice, express anger or sarcasm or even try to proselytize. Rather, he expresses his views in measured and temperate tones.

BECKER: Second, integrity: Sam Alito is a soul of honor. I have never seen a chink in the armor of his integrity, which I view as total, an opinion he's not undermined by the furor over the Vanguard issue by which I remain baffled.

My wife holds Vanguard mutual shares, which I report on my financial disclosure form. However, I do not identify Vanguard on my recusal list because I am satisfied that my wife possesses no ownership interest in the Vanguard Management company, which is what controls the recusal determination. She has never received a proxy statement, an opportunity to vote for directors, or any indicia of ownership, other than her (inaudible) share and the fund to the extent of her investment.

I believe that the view of Dean Rotunda, which is in your record, explains why Judge Alito was not required under the law to recuse himself in the suit against Vanguard.

Third, intellect: Judge Alito's intellect is of a very high order. He's brilliant, he's highly analytical and meticulous and careful in his comments and his written work.

He's a wonderful partner in dialogue. He will think of things that his colleagues have missed. He's not doctrinaire, but rather is open to differing views and will often change his mind in light of the views of a colleague.

Contrary to some reports, Sam does not dissent often. According to our court statistics, in the last six years, he has dissented only 16 times -- a little over two cases per year. That's the same number that I have dissented, and fewer than the number of our colleagues.

In my view, Sam Alito has the intellect to sit on the Supreme Court. I know all of its members. I know them reasonably well. And in my view, he would be a strong and independent justice, his own man.

Finally, Sam's intellect is not abstract, but practical. He does not mistake the obscure for the profound.

Fourth, approach to the law: As I address this topic, I'm acutely aware of the deep concern of the members of the committee about this subject. I am also aware that my role here is to testify to fact, not to opinion, and hence I will express neither normative or predictive judgments.

BECKER: The Sam Alito that I have sat with for 15 years is not an ideologue. He's not a movement person. He's a real judge deciding each case on the facts and the law, not on his personal views, whatever they may be.

He scrupulously adheres to precedent. I have never seen him exhibit a bias against any class of litigation or litigants.

He was a career prosecutor, but in the numerous criminal cases on which we have sat together, if the evidence was insufficient or the search was flawed, he would vote to overturn the conviction.

And, if the record did not support summary judgment against the plaintiff in an employment discrimination or civil rights case, he would vote to reverse. His credo has always been fairness.

Now I know that there's been controversy about certain ideological views expressed in some 20-year-old memos. Whatever these views may be, his judging does not reflect them.

I think that the public does not understand what happens when you become a judge. When you take that judicial oath, you become a different person. You decide cases not to reach the result that you would like, but based on what the facts and the law command.

What you decide as a judge are not general principles but the case in front of you. You view it as narrowly as possible. That's what Sam always does, with great respect for precedent.

Sam Alito has been faithful to that judicial oath.

Now, my final point relates to his approach to the law -- another facet of his approach to the law. And the best calibers that I can find to measure his approach to the law was to compare it with my own.

I have been a federal judge for 35 years, one week and one day. My opinions would fill many bookshelves. But I think that I am fairly viewed as a mainstream or centrist judge.

A computer survey run by our court librarian received 1,050 opinions in cases in which Sam Alito and I sat together. In these cases, we disagreed 27 times, which is probably about the same number that I would have disagreed with most other colleagues.

Some cases turned on a reading of the record, others on how rigorously or flexibly we interpreted the reach of a statutory or constitutional provision or a state court's jurisprudence or applied our usually deferential standard of review.

But, in every case on which we differed, Sam's position was closely reasoned and supportable either by the record or by his interpretation of the law or both.

The short of it, members of the committee, is that Sam Alito is a superb judge in terms of temperament, integrity and intellect. And he has exhibited a careful, temperate, case-by-case approach to the law.

BECKER: Thank you for the opportunity to address you.

SPECTER: Thank you very much, Judge Becker.

We now turn to Chief Judge Anthony Scirica who, like Judge Becker, has known Judge Alito on the 3rd Circuit for the 15 years of Judge Alito's service there.

Judge Scirica became chief judge in May of 2003, succeeding Chief Judge Edward Becker. Judge Scirica has a Bachelor's degree from Wesleyan, 1962, Michigan Law School, 1965. Appointed to the district court by President Reagan and, in 1984, to the circuit court also by President Reagan in 1987.

Thank you very much for coming in, Judge Scirica, and we look forward to your testimony.

SCIRICA: Mr. Chairman, thank you very much.

For the last 15 years, I have worked with Judge Alito. For 15 years, we have decided thousands of cases while serving on the same Court of Appeals.

On most cases we have agreed, but not always. Judges don't always agree on every case.

As the chief justice remarked last summer, much like a baseball umpire, a judge calls balls and strikes. If the pitch is down the middle or way outside, the call is straightforward. But many pitches are on the corners and then the calls are difficult.

These cases require hard thought, and these are the cases where a judge earns his or her keep.

In 15 years on the Court of Appeals, Judge Alito has more than earned his keep. He is a thoughtful, careful, principled judge who is guided by a deep and abiding respect for the rule of law.

He is intellectually honest. He is fair. He is ethical. He has the intellect, the integrity, the compassion and the judicial temperament that are the hallmarks of an outstanding judge.

SCIRICA: On three separate occasions I spoke with a representative of the American Bar Association during its evaluation process. My views and those of my colleagues on the court were sought by the American Bar Association because we have a unique perspective on Judge Alito, a perspective that no one else has.

Anyone can read and interpret his opinions. But we know Judge Alito from almost daily contact over a period of years. We have sat together in the same conference room. We have discussed the cases. We have decided them. And we have exchanged legal memoranda.

Judge Alito approaches each case with an open mind and determines the proper application of the relevant law to the facts at hand. He has a deep respect for precedent. His reasoning is scrupulous and meticulous. He does not reach out to decide issues that are not presented in the case.

His personal views, whatever they might be, do not jeopardize the independence of his legal reasoning or his capacity to approach each issue with an open mind.

Like a good judge, he considers and deliberates before drawing a conclusion. I have never seen signs of a predetermined outcome or view, nor have I seen him express impatience with litigants or with colleagues with whom he may ultimately disagree.

He is attentive and respectful of all views and is keenly aware that judicial decisions are not academic exercises but have far-reaching consequences on people's lives.

We admire him as a person.

Despite his extraordinary talents and accomplishments, Judge Alito is modest and unassuming. His thoughtful and inquiring mind, so evident in his opinions, is equally evident in his personal relationships. He is concerned and interested in the lives of those around him. He has an impeccable work ethic, but he takes the time to be a thoughtful friend to his colleagues.

He treats everyone on our court, and everyone on our court staff, with respect, with dignity and with compassion.

SCIRICA: He is committed to his country and to his profession. But he is equally committed to his family, his friends and his community.

He is an admirable judge and an admirable person.

Thank you, Mr. Chairman.

SPECTER: Thank you very much, Judge Scirica.

We turn now to 3rd Circuit Judge Maryanne Trump Barry. Graduate of Mount Holy Oak 1958, Columbia university in 1962 with a Master's, and a law degree from Hofstra, 1974.

Judge Barry was in the U.S. Attorney's Office before Judge Alito was there. Appointed to the district court in 1983 by President Reagan, and to the circuit court in 1999 by President Clinton. She has worked with Judge Alito for the past six years as colleagues on the 3rd Circuit.

Thank you for joining us, Judge Barry, and we look forward to your testimony.

BARRY: Thank you, Mr. Chairman. Good afternoon.

Good afternoon, members of the committee.

It is my privilege to appear before you, and it is a particular privilege to speak on behalf of my friend and colleague, Judge Samuel Alito.

Now, I warn you, I may be a little free and call him Sam on occasion, because Judge Alito and I go back almost 30 years to 1977.

In 1977, Judge Alito came to the United States Attorney's Office in the District of New Jersey following his clerkship with Judge Leonard Garth, who was and remains a giant on our court.

Sam was assigned -- see, I did it -- to the appeals division and I was the chief of that division, although in those days I didn't have very much more experience than he did.

Now, I said appeals division -- that sounds very much more substantial than it was. For what it was, was three assistant United States attorneys working very, very hard at a very, very responsible job.

