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November 1, 2024

Reed D. Rubinstein  
America First Legal Foundation  
600 14th Street NW, Fifth Floor  
Washington, DC 20005  
[foia@aflegal.org](mailto:foia@aflegal.org)

Re: FOIA-2022-00899  
23-cv-00391 (DDC)  
VRB:JMB:CEY

Dear Reed D. Rubinstein:

This is a second interim response to your Freedom of Information Act (FOIA) request dated and received in this Office on March 14, 2022, in which you requested records concerning Supreme Court Justice Clarence Thomas and his wife, Virginia Thomas.<sup>1</sup>

We previously provided you with an interim response on July 25, 2024. At this time, I have determined that an additional 231 pages are appropriate for release in full without withholdings, and copies are enclosed. We are also withholding in full eighty-four pages pursuant to Exemption 5 of the FOIA, 5 U.S.C. § 552(b)(5). Exemption 5 pertains to certain inter- and intra-agency communications protected by the deliberative process privilege. Please be advised that we have considered the foreseeable harm standard when reviewing records and applying FOIA exemptions.

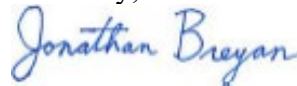
For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. *See* 5 U.S.C. § 552(c) (2018). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

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<sup>1</sup> The parties have subsequently reached agreements regarding the scope of this request.

If you have any questions regarding this response, please contact Marcia Sowles of the Department's Civil Division, Federal Programs Branch at 202-514-4960.

Sincerely,



Jonathan Breyan  
Senior Supervisory Attorney  
for  
Vanessa R. Brinkmann  
Senior Counsel

Enclosures

**From:** White House Press Office  
**Subject:** [EXTERNAL] President Biden Announces Key Regional Appointments for USDA, FEMA, and HUD  
**To:** Coley, Anthony D. (PAO)  
**Sent:** March 17, 2022 4:00 PM (UTC-04:00)



**FOR IMMEDIATE RELEASE**

March 17, 2022

**President Biden Announces Key Regional Appointments for USDA, FEMA, and HUD**

WASHINGTON – Today, President Joe Biden appointed the following individuals to serve in key regional leadership roles at the United States Department of Agriculture (USDA), the Federal Emergency Management Agency (FEMA) at the Department of Homeland Security, and the Department of Housing and Urban Development (HUD):

- Julia Wickard, USDA State Executive Director, Farm Service Agency, Indiana
- Jeffrey Holmes, USDA State Executive Director, Farm Service Agency, New Hampshire
- Steve Dick, USDA State Executive Director, Farm Service Agency, South Dakota
- Deidre Deculus Robert, USDA State Director, Rural Development, Louisiana
- Lucas Ingvolstad, USDA State Director, Rural Development, Nevada
- Erin Oban, USDA State Director, Rural Development, North Dakota
- Nikki Gronli, USDA State Director, Rural Development, South Dakota
- Perry Hickman, USDA State Director, Rural Development, Virginia
- Ryan Thorn, USDA State Director, Rural Development, West Virginia
- Thomas Sivak, FEMA Regional Administrator, Region 5
- Juana Matias, HUD Regional Administrator, Region 1
- Candace Valenzuela, HUD Regional Administrator, Region 6

These regional appointees will be critical to the President's efforts to rebuild communities most impacted by the pandemic, the economic recovery, and climate change. They bring deep expertise in their issue areas as well as critical relationships with federal, state, tribal, and local leaders. And, consistent with the President's commitment to building an administration that looks like America, these regional appointees represent the diversity of America and the communities they serve.

## **UNITED STATES DEPARTMENT OF AGRICULTURE (USDA)**

The USDA's Farm Service Agency implements agricultural policy, administers credit and loan programs, and manages conservation, commodity, disaster, and farm marketing programs in each U.S. State. Its mission is to equitably serve all farmers, ranchers, and agricultural partners through the delivery of effective, efficient agricultural programs for all Americans. State Executive Directors oversee this work, ensuring the needs of local constituents are met and that USDA resources are distributed equitably and fairly.

USDA's Rural Development mission area is committed to helping improve the economy and quality of life in rural America. State Directors lead offices that offer grants, loans, and loan guarantees to help create jobs and support economic development and essential services.

### **Julia Wickard, USDA State Executive Director, Farm Service Agency, Indiana**

Hailing from her family's Hoosier homesteaded livestock and row-crop farm, Julia A. Wickard, her husband, and two children own and operate Wickard Livestock where they raise registered Angus cattle and Boer goats. Wickard embarked on a journey with the State of Indiana at the Indiana Department of Environmental Management (IDEM) in April of 2017 as the Government Affairs Director and Agricultural Liaison. Just a few short months following her arrival at IDEM, she was appointed as Assistant Commissioner in the Office of Program Support, while also maintaining her Agricultural Liaison role. Prior to IDEM, she served for eight years as the Indiana State Executive Director of the U.S. Department of Agriculture's Farm Service Agency (FSA) where she led over 300 employees in 75 county offices in administering federal agricultural programs. She served as the Executive Vice President of the Indiana Beef Cattle Association, Chief Operating and Marketing Officer and Environmental and Natural Resources Director at the Indiana Farm Bureau Inc., and was the Environmental and Natural Resources Director in the Office of the Commissioner of Agriculture. She has worked for the Indiana Association of Soil and Water Conservation Districts, Inc. and served two members of Congress.

Wickard is a graduate of AgRIInstitute's Indiana Agricultural Leadership Program and currently chairs the board of directors. She is a recipient of Indiana's highest honor from the Governor of the State, the Sagamore of the Wabash, and in 2019 was recognized as a Purdue University Agricultural Sciences Education and Communication Distinguished Alumni. Wickard is active in her community and enjoys spending time with family and exhibiting cattle and goats in the state and across the country.

### **Jeffrey Holmes, USDA State Executive Director, Farm Service Agency, New Hampshire**

Jeffrey Holmes is a fifth-generation farmer from Langdon, New Hampshire on property owned by the family since 1873. The farm was home to registered jersey cattle for over 80 years. Commodities currently produced on the farm include hay, corn, maple, timber, and firewood. Holmes' public service includes 22 years on the New Hampshire Farm Bureau (NHFB) Board of Directors with eight years as NHFB President, 15 years as the Langdon town moderator, FSA county committee member, and County Executive Director in the Cheshire-Sullivan County office. Holmes and his wife Lisa are the proud parents of two adult children, and are enjoying the arrival of a grandson born in 2021.

### **Steve Dick, USDA State Executive Director, Farm Service Agency, South Dakota**

Steve Dick has served as the Executive Director of Ag United for South Dakota since January 2005. Within this capacity he worked with the South Dakota Farm Bureau, South Dakota Cattlemen, South Dakota Pork Producers, South Dakota Soybeans, South Dakota Corn Growers, South Dakota Dairy Producers, and the South Dakota Poultry Industries Association to organize events and activities connecting consumers with South Dakota farm and ranch families. Before joining Ag United, Dick served on Senator Tom Daschle's (D-SD) staff for a total of ten years in South Dakota and Washington, DC. In his last position with Senator Daschle, he served as the Agriculture Outreach Coordinator.

A native of southeastern South Dakota, Dick operates his family's farm near Canistota in McCook County where he grows corn and soybeans and feeds cattle. He has served on the boards for East Dakota Water Development District, South Dakota Ag Foundation, East Dakota Education Foundation, Sioux Valley Energy Operation Round-Up, and the West Central School District. He is a graduate of the University of South Dakota. Dick and his wife, Jeanