

with a law firm bearing his name, experienced in civil litigation, professional negligence and domestic relations; undergraduate and law degree from Syracuse University; on 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 are about to describe, in reaching an evaluation of a Supreme Court nominee, and the importance of your judgment, so we thank you and Mr. Payton and Ms. Tucker for your public service.

Now, Mr. Tober, the floor is yours.

STATEMENT OF STEPHEN L. TOBER, ESQ., CHAIRMAN, AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON THE FEDERAL JUDICIARY, PORTSMOUTH, NEW HAMPSHIRE; ACCOMPANIED BY MARNA TUCKER, ESQ., D.C. CIRCUIT REPRESENTATIVE, AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON THE FEDERAL JUDICIARY, WASHINGTON, D.C.; AND JOHN PAYTON, ESQ., FEDERAL CIRCUIT REPRESENTATIVE, AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON THE FEDERAL JUDICIARY, WASHINGTON, D.C.

Mr. TOBER. Thank you, Your Honor. Thank you, Mr. Chairman, members of the Committee. My name is Stephen L. Tober of Portsmouth, New Hampshire, and it is my privilege to chair the American Bar Association Standing Committee on the 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.

Our committee conducts a thorough, nonpartisan, nonideological 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 are 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.

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 an 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.

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

Mr. TOBER. 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 evenhanded 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. 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. With that, thank you for the opportunity to present these remarks.

[The prepared statement of Mr. Tober appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Tober, for your work and for ending right on the button, 5 minutes to a tee.

Mr. TOBER. I worked on that, sir.

[Laughter.]

Chairman SPECTER. That quality of yours would recommend you for Supreme Court argument, where Chief Justice Rehnquist stopped the speaker in mid-sentence, and the word from Judge Becker, who will testify later, he was looking for an opportunity—he stopped me in mid-sentence one day—and he was looking for an opportunity to stop a speaker in the middle of the word “if,” I did not give him that chance.

[Laughter.]

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

Senator LEAHY. I do not, Mr. Chairman. Thank you, though.

Chairman SPECTER. We have 5-minute rounds for each of the members of the Committee.

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

Mr. 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 even-handedness, of his open-mindedness, of his willingness to be fair. He is 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, and 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 decisionmaking. We discussed that with him in that interview that we had on December 12th. He tried to do what he thinks is right with respect to the application of the law that is 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 has not misapprehended something in the first instance, and second, to make sure that the outcome is fair. That to me suggests—

Chairman SPECTER. You say he came back to you twice?

Mr. TOBER. I am sorry?

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

Mr. 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.

Chairman SPECTER. Did your group study all of his opinions?

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

Chairman SPECTER. And did they make any analysis of—an issue has been raised as to whether Judge Alito unduly favored the powerful or the Government. Did your ABA analysis reach that issue?

Mr. TOBER. That issue was one that we looked at, and we discussed it in our letter of evaluation, and I gave some examples of some of the disparate results that we were told about. One of the reading groups reported to us that they could not reach a full conclusion on whether or not it 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, that—

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

Mr. 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.

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

Mr. 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.

Chairman SPECTER. A 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?

Mr. TOBER. I am going to defer to Mr. Payton, who took the lead on the Vanguard-related issues, if that is OK with the Chairman.

Chairman SPECTER. Mr. Payton?

Mr. 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 is well over a thousand 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 the 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. We asked him how that came about. He explained how he thought it came about, but I think it is 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 were captured by the screen in 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 Third 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 Third Circuit who were on the district court who had contact with Judge Alito. 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—everyone—thought that he has the highest integrity and that these few cases that slipped through do not diminish his integrity.

Chairman 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.

Senator LEAHY. Just to followup on that, on Vanguard, the only reason I even mention this is that the initial explanation from Judge Alito and the White House after his nomination was a computer glitch had precipitated the *Vanguard* case. But then he answered some questions from Senator Feingold by saying that in the *Monga* case it wasn't a computer glitch that caused his failure to submit Vanguard to the clerk of the court. Then he said when it came before him, he was not focused. Since your report was filed, we have learned that Judge Alito did not have Vanguard on his recusal list as far back as 1993, notwithstanding the fact that in 1990 he had given a sworn statement to the Committee that he would recuse.