BARRY: We handled all the criminal appeals of those defendants who were convicted at trial. It was our job to master the record, to analyze the issues, to read the relevant cases, to write a persuasive brief on behalf of the United States and, if necessary, to argue the case on the floor of the Court of Appeals.

Nobody did it better than Sam Alito.

And if there were any doubt on that score, the best evidence is the fact that after just four years as an assistant United States attorney, he went directly to the Office of the Solicitor General. Only the best are able to do that.

For the next six years, Judge Alito distinguished himself with public service in Washington, D.C., and then he returned to the District of New Jersey in 1987 as the United States attorney.

Important cases were brought on his watch -- organized crime cases, drug trafficking cases, public corruption cases. I know because I was there. And as the district court judge at that time, having been appointed by President Reagan, I handled some of his more important cases.

Now, I mentioned the cases that were handled on his watch for another reason.

The tone of a United States Attorney's Office comes from the top. The standard of excellence is set at the top.

Samuel Alito set a standard of excellence that was contagious -- his commitment to doing the right thing, never playing fast and loose with the record, never taking a shortcut, his emphasis on first-rate work, his fundamental decency.

The assistant United States attorneys who worked for him were proud to do so. They admired him completely.

Now, of course, in 1990 Judge Alito became Judge Alito. And you have heard the most glowing things said about Sam as a colleague on our court. I embrace every glowing statement.

Let me just conclude with this: Judge Alito is a man of remarkable intellectual gifts. He is a man with impeccable legal credentials.

BARRY: He is a fair-minded man, a modest man, a humble man. And he reveres the rule of law.

If confirmed, Judge Samuel A. Alito, Jr. will serve as a marvelous and distinguished associate justice of the Supreme Court of the United States.

Thank you, Mr. Chairman.

SPECTER: Thank you very much, Judge Barry.

We turn now to Judge Ruggero Aldisert, with a bachelor's degree from the University of Pittsburgh in 1942 and a law degree from the same institution in 1947, with intervening service in the Marine Corps.

He served on the court of common pleas of Allegheny County from 1961 to 1968, at which point he was appointed to the 3rd Circuit by President Lyndon Johnson.

Judge Aldisert and I were reminiscing about my predecessor, Senator -- yet to be a judge, Senator Joe Clark, whose seat I now occupy.

He was chief judge from 1984 to 1986 and took senior status in 1986. He has been an adjunct professor at the University of Pittsburgh and has served with Judge Alito on the 3rd Circuit for the past 15 years.

Thank you for coming all the way from California, Judge Aldisert, to be with us today. And we look forward to your testimony.

ALDISERT: Thank you, sir.

Mr. Chairman and members of the committee, I thank you for this invitation to offer my views on my colleague.

But, before proceeding into my formal statement, I want the record to show that there was a discussion this morning about ages of judges. Well, I am an old man. And I will tell you how old I am.

(LAUGHTER)

There's a certain distinguished United States senator sitting up there who I swore in as a lawyer in the city of Pittsburgh over 40 years ago. And that's Orrin Hatch.

(LAUGHTER)

And I will also say that I presided over the first jury trial that he ever tried. And he won the case.

LEAHY: Oh, that's sweet, Orrin.

HATCH: I'm glad you said that, Judge. They don't believe it.

(LAUGHTER)

LEAHY: I never knew you won one. That's nice.

(LAUGHTER)

SPECTER: They've always gotten along very well together, Senator Leahy and Senator Hatch.

ALDISERT: When I first testified before this committee in 1968, I was seeking confirmation of my own nomination to the federal circuit court. I speak now as the I speak now as the most senior judge on the 3rd circuit.

And I begin my brief testimony with some personal background.

ALDISERT: In May 1960, I campaigned with John F. Kennedy in the critical presidential primaries of West Virginia.

The next year, I ran for judge, as was indicated, and I was on the Democratic ticket, and I served eight years as a state trial judge.

And as the chairman indicated, Senator Joseph Clark of Pennsylvania was my chief sponsor when President Lyndon Johnson nominated me to the Court of Appeals, and Senator Robert F. Kennedy from New York was one of my key supporters.

Now, why do I say this? I make this as a point that political loyalties become irrelevant when I became a judge. The same has been true in the case of Judge Alito, who served honorably in two Republican administrations before he was appointed to our court.

Judicial independence is simply incompatible with political loyalties, and Judge Alito's judicial record on our court bears witness to this fundamental truth.

I have been a judge for 45 of my 86 years. And based on my experience, I can represent to this committee that Judge Alito has to be included among the first rank of the 44 judges with whom I have served on the 3rd Circuit, and including another 50 judges on five other courts of appeals on which I have sat since taking senior status.

Moreover, I have been a longtime student of the judicial process. I have written four books on the subject and more than 30 law review articles. And this study required me to study the current work of 22 justices of the U.S. Supreme Court. And I've read hundreds of opinions of appellate judges of every federal circuit, every state, and every political stripe.

And the great Cardozo taught us long ago the judge, even when he is free, is not wholly free. He is not to innovate at pleasure. This means that the crucial values of predictability, reliance and fundamental fairness must be honored.

ALDISERT: And as his judicial record makes plain, Judge Alito has taken this teaching to heart. He believes that legal outcomes will follow the law as dictated by the facts of the particular case, whether the facts involve commercial interests, government regulation or intimate relationships.

According to these criteria, Mr. Chairman, Judge Alito is already a great judge.

We who have heard his probing questions during oral argument, we who have been privy to his wise and insightful comments in our private decisional conferences, we who have observed at first hand his impartial approach to decision-making and his thoughtful judicial temperament and know his carefully crafted opinions, we who are his colleagues are convinced that he will also be a great justice.

If Justice Alito is confirmed, as I believe wholeheartedly he deserves to be, he will succeed a justice who has gained a reputation as a practical justice, whose resistance to ideologically driven solutions has positioned her as a swing vote on the court.

And as has been heard several times in this hearing, Justice O'Connor, in 1995, described her approach to judging. What she said then is even more important today. And I quote, "It cannot be too often stated that the greatest threats to our constitutional freedoms come in times of crisis. The only way for judges to mediate these conflicting impulses is to do what they should do anyway: Stay close to the record in each case that appears before them and make their judgments based on that alone."

And knowing Sam Alito as I do, I am struck by how accurately these words also describe the way in which he has performed his work as a United States circuit judge.

And that is why, with utmost enthusiasm, I recommend that he be confirmed as an associate justice on the Supreme Court.

And thank you, Mr. Chairman.

SPECTER: Thank you very much, Judge Aldisert.

We turn now to Judge Leonard Garth who is coming to us -- you see him on the television screen -- coming to us from California. Judge Garth is a graduate of Columbia, 1942; served in the United States Army, lieutenant from '43 to '46; and then from the Harvard Law School, where he graduated in 1952.

In 1969, he was appointed to the district court by President Nixon, and then to the circuit court by President Nixon in 1973; a lecturer at Rutgers Law School and at the Seton Hall Law School.

Has known Judge Alito since Judge Alito clerked for Judge Garth back in 1976 to 1977 and has served with him on the 3rd Circuit for the 15 years of Judge Alito's tenure there.

SPECTER: Judge Garth, we very much appreciate your being with us, and we look forward to your testimony.

GARTH: Thank you, Senator Specter, Senator Leahy and the honorable members of the Senate Judiciary Committee -- and, of course, my own family of judges who have preceded me in speaking to you today.

I, too, am privileged to appear before you today, albeit by video conferencing rather than in person. I cannot be with you in person because I recently had some major spinal surgery, and I find it extremely difficult and painful to travel.

As Senator Specter has indicated, I have served as a federal judge for some 36 years, as a district court judge in New Jersey and, since August of 1973, as a member of the 3rd Circuit Court of Appeals.

Now, I do want to interject and say that in that respect, perhaps Judge Aldisert is older than I am -- not by many days.

(LAUGHTER)

And I'm almost as old as he is, but not quite as handsome as Judge Barry of my court.

(LAUGHTER)

I hope you'll forgive that aside, but I want to ask you something else to forgive me. I have heard all of my colleagues speak so eloquently, and I'll use the term that Judge Barry used, glowingly, about Judge Alito. But I have known him just a little bit longer and in a different capacity over the course of his career.

