

1964 Civil Rights Act, Title 7, which was the issue decided in the *Ricci* case.

Thank you, Mr. Chairman.

Senator CARDIN. And thank you for your testimony.

We'll now hear from Linda Chavez, who is chairman of the Center for Equal Opportunity and a political analyst for Fox News Channel. She's held a number of appointed positions, among them White House Director of Public Liaison, and Staff Director of U.S. Commission on Civil Rights.

**STATEMENT OF LINDA CHAVEZ, PRESIDENT, CENTER FOR
EQUAL OPPORTUNITY**

Ms. CHAVEZ. Thank you, Mr. Chairman and members of the Committee. I testify today not as a wise Latina woman, but as an American who believes that skin color and national origin should not determine who gets a job, a promotion, or a public contract, or who gets into colleges or receives a fellowship.

My message today is straightforward: Mr. Chairman, do not vote to confirm this nominee. I say this with some regret, because I believe Judge Sotomayor's personal story is an inspiring one, which proves that this is truly a land of opportunity where circumstances of birth and class do not determine whether you can succeed. Unfortunately, based on her statements both on and off the bench, I do not believe Judge Sotomayor shares that view.

It is clear from her record that she has drunk deep from the well of identity politics. I know a lot about that well, and I can tell you that it is dark and poisonous. It is, in my view, impossible to be a fair judge and also believe that one's race, ethnicity and sex should determine how someone will rule as a judge. Despite her assurances to this Committee over the last few days that her "wise Latina" woman statement was simply a "rhetorical flourish that fell flat", nothing could be further from the truth. All of us in public life have at one time or another misspoken, but Judge Sotomayor's words weren't uttered off the cuff. They were carefully crafted, repeated not just once or twice, but at least seven times over several years.

As others have pointed out, if Judge Sotomayor were a white man who suggested that whites or males made better judges, again, to use Judge Sotomayor's words, "whether born from experience or inherent physiological or cultural differences", we would not be having this discussion because the nominee would have been forced to withdraw once those words became public.

But of course, Judge Sotomayor's offensive words are just a reflection of her much greater body of work as an ethnic activist and judge. Identity politics is at the core of who this woman is. And let me be clear here. I'm not talking about the understandable pride in one's ancestry or ethnic groups, which is both common and natural in a country as diverse and pluralistic as ours. Identity politics involves a sense of grievance against the majority, a feeling that racism permeates American society and its institutions, and the belief that members of one's own group are victims in a perpetual power struggle with the majority.

From her earliest days at Princeton University and later Yale Law School, to her 12-year involvement with the Puerto Rican

Legal Defense and Education Fund, to her speeches and writings, including her jurisprudence, Judge Sotomayor has consistently displayed an affinity for such views.

I have outlined at much greater length in my prepared testimony—which I ask permission be included in the record in full—the way in which I believe identity politics has permeated Judge Sotomayor’s life’s work. But let me briefly outline a few examples. As an undergraduate, she actively pushed for race-based goals and time tables for faculty hiring. In her much-praised senior thesis, she refused to identify the U.S. Congress by its proper name, instead referring to it as the “North American Congress”, or the “mainland Congress”.

During her tenure as chair of the Puerto Rican Legal Defense and Education Fund’s Director Litigation Committee, she urged quota-seeking lawsuits challenging civil service exams, seeking race-conscious decision making similar to that used by the city of New Haven in *Ricci*.

She opposed the death penalty as racist. She supported race-based government contracting. She made dubious arguments in support of bilingual education and, more broadly, in trying to equate English language requirements as a form of national origin discrimination. As a Judge, she dissented from an opinion that the Voting Rights Act does not give prison inmates the right to vote, and she has said that as a witness—a witness’ identification of an assailant may be unconstitutional racial profiling, in violation of the Equal Protection Clause, if race is an element of that identification.

Finally, she has shown a willingness to let her policy preferences guide her in the *Ricci* case.

Although she has attempted this week to back away from some of her own intemperate words and has accused her critics of taking them out of context, the record is clear: identity politics is at the core of Judge Sotomayor’s self-definition. It has guided her involvement in advocacy groups, been the topic of much of her public writing and speeches, and influenced her interpretation of law. There is no reason to believe that her elevation to the Supreme Court will temper this inclination, and much reason to fear that it will play an important role in how she approaches the cases that will come before her if she is confirmed.

I, therefore, respectfully urge you not to confirm Judge Sotomayor as an Associate Justice of the Supreme Court. Thank you.

Senator CARDIN. Thank you for your testimony.

[The prepared statement of Ms. Chavez appear as a submission for the record.]

Senator CARDIN. Let me, first, recognize our Chairman, Chairman Leahy, who I understand wants to reserve his place.

Chairman LEAHY. Thank you, Senator Cardin. One, I thank you and the other Senators who have filled in on this part. I was here throughout the—throughout all the testimony by Judge Sotomayor and the questions asked by both Republicans and Democrats, so I will reserve my time.

I do welcome all the witnesses, both for and against the nominee. Senator Sessions and I joined together to make sure that everybody

was invited, everybody was given a chance to testify. And if you wish to add to your testimony, the record will be open for 24 hours for you to do that.

Thank you very much.

Senator CARDIN. Thank you, Mr. Chairman.

Mayor Bloomberg, let me start with you, if I might, in my questioning. There's been a lot of discussion about the Puerto Rican Legal Defense and Education Fund, including during this panel discussion. And Judge Sotomayor served on the board, had nothing to do with the selection of individual cases from the point of view of its content, but served in a voluntary capacity with that board.

And first I'm going to quote from you and then give you a chance, perhaps, to expand upon it. You have been quoted saying, "Only in Washington could someone's many years of volunteer service to a highly regarded nonprofit organization that has done so much good for so many be twisted into a negative and that that group has made countless important contributions to New York City."

I just want to give you a chance to respond to Judge Sotomayor's service on the Puerto Rican Legal Defense and Education Fund.

Mayor BLOOMBERG. Well, this is an organization that has defended people who don't have the wherewithal to get private counsel, don't have traditions of understanding the law, and it happens to focus on people mainly who come from Puerto Rico and have language problems in addition to a lack of, perhaps, understanding of how our court system works.

And it provides the kind of representation that we all, I think, believe that everybody that appears before a judge and before the law deserves. They raise money privately to pay lawyers to defend, and I don't agree with some of their positions, and I agree with other ones. But having more of these organizations is a lot better than having less. At least people do have the option of getting good representation.

Senator CARDIN. Thank you.

Mr. Henderson, during the hearing of Judge Sotomayor we had a chance to talk a little bit about voting rights and the recent case before the Supreme Court, and the fact that one Justice questioned the constitutionality, in fact, pretty well determined the constitutionality of the—reauthorization of the Voting Rights Act, saying it was no longer relevant.

Judge Sotomayor, during her testimony, talked about deference to Congress, the fact that it was passed by a 98:0 vote in the U.S. Senate, and by a lopsided vote in the House of Representatives, the 25-year extension. I just want to get your comments as to whether the Voting Rights Act is relevant today and your confidence level of Judge Sotomayor as it relates to advancing civil rights for the people of our Nation.

Mr. HENDERSON. Thank you, Mr. Chairman, for your question. Let me back up for just a minute and say that these hearings have really been a testament to the wisdom of the founding fathers in setting up a three-part system of government, with the President making a nomination for an Associate Justice on the Supreme Court and the Senate Judiciary Committee providing its advice and consent. Under our system of government, the Senate and the House have a particular responsibility to delve deeply into the con-

stitutional rights of all Americans, particularly around the right to vote.

Voting really is the language of democracy. If you can't vote, you don't count. And the truth is that, notwithstanding the Fifteenth Amendment to the Constitution, the Thirteenth and Fourteenth Amendments, African-Americans, Latinos, women, other people of color, were often denied their right to vote well into the 20th century.

It took not just those amendments, but actually a statute enacted by this Congress to ensure that the rights of Americans to vote, indeed, could be preserved, and it was only in the aftermath of the 1965 Voting Rights Act that we have seen the expansion of the franchise and democratization of our, you know, Republic in a way that serves the interest of the founders.