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

Mr. PAYTON. I think that it is—like I said, from the interview with him, I am not sure we figured out what caused these cases to slip through. I am 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—it is 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.

Mr. TOBER. Senator, may I add to that very briefly.

Senator LEAHY. Sure.

Mr. 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 has 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.

Senator LEAHY. You understand the reason this became an issue here is because it was based on a sworn statement that he recuse.

You also looked into his open-mindedness, his commitment to equal justice. I am just asking, in doing that—because I have never served on one of these committees that you are on. There have been a number of studies of the judge's record—Knight-Ridder, the Washington Post, Cass Sunstein and others—and they have concluded that he had much more likelihood of siding against discrimination plaintiffs than other circuit judges. Knight-Ridder reviewed 311 of his published opinions and found that he seldom sided with a criminal defendant, a foreign national facing deportation, an employee alleging discrimination, or a consumer 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?

Mr. 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 3 days very carefully. We are where we started with that issue, and that is, the 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 his decisionmaking.

Senator LEAHY. And, last, on the issue of CAP, nobody is suggesting a bias on his part, but what bothers me, when you are doing a job application in 1985—we know Judge Alito is a very

careful person, and I mean that as a compliment. On a 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 toward either Judge Alito's Italian ancestors or my Italian ancestors. Was this just pandering to the Meese and the Reagan administration, or was this just a total screw-up?

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

Senator LEAHY. Sure.

Ms. 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, but 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—

Senator LEAHY. But that is not really my question. Was there any question of why—why was he so proud of this that he would put it in a 1985 job application—when everybody—everybody—knew what kind of an organization it was, where Senator Bill Frist had condemned it and Senator Bill Bradley had. Did you ask why he proudly put that on his application?

Ms. 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, 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 organization 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. 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.

Senator LEAHY. Thank you very much.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Mr. Tober. Thank you, Ms. Tucker. Thank you, Mr. Payton.

Senator Hatch?

Senator HATCH. I will reserve my time. Thank you.

Chairman SPECTER. Thank you.

Senator Kennedy?

Senator KENNEDY. Thank you very much.

Did you know, Mr. Tober, that the Vanguard *Ventron*, which is the case of 1992, actually involved the carpenters? It names the carpenters which were on the Alito list for recusal, and—Mr.

Payton, maybe this should be directed to you—and that most of the people that have looked through there in detail feel that the reason that that was actually recused is because of the carpenters. I think it is spelled carpenteers—yes, c-a-r-p-e-n—carpenter, and that is the reason it was under the name of the Vanguard. You are familiar with that?

Mr. 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 is unclear. You cannot tell from what is there.

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

Mr. PAYTON. Yes, and we asked him about that.

Senator KENNEDY. And did he indicate what—well, what was his response?

Mr. 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.

Senator KENNEDY. Was the mistake, as you understand it, is because he did not, for one reason or another, neglected to put the Vanguard on his recusal list?

Mr. PAYTON. No, I do not 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, and I am not sure it was clear to Judge Alito. It got through.

Senator KENNEDY. It was not on his 1993, 1994, 1995, 1996 list, and the 1993 said no changes were made from 1992. So there is just 1 year, year and a half. We do not have the record on it, and I am just wondering, in your inquiry and review of that case, since that is the principal source of, as I understand it, of revenue. I mean it has had sizable increases in the revenue from the time he took that oath till the more recent years. So that is one of the factors on it. I was just interested, when he said it was a mistake, whether you made a determination, detection, because we have not been able to find that it was ever put on. Quite frankly, at least as a member of the Committee, we have heard a number of reasons for it. We have heard computer glitch. We have heard that it was an interim pledge and a commitment. We have heard that it was a *pro se* case and, therefore, the computers do not exist in the Third Circuit the way they do in law firms here in Washington, D.C. I am just trying to find out what was told to you.