Following his graduation from law school, he served as one of my two law clerks in 1976 to 1977. And as you have heard, since 1990 he has served as my colleague on the court of appeals.

GARTH: During the interim years, because of the relationship that we developed during his clerkship and the fact that both he and I are New Jersey residents, we remain close to one another. Hence I think I can speak knowledgeably about Sam's qualifications and his talents, his discretion, his honesty, his fairness and his integrity.

These are qualities that Judge Alito possesses now and has possessed since the very beginning of his legal career.

Let me first tell you about Sam's clerkship with me. As you may know, a law clerk is a judge's legal adviser and a sounding board, if I may use that term. But he or she often becomes much more than that -- a member of the judge's extended family.

And, as a result, a judge gets to know his law clerk in a particularly personal way.

I knew Sam in this personal way at the very beginning of his career as a lawyer. For that reason, I think I have a unique perspective to share with you about him.

I chose Sam to be my law clerk in 1976 from among the literally hundreds of applicants who sent their resumes to me and the other judges of honor of our court that year.

Sam was still a law student when I interviewed him, but he struck me in that encounter as fiercely intelligent, deeply motivated and extremely capable.

I did not know at that time that Sam was the son of Samuel Alito Sr. That's a gentleman who had impressed me very, very much as a witness in the New Jersey redistricting case that I heard about 1972.

Once I made the connection, however, I fully understood why Sam was so impressive and why he regarded -- and regards today -- his father as a role model.

During his tenure with me, Sam bore out all my initial impressions of his excellence -- impressions which had led me to engage him. He was a brilliant and exceptional assistant to me.

He enabled me to test judicial theories and to fashion appropriate judgments in each case that came before our court. I have had some 85 law clerks assisting me in chambers over the course of my career on the bench.

GARTH: They have all been extremely well qualified in all ways to serve a court of appeals judge.

Sam Alito stands out even among that very elite group. And during the year that he was my law clerk, Sam and I frequently took an afternoon walk near the courthouse in Newark and discussed the cases while we walked.

I can tell you that the recommendations and arguments that Sam made about those cases were, as my colleagues have pointed out, always reasoned, principled and supported by precedent.

I developed, then, a deep respect for Sam's analytical ability, his legal acumen, his judgments, his institutional values and, yes, even his sense of humor which, if he is confirmed -- as I hope he might -- will probably compete with that of other justices.

Few of the cases that come before our court are slam-dunk cases. Most involve difficult questions on which reasonable people can disagree. And generally Sam and I reached agreement after discussing these cases, but more than once we did not.

Even in those latter cases, the ones in which we disagreed, I understood and respected the positions that Sam advanced and the contours of his analysis.

Our afternoon walks invariably ended at a neighborhood store, T.M. Ward Company, where we purchased peanuts and coffee. I note parenthetically that Ward has since honored Sam by naming a special blend of coffee that he favors, Judge Alito's Bold Justice Blend.

(LAUGHTER)

I think there are few of us that have that distinction.

After he left my chambers, Sam continued on to public service, as you have heard. In a letter to the then-Deputy Assistant Attorney General Arnold Burn, I endorsed Sam's candidacy for United States attorney for the district of New Jersey. And I want to just read you what I wrote. This was a long, long time ago.

"I can certify to Mr. Alito's integrity, ability, discretion and honesty.

GARTH: "Above and beyond those qualities, however, I believe his talents as a lawyer are exceptional.

"I am sure that his tenure in government service since he has left my chambers has reflected the fact that he is a thorough, meticulous, intelligent and resourceful attorney and that his judgments are mature and responsible. Indeed, he was one of the finest law clerks I have had the privilege to engage. And if I were to rate him on the basis of one to 10, 10 being the highest rating, he would without question receive a 10-plus rating."

I stress these same attributes when I endorsed Sam for membership on our court seven years later. He has more than lived up to my rating and the qualities that I attributed to him in the 15 years since he joined the court and became my colleague.

Sam is an intellectually gifted and morally principled judge. We have not always agreed on the outcome of every case, as just recently stated.

Just this fall, for example, Sam dissented from a majority opinion that I wrote in an Employee Retirement Income Security Act -- that's ERISA -- that I wrote in an ERISA case.

In that case, Sam and I disagreed about how two provisions of the statute interact. I and the other majority judge were attracted in large part to the reasoning of the 2nd Circuit.

Judge Alito, on the other hand, was attracted by the reasoning of the 7th Circuit. Even in the cases on which we disagree, however, I always respect Sam's opinion -- just as I did during our afternoon walks when he was my law clerk.

Sam is also a prudent judge.

Make no mistake, he is no revolutionary. He is a sound jurist, always respectful of the institutions and the precepts that led to the decisions in the cases under review.

I have heard concerns expressed about whether Judge Alito can be fair and evenhanded.

GARTH: Let me assure me from my extensive experiences with him and with my knowledge of him going back, as I have stated, over 30 years, that he will always vote in accordance with the Constitution and laws as enacted by Congress.

His fairness, his judicial demeanor and actions, and his commitment to the law -- all of those qualities which my colleagues and I agree he has -- do not permit him to be influenced by individual preferences or any personal predilection.

As you may know, when the judges of our court meet in conference -- and I think Judge Becker referred to this in his remarks -- we are the only individuals in chambers. No law clerks, no assistants, no administrative personnel or, indeed, anyone else attend these conferences.

I can tell you with confidence that at no time during the 15 years that Judge Alito has served with me and with our colleagues on the court and the countless number of times that we have sat together in private conference after hearing oral argument, has he ever expressed anything that could be described as an agenda. Nor has he ever expressed any personal predilections about a case or an issue or a principle that would affect his decisions.

He has a deep and abiding respect for the role of stare decisis and established law. I appreciate, of course, that the Supreme Court can retreat from its earlier decisions, but it does so rarely and only in very special circumstances.

And I am convinced that if Judge Alito is confirmed as an associate justice of the Supreme Court, he will continue to honor stare decisis as he did as a law clerk and as he has done as a member of our court.

He will sit among those jurists whose qualities of fairness and of principle are the lode star of the judiciary.

GARTH: In my opinion, Sam is as well qualified as the most qualified justices currently sitting on the Supreme Court.

A word about Sam's demeanor is in order. Sam is and always has been reserved, soft spoken and thoughtful. He is also modest, and I would even say self-effacing. And these are the characteristics I think of when I think of Sam's personality. It is rare to find humility such as his in someone of such extraordinary ability.

Over the 30 years I have known Sam, I have seen him grow professionally into the reserved, mature, independent and apolitical jurist that graces our court today. I regard him as the most qualified member of our court to be considered as an associate justice of the Supreme Court.

I know that just as Judge Alito has brought and brings grace and luster to the 3rd Circuit, so too will he bring grace and luster to the United States Supreme Court if he is confirmed.

Thank you, members of the Senate Judiciary.

SPECTER: Thank you very much, Judge Garth, coming to us, I've just been advised, from Phoenix, Arizona. Thank you.

Our next witness is Judge John Gibbons. Graduate of Holy Cross, 1947, bachelor's, Harvard Law School in 1950. Nominated to the 3rd Circuit by President Nixon in 1970, chief judge from 1987 to 1990 -- at which time he resigned to become a professor of law at Seton Hall University.

He now is in the practice of law. Known Judge Alito for more than 20 years when Judge Alito was a U.S. attorney and has tried cases before Judge Gibbons.

Thank you very much for being with us today, Judge Gibbons, and we look forward to your testimony.

GIBBONS: Mr. Chairman and members of the Judiciary Committee, as you all probably know, or as Senator Specter has just said, I was a member of that court of appeals where Judge Alito is now a member for 20 years.

And, indeed, it was my retirement from that court 16 years ago that created the vacancy which Judge Alito filled on the court of appeals.

Since his appointment, lawyers in the firm of which I'm a member have been regular litigators in the courts of the 3rd Circuit, not only on behalf of clients who pay us handsomely for such representation but also frequently through the firm's

Givens Fellowship Program on behalf of nonpaying clients whose cases have presented those courts with challenging human rights issues.

The Givens Fellowship Program is certainly a significant part of our practice, as aptly demonstrated by the fact that, since 1990, Givens Fellows lawsuits have resulted in 115 reported judicial decisions.