Having said that, Congress reached a decision and we authorize in the Voting Rights Act in 2006 that this law was necessary. Sixteen thousand pages of a congressional record speak eloquently to that important interest. The fact that this issue was held, both with congressional review and also a national commission set up by the Lawyers Committee for Civil Rights and others in the civil rights community, holding hearings around the country, added to the record that was created.

The fact that this bill passed, rather the reauthorization of the Voting Rights Act, 390:33 in the House and 98:0 in the Senate speaks eloquently about the important need of this Act, and the continuing need for it. So the fact that some on the Supreme Court found otherwise doesn't disturb me at all. There is a need for it. That need continues, and notwithstanding evidence.

Senator CARDIN. Well, thank you for correcting my numbers on—the number that it voted by. I appreciate that.

I just wanted to ask Mr. McDaniel a quick question. That is, during the confirmation hearings both Democratic and Republican Senators have been urging from our nominee to look at what the law is, and not judge based upon an emotion. You have to follow the precedents of the court.

I have a simple question to you in the *Ricci* case. Do you believe that the Sotomayor decision with the three-judge panel was within the mainstream of judicial decision making when that decision was reached?

Mr. MCDANIEL. Senator, I do believe that. And to hear the stories of these—these firefighters in person, I—I don't have any reason not to use the word "empathy". I have a great deal of empathy for the circumstances that they have described, and I don't know that I have a great deal for how the city fathers handled the matter. But by the time it made it to the Second Circuit, I believe that the panel did what the law required and I don't think that there is a grant—a just legal criticism for the way that the panel handled the matter, and the fact that the Supreme Court chose to change the law in a bare majority also is their prerogative.

Senator CARDIN. Thank you very much.

Senator Sessions.

Senator SESSIONS. Thank you. I thank all of you. This is a very important panel. Actually, much of your testimony was moving and I appreciate it, and I think you're calling us to a higher level of dis-

cussion on these issues because they go to the core of who we are as Americans, and I just want to share that.

We are worried about the Second Amendment. I will just as the Mayor, you signed a brief in favor of the DC gun ban, which would bar even a handgun in someone's home, so I would assume you would be agreeable with the opinion of Judge Sotomayor and her view. We've got different views about these things.

Mayor, I want to tell you, I appreciate your leadership. It's a tough job to be Mayor of New York. You're showing strength and integrity.

Mr. Morgenthau, you're the dean of prosecutors. I hear many people over the years that have worked for you and they're very complimentary of you, and I know you're proud of this protégée of yours who's moved forward.

Mr. MORGENTHAU. Senator, may I tell you that my grandmother was born in Montgomery, Alabama?

Senator SESSIONS. I am impressed to hear that.

[Laughter.]

Senator SESSIONS. I feel better already. Oh, that's good.

Mr. Attorney General, thank you for your able comments. And Mr. Henderson, it's good to work with you. Senator Leahy and I—I'm talking, during these hearings, we're going to do that crack cocaine thing that you and I have talked about before. We've got to.

[Laughter.]

Mr. HENDERSON. Thank you, Senator. I appreciate it.

Senator SESSIONS. I may want to restate that.

[Laughter.]

Senator SESSIONS. Let me correct the record.

Ms. CHAVEZ. Please rephrase it, Senator. Please rephrase.

Senator SESSIONS. I misspoke.

Mr. HENDERSON. No. Quite all right.

Senator SESSIONS. We're going to reduce the burden of penalties in some of the crack cocaine cases and make them fairer.

So Mr. Ricci, thank you for your work. I would say, Mr. Henderson, that I said the PRLDEF Legal Defense Fund is a good organization in my opening statement, and I think it has—it—it has every right to advocate those positions that it does. But the nominee was on the board for a long time and it did take some positions that she rightly was asked about, whether or not she agreed to it, especially during some of those times she was chairman of the Litigation Committee. But I value these—I value that groups can come together and file lawsuits and take the matter to the court.

Just briefly, Mr. Kirsanow, on a slightly different subject than you started, I think you probably know this answer, but could you tell us, for the purpose of this hearing, as briefly as you can, what the concern is in the Voting Rights Act? It's not that we're against—anybody is against voting rights. I voted for it. But there are some constitutional concerns.

Could you share precisely what that is?

Mr. KIRSANOW. Sure. And specifically with respect to the latest Supreme Court decision related to that, what was articulated is that the pre-clearance provisions of the Voting Rights Act pertain to a legacy of discrimination that occurred in many States where poll taxes and literacy tests were being imposed on black citizens.

However, in this particular case the Austin political subdivision came into existence after all of the—the legacy of this discrimination had actually occurred, or even after the Voting Rights Act itself had been passed.

The question is, how can it be that you've got a preexisting law that is almost, for lack of a better term, *ex-post facto*, applying to an organization that came into existence after the law was in effect. There was no history of discrimination or denials of equal protection or denial of voting rights by this particular political subdivision, so it was peculiar in that regard, and I think there were several justices who evinced some concern about the approach in that particular case.

Senator SESSIONS. Thank you. It's just, there are two sides to that story. We passed the bill and we extended it, and all of us had some angst and worry. I said I wanted to vote for it, and we did. We extended it for probably longer than we should have. Not that it would ever end. Huge portions of it would—may never end. But some portions of it may not have been needed to continue.

Mr.—Lieutenant Vargas, that was a moving story you gave us. Let me just ask you this. Do you think that other members of the fire department, had they study as—studied as hard as you and mastered the subject matter as well as you did, could have passed the test—more of them would have passed if they'd studied as hard as you?

Mr. VARGAS. Absolutely.

Senator SESSIONS. You think you—

Mr. VARGAS. Absolutely. I studied with a group of them and they all supported me on what I was doing because they knew the effort that I put in and—and they were right there. We really weren't all that far behind. And, you know, minorities would have been promoted. That's something that—that continues to get left out. There would have been minorities promoted to captain, minorities promoted to lieutenant as well, and, you know, when you take these exams, sometimes you have winners and sometimes—you know, but you go into that situation knowing that that's going to be the case.

Senator SESSIONS. Mr. Kirsanow, you indicated that all the judges, I believe your phrase was, on the Supreme Court, rejected the standard of review that the panel, Justice Sotomayor's panel, set for the firefighter exam. Is that right?

Mr. KIRSANOW. Senator, even the dissent had a different standard. It was a good cause standard which would have given a little bit more definitiveness to the approach that defendants could take in defending. As you know, Title 7 has a safe harbor of job-related, consistent with business necessity. If you can establish that in fact the test that the firefighters took were job-related, consistent with business necessity, then only under those circumstances—the only way you could show a disparate impact if—is if those tests weren't made. Even the dissent said it should have been sent back on remand.

Senator SESSIONS. Thank you.

Ms. Chavez, I noticed one thing. According to the ABA statistics, only 3.5 percent of lawyers in America in 2000 were Hispanic, yet

Hispanics make up 5 percent of the Federal District Court judges and 6 percent of Circuit Court judges. Would you comment on that?

Ms. CHAVEZ. Well, first of all, I think it's important—you know, there's been a lot of attention focused on the phrase "a wise Latina woman". I used it myself, obviously, ironically, in testifying today.

But I think it's important to read Judge Sotomayor's entire speech because, in fact, it wasn't just that she was saying a wise Latina woman would make a better judge. What she was saying was that the race, ethnicity and gender of judges would, and should, make a difference in their judging.

And she says in the speech itself, she says she doesn't know always how that's going to happen, but she even cites some studies, sociological studies, that took—take a look at the way in which women judges have handed down decisions and makes the case that women judges decide cases differently than men do, and she speaks of this approvingly. And she talks about statistics and how few Latinos there are on the bench. And the statistics that you just cited come from an article that I wrote in Retort to the statistics that she used.

I bring that up because inherent in that analysis of hers is the notion that there ought to be proportional representation on judicial panels, that we ought to be selecting judges based on race, ethnicity and gender, and that we ought to have more or less proportional representation.

And I have to say that, you know, that really I think comes very close to arguing for quotas, a position, by the way, that she has taken with—when she was with the Puerto Rican Legal Defense and Education Fund. By the way, she was not just on the board, she actually signed some memoranda. Those are in the record, and I've cited some instances of that in my written testimony. And the point is that if there is so-called under representation of some groups, it means there's over-representation of others.

