

Representative SERRANO. Thank you.

Senator SESSIONS. We appreciate it very much.

Representative SERRANO. And with your permission—I do not know if it is allowed—I have some statements I have made about her in the past in 1998 and 1999 that I would like to submit for the record.

Senator KAUFMAN. Without objection.

Representative SERRANO. Thank you.

[The statements appear as a submission for the record.]

Senator KAUFMAN. Our next witness is Mr. David Rivkin. David Rivkin is a partner in the law firm of Baker Hostetler. Previously, he was Associate Executive Director and Counsel to the President's Council on Competitiveness at the White House. He also worked in both the Department of Justice and the Department of Energy.

Mr. Rivkin, I look forward to your testimony.

STATEMENT OF DAVID RIVKIN, ESQ., PARTNER, BAKER HOSTETLER, LLP, AND CO-CHAIRMAN, CENTER FOR LAW AND COUNTERTERRORISM, FOUNDATION FOR DEFENSE OF DEMOCRACIES

Mr. RIVKIN. Chairman Kaufman, Ranking Member Sessions, I want to thank you for the opportunity to testify here today. Indeed, I am honored to be here. Let me begin, though, by noting briefly that I am appearing here on my own account and do not represent the views of my law firm, its clients, or any other entity or organization with which I am affiliated. I am also not expressing a view as to how you should discharge ultimately your advise-and-consent function.

Without a doubt, Judge Sotomayor is both an accomplished jurist and an experienced lawyer. It is, nevertheless, critical that the Senate weigh her understanding of the judiciary's proper role in our constitutional system before consenting to her appointment.

In my view, it is particularly essential that the Senate probe her views on the proper judicial handling of national security cases. This is the case for two distinct reasons.

First, the United States remains engaged in a protracted global war against al Qaeda and the Taliban. Winning this war is essential to our country, and its conduct has presented novel legal challenges rarely seen in previous conflicts.

Second, despite Judge Sotomayor's long and distinguished service on the Federal bench, she has not had the occasion to consider many cases in the national security area. Therefore, the central topic of the Committee's inquiry should be Judge Sotomayor's understanding of the proper role of Article III courts vis-a-vis the executive and legislative branches in the area of national defense. To the extent that these hearings in your judgment have not produced sufficient information regarding her views in this area, I would urge the Committee to pose written questions to her.

As you know, Congress and the President have traditionally been accorded near plenary authority in the national defense and foreign policy arenas, particularly when the conduct of armed conflict is involved. In recent years, however, the Supreme Court has dramatically expanded its role in these areas. In my view, this has significant implications for our Government's ability to prevent another

devastating attack on the United States and be able to win this war.

Indeed, there can be little doubt that the principles the Supreme Court has developed since *Hamdi v. Rumsfeld* was decided in 2004 make it far more difficult for the United States to defeat any enemy that resorts to unconventional warfare.

For example, the Supreme Court has imposed what has proven to be an unworkable habeas corpus regime with regard to the detainees now held at Guantanamo Bay, Cuba.

Meanwhile, the lower courts have begun the process of extending this habeas regime to individuals captured and held by the United States in other parts of the world, particularly at the Bagram Air Force Base in Afghanistan. This development threatens our ability to wage war in the Afghan theater in general and presents problems for operations of our special forces in particular.

I want to emphasize that this judicial activism was not prompted by, nor even exclusively directed at, the previous administration's allegedly exaggerated view of executive power. To begin with, the Bush administration's use of Presidential powers, in my view, was far more modest than that of any previous wartime American President.

Second, in striking the key parts of the Military Commissions Act of 2006 in the 2008 *Boumediene* case, the Supreme Court invaded the constitutional prerogatives of both political branches. The Court's majority did not seem to be particularly troubled by the fact that Congress and the President worked in concert at the very height of their respective Article I and Article II constitutional prerogatives as identified in Justice Jackson's seminal Youngstown Sheet & Tube analysis.

The substance of these cases aside, I am also troubled by some of the stated assumptions that seem to undergird this ongoing wave of judicial activism in the national security area. These assumptions basically are that the courts are the best guardians of civil liberties and that the extension of judicial jurisdiction over all national security issues would produce a superior overall policy for our Nation. This view is both a historical and profoundly at odds with our constitutional fabric. When Article III courts extend jurisdiction over matters that are not properly subject to judicial jurisdiction, they act extra-constitutionally. Such an action by the courts, even if cloaked in the high-minded language of individual liberty, is no better than any extra-constitutional exertion of authority by congressional or executive branch.

As we address these issues today, I note that these concerns are now shared by both sides of the aisle. Despite criticizing President Bush's wartime policies during last year's campaign, President Obama has continued virtually all of them. His administration's litigation strategy on all of the pending key national security issues is identical to that of his predecessor. This is especially true with regard to the detention of captured enemy combatants without trial outside of the United States.

His policies will continue to be challenged in the courts, and the Supreme Court is certain to play a central part in determining what those policies should be. If Judge Sotomayor is confirmed, her rulings will have immense consequences for our country's safety

and security. I believe the Senate owes it to the American people to engage her on these issues fully and openly.

I thank you for the opportunity to share my views with the Committee, and I look forward to your questions.

[The prepared statement of Mr. Rivkin appear as a submission for the record.]

Senator KAUFMAN. Thank you, Mr. Rivkin.

Our final witness in this panel is Dr. Stephen Halbrook. Dr. Stephen Halbrook has practiced law for over 30 years and has authored or edited seven books and numerous articles on the Second Amendment. Most recently, he drafted the amicus brief for the Supreme Court case *District of Columbia v. Heller*, which was signed by Vice President Cheney, 55 Senators, and 250 Members of the House of Representatives. He is a graduate of Georgetown University Law Center.

Mr. Halbrook, I look forward to your testimony.

STATEMENT OF STEPHEN HALBROOK, ATTORNEY

Mr. HALBROOK. Thank you, Chairman Kaufman, Ranking Member Sessions, Senator Whitehouse. We've learned that Judge Sotomayor ended the great baseball strike and we've learned that she was and she is a fan of the New York Yankees.

However, in her decision in *Maloney v. Cuomo*, had the State of New York decided to ban baseball bats, it would be upheld under the rational basis test. Al Capone proved that you could bash out the brains of two colleagues with a baseball bat.

Instead of banning one big piece of wood called a baseball bat, New York State banned two little pieces of wood connected by a cord called a nunchaku, and that's what the court upheld in the *Maloney* case.

But for our purposes, the issue is the decision in *Maloney* that the Second Amendment does not apply against the states through the 14th Amendment. The court relied—the only Supreme Court case relied on by *Maloney* was *Presser v. Illinois*, which simply held that the First and Second Amendments do not apply directly to state action. It was never raised whether the 14th Amendment incorporated the Second Amendment through the due process clause.

Presser relied on *Cruikshank*. *Cruikshank* relied on pre-14th Amendment cases deciding that the Bill of Rights did not apply directly against the states. But we find out in *Heller*, the *Heller* decision, footnote 23, that *Cruikshank* does not apply because it did not engage in the kind of modern 14th Amendment analysis that's required by the Supreme Court's cases decided primarily in the 20th century that Bill of Rights guarantees, especially substantive guarantees, apply to the states through the due process clause of the 14th Amendment.

Despite that admonition in the *Heller* case, decided a year ago, the panel in the *Maloney* case did not say anything about the modern incorporation analysis. Now, Judge Sotomayor did say yesterday that under Supreme Court precedent, the Second Amendment does not apply against the states through the 14th Amendment. That's an inaccurate statement. The Supreme Court has never decided that issue.