This committee should appreciate that the Court of Appeals for the 3rd Circuit has been, for the 50-plus years that I followed or participated in its work, a centrist legal institution.

An important reason why that's so is that, many years ago the court adopted the requirement that all opinions intended for publication must, prior to filing, be circulated by the opinion writer not only to the members of the three-judge panel, but also to the other active judges on the court.

The purpose of this internal operating rule was to permit each active judge not only to comment upon the opinion writer's treatment of 3rd Circuit and Supreme Court precedent but also to vote to take the case en banc for rehearing by the full court if the judge thought that the opinion was outside the bounds of settled precedent.

Thus, the level of interaction among the 3rd Circuit appellate judges has, for a half century, been unusually high. This committee should also appreciate that appointment to an appellate court where one has life tenure is a transforming experience.

GIBBONS: I remember a former judicial colleague saying to me once, after several years on the bench, "John, what other job in the world is there in which you can look in the mirror while you're shaving and say to yourself, 'All I have to do today is the right thing according to the law?'"

A good judge puts aside interests of former clients, interests of organizations one may have belonged to and interests of the political organization that may have been instrumental in one's appointment.

I personally experienced that transformation, and I witnessed it repeatedly in the judicial colleagues who joined the court after I did.

These two points, the unusual internal cohesion of the 3rd Circuit Court of Appeals and the transformative experience of serving on a court protected by life tenure, suggest to me that the committee members in determining whether or not to vote in favor of confirming Judge Alito should concentrate not on what he thought or said as a recent Princeton undergrad or graduate or as a young lawyer seeking advancement as an employee of the Department of Justice, but principally, if not exclusively, on his record as an Article III appellate judge.

If you look, as you should, at that 15 record as a whole, you cannot, in good conscience, conclude that Judge Alito will bring to the Supreme Court any attitude other than the one held by the colleague I mentioned who thought important thoughts about judging every morning while he was shaving.

He has consistently followed the practice of carefully considering both Supreme Court and 3rd Circuit Court precedents.

Very few of the opinions he has written for a unanimous panel or for a panel majority have moved his colleagues among the active judges to vote to take the case en banc. The cases in which he participated that produced dissenting opinions by him or from him, all, it seems to me, were close cases in which either the law or the evidentiary record were such that equally conscientious judges could quite reasonably disagree about the outcome.

GIBBONS: Take, for example, cases presenting challenges to state regulations of abortion, certainly a hot-button topic for many people who are opposing Judge Alito's confirmation.

I found four such cases in which he participated. In three of them, he decided against state regulations that might have put a burden on a woman's choice for an abortion.

In the fourth case, about which a lot has been said, *Planned Parenthood of southeastern Pennsylvania v. Casey*, Judge Alito dissented from a majority opinion holding unconstitutional the Pennsylvania spousal consent provision for an abortion. And it is that dissent which the opponents of his confirmation talk about most frequently.

They seem to urge that on the basis of that dissent, Judge Alito is so far out of the mainstream of constitutional law that his confirmation will endanger the constitutional protection of civil rights practically across the board.

In your consideration of that dissent, I suggest that you should take into account these points.

First, at the time the circuit considered the Pennsylvania spousal consent statute, the Supreme Court had not yet decided whether states could impose such a requirement.

And second, the Court of Appeals majority invalidated the statute. Had the Supreme Court simply denied certiorari, that invalidation would have remained in place.

GIBBONS: Instead, at least four justices voted to grant certiorari.

If the issue of the statute's constitutionality was so overwhelmingly clear, why was certiorari granted to endorse the 3rd Circuit's majority position?

Clearly, *Planned Parenthood v. Casey* was, at the time the court of appeals acted, a case over which conscientious judges could reasonably disagree. Otherwise, the Supreme Court would simply have denied certiorari.

Nothing in the Supreme Court's case law dealing with abortion relieves the appellate judges in intermediate appellate courts from the duty of making a conscientious effort to fit the case before them within that case law -- and the four abortion cases in which he participates show that that is exactly what Judge Alito has done.

Another opinion that has caught the attention of those clamoring for Judge Alito's scalp is his dissent in *United States v. Rybar*, in which he would have held that the Supreme Court decision in *Lopez* prohibited Congress from regulating mere possession of machine guns. The majority opinion upheld the statute.

Unlike *Casey*, the Supreme Court didn't review that case. Thus, the question of the reach of *Lopez* was left open. And when the issue reached the 9th Circuit in the *United States v. Stewart* in 2003, it adopted Judge Alito's dissenting position.

Some opponents of his confirmation have relied on that dissent in suggesting that Judge Alito is perhaps a captive of the right-wing gun lobby.

This committee, after actually reading *Lopez* and *Rybar* and the 9th Circuit case, I suggest, cannot in good conscience find the dissent to be anything more than a good faith effort to somewhat unenthusiastically apply the perhaps unfortunate Supreme Court precedent of *Lopez*.

Indeed, in his *Rybar* dissenting opinion, Judge Alito suggested how Congress could cure the *Lopez* violation.

The extent to which opponents of Judge Alito's confirmation largely ignore his overall 15-year record as a judge suggests, at least to me, that the real target for many of the somewhat vitriolic comments on the nomination is less him than the executive branch administration that nominated him.

GIBBONS: The committee members should not think for a moment that I support Judge Alito's nomination because I'm a dedicated defender of that administration.

On the contrary, I and my firm have been litigating with that administration for a number of years over its treatment of detainees held at Guantanamo bay, Cuba and elsewhere. And we are certainly chagrined at the position that is being taken by the administration with respect to those detainees.

It seems not unlikely that one or more of the detainee cases that we are handling will be before the Supreme Court again. I do not know the views of Judge Alito respecting the issues that may be presented in those cases. I would not ask him. And if I did, he would not tell me.

I'm confident, however, that, as an able legal scholar and a fair-minded justice, he will give the arguments -- legal and factual -- that may be presented on behalf of our clients, careful and thoughtful consideration without any predisposition in favor of the position of the executive branch.

That's more than the detainees have received from the Congress of the United States, which recently enacted legislation stripping federal courts of habeas corpus jurisdiction to hear many of the detainees' claims -- without even holding a committee hearing.

Justice Alito is a careful, thoughtful, intelligent, fair-minded jurist who will add significantly to the court's reputation as the necessary expositor of constitutional limits on the political branches of the government. He should be confirmed.

SPECTER: Thank you very much, Judge Gibbons.

Our final witness on the panel is former 3rd Circuit Judge Tim Lewis, a graduate of Tufts University in 1976, a law degree from Duquesne in 1980.

SPECTER: He served as an assistant United States attorney before President Bush the elder appointed him to the Western District Court. And then in 1992, President Bush the elder nominated him to the 3rd Circuit.

Judge Lewis resigned in 1999 and now is co-chair of the appellate practice group at the Schnader Harrison office. He serves as co-chair of the National Committee on the Right to Counsel, a public service group dedicated to adequate representation of indigents.

Judge Lewis and Judge Alito served together on the 3rd Circuit for seven years.

We appreciate your being here, Judge Lewis. And the floor is yours.

LEWIS: Thank you very much, Senator Specter.

Thank you, members of the committee. It's a pleasure and an honor to be here today.

When Thurgood Marshall announced his intention to resign as a justice of the United States Supreme Court in conference one day, the first person to respond was Chief Justice Rehnquist. Chief Justice Rehnquist's words were, "No, Thurgood, no. Please don't. We need you here."

Shortly thereafter, when Justice Marshall had resigned, he was interviewed and, in the course of that interview, was asked about Chief Justice Rehnquist. And during that interview, he said, "This is the best chief that I have ever served under" and went on to extol Chief Justice Rehnquist's service on the United States Supreme Court.

Now, I was quite frankly stunned by both of those observations when I learned them at the time. And it wasn't until I had served for a period of time as a judge on the United States Court of Appeals that it all began to make sense to me.

It is no coincidence to anyone who is familiar with my body of work while I served on the United States Court of Appeals and my body of work since having left the court, that I happen to be sitting on the far left of this panel here this afternoon.

(LAUGHTER)

And yet, I am here. And what I have just related about the exchanges between Justice Marshall and Justice Rehnquist -- and Justice Marshall's later observation about the chief justice helps explain why I am here, because it is true that during the time that I served with Judge Alito, there were times when we did not agree.

I am openly and unapologetically pro-choice and always have been. I am openly -- and it's very well known -- a committed human rights and civil rights activist and am actively engaged in that process as my time permits, my law practice permits today and through my law practice at Schnader Harrison Segal & Lewis.

LEWIS: I am very, very much involved in a number of endeavors that one who is familiar with Judge Alito's background and experience may wonder -- well why are you here today saying positive things about his prospects as a justice on the Supreme Court?

And the reason is that having worked with him, I came to respect what I think are the most important qualities for anyone who puts on a robe, no matter what court they will serve on, but in particular, the United States Supreme Court.

And first and foremost among these is intellectual honesty. As Judge Becker and others have alluded to, it is in conference, after we have heard oral argument and are not propped up by law clerks -- we are alone as judges, discussing the cases -- that one really gets to know, gets a sense of the thinking of our colleagues.

And I cannot recall one instance during conference or during any other experience that I had with Judge Alito, but in particular during conference, when he exhibited anything remotely resembling an ideological bent.

That does not mean I agreed with him. But he did not come to conference or come to any decision -- any decision -- that he made during the time that I worked with him, based on what I perceived to be an ideological bent or a result-oriented demeanor or approach.

He was intellectually honest and, I would say rigorously so, even with respect to those areas that he and I did not agree.

Second, I have no hesitation in commending his commitment to principal, both in how he went about his work on the 3rd Circuit and how he came to his decisions.

LEWIS: It was through a very difficult process we all would put ourselves through.

But in Sam's case, I think that I can say that no one worked harder at coming to what he thought was the right decision than Judge Alito.

Finally, though we did disagree, it was always respectful, and that is what I came to understand as probably the most important facet of appellate judging. No one, and I mean no one, has a corner on the marketplace of ideas in terms of what is best, what is right.

We have different approaches and it's very important that we maintain different approaches in positioning and in pushing forward our sense of jurisprudence. They do not have to be the same.

In fact, I think that it is contrary to the best interests of democratic government for there to be some monolithic approach to judicial decision-making on the United States Supreme Court or on any other court.

Sam Alito practiced a form of jurisprudence that I think is best referred to as judicial restraint, judicial deference. It is, in many respects, a more conservative form of jurisprudence than was my own. And that is fine. That is perfectly fine. And as a matter of fact, I dare say it's important because through the exchanges we learn from one another and I think we're a better court.

And I know that this is the case on the Supreme Court, as it is reflected in Chief Justice Rehnquist's observation when Justice Marshall announced his resignation.

And I think that it's important that different approaches be respected.

So that in the end I am here as a matter of principle and as a matter of my own commitment to justice, to fairness and my sense that Sam Alito is uniformly qualified in all-important respects to serve as a justice on the United States Supreme Court.

Thank you.

SPECTER: Thank you very much, Judge Lewis.

This distinguished panel has been accorded much more time than we customarily allow because of the very large number of witnesses which we have.

SPECTER: But out of deference to your positions and your coming here and your unique knowledge, we have done that.

I would like to ask each of you a great many questions, but I'm going to limit myself to five minutes. And I would urge that the responses be sound clips.

You haven't had as much experience with that as we have, but on the networks a sound clip goes for about eight seconds and locally about 18 seconds. You don't have to quite do that, but as close as you can.

You can start my clock now.

Judge Becker, the conference is a unique opportunity, as has been explained, to really find out about what your colleagues think. Do you think -- is your judgment that Judge Alito would allow his personal views on a matter to influence his decisions as a justice?

BECKER: I do not think that. I am confident that he would not.

SPECTER: Judge Garth, you spoke about stare decisis. You have been quoted about your views of Judge Alito as to his approach, if confirmed, where the bounds of a Supreme Court justice on stare decisis are not the same as a court of appeals judge.

As Judge Gibbons has noted, the issue of a women's right to choose has become a very central factor in our deliberations. Do you have any insights which you would care to offer as to how Judge Alito would weigh the issue of stare decisis on that particular subject?

GARTH: (OFF-MIKE) And it would be presumptuous of me to even think of how he would rule on that subject.

GARTH: But I can tell you that when it comes to applying the precedents in our court and in the Supreme Court, he has always been assiduous in the manner in which he has applied them. And he has always had good reason and principle.

I can't say more than repeat again that I believe that Judge Alito, when he described to the committee how he would rule on a case and what he would do in respect of stare decisis, I could not express it better than he did.

SPECTER: Judge Barry, you've sat with him in these private conferences, known him for a long time, back to days when you were in the -- and I hadn't noted that -- you were in the U.S. Attorney's Office when he was an assistant. How would you evaluate Judge Alito on his consideration of women's issues?

BARRY: If I had to add anything to my initial testimony, I would have stated more about what Sam and I did together on this wonderful court and how reasonable he was, and how he never indicated bias of any kind.

I told you at the outset I have known Judge Alito for almost 30 years. I have the utmost respect for him. I have never heard him say one thing that would give me any reason to believe that he would give other than the most careful consideration to what you described as women's issues.

SPECTER: Judge Lewis, I have a question for you. And then I'm going to propound a question for the other three judges before my red light goes on.

SPECTER: I would like you to be a little more specific in your evaluation on Judge Alito as to how he would handle the civil rights issue.

And I'm not going to wait for to you start to answer because my red light will go on in advance.

And then I'm going to ask Judge Scirica, Judge Aldisert and Judge Gibbons to address the subject which has concerned this committee in some detail, as to whether there is any tilt in Judge Alito's approach to the powerful, to the government, as opposed to the average citizen whom we characterize as "the little guy?"

Would you start, Judge Lewis, with your evaluation?

LEWIS: Yes, I will. Thank you, Senator.

Let me begin by saying that, if I believed that Sam Alito might be hostile to civil rights as a member of the United States Supreme Court, I guarantee you that I would not be sitting here today.

That's the first thing that I want to make clear.

My experience in civil rights cases on the 3rd Circuit were primarily in the Title VII area, with Judge Alito. And there were cases in which we agreed and cases where we disagreed.

There was one in particular, the Piscataway case which was, for lack of a better term, a reverse discrimination case that became an en banc matter where I and a number of my colleagues wound up writing dissenting opinions.

But that was a very close and, I think, very closely contested case having to do with whether or not Title VII contemplated diversity as an interest that an employer could use.

And, to my disagreement and chagrin, the majority did not agree with Judge Sloviter, Judge McKee and myself in that case.

But I never felt that Judge Alito or any of my colleagues who were in the majority in that case were in any sense hostile to civil rights interests. It was a legal question and they came out the way that they did.

In other cases -- for example, the Aman v. Cort Furniture case which I authored.

LEWIS: Judge Alito was not on the panel, but as I think Judge Gibbons mentioned, all opinions are circulated on the 3rd Circuit.

And so really, any opinion that comes out as the opinion of the court. I don't believe in that case, which was another Title VII case that I think furthered the law in some very important respects, defining racial code words as actionable under Title VII -- I believe that Judge Alito went along with that. I was very happy that he did that. And there were others.

My sense of civil rights matters and how courts should approach them jurisprudentially might be a little different. I believe in being a little more aggressive in these areas.

But I cannot argue with a more restrained approach. As long as my argument is going to be heard and respected, I know that I have a chance. And I believe that Sam Alito will be the type of justice who will listen with an open mind and will not have any agenda-driven or result-oriented approach.

SPECTER: Judge Scirica, would you reply as briefly as you can as to the question I've posed?

SCIRICA: In my 15 years with Sam Alito, I have never seen any indication that he would favor that particular interest.

SPECTER: Judge Aldisert?

ALDISERT: Well, I'd approach it from a rather personal standpoint.

Judge Alito is an American of Italian origin and, until quite recently, Americans of Italian origin were subject to a lot of discrimination -- quotas as to whether they could get into professional schools.

A little example in my particular case. When you consider all the Americans of Italian origin from New England, Connecticut, New York, New Jersey, Pennsylvania and along the seaboard, there had never been an American of Italian origin -- where these millions of Americans of Italian origin lived -- there had never been an American of Italian origin ever appointed to the United States Court of Appeals until President Johnson appointed me in 1968.

ALDISERT: So I can speak from experience: Things are better now, but I have lived through that.

When you look at Judge Alito, his father came to the United States as an Italian immigrant at a very early age. And I'm certain that the idea of protecting the rights of the so-called little guy is in the genes of Samuel A. Alito Jr.

SPECTER: Judge Gibbons, as briefly as you can.

GIBBONS: Well, his attitude toward criminal defendants is of some significance for our law firm, because we have a very big white collar criminal defense practice. And my partner, Larry Lustberg, prepared a memo on the subject.

He says although given his prosecutorial background, Judge Alito has been seen by many of the defense bar as pro-government. A thorough review of his record shows that, in fact, he's a fair-minded jurist who pays careful attention to the record below and who takes great pains to apply precedent.

Now he then goes on in the memo to review the series of cases in which Judge Alito decided against the government on many significant issues.

And he concludes, "While, like most appellate judges, there are far more decisions affirming than reversing convictions" -- that is certainly true of every judge who's sat on the court of appeals -- "Judge Alito's jurisprudence is properly characterized as careful, based on precedent and particularly attentive to the record. If that record does not support affirmance, he reverses."

But he also included an admonition to the rest of the department that you better know the record, because he will.

SPECTER: Thank you, Judge Gibbons.

Senator Feinstein?

FEINSTEIN: Thank you very much, Mr. Chairman.

And I'd like to thank you very much for being here. I think the testimony was very interesting. I listened acutely.

And, you know, I think we'd all be very lucky if any one of us had colleagues like you that would come forward and say the things that you all have said.

Let me ask this question. How do you look at the evaluations that have been done, those evaluations that say, "Well, in the cases looked that he has judged," whatever percent it was but let's say it's 70 percent, I'm just making it, in favor of corporations or business, or against the little man? How do you look at that sample and how do you regard that? It's been written about rather extensively.

Anyone that would like to try to answer it.

Judge Becker?

ALDISERT: I would try that.

FEINSTEIN: Oh, all right. Give Judge Becker, because I've known him longer.

BECKER: Senator Feinstein, first of all, you have to keep in mind that -- and I think this is a national -- this statistic applies nationwide. I think somewhere between 80 and 85 percent of cases are affirmed. So a lot of this is going to determine who won in the district court or who won in the agency. So those numbers are skewed by that very fact.

The only other thing I would say is, I haven't analyzed these statistics, but that's nothing I've ever seen. He's voted with me. There was a case not long ago, it was a very thin employment discrimination case which a woman, while she never got to a jury in district court, one of my colleagues wanted to affirm. I was on the fence. And Sam wanted to reverse. I said, "OK, write it up." And we went along.

I've just never seen any evidence that he's for the big guy against the little guy. But I think if you analyze these, I think you'd find most of the statistics come from the fact that the big guy won in the district court and 80 to 85 percent of those case are affirmed, and most of those would have been unanimous.

ALDISERT: I was about to say the same thing, but my good friend Judge Becker, your figure was a little skewed there.

ALDISERT: The percentage of reversals is not 15 percent; it's 8.7 percent...

(LAUGHTER)

... in the statistics of last year of all cases. In criminal cases, through in the figures of 2004, the reversal rate in criminal cases was 5.1 percent.

BECKER: I always defer to the master...

BARRY: And of course it should be added that when we are considering cases on appeal, we are operating on a standard of review. So we are not typically looking at the issues underlying that review.

We're looking at an abusive discretion standard. We're looking at: Were the facts clearly erroneous? So we're not starting from scratch, typically.

FEINSTEIN: Let me ask you this question: The subject of abortion and Roe was raised. And, obviously, if you've listened to the hearings, you've heard the questioning going on, back and forth.

I was very puzzled when I read Chief Justice Roberts' statement before us on Roe and how he answered Senator Specter's questions. And the chief ended up by saying that he felt that Roe was well-settled law. I think he even added to that very well-settled law.

SPECTER: He said settled beyond that.

FEINSTEIN: All right, settled beyond that.

And I asked Judge Alito, and I thought at the very least he was going to agree with Justice Roberts.

FEINSTEIN: And he said, "Well, it all depends upon what settled means."

What do you make of that?

BARRY: I respectfully cannot characterize what Judge Alito meant by that, and I much prefer not to have to try.

FEINSTEIN: That's fine.

Anybody?

(UNKNOWN): I think we're here as fact witnesses more than opinion witnesses, Senator Feinstein, and I really would not answer that question.

FEINSTEIN: Very good, very good.

(UNKNOWN): I couldn't make a judgment on it.

FEINSTEIN: Thank you. Thank you very much.

Thanks, Mr. Chairman.

SPECTER: Senator Hatch?

HATCH: Well, I want to express my gratitude to all of you judges -- you too out there in the West, Judge Garth -- for coming here today and helping this committee.

It was pretty apparent that I got quite emotional when my old friend Judge Aldisert testified -- I really did. I got emotional because I care for you and I watched you for years there and just have a tremendous amount of respect. Read your books -- and you've always sent them to me. And that's meant a lot to me.

But you all mean a lot to me. It's no secret that, with very few exceptions, I love the federal courts. I love the judges. And there are very few exceptions.

There are a few that I think you could name yourselves.

(LAUGHTER)

But by and large -- you know, we pass unconstitutional legislation up here all the time and the president sometimes, too.

(LAUGHTER)

If it hadn't been for the courts, we would probably not have preserved the Constitution.

(LAUGHTER)

So I want to give you all credit for that.

But let me just say this -- by the way, just to correct the record, what Judge, now Chief Justice Roberts -- he and Judge Alito basically said the same thing. They said, well, it's settled as a precedent of the court -- with regard to Roe v. Wade. And that's exactly what he said. Entitled to respect under principles of stare decisis. That's basically what Alito said.

HATCH: And Roberts said, "And it is settled as a precedent of the court, yes."

So Senator Specter asked him some more, and then he said, I think the initial question for the judge confronting an issue in this area -- you don't go straight to the Roe decision. You begin with Casey, which modified the Roe framework and reaffirmed its central holding.

So these are maybe touchy words, but it's important to get it right.

Now, one of the most prominent issues in this hearing has been how Judge Alito views the role of precedent in deciding cases. Too often, I think, the objective seems not so much to get insight into Judge Alito's general views about precedent, but about clues about how he will treat particular precedents.

First, let me make this point about Judge Alito's record regarding circuit precedent. As I understand it, the appeals court can reconsider its own precedents only when all 3rd Circuit judges sit together en banc.

Is that correct?

(UNKNOWN): That is correct.

HATCH: OK. It is my understanding that in his 15 years on the 3rd Circuit, Judge Alito has participated in 38 en banc decisions.

Now, Judge Alito voted to overturn circuit precedent in just four of those cases. Two of those decisions were unanimous, all judges agreed.

Now, that does not look to me like someone who plays fast and loose with precedent.

Let me just ask you, Judge Becker -- and if anybody disagrees with what Judge Becker says I'll be happy to have you respond -- let me ask you a question about Judge Alito's handling of -- and the reason I ask Judge Becker is Judge Becker, as Senator Specter said, is the 101st senator. He came down here and gave (inaudible) time trying to help this asbestos problem, and we all respect him for that.

Let me just say, I know you have participated in more than 1,000 cases -- or decisions rather -- with Judge Alito. All of you, of course, can offer your thoughts as well.

Yesterday during the hearing, one of my Democratic colleagues held up some charts listing quotes from a few case in which Judge Alito's colleagues criticized how he applied circuit precedent. The picture that was painted was that Judge Alito misapplies precedent when it suits him -- suggesting, I suppose, that he might be an activist or careless in this regard on the Supreme Court.

HATCH: Now I certainly agree that the views of his fellow judges are particularly relevant on this point, and having you here is very valuable to all of us for that reason.

Now, asking you all about this here seems more useful than a few selective sentence fragments on a chart.

Realizing, Judge Becker, that judges do not always agree on every single point every single time, how would you characterize Judge Alito's overall view or approach to precedent?

BECKER: Respectful of it. I've never seen what was portrayed where...