And I said in my testimony that if we are concerned about the number of Latino judges, the first thing you need to be a judge is a college degree and a law degree. And, in fact, if just using Judge Sotomayor's own statistics, if anything, if you look at the number of attorneys who are Latino at the time that she was writing, Hispanics were actually somewhat over-represented on the judicial bench. I reject all of that. That doesn't bother me in the least that they are over-represented. I think we should not be making ethnicity and race or gender a qualification for sitting on the bench, or being a firefighter, or being a captain or a lieutenant on a fire-fighting team. I think we ought to take race, ethnicity and gender out of the equation.

Senator SESSIONS. Thank you.

Senator CARDIN. Senator Durbin.

Senator DURBIN. Ms. Chavez, do you think that Judge Sotomayor's being awarded the Pyne Award at Princeton for high academic achievement and good character, being summa cum laude and Phi Beta Kappa was because it was a quota, that they wanted to make sure there was a Latina who received that?

Ms. CHAVEZ. No, I don't. And, in fact, what is interesting about Judge Sotomayor's tenure at Princeton University is that she has said that she was admitted as an affirmative action admittee be-

cause her test scores were not comparable to that of her peers. But she also has talked about what happened to her when she got there, and that she recognized that in fact she was not particularly well-prepared, that she did not write well and that one of her professors pulled her aside and said she had to work on her writing skills.

Senator DURBIN. So that would have been—

Ms. CHAVEZ. I admire—

Senator DURBIN. Excuse me. That would make it a pretty amazing story then.

Ms. CHAVEZ. That's right. And I wish that that was the story that she was telling Latinos, that she—

Senator DURBIN. I think that's the story of her life that I'm describing.

Ms. CHAVEZ. Well, it—I wish that what she was telling Latinos is that if you do what Ben Vargas has done, if you do what Frank Ricci has done, if you take home the books and you study them and you memorize what you need to know so that you can pass the test like I did when I took home grammar books—

Senator DURBIN. Well, I—

Ms. CHAVEZ.—and learned how to write standard English, that that should be the story, not that she should be insisting on racial quotas and racial preferences.

Senator DURBIN. Ms. Chavez, I think that—I think that the story of her life is one of achievement, overcoming some odds that many people have never faced in her family life and personal life.

Mr. Morgenthau, when you were alerted about her skills in law school, did they tell you that they had an opportunity here for you to hire a wise Latina lawyer? Is that what you were in the market for?

Mr. MORGENTHAU. Absolutely not.

Senator DURBIN. Would you—if you could speak in the microphone, I'd sure appreciate it.

Mr. MORGENTHAU. I'm sorry. Absolutely not. I mean, I took one look at her resume, you know, summa cum laude at Princeton, the Yale Law Journal, and I said—and then I talked to her and—and I thought she had common sense and judgment and willingness to work. The fact that she was Latino or Latina had absolutely nothing to do with it.

And may I just use this opportunity to say that I was one of the founding directors of the Puerto Rican Legal Defense Fund and the reason I did that was I thought it was important to represent a way under-represented minority—you know, you're looking back 35, 40 years—to have an organization which was dedicated to help people in Housing Corp discrimination cases.

So I urged her to join the Puerto Rican Legal Defense Fund. I mean, I had become a life member of the NAACP in 1951. I've been on the National Commission of the Anti-Defamation League. I think that one of the great strengths of the United States is its diversity and—and—but we've got to help people from the various minority groups make their way and advance. I must say, I'm very critical of some of my friends and relatives who want to forget where they came from, and it's to her credit that she remembers where she came from.

Senator DURBIN. And Mayor Bloomberg, I believe you had a quote that I read about Washington being maybe the only place—would you recall that quote on the Puerto Rican Legal Defense and Education Fund?

Mayor BLOOMBERG. Yes. I think that public service is something that certainly you, Senator, know the value of and the satisfaction when you do it. And in New York City, we value those who are willing to give their time and help others. They walk away in many cases from lucrative careers to serve as public defenders or outside of the legal profession in myriad other ways, and the fact that the organizations that they work for sometimes do things that you or I disagree with doesn't take away from the value that they provide in other things that they do.

Senator DURBIN. I've been honored to serve on this Committee to consider three Supreme Court nominees. The two previous nominees, Chief Justice Roberts and Justice Alito, were both white males, and the questioning really came to this central point: do you, as a white male have sensitivity to those unlike yourself, such as minorities and disadvantaged people? Those questions were asked over and over again. In this case where we have a minority woman seeking a position on the Supreme Court, it seems the question is, are you going to go too far on the side of minorities and not really use the law in a fair fashion?

Mayor BLOOMBERG. Senator, isn't the reason that the founding fathers—or at least I assume the reason the founding fathers said nine justices is that they wanted a diverse group of people with different life experiences who could work collaboratively and collectively to understand what the founding fathers meant generations later on. And so the fact that I—I said before in my testimony, I do not think that no matter how compelling Judge Sotomayor's life experience and biography is, that's not the reason to appoint her. Certainly we benefit from having a diverse group of people on the court, in the same way as my city benefits from a diverse group of citizens.

Senator DURBIN. Mr. Chairman, if I could ask one last question. I might say, Mr. Mayor, you're getting dangerously close to empathy.

[Laughter.]

Senator DURBIN. But I happen to agree with you.

Mr. Morgenthau, when Judge Sotomayor worked in your office, did you notice whether or not she treated minorities any differently?

Mr. MORGENTHAU. She was right down the middle, Senator. She didn't treat minorities any differently than she treated everybody else. Right down the middle, looked at the law. She's tough, but fair.

Senator DURBIN. Thank you very much.

Thanks, Mr. Chairman.

Senator CARDIN. Thank you.

Senator Sessions indicated Senator Graham will be next to inquire.

Senator GRAHAM. I'd like to thank my colleagues for the courtesy here. I've got to run back and do some things.

This has been a very good panel, by the way. I think we're sort of grappling with issues right here in the Senate the country is grappling with, and I'll try to put it in perspective the best I can.

Ms. CHAVEZ, identity politics. I think I know what you're talking about. I asked the judge about it. It's a practice of politics I don't agree with, and I think overall is not the right way to go. But having said that, I've tried to look at the judge in totality.

The Well Qualified rating from the American Bar Association, when it was given to Judge Alito and Roberts, we all embraced it and I used it a couple of times to say that if you thought this person had a rigid view of life or the law, it would have been very hard for the ABA to give them a well qualified rating.

Does that impress you all that the ABA had a different view in terms of how she might use identity politics on the bench?

Ms. CHAVEZ. Well, I'm not sure they dealt with that question. I think they did deal with her record as a judge and the decisions that she has made as a judge. The ABA and I often disagree on matters, so—

Senator GRAHAM. Yeah. I totally understand.

Ms. CHAVEZ.—it's not—

Senator GRAHAM. I totally understand. But I guess the point I'm making, I don't want to sit here and try to have it both ways, you know, say the ABA is a great thing one day and means nothing the next.

Have you ever known a Republican political leader to actively try to seek putting a minority in a position of responsibility to help the party?

Ms. CHAVEZ. I think that the idea of giving due deference to making sure that people are representative in diverse ways is a standard way of operating in political circles.

Senator GRAHAM. Well, the only reason I mention that, the statement you made, "the way we pick our judges should be based on merit, the way we pick our firefighters"—I totally agree with that. But politics is politics in the sense that I know that Republicans sit down and think, Okay, we've got some power now, let's make sure that we let the whole country know the Republican party is just not a party of short white guys.

Ms. CHAVEZ. I think that's different, though, Senator, than, as she suggested in her speech, that there ought to be some sort of proportional representation.

Senator GRAHAM. Yeah. That's right. You can go—that's right. I totally agree.

Ms. CHAVEZ. And I think that's farther. And I also think it matters that we're not just doing that because we want to see diverse opinions, but it seems to me that what she was saying in her speech was that we do that because blacks, Latinos and women are different, think differently, and will behave differently. I mean, she said that explicitly.

Senator GRAHAM. Yeah.

Ms. CHAVEZ. She said it may be as a result of physiological differences. I think any white man that said such a thing about minorities or women would be laughed out of this room.

Senator GRAHAM. Well, since I'm the white guy that said that, I agree with you.

[Laughter.]