To be very honest about it, if it had been said it was a mistake in the very beginning, I do not even think this issue would have taken more than 30 seconds of the Committee's time, but since we have had so many different reasons for it, which we have 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 are wondering what the Bar Association, in its interview—

Mr. PAYTON. I do not know the answer to your question. I do not 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 am 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.” The why then sort of became less significant.

Senator KENNEDY. Well, of course, Mr. Payton, he did. He took, 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’s name off the list. We went through this. I would be glad to make available to you—you indicated that you had gone through the hearings on this, and I welcome the opportunity just to make available to you the same material, and to get your response.

Mr. TOBER. Senator, we indicated in our letter of explanation, as we always do, that we continue to monitor these proceedings, and we will be happy to revisit anything the Committee wishes us to look at.

Senator KENNEDY. I want to join in thanking you for the service of the Bar Association. This is a very challenging and in many sense, a thankless job. But I think the country is much better off. So it judiciary. I thank you for your service.

Chairman SPECTER. Thank you, Senator Kennedy.

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

Senator HATCH. Just shortly. We appreciate the efforts that you make. We appreciate what the Bar Association is doing, and we appreciate what you have done in this particular case as well.

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 had made a mistake, but he asked the succeeding panel to retry the case. Are you aware of that?

Mr. TOBER. Yes.

Mr. PAYTON. Yes.

Senator HATCH. Was that an appropriate thing to do?

Mr. PAYTON. He asked that the Chief Judge identify a new panel, and I think that was the appropriate thing to do.

Senator HATCH. That is what an honest, decent judge would do, is it not?

Mr. TOBER. Sure, of course.

Senator HATCH. You are all aware of this 28 USC, the U.S. Code statute on this, am I correct?

Mr. TOBER. Correct.

Senator HATCH. I mean that statute defines a financial interest for the courts. It 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 a party, except that ownership in a mutual or a common investment fund that holds securities is not a “financial interest” in such securities, unless the judge participates in the management of the fund.” Are you aware of that?

Mr. PAYTON. Yes.

Senator HATCH. Now, did he participate in the management of the fund?

The answer is no. Then if he did not participate in the management of the fund, would he have had, under normal circumstances, to recuse himself?

Mr. PAYTON. I think the normal circumstances is amplified by the representation to this Committee, which he acknowledged, independent of the obligation that you are talking about, would have caused him to not want these cases to come before him.

Senator 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.

Mr. PAYTON. Yes, sir.

Senator HATCH. And you knew that. And so, I take it, you do not find any real fault in the way he handled the Vanguard matter?

Mr. TOBER. That is so.

Mr. PAYTON. That is correct.

Senator HATCH. That is correct?

Mr. PAYTON. That is correct.

Senator HATCH. Thank you so much.

Chairman SPECTER. Thank you, Senator Hatch.

Senator FEINSTEIN?

Senator 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?

Mr. TOBER. Well, the hearings are still going and I am 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 am still comfortable that we understood the judicial and legal profile of Judge Alito when we reached our rating.

Senator FEINSTEIN. Thank you.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Feinstein.

Senator KYL?

Senator KYL. Mr. Chairman, I do not 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 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.

Chairman SPECTER. Senator DeWine?

Senator DEWINE. No questions, Mr. Chairman.

Chairman SPECTER. Senator Sessions?

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

Mr. TOBER. As it turned out, Senator, the Chair just gets into a lot of marshaling, and the Third Circuit representative had to recuse herself because she had argued a case before a panel that Judge Alito had served on before he had 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 300 people, contacting over 2,000 people, putting together their

own written reports, marshaling the information from every corner and putting it in what turned out to be an 11-pound report. And when I first received it, as I told Ms. Tucker, I did not know whether to read it or send out birth announcements.

Senator SESSIONS. We are glad you do not have to do background work on Senators.

[Laughter.]

Mr. TOBER. We are pleased it is done for the moment.

Senator SESSIONS. One of the things, you know, some of us have complained about the ABA ratings, but there is so much value to it, it strikes me, because is it not true that sometimes when you are interviewing a lawyer that has been before the judge, or lost a case, a lawyer who has litigated against him, they will 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?