(CROSSTALK)

BECKER: Judge Alito might have disagreed with prior precedent, but he followed it unless he felt that it was dicta -- in which case it wouldn't be precedent...

HATCH: Right.

BECKER: ... or the case was distinguishable. But I have never seen him ignore or disregard precedent.

HATCH: Has any of the rest of you seen that?

(UNKNOWN): No.

HATCH: Judge Aldisert?

ALDISERT: Judge Hatch...

HATCH: Senator Hatch, please.

(LAUGHTER)

ALDISERT: I wanted to answer Judge Feinstein (sic) the same way.

In my book "The Judicial Process: Text, Materials and Cases," second edition, 1996, I have an entire chapter on precedent.

And one of those sections is called viability of precedent or when do you depart? And there's a sophisticated body of law - and I cite cases with Justice Sandra Day O'Connor, Thurgood Marshall and a few others.

And there are also some very important scholarly academic articles on it. And I think that Judge Alito's expression that it depends is a statement that you have to consider all the factors on all the Supreme Court cases that discuss when do we depart from precedent?

ALDISERT: And there's a body of law. And it's in my case book.

HATCH: Thank you so much.

Mr. Chairman, I want to thank all of these great judges for being here. And I want to thank you, Judge Lewis, for taking time to be here, in particular. We just really respect you. I love and respect the 3rd Circuit Court of Appeals.

SPECTER: Thank you, Senator Hatch.

Senator Leahy?

LEAHY: Well, Mr. Chairman, I realize we have some retired and very distinguished retired judges, but some current judges. Insofar as the current judges, their cases are appealed to the Supreme Court. If Judge Alito becomes a member of the Supreme Court, he'll have to rule on appeals from their decisions.

And so I think, rather than create a difficulty for them or for Judge Alito if he is confirmed, I think I will not avail myself of a chance to ask questions of this unprecedented panel.

SPECTER: Thank you very much, Senator Leahy.

Senator Kyl?

KYL: Thank you, Mr. Chairman.

I just had a question -- and I think, Judge Lewis, it was a comment that you made that raised this question in my mind.

There was a point made about the circulation of opinions among all of the judges on the court.

When a three-judge panel has tentatively made a decision in a case and circulates an opinion, is that opinion circulated among all the judges? And then do all of the judges have an opportunity to comment on that in some way?

(UNKNOWN): Yes.

KYL: Any of you -- Judge Lewis?

LEWIS: Yes, that is correct. And that is why the opinion is the opinion of the entire court, in the end, when it is released.

I should let Chief Judge Scirica address the current practice. I've been off the court for some time.

SCIRICA: Thank you.

LEWIS: But I assume it's done the same way. Is it not, sir?

KYL: This is interesting to me because I practiced before the 9th Circuit Court of Appeals and that same opportunity, I think, is not as available.

LEWIS: Yes.

ALDISERT: That, Senator -- that was invented by Judge Biggs in the late 1930s.

KYL: In the 3rd Circuit, sir?

ALDISERT: Yes.

SCIRICA: We circulate all of our precedential opinions to the entire court before they are ever published; that is, before the litigants or before the public sees them.

We do not do that with a category that we call not precedential opinions. They are handled by the panel themselves unless there is a dissent, in which case we circulate them as well.

Now, of course, when a litigant loses a case, that litigant has the opportunity to file a petition for rehearing. And that goes to the entire court, because the litigant usually asks both for panel rehearing before the original panel and also before the entire court.

And so for precedential opinions it gets sent to the court on two different occasions -- one before it is ever published and one after it is published.

KYL: I'm curious, what happens if there's a strong opinion by one of the judges on the court who did not sit on the original three-judge panel?

SCIRICA: Well, that's...

KYL: Different from the conclusion.

SCIRICA: Any judge on our court, on the initial circulation or even on the circulation for the petition for a rehearing may write to the entire court or may write to the opinion writer or may write to the panel expressing his or her disagreement.

It's one of the wonderful things about an appellate court, because we view the panel decisions that are precedential as opinions of the court, more than just the opinion of the panel or the opinion of the author of the case.

And there's often this wonderful dialogue that goes back and forth between the opinion writer or the panel and the judge who may have concerns about what is being decided. And it can sometimes go on for days, sometimes the panel will, or the author, will say, "I want to think about this. I want to have the opportunity to revisit this issue."

SCIRICA: And sometimes it takes weeks before the panel comes back with a new opinion, often a revised opinion. This is part of the collegial aspect of the court.

KYL: This should be very reassuring to the litigants...

BARRY: And sometimes we'll go en banc before the opinion ever issues.

(UNKNOWN): Often the panel will change its mind, say, "We got it wrong."

KYL: It's very interesting, and I appreciated the opportunity to at least mention that. And I, too, want to thank all of you for your willingness to be here, to take time out, but most especially to speak on behalf of a colleague who I know you all admire a great deal. And I thank you for that very much.

SPECTER: Thank you, Senator Kyl.

Senator Durbin?

DURBIN: Mr. Chairman, I thank the members of the panel for their public service. I have no questions. And I would like to associate myself with the remarks of Senator Leahy.

SPECTER: Thank you very much, Senator Durbin.

Senator DeWine?

DEWINE: I have no questions, Mr. Chairman.

SPECTER: Senator Sessions?

SESSIONS: I would just like to ask the panel, I see one of the articles that stirred up some of this discussion about not being evenhanded judge actually only considered 221 cases in the judge's first six years on the bench.

I'm sure you as professionals who have been there, your judgment is better about his style and fairness than some abstract numbers would be. But I will just ask you, Judge Scirica, maybe, and if others would like to comment please do so, on civil rights cases that I've seen here, the civil rights cases Judge Alito wrote, the panel agreed with him 90 percent of the time and his opinions were unanimous 90 percent of the time. That doesn't sound like an extreme position to me.

What would you say about that?

SCIRICA: Well, I would agree. That would comport with my recollection of these cases.

SESSIONS: And I notice the respect Judge Lewis had for Judge Alito. It said, when he sat on panels where both the other judges were Democratic appointees, the decision was unanimous in 100 percent of the cases, or whatever those statistics show.

And then, with regard to the immigration cases, it says that his appeals, the average judge in the country, in the average cases, the immigrant wins asylum claims in the court of appeals in slightly over 11 percent of the time. But in Judge Alito's record he ruled for the immigrant seeking asylum in fully 18 percent of the cases.

Do those numbers, Judge Scirica, strike you as sort of what the -- well, the 11 percent, is that about what you would expect?

SCIRICA: Yes, sir.

SESSIONS: And in the cases that he wrote opinions on, the average court of appeals judge ruled for the immigrants 8 percent; he ruled for the immigrants 19 percent.

Well, I don't know that those numbers mean a whole lot, but I do think they tend to rebut some of the numbers that we've seen floating around, because your opinion of him does not reflect a person who shows bias.

In the Rybar case, Judge Gibbons, you're no longer on the bench, you could be honest with us right here in Congress. If the Congress had put in an interstate commerce nexus in the statute they passed about machine guns, like they did in ITSMV, Interstate Transportation of Stolen Motor Vehicle, or interstate transportation of stolen property, kidnapping or theft from interstate shipment, it would have been upheld, wouldn't it?

GIBBONS: That's what he said in his dissenting opinion.

SESSIONS: So the truth is that Congress missed the boat.

GIBBONS: Yes.

(LAUGHTER)

(CROSSTALK)

SESSIONS: And we'd be fix it soon as we passed the law correctly, I would submit.

SESSIONS: And I would just ask this, Judge Aldisert. I'm serious about this question, but I think Judge Roberts agreed with me that if an individual within the heart of Pennsylvania or New Jersey picks up a rock and kills another person, that is not a federal crime. Is that correct? Unless there's something added, without an interstate nexus of some kind, or that would be prosecuted solely by the state court.

(UNKNOWN): Unless he stole the rock out of an interstate shipment.

(LAUGHTER)

LEWIS: It could be a violation of federal civil rights, also.

(UNKNOWN): Or if the person he assaulted was a federal official.

SESSIONS: Right.

(UNKNOWN): A president or a vice president or a senator.

(LAUGHTER)

SESSIONS: Well, Judge Lewis said it could be a civil rights violation if he was in a way to deny someone of civil rights or if he was a federal official. But classically, the federal criminal law has been tied to interstate commerce nexus, hasn't it, Judge Aldisert?

(UNKNOWN): Civil rights.

SESSIONS: Judge Lewis?

LEWIS: That's right.

SESSIONS: Thank you.

SPECTER: Thank you, Senator Sessions.

Senator Cornyn?

CORNYN: Thank you, Mr. Chairman.

I feel like I need to say "may it please the court."

Thank you all for being here. It's very important, I believe, to have testimony from people that know this nominee.

We've heard a lot of wild and crazy, from my perspective, accusations that have been unsubstantiated, from people who don't know this nominee as well as you do.

I want to just try to eliminate one concern that's been expressed. And I've heard a hint of criticism about these judges appearing as witnesses in this hearing, supposing that perhaps there will be some conflict of interest if your decisions would be appealed to the United States Supreme Court and Justice Alito had to sit on it.

I haven't noticed any lack of a willingness to disagree with him while you were colleagues on the 3rd Circuit. That seems highly unlikely. And for the suggestion that this is somehow unprecedented, to have judges, former and current sitting judges, testify, Mr. Chairman, I have a list of examples where sitting members of the federal judiciary have testified during the confirmation proceedings of another federal judge. And I would ask that that be made a part of the record.

SPECTER: Without objection, it will be made a part of the record.

CORNYN: Canon 4B of the code of conduct for U.S. judges provides, "A judge may appear at a public hearing before a legislative body..."

There's some ellipses there.

"... on matters concerning the law, the legal system and the administration of justice to the extent it would generally be perceived that a judge's judicial experience provides special expertise in the area."

And I regret, your honors, that you somehow get sucked in to the contentiousness and some of the unfairness that occurs sometimes -- the innuendo that sometimes arises when you're a witness in a contested proceeding.

And, as you can tell, these hearings have become -- and the confirmation process -- an adversarial process.

The unfortunate point, as our chairman has noted before, it's not controlled by the rules of evidence. It could be based on speculation, hearsay and rumor. Whereas we know, in a court of law, that wouldn't be admissible.

And our procedures are a lot more flexible and open-ended. And, certainly, there's no standard of review that applies to judges in your distinguished and exalted position as members of the federal judiciary.

Judge Aldisert, I want to say that I guess I'm the only other panel member, member of this committee, who's probably read one of your books. But I'm certainly familiar with your great work and your writings.

And, of course, as has already been noticed, Judge Becker is very familiar to the Judiciary Committee.

And I want to ask both Judge Gibbons, who is no longer on the bench, and Judge Becker -- both of you have talked about the transforming experience of crossing over from being an ordinary lawyer, including a U.S. attorney, and then putting on the black robe, after you have put your hand on the Bible and have taken an oath to uphold the laws and Constitution of the United States, so help me God, and what a different perspective that provides -- a different obligation, different responsibilities.

CORNYN: And I think Judge Trump Barry noticed that transformation in this nominee when he crossed over from being a practicing lawyer to becoming a member of the judiciary.

And, Judge Becker, I wonder if you just might comment -- we just have a couple of seconds here. But this morning, Senator Biden was asking questions about this nominee's views on Roe v. Wade and perhaps is reflected in an application he made for a job in 1985. And it seemed to raise the question of: Well, if that's your view today, wouldn't you just feel free to go in and vote to overrule it?

And it struck me because of the difference in a judge's role from that of an advocate. He was applying for a job as part of the Reagan administration.

But on one hand he was talking about, well, maybe you have the power, but what Judge Alito seemed to talk about most was legitimacy of the judicial making process and the judgments rendered by courts and why that's such an integral part of the role judges play in our system of government.

Would you please respond to that?

BECKER: Well, I agree with Judge Alito and I think, Senator Cornyn, that you have eloquently described the transforming experience.

I know that it is within your life's experience when you took the oath of office to be the justice of the Texas Supreme Court, it just transforms you. You become a different person and your obligation is to the rule of law. And you have no interest in a case -- and if I could just segway this into your original point, which bears upon what Senator Leahy had to say in terms of whether or not a justice of the Supreme Court would have to recuse on an opinion I wrote, on one of our cases, I have no interest in the case.

Recusal is a function of whether or not the party or the lawyer has an interest in the case.

BECKER: But I don't have any interest in any case. And (inaudible) none of us have any interest in any case. And this is consistent with what Judge Alito said and your description of that transforming experience.

CORNYN: Mr. Chairman, I would just say, Judge Gibbons and Judge Lewis are no longer members of the bench; I'm sure have experienced the liberating transformation once you cross back over that rubicon, perhaps, as well.

Thank you very much.

SPECTER: Thank you very much, Senator Cornyn.

Senator Coburn?

COBURN: Thank you very much. And I appreciate so much you all taking the time to come here.

As a physician, I'm starting to learn some of the lingo of the legal profession. It's hard, but I'm going to talk in doctor's terms so the rest of them can't understand.

But, Judge Barry, I wanted to ask you -- and also Judge Lewis -- do you think that there is any merit whatsoever to the allegations that were made that Judge Alito is hostile to the rights of women or minorities? And have you seen that? In the 30 years, have you seen any indication whatsoever, either in his opinions, his personal life, in his interpersonal relations with you, or you, Judge Lewis, that there is any indication that there's that type of bias in this man?

BARRY: I have never seen it. And if I had seen it, I would not be here today.

COBURN: Judge Lewis?

LEWIS: I've already said that if I sensed that Sam Alito, during the time that I served with him or since then, was hostile to civil rights or would be hostile to civil rights as a justice of the United States Supreme Court, I absolutely would not be here today.

I am not interested in saying anything on behalf of someone that I believe would hold views like that or would proceed in that way.

I am basing what I am saying on my years of experience in conference with him, discussing cases. We had different views and different approaches, but never did it seem to me that he held any hostility to civil rights, which is an area that I hold very dear and is very important to me -- and remain committed to furthering in this country.

COBURN: Thank you.

Well, Mr. Chairman, I don't think that you can have a better recommendation than the people that you worked with and the people that you spend the greatest amount of time with and the people who see you under stress, who make evaluations.

And the greatest tragedy, I think, of this hearing is the allegations that have been made that aren't substantiated based on fact, but are substantiated on the basis of the fact that you want to try to destroy somebody's character and undermine their character to make them look a certain way in which they're not.

COBURN: And I appreciate your all's very straightforward answer, and I thank you coming.

And I yield back my time.

SPECTER: Thank you very much, Senator Coburn.

The question has been raised as to precedents. And Senator Cornyn has addressed that. And it's worth mentioning just a few, that former Chief Justice Burger testified for Judge Bork, District Judge Craig testified for Chief Justice Rehnquist, District Judge Tanner testified for Justice Thomas. The canons, specifically 4B, of the conduct of U.S. judges makes a specific allowance for this kind of a situation. Quote, "A judicial experience provides special expertise to the area."

And it is certainly obvious that the insights which you judges have to Judge Alito's background is unique. When you talk about what goes on in those conferences, you're the only ones who are there. And you have much more insights as to the opinions he has written that you have worked with him on.

We have 30 witnesses who are coming in, and that has been a traditional part of the process, but I know of no situation where witnesses have more to say which is relevant and weighty. Perhaps weight is the best evidentiary characterization of what you've had to say.

A lot of things can be relevant. Especially where you have the issue which has been before this committee as to Judge Alito's agenda or Judge Alito's approach or Judge Alito's personal views dominating his judicial determinations, this panel is right on the head.

SPECTER: And it has been an unusual panel, but that's really not a strike against the practice. It may be a precedent for the future and it, I think, will be a good precedent.

But whenever you try something new, there are differing voices, but I think it's an extraordinary contribution which this panel has made to this process.

So, Judge Becker, former Chief Judge Becker, Chief Judge Scirica, Judge Barry, Judge Aldisert, Judge Gibbons, Judge Lewis and Judge Garth from Phoenix, Arizona -- you lucky fellow -- we thank you all very much for coming in.

We're going to take only a 10-minute break now. I didn't have a chance to discuss it with Senator Leahy.

But we do not have the situation where Judge Alito is on the stand and he needs a little longer break. We'll have fresh witnesses and tired senators.

Ten minutes. We'll resume at 5:20.