Senator GRAHAM. But the point is that I'm trying to get the country in a spot where you're not judged by one thing, that we just can't look at her and say "that's it". You know, when I look at her I see speeches that bug the hell out of me, as I said before. But I also see something that very much impresses me, and the ABA apparently sees something, and Louis Freeh sees something, and Ken Starr sees something, and, you know, what I want to tell the country is that Republicans very much do sit down and think about political picks and appointments in a political sense to try to show that we're a party that looks at all Americans and wants to give an opportunity, and that's just life, and that's not a bad thing.

Now, Mr. Ricci, I would want you to come to my house if it was on fire.

[Laughter.]

Senator GRAHAM. And I appreciate how difficult this must have been for you to bust your ass and to study so hard and—and to have it all stripped at the end. But I just want you to know, as a country, that we're probably one generation removed to where, no matter how hard you studied, based on your last name or the color of your skin, you'd have no—no shot. And we're trying to find some balance. And in your case, I think you were poorly treated and you did not get the day in court you deserved, but all turned out well. It was a 5:4 decision. Maybe we can learn something through your experience. But please don't lose sight of the fact, not so very long ago the test was rigged a different way.

Mr. Vargas, you're one generation removed from where your last name wouldn't have been it. Do you understand that?

Mr. VARGAS. Yes, sir.

Senator GRAHAM. What did you go through personally to stand with Mr. Ricci? What came your way? Did anybody criticize you?

Mr. VARGAS. I received lots of criticism.

Senator GRAHAM. Well, tell me the kind of criticisms you received.

Mr. VARGAS. But I—I've got thick skin. I believe that I'm a person with thick skin.

Senator GRAHAM. Well, did people call you an Uncle Tom?

Mr. VARGAS. Yes.

Senator GRAHAM. People thought you were disloyal to the Hispanic community?

Mr. VARGAS. Absolutely. Yes.

Senator GRAHAM. Well, quite frankly, my friend, I think you've done a lot for America and the Hispanic community. My hat's off to you.

Mr. VARGAS. Thank you, Senator.

Senator GRAHAM. Finally, Mayor, having to govern a city as diverse as New York must be very, very difficult. Is it also a pleasure?

Mayor BLOOMBERG. It is a pleasure. And we—I said before you came in that some of the—Judge Sotomayor's views, I don't happen to agree with. Some of her decisions, I think, were wrong. We—for example, I disagreed with what the city of New Haven did. In New York City, you should know that our city is a defendant in a case, class action suit in the Justice Department where the challenge is

two entry-level tests for our fire department, one given in 1999 before I became mayor, and one afterwards in 2002, and we're defending it on the ground—the suit alleges that the written portions of the test were not germane to the job and it had a disparate impact. I've chosen to fight this.

I think that, in fact, the tests were job-related and were consistent with business necessity. This is a case that's going to go to trial sometime later this year. What we've tried to do is to approach it from a different point of view: aggressive recruiting to try to get more minorities to apply to be firefighters, and we have revised our test.

We've had a substantial increase in the number of minorities taking the test, passing the test, and joining our fire department. And I really do believe that that's a better way to solve the diversity problem, which does affect an awful lot of fire departments around this country, rather than throwing out tests and thereby penalizing those who pass the test.

Senator CARDIN. Senator Klobuchar.

Senator KLOBUCHAR. Thank you. I'm going to let Senator Specter, who is—I guess I'm more senior to him only because of a technicality, but also he's been here longer. So I'm going to let him go, and then I will go after.

Senator CARDIN. Senator Specter.

Senator SPECTER. No, no. I'll defer to Senator Klobuchar.

[Laughter.]

Senator KLOBUCHAR. Okay. Here we go. I, first, wanted to thank both firefighters for your service. As a prosecutor, we worked extensively on arson cases and I just got a little sense of what you go through every day and how dangerous your job is. So, thank you for that.

I just wanted to follow up on one thing, Ms. Chavez, when you talked about—you clearly know Ms. Sotomayor's history and her record. But when you talked about how she got into Princeton, you didn't point out the one thing that I think Mr. Morgenthau did, and that is that she ended up graduating from there summa cum laude, and that certainly is all about numbers and grades, I would think, and not affirmative action. Would that be correct?

Ms. CHAVEZ. That's absolutely right. And I wish that was the message that she was giving to her Hispanic audiences, that she was able to do it, that she was able to overcome adversity, that she was able, because she applied herself and worked hard and put in the hours studying, to be able to succeed, and that is not the message that she gives.

Senator KLOBUCHAR. Okay. But she also was valedictorian of her high school class. Where I went to high school, that was all numbers and grades and nothing to do with anything else. Isn't that true?

Ms. CHAVEZ. I'm only quoting what she has said herself. I don't have any idea what her test scores were. I don't think anyone but she does. But she has said that she got into Princeton, and also Yale, based on the affirmative action programs at those universities.

Senator KLOBUCHAR. Okay.

Mr. Morgenthau, it's just an honor to meet you. When I was District Attorney, I hired a number of people that learned everything they knew from you and your office, so thank you for that. And, in fact, when I did my opening statement I talked about a quote you gave once about how you hired people, and you say, "we want people with good judgment because a lot of the job of a prosecutor is making decisions".

You said, "I also want to see some signs of humility in anybody that I hire. We're giving young lawyers a lot of power and we want to make sure that they're going to use that power with good sense and without arrogance". Could you talk about those two qualities, the good judgment and the humility, and how you think those qualities may be or may not be reflected in our nominee?

Mr. MORGENTHAU. Well, I mean, I think she met all those standards. I—I interviewed her and talked to her, thought she was a hard worker. I thought she would relate to—the victims and witnesses. I thought she had humility. I thought she was fair. I thought she would apply the law. She met all of those standards that I thought were important to me. I hired her entirely on the merits. Entirely on the merits. Nothing to do with her ethnic background or anything else. She was an outstanding candidate on the merits.

Senator KLOBUCHAR. There is also a letter that we received from 40 of her colleagues, and one of the things I've learned is that while maybe sometimes someone does well in the workplace by their superiors, sometimes their colleagues think something else. And here you have her colleagues talking about the long hours she worked, how she was among the very first in her starting class to be selected to handle felonies. Could you describe how your process works in your office and how certain people get to handle felonies sooner than others?

Mr. MORGENTHAU. Well, we have six trial bureaus with about 50, 55 lawyers in each one, and it's up to the bureau chief, the deputies, to decide who should move along. I know one of those people who wrote that letter have gone to—to Princeton and to Yale Law School and studied for the bar with Sonia. I said, "Damn, I guess she was a little bit ahead of you." And he said, "She was a full step ahead of us." And she had the—the judgment, the common sense, the knowledge of people, the ability to persuade victims and witnesses testifying, and we thought she was a natural to move up to the Supreme Court.

Senator KLOBUCHAR. Very good.

Mayor Bloomberg, I noted today earlier that the—that Judge Sotomayor has the support of so many law enforcement organizations in New York, National District Attorneys Association. Could you talk about the—what that support means and how—I know you've had success, along with Mr. Morgenthau's amazing record of bringing crime down in New York, working with the police, working with the county attorneys as a team, and while our nominee was a small part of that, one—one Assistant District Attorney, as part of the big effort, what difference that has made to New York.

Mayor BLOOMBERG. Well, I think, Senator, the reason that we've been able to bring crime down and improve the schools and the economy and all of these things is because I've never asked any-

body or considered their ethnicity, their marital status, orientation, gender, religion, or anything else. I just try to get the best that I possibly can to come to work for the city, and I think the results are there.

When I interview for judges—and I've appointed something like 140 so far in the last seven-and-a-half years—I look for integrity and professional competence and judicial temperament, and how well they write, and their appellate records, and their reputation for fairness and impartiality, but also we extensively talk to members of the bar and the bench to see what professionals who have to work with the candidate day in and day out think. It's very easy to be on your best behavior when you come to Washington and have to testify before a group like this. But the truth of the matter is, your real character comes out when you do it day in and day out over a long period of time, and that's what your contemporaries see. And so the fact that a lot of people who have worked with this judge think that she is eminently qualified to move up carries an awful lot of weight with me. They can find—they know a lot more about her and her abilities than you or I could ever find out with the short period of time that we interact with her or read of her—read about her decisions, take them out of context of what was going on at the time and we don't have the ability to do all of the research that her contemporaries have been doing.