Mr. 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 or 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 is 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 a moment, I would like to say it is a remarkable group of people that I have had the privilege to work with.

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

Mr. PAYTON. I did.

Senator 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 is 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.

Mr. PAYTON. Thank you.

Chairman SPECTER. Thank you, Senator Sessions.

Senator GRAHAM?

Senator GRAHAM. Thank you, Mr. Chairman.

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

The idea of who you are getting as a person is important, and the homework you have 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.

Mr. TOBER. Well, we do not compare one nominee to another, Senator, as I am sure you can appreciate. But I will take the direct question, and indeed, I believe we said in our letter of evaluation that he has created an enormous record of public service, and his writings speak top that, and that is indeed what we have reviewed.

Senator GRAHAM. Thank you. About your rating, you know, we are 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 an occasion where you will render a writing I will not agree with, and that is just the way it goes. But I think the process where you are involved really helps us a lot. I think it helps the country, and I appreciate the time you have taken from your families, from your business to do it.

Now, what may take normal people 30 seconds to figure out may take the Senate 3 days—

[Laughter.]

Senator GRAHAM.—but we are going to ask one simple question about Vanguard. With this much material to have dealt with, and as many cases as he has heard, the first question for me about Judge Alito is, who am I getting here? Is an innocent mistake OK? I hope so because I make them all the time. What would I not want? I would not want someone who is 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?

Mr. 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.

Senator GRAHAM. Thank you very much. One last thought about Vanguard. What is in it for him to intentionally hear the case knowing that he should not? 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?

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

Senator GRAHAM. And there is no benefit one could find for him intentionally doing it, based on the nature of the case.

Mr. PAYTON. I am not aware of one.

Senator GRAHAM. Thank you all.

Mr. 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 indeed that happened.

Senator GRAHAM. Again, thank you for your service.

Chairman SPECTER. Thank you, Senator Graham.

Senator Schumer?

Senator SCHUMER. Thank you, Mr. Chairman.

I just have a brief question because we have heard a lot about the ABA rating, which is something that is prized and important.

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

Mr. TOBER. That is correct.

Senator SCHUMER. So it would not at all get into what somebody's judicial philosophy would be, is that correct?

Mr. TOBER. That is also correct.

Senator 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 is what you would rate them on?

Mr. TOBER. Senator, we do not do politics. What we do is integrity, professional competence and judicial temperament. They are objective standards and that is what we bring to this Committee.

Senator 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?

Mr. TOBER. If the suggestion was that they were out of the mainstream politically, That is correct. If they are out of the mainstream in terms of their judicial temperament, we might have a different thought.

Senator SCHUMER. Thank you.

Chairman SPECTER. Thank you very much, Mr. Tober, Ms. Tucker, Mr. Payton. We very much appreciate your service and your being here today.

Mr. TOBER. Thank you.

Chairman SPECTER. We next 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?

Senator COBURN. No, Mr. Chairman.

Senator SESSIONS. AMA, he would like to ask.

Chairman 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 legislation, more than 40 meetings in a very, very tough legislative approach. And he was in my office last December, at a time when I was being interviewed by Kathy Kiley, of USA Today.

And I introduced Judge Becker to Ms. Kiley, who asked him about Judge Alito. And without objection, I would like to make a part of the record the article which Ms. Kiley 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 and 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 Presi-

dent Reagan to the district court in 1970 and to the Court of Appeals for the Third Circuit in 1981. He has really been performing services as the 101st Senator, and by way of full disclosure I have 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.

Judge BECKER. Thank you, Mr. Chairman.

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

Judge Becker.

STATEMENT OF EDWARD R. BECKER, SENIOR JUDGE, U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, PHILADELPHIA, PENNSYLVANIA

Judge 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 a thousand 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 dialog with each other. 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 is gentle, considerate, unfailingly polite, decent, kind, patient and generous. He is modest and self-effacing. He shuns praise. When he had completed his tenth 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.