Senator KLOBUCHAR. So you're saying that you'd give that a lot more weight than all the questions we've been asking for the last 3 days?

Mayor BLOOMBERG. No, I wouldn't—
[Laughter.]

Mayor BLOOMBERG. I wouldn't go quite that far. But I do think that people who work with somebody for a long period of time really do get to know them. And most importantly, people who are on the other side of the issues, on the other side of the bench, if they think that even though sometimes they win and sometimes they lose, their views, to me, matter an awful lot more.

Senator KLOBUCHAR. I would agree. Thank you.

Senator CARDIN. Senator Hatch.

Senator HATCH. Well, thank you, Mr. Chairman.

Mayor, it's always good to see you. I appreciate the joy and the verve with which you run New York City. I know that it's a tough city to run, but you do a great job.

Mayor BLOOMBERG. Thank you.

Senator HATCH. Mr. Morgenthau, we all respect you. You know that, I know that. You've given a long public service that is of great distinction.

It's always good to have attorneys general from any State here, and we're grateful to have you here, Mr. McDaniel.

Mr. Henderson and I have been friends for a long time. We sometimes oppose each other, but it's always been with friendship and kindness.

We're grateful to have you two great people here who do such very important work in the city of New Haven. I know it takes guts to come here, and we appreciate you being here.

Mr. Kirsanow, let me just—and certainly Mr. Kirsanow, and Linda Chavez, we’ve—we recognize your genius, too, and the things that you bring to the table.

Let me just ask you this, Mr. Kirsanow, because I was the one who raised the *Ricci* case to begin with. I have two related questions about the *Ricci* case. Do you agree with what Judge Cabranes and the other five judges who agreed with him, that this was a case of first impression in the Second Circuit, which means that there was no precedent?

Mr. KIRSANOW. That’s correct, Senator. We took a very strong look as to whether or not there was anything on point. There may have been some peripheral cases that wouldn’t provide any definitive guidance. As I indicated in my statement, to the extent there were cases to provide guidance, really EPC—Equal Protection Clause cases, *Wygant*, so on and so forth, those were the kind of cases you’d have to look to, but none under Title 7.

Senator HATCH. Well, explain what was the issue of first impression that these six judges found—

Mr. KIRSANOW. It was—

Senator HATCH [continuing]. In the minority, 7:6, but they—they—

Mr. KIRSANOW. Right.

Senator HATCH. Judge Cabranes got very alarmed because this was a summary order that ordinarily they wouldn’t have seen, but he caught it in the newspaper, asked to see it, and then said, my gosh, this is a case of first impression, we ought to do more than just a summary order on it, which is something that I’ve been very critical of.

Mr. KIRSANOW. Senator, it was the tension between two provisions of Title 7, and that is—

Senator HATCH. You’re talking about disparate treatment and disparate impact?

Mr. KIRSANOW. Precisely.

Senator HATCH. And this was—

Mr. KIRSANOW. If I could balance the two. And keep in mind that the 1991 amendments were really a product of *Griggs v. Duke Power* and its progeny.

Senator HATCH. Right.

Mr. KIRSANOW. And remember that *Griggs* was really a response to the difficulty in demonstrating intentional discrimination so that there was a resort to disparate impact to try to help prove the case. So whether you give primacy to intentional discrimination or disparate impact was what was trying to be determined here, or not necessarily primacy, but trying to evaluate both consistently with the purposes of Title 7.

Senator HATCH. Well, please explain the difference between what the Supreme Court split 5:4 and what all nine of the Justices on the Supreme Court—why they criticized Judge Sotomayor’s decision.

Mr. KIRSANOW. It had to do with the process by which the decision was reached. Even the dissent, Justice Ginsburg noted in Footnote 10 that this is something that ordinarily should have been sent back on remand because it was to determine whether or—that

is, to determine whether or not there was good cause for taking the decision New Haven took.

The majority, on the other hand, said the city of New Haven had to have a strong basis in evidence before it discarded the test results. So there were two separate standards by both the majority and the dissent, but neither agreed with the manner in which the Sotomayor panel disposed of the case.

Senator HATCH. So all nine Justices on the court agreed that the appropriate law wasn't followed.

Mr. KIRSANOW. Correct.

Senator HATCH. And five of them said the city of New Haven was wrong.

Mr. KIRSANOW. Correct.

Senator HATCH. So the firefighters won.

Now, Mr. Vargas, I just want to make that clear, because I don't think a lot of people realize that, and that's a very, very big thing to me. Mr. Vargas, your comments about your sons were powerful. What difference does it make for them whether merit or race determines opportunity? What difference does this case mean for them?

Mr. VARGAS. I believe this is going to be a greater opportunity for them in the future because they're not going to be stigmatized that way. They're not going to be looked at that way, and they're going to rise and fall on their own merits and—

Senator HATCH. And that's one reason why you brought this case.

Mr. VARGAS. That's absolutely right.

Senator HATCH. Mr. Ricci, I only have a few seconds, but let me say this. I want to thank you for your service, for protecting your fellow citizens up there. As I understand it, the city of New Haven went to great lengths to devise this promotion test that was—the lengths were fair and objective, the test was fair and objective, and not tilted toward or against any demographic group. In fact, I understand that the test was not a question. They worked on the kind and content of the questions so that they were relevant to the job but would not create a hurdle for anyone. They used both a written and an oral exam format, right?

Mr. RICCI. Yes.

Senator HATCH. Is your understanding of how they worked to put together the test and did—that's the way they put it together. Did that make you believe that you would be judged on your merits?

Mr. RICCI. Yes, Senator. The rules of the game were set up, and we have a right to be judged fairly. And just by taking the test we knew that the test—we didn't even need to go any further. Just by taking the test we knew that the test was job-related and measured the skills, ability and knowledge needed for a competent fire officer.

Senator HATCH. Well, did that make you see this as a genuine opportunity that might indeed be open to you?

Mr. RICCI. Yes, Senator.

Senator HATCH. Now, tell me more about your expectations when you looked at this opportunity. You were, no doubt, familiar with the racial dynamics that existed in New Haven at the time. Anyone involved in their community anywhere would be aware of that. Did you think that at all, that because the test was so rigorously and

fairly designed, that any of those outside racial dynamics would become an obstacle to your future service in the fire department as long as you were qualified for the job?

Mr. RICCI. No. Myself, and all 20 plaintiffs, including other firefighters that didn't join the suit, including African-Americans and Hispanics, I think we all had the expectation when we took the test that the test would be fair, job-related, and that it was going to be dictated by one's merit on how well you did on the exam, not by the color of your skin.

Senator HATCH. Okay.

Now, gentlemen, I just have one statement to make. You made the comment that the Supreme Court changed the law by a majority. They didn't change the law, they actually recognized there was a case of first impression here that had to be decided, and they decided it. They didn't change any laws. Now, it wasn't by a bare majority. I mean, nine of them said the case should be reexamined, five of them said that New Haven was wrong.

I just wanted to make that clear so that everybody would understand it, because this is not some itty-bitty case. This is one of the most important cases in the country's history, and that's why it's caused such a furor. I want to compliment all of you firemen for being willing to stand up in this issue, because this is an important issue for people of whatever race, or gender, or ethnicity. You know, you've taken a lot of flack for it, and you shouldn't.

Thank you, Mr. Chairman.

Senator CARDIN. Thank you.

Senator SPECTER.

Senator SPECTER. Thank you, Mr. Chairman.

Mr. Ricci, I agree with just about everything you said, that you had a right to go to Federal court and get justice; that racial statistics are wrong; what we sought was even-handed justice. And as the court finally decided, you had been deprived of your rights, and made a change.

The question that I have for you, do you have any reason to think that Judge Sotomayor acted in anything other than good faith in trying to reach a fair decision in the case?

Mr. RICCI. That's beyond my legal expertise. I'm not an attorney or a legal scholar. I simply welcomed an invitation by the U.S. Senate to come here today and—because this is our first time that we've gotten to testify about our story. So I can't comment on—

Senator SPECTER. Well, I think that it's really good that you've been here and have had a chance to testify. I agree with that totally. And there is enormous appreciation for the work the firefighters do. I had a lot of association with the firefighters in my days as a city official in Philadelphia. On the homeland security, I've been on the forefront of funding for firefighters. And what the firefighters did on 9/11 was—words are inadequate, the heroism and the bravery and the loss of lives and suffering.

Lieutenant Vargas, again, I agree with all of your testimony. In your work, you have to get it right the first time. Well, when you have 5:4 decisions, it's hard to say which way the ball bounces, especially when they get reversed from time to time. But I would ask you the same question I asked of Mr. Ricci, whether you have any

reason to doubt the good faith of Judge Sotomayor in coming to the conclusion that she did.

Mr. VARGAS. I would have to defer to pretty much the same response. We were invited here to give our story and—and we wanted to focus on that, and I really didn't put much to that. So—

Senator SPECTER. Okay. Well, that's fair enough. It's up to the Senate. We hope we get it right. But all anybody can use is their—is their best judgment.

Ms. Chavez, when you place so much reliance on *Ricci v. DeStefano* as a basis for opposing Judge Sotomayor, isn't that case just overloaded with subtlety and nuance and could have gone the other way? Can you really place much reliance on criticism of Judge Sotomayor as a disqualifier?

Ms. CHAVEZ. Well, first of all, Senator Specter, I think I actually went back to criticize Judge Sotomayor's activities going all the way back to Princeton University, so I don't think I relied exclusively. I think what—and I would answer the question that you asked Mr. Vargas and Mr. Ricci. I do think that Judge Sotomayor, based on her history, her involvement with the Puerto Rican Legal Defense and Education Fund, her writings, her activism, has indicated a preference to eliminate testing. She has fought to—to get rid of civil service testing.

She has challenged tests as being inherently—standardized tests as being inherently unequal and, as always, arriving at a disparate impact. And I think that activism, that involvement going back decades, did in fact influence the way she approached this case. So I think it is relevant, and that is the reason I'm criticizing it. It is not just her one decision in one case, it is her whole body of work, her whole life experience and the views that she has expressed over several decades.

Senator SPECTER. Well, we consistently have nominees for the Supreme Court come to this panel, Justice Alito, Chief Justice Roberts, Justice Thomas, on both sides of the ideological divide. And what they do in an advocacy position is customarily set aside to make an evaluation as to their—their competency. When you talk about being a woman or being an Hispanic, it's my view that that kind of diversity is enormously helpful.

I go back to a question I asked Attorney General Meese more than 25 years ago. The debate was raging on affirmative action even more than it is now. If you have two people of equal competency and one is a minority, Attorney General Meese, not known for being a flaming liberal, took—took the minority position. My own view is that it's time we had more women and we had more diversity, and we have to have qualifications. Have to have qualifications. And I think that's what ultimately determines this nomination.

Attorney General McDaniel, I'm going to ask you a loaded question. You can handle a loaded question. Do you think, with all of the critical issues we have to face on separation of powers and what the Congress does by way of fact finding and what is done on the Americans With Disabilities Act and trying to find out about warrantless wire taps and the Foreign Intelligence Surveillance Act and compensation for the survivors of the victims of 9/11, and the intricate relationship to the State Department influencing the way

Congress interprets the foreign sovereign immunity, that there is a little too much attention paid to the *Ricci* case? Not that it's not very important, but there are a lot of matters that are important. Isn't this a little heavy on one case?

Mr. MCDANIEL. Senator, not—not only do I agree with you about the other issues that should be given ample attention because of their enormous weight, I think that perhaps the wrong focus of attention, even on this case, has been applied. Chief Justice Roberts has said that he would like to narrow standing analyses and he would like to be a conservative Justice who wants to look only at the disagreements between two parties and not go beyond the scope of that.

One of the important issues in the *Ricci* case was a standing issue, which was their standing to bring action if one had not been denied promotion. Senator Hatch's own attorney general joined with me in the brief because we thought that that was among the issues that were important and should have been followed under *stare decisis*. Instead, the court expanded standing to someone who had not been harmed under the legal standard.

I think that that is important to consider. I think that it's important to note that if they were going to change standing and standards, I think it's somewhat unfair to put emphasis on the footnote. For instance, Footnote 10 of Justice Ginsburg, which said that if we are going to change the rules of the game then we should remand the case back to be reviewed. But that wasn't critical of the Second Circuit, in and of—

Senator SPECTER. I regret—

Mr. MCDANIEL. So I agree with you about your—your emphasis or the—on the—

Senator SPECTER. I regret that there is so little time. Having Mayor Bloomberg and Dean Morgenthau, I'd like to really have a chance to cross-examine them.

[Laughter.]

Senator SPECTER. Except that I agreed with their testimony.

Thank you, Mr. Chairman.

Senator CARDIN. Thank you, Senator.

Senator CORNYN.

Senator CORNYN. Thank you, Mr. Chairman. I want to extend my appreciation to each of the witnesses for taking your time to be here today. It's very important. These are—as we need to remind ourselves—this is an historic time and appointment, and these are very important issues that should not be neglected or overlooked because of the press of other activities.

My own position is that I think, by virtue of her training, her experience and her high achievement, Judge Sotomayor is very well qualified, all other things being equal. Unfortunately, because of her speeches and other public statements where she said “there's no such thing as objectivity in the law”, which the opposite of objectivity is subjectivity. She said there's “no neutrality”. If there's no neutrality, then I guess all that leaves is bias. And it really strikes a body blow, I think, to the concept of equal justice under the law.

Judges are not policymakers and judges should leave that job to the elected representatives of the people who reserve the time-hon-

ored right to throw the rascals out if they don't like what we're doing as elected members of the legislative branch.

So, you know, my concern is, what kind of judge would she be, if confirmed to the United States Supreme Court, the kind of judge that follows her speeches or the kind that follows the law?

I just want to say to these firefighters what I told them earlier today when they were kind enough to come by my office. I think, you know, judges make mistakes. They used to say the only lawyer that hadn't lost a case is one that hadn't tried one. I don't necessarily hold it so much against Judge Sotomayor that she didn't rule your way in the case. Unfortunately, I think she did not give it the proper respect and pay it the sort of attention that she should, because there were real claims there that needed to be resolved by a court.

Every citizen is entitled to that, to have judges pay attention and not make mistakes by, you know, trying to sweep it under the rug. And thank goodness that Judge Cabranes found the case, because it almost slipped through the cracks, and then highlighted it so it could get to the Supreme Court of the United States and the Supreme Court could address the very important issues that you've presented here.

And one of the most important aspects, I think, of this hearing, is that it provides an opportunity—and it would not have been provided, I think in large part, unless these firefighters had had the courage to do what they've done—for us to refocus our attention on some of these areas, as Chief Justice Roberts said. He said, "It's sordid business, this divvying up by race." And looking at people not as an individual human being, but as a member of a group or because of their sex, or their ethnicity, or their race. You know, it's time for this Nation—I hope we would all agree—to look at everyone as individuals and to reward hard work, sacrifice, and initiative. The kinds of things that I think—particularly you, Frank and Ben have demonstrated. Frank is the lead plaintiff—but all the firefighters have helped demonstrate the importance of not divvying up by race, not using de facto quotas.

And I think I would have felt a lot better if Judge Sotomayor had said, you know what? This is really an important issue and we should have addressed it. It slipped through our fingers, but thank goodness it was caught and it was ultimately reviewed. But she didn't. I think the idea that the city could throw out a test just because the outcome wasn't what they wanted is really pretext for racial discrimination. It's to deny people what they are entitled to because of the color of their skin.

So I just want to ask, in the short time I have here, Mr. Vargas, I read earlier a statement that you had made to the New York Times about the reason why you'd gone through these five grueling years of litigation and the abuse that you've taken from people who tried to shame you out of standing on your rights and seeing this thing through.

Could you just tell the Committee what sacrifices you have made, what your family has made, and why you felt like those sacrifices were so important to vindicate this important right?

Mr. VARGAS. Well, let alone the financial sacrifice, but, you know, it—it starts from the moment you get out of the academy. I mean,

this was something that I wanted to do. I wanted to advance my career as a firefighter right through the ranks. And, you know, the books came with me to work every single day, you know, from the minute I graduated from the academy right up to when I got promoted to lieutenant, and they kept coming with me right on till I took the captain's exam. And once I get promoted to captain, they're going to continue to come with me until I go right up through the ranks, you know.

It's—it's not something that, you know, you can lose sight of. You've got to continue to work hard and—and I want to instill that in my kids. I want them to see that and I want them to know that this is what America is all about. You work hard. This is how America was built. We're the greatest country in the world because you—you—as I said before, you rise and fall on your own merits.

Senator CORNYN. Do you hope for a day for your children in which, as we mentioned from Martin Luther King's statement previously, "they will be judged by the content of their character and not the color of their skin"?

Mr. VARGAS. I think our case goes a long way to help in—in assuring that for them, and they're going to benefit from this and I think we're going in the right direction now.

Senator CORNYN. I couldn't agree more.

Thank you, Mr. Chairman.

Senator CARDIN. Senator Kyl.

Senator KYL. Thank you, Mr. Chairman.

Welcome to all of you. One of the things that I think may have gotten lost in all of this is why tests are important. I particularly wanted to ask the two firefighters here, Mr. Ricci and Mr. Vargas, what difference does it make how well you perform on the test, whether you pass it or not? What's the big deal? What do you really have to show in those tests? And when you're out performing your duties, what difference does it make whether you pass the test or not? Mr. Ricci, maybe start with you.

Mr. RICCI. Thank you, Senator. It's important to realize that over 100 firefighter die in the line of duty each year, an additional 80,000 are injured. You need to have a command of the knowledge in order to make command decisions. You need to understand the rules and regulations. Experience is the best teacher, but only a fool learns in that school alone. You have to have a basis to make the right decisions, because firefighters operate in all different types of environments. I've had the proud privilege of training the United States Marine Corps Seabird team, and they respond to anthrax attacks in one of these buildings.

I mean, firefighters have to be prepared for the regular house fire, to the car accident, to the hazardous material incident. You go to work every day and we're like an insurance policy for the American public that they hope they never have to use. But when someone calls 911, within four to 5 minutes there's a fully staffed fire company at your door, with no paperwork, and we're there to answer the call. And when you show up, the officer has to be competent to lead his men and women of this fire service, career and volunteer, across the country to make the right decisions.

Senator KYL. Thank you. That's a great explanation.

Lieutenant Vargas.

Mr. VARGAS. There's not much I can add to that.

Senator KYL. That was pretty good.

[Laughter.]

Mr. VARGAS. That was pretty good, huh?

Senator KYL. Well, I—I appreciate it, and I know that everybody here, regardless of party or position on the nominee or anything else, appreciates what you do and what your colleagues do, and I'm—I'm sure I speak for all of us in that regard.

One of the things that I wanted to just say briefly, is that I—I am very proud of our—I was a lawyer and I practiced law and I—and I won some and I lost some. But I always had confidence in our system. And America is not unique, but there aren't very many countries in the world like us where we willingly volunteer to put our—our fortunes, our freedom, in the event that we're accused of a crime, maybe even our life if there could be a death penalty involved, our careers, in the case of the suit that you all were involved in. We willing do that. And the way we do it is interesting. You all may not know this.

The lawyers here certainly know it. When I filed a case in the U.S. District Court in Arizona, I didn't know which judge I was going to get. There were about 10. There was one I hoped I didn't get, but I knew the other nine, it didn't matter. They would all approach—they were Democrats, they were Republicans. But I didn't know because it's the next one in order and the lawyers don't know the order, so it's almost by lot. But we had confidence that we could put our client's issue before the court and that justice would be done because that's the way our system works. And over 220 years, the rule of law has been established in this country by judges applying the law fairly and impartially. Over time, the precedents have been built up.

And what struck me about what you all had—I'm talking about the two of you—to go through, is first of all, you were confronted with a judge who, in a very thorough decision, said "you lose". Then you appeal to the Second Circuit in a pro curium opinion, and you all know now what that is all too well. The court didn't even write about it and said, "no, you lose again". Then the day that you got the results from the Supreme Court, just, what's the difference between what you felt at the first situation and when you got the news about the Supreme Court, about your confidence in our system?

Mr. VARGAS. I tried to say earlier that this is exactly how this country was built. This is why we're so great, because, you know, you can work hard and you can go after the things that you want in this—in this country. And, you know, you're going to be successful, you know, but you have to apply yourself. And those are the things that I tried to instill in—in my kids, and I'll always put that forth. And I'll speak with my accent so that they can see that it's a great country, you know, and that's why you need to work hard.

Mr. RICCI. The price of democracy is vigilance, to be willing to participate—and the original feeling was, you know, we always—through our attorneys, always went back to that process and said, this is America. If we keep going forward, the process will work. That, at the end, to be able to look at my son and say, you know, I haven't been there for you, but to look at him and say this is a—

this is an unbelievable civics lesson—lesson, that if you participate in democracy, that's how it all works. And I thank you, Senator.

Senator KYL. And I thank you. I hope that all of you will have confidence in our legal system in the future. Everybody here, again, regardless of position, will really stand in awe at a system which, in our country, year in and year out, has proved to be a very, very good system for our people.

Thank you.

Senator CARDIN. Well, Senator Kyl, I want to thank you for your questions and the responses. I think it was the right way for the record to reflect the end of this panel, which has been, I think, very, very helpful to us in the record on the confirmation process for Judge Sotomayor.

I want to thank Chairman Leahy for allowing me to chair this panel. We've had a very distinguished panel, all eight of you, we thank you for being here. I particularly want to thank Mayor Bloomberg for taking the time to come from New York. I mention him because not only—does he do a great job as mayor, but he has had an important role at Johns Hopkins University and we very much appreciate that.

And to Mr. Morgenthau, you are the model for the Nation in the District Attorney's Office, and it's—its a real honor to have you before our Committee and we thank you for your energy and continuation in public service.

And to Firefighter Ricci and to Lieutenant Vargas, I personally want to thank you for being here. You put a face on the issues. We—look at cases and we talk about the impact, but it affects real people, and real lives, and real families. I think you really have added to today's hearing by your personal stories. Each one of us thank you for your public service, and we thank you for your belief in our Nation and for the testimony that you have given to this Committee. It's been extremely helpful to each one of us on—the Judiciary Committee.

And with that, we are going to take a 5-minute recess. When we return, Senator Klobuchar will be chairing the next panel.

[Whereupon, at 4:20 p.m., the Committee was recessed.]

After Recess [4:29 p.m.]

Senator KLOBUCHAR. I think we are going to start our third panel here. If everyone could be seated. I will warn those of you out there, anyone that has asked David Cone to sign a baseball, you must ask all seven of our other panelists as well.

We are going to start by getting sworn in. Would you please stand? Raise your right hand. Do you affirm that the testimony you are about to give before the committee will be the truth, the whole truth, and nothing but the truth, so help you God? Thank you.

We are going to start. I will introduce each of you and then you will give your 5 minutes of testimony and then we will have questions after that. We are going to start here with Mr. Freeh. Louis Freeh is the former Director of the Federal Bureau of Investigation whose career in the Department of Justice began in 1975 when he became a special agent in the FBI.

Mr. Freeh has a long and distinguished career as a public servant under both Democratic and Republican Presidents. He was appointed by President George H. W. Bush as a Federal District

Court judge on the Southern District of New York. He was also a career Federal prosecutor in the United States Attorney General's Office for the Southern District of New York, serving as Chief of the Organized Crime Unit, Deputy United States attorney and Associate United States attorney.

He graduated from Rutgers Law School and has an LOM degree in criminal law from New York University Law School. I look forward to your testimony, Mr. Freeh.

STATEMENT OF LOUIS FREEH, FORMER DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

Mr. FREEH. Thank you very much, Senator. Good afternoon, Senator Sessions, good afternoon to you. It is a great privilege to be before the committee, the committee where I have appeared over 100 times and it is always a pleasure to be here.

There are many friends on the committee who I have seen over the last few days. You have a prepared statement from me. As Senator Sessions knows, I generally don't read my opening statements which has gotten me in trouble with OMB over the years, but I thought it might be good just to talk and tell you why I'm here.

I have had the privilege to work with great judges and a few people who are truly legendary judges. Let me just mention a couple. I served on the District Court with Constance Baker Motley who before she was a judge had those qualities of fairness and open-mindedness and commitment to the rule of law that I think we wish to see in our judges.

The last case I tried as a judge was in the District of Minnesota before Judge Devitt. It was a case which by the way, Judge Sessions, Senator Sessions and I worked on together. He was the Attorney General of Alabama, great Attorney General, and I was an Assistant U.S. Attorney working on the case. It was the murder of a Federal judge. It was one of the few tragic times in our history when a Federal judge was murdered and the case was tried before Judge Devitt.

Judge Devitt, who many of his peers said was the judge from central casting, was the model of judicial conduct and commitment. The jury instruction book, Devitt and Blackmun, was named after him. The Devitt Award, which is probably the most prestigious judicial award, is named after him. He was actually one of my mentors when I went on the Southern District bench.

I was sworn in as FBI Director by Judge Frank Johnson, who as someone has mentioned here before, was a legendary judicial hero from Winston County, Alabama. He, together with a handful of other Republican judges, really changed the tide of history by their commitment to the law and to civil rights. Their fearlessness, honesty, and integrity with which they took office—an example to all judges.

So it is my pleasure to recommend to the committee the confirmation of this outstanding judge, Sonia Sotomayor. I want to talk a little bit about her judicial experience. I have been here or listening to these proceedings for the last few days. I think I may be the only lawyer who has actually been with her in a courtroom. Since in my view real life experience is the best indicator of what

a judge will do in the future—how they behaved, conducted, wrote and decided matters as a judge.

As has been mentioned before, this candidate has an enormous and rich judicial record, 17 years, thousands of opinions, all the things that you want to look for as you make your evaluation.

The process by which Judge Sotomayor comes here before you is quite extensive. You have the President and his reviewers, own investigation, you have the Bar Associations, this committee. You have the FBI that conducted now three background investigations. I was actually Director when the second one was done.

You have any and all information that has come from the public, from the citizens, Americans. You have reputational evidence from other judges, from lawyers who had appeared before her.

My association with her began in 1992. She was a new judge on the Southern District and we had this tradition where the second newest judge would mentor the new judge. Some of us didn't think it was the wisest rule to have, since I had about 9 months on the bench when she was entrusted to my care, so to speak.

I actually sat with her in court and sat with her during trials. I helped review opinions that she asked me to look at. My law clerks were encamped with her law clerks.

What I want to communicate to you in the very short period remaining is Judge Sotomayor's enormous judicial integrity and commitment to finding the facts, to being open minded, to being fair. She struggled and deliberated in making sure she had all the facts, making sure she had the right law, following the law and being the kind of judge that I think we would all be proud of.

Speeches are important and it is great the way you all have considered that so carefully, but when you enter the courtroom and you put the judicial robe on, just as you assume the authority when you take your committee, it is a whole different set of influences and immense power and influence that takes over.

When Judge Sotomayor has been on the bench, what she has written, when she has argued, the way she has conducted herself, I think we can very safely predict this is going to be an outstanding judge with all the qualities that I know that you would want. So I urge you all to support her. Thank you very much.

Senator KLOBUCHAR. Thank you very much. Thank you for your testimony. Next we have Chuck Canterbury. Chuck Canterbury is the National President of the Fraternal Order of Police, one of the nation's largest and most prominent voices for law enforcement officers.

Mr. Canterbury has served in numerous capacities in the organization including national Vice President and national Second Vice President. He has 25 years of experience in law enforcement where he worked as a police officer in Horry County, South Carolina. Maybe you know Lindsey Graham, one of our members here. In only the best ways, I am sure.

We look very much forward to your testimony. Thank you, Mr. Canterbury.

**STATEMENT OF CHUCK CANTERBURY, NATIONAL PRESIDENT,
FRATERNAL ORDER OF POLICE**

Mr. CANTERBURY. Thank you, Madam Chair, Ranking Member Sessions, Senator Hatch. It is a pleasure to be here today to offer the support of 327,000 rank and file police officers, my members in the Fraternal Order of Police.

It is my pleasure to testify in support of the nomination of Judge Sonia Sotomayor to the Supreme Court. Speaking as a law enforcement officer, I think it says a lot about the character of a young person who graduated from Yale and then accepted her first job as a poorly paid prosecutor in the District of Manhattan. Yet that is exactly what Judge Sotomayor did, as my members do in every city in America.

She spent 5 years with that office, prosecuted many criminal cases, including a triple homicide and she forged an excellent working relationship with the men and women working the beat in Manhattan. She earned their respect and a reputation as being tough, which in my profession is a compliment.

As an appellate judge, she has participated in over 3,000 panel decisions and authored roughly 400 opinions, handling difficult issues of constitutional law, complex procedural matters and lawsuits involving complicated business organizations.

Some of her critics have pounced on a few of those decisions as well as some of the comments made during speaking engagements and have engaged in some pretty wild speculation as to what she would do as a Supreme Court Justice.

As a law enforcement officer, I prefer to rely on evidence and fact and not speculation to reach those conclusions.

One such area of speculation is on her feelings toward our right to bear arms as guaranteed by the Second Amendment. I want no mistake to be made. I take a back seat to no one in my reverence for the Second Amendment. In fact, if I thought that Judge Sotomayor's presence on the court posed a threat to my Second Amendment rights, I would not be supporting her here today.

The facts, as some have already pointed out, reflect a brilliant and thoughtful jurist respectful of the law and committed to its appropriate enforcement.

Over the course of her career, she has analyzed each case on its merits. To me, that's evidence of strong commitment to duty and to the law, two characteristics that we should expect from all of our judges.

I want to cite a few cases which I'm familiar with because they deal with issues that every beat cop in the United States has dealt with. In the *United States v. Fausto*, an offender indicated on 242 counts relating to child pornography sought to have evidence against him thrown out because a search warrant that was sworn out lacked probable cause.

Judge Sotomayor's ruling held that the error was committed by the District Court issuing the warrant, not the officers who executed it. The conviction was upheld.

In the *United States v. Santa*, she ruled that law enforcement officers executing a search of a suspect based on an arrest warrant they believed to be active and valid should not result in the suppression of evidence even if that warrant had expired.

In the *United States v. Howard*, she overturned the District Court's decision to suppress evidence of drug trafficking by finding warrantless automobile searches to be constitutional.

In the *United States v. Clark*, she held that the law enforcement officers did not violate the Fourth Amendment by asking to see the VIN plate under the hood of a vehicle after discovering that the VIN plate on the dashboard was missing.

All of these rulings show that Judge Sotomayor got at least as much of her legal education from her 5 years as a prosecutor as she did at Yale Law School. These 5 years in my view reflect the same kind of commitment to the law that I have seen in the officers that I represent.

She has clearly demonstrated that she understands the fine line that police officers must walk and in her rulings reflect a working knowledge, not a theoretical knowledge, of the everyday realities of law enforcement work.

After reviewing her record, I can say that Judge Sotomayor is a jurist in whom any beat cop could have confidence. It is for that reason that the National Executive Board of the FOP voted unanimously to support her nomination and we urge you to as well. Thank you very much.

Senator KLOBUCHAR. Thank you very much, Mr. Canterbury. Next is David Cone. David Cone is a former major league baseball pitcher who over an 18-year career played for five teams in both the American and National Leagues.

Mr. Cone won the American League Cy Young Award in 1994 and pitched a perfect game in 1999 as a member of the New York Yankees. He was a member of the Major League Baseball Player's Association throughout his major league career and was an officer from 1994 through 2000. Thank you very much for being here, Mr. Cone.

STATEMENT OF DAVID CONE, FORMER MAJOR LEAGUE BASEBALL PLAYER

Mr. CONE. Thank you, Senator Klobuchar, Senator Sessions, Senator Hatch. Nice to see you again.

On behalf of all major league players both former and current, I greatly appreciate the opportunity to acknowledge the unique role that Judge Sonia Sotomayer played in preserving America's pastime.

As you know, I am not a lawyer, much less a Supreme Court scholar. I was a professional baseball player from the time I was drafted out of high school in 1981 until the time I retired in 2003. I was also a union member and an officer of the Major League Baseball Players' Association.

As is well known, major league baseball has a long history of acrimonious labor relations. It was not until the 1970's that players first gained the rights of free agency and salary arbitration. This meant that for the first time ever, players were able to earn what they were worth and have some choice about where they played.

The next 20 years were quite difficult. There was a lockout or strike at the end of every contract. To the players, every dispute seemed to center on the owners' desire to roll back free agency rights the players had won. But 1994 was the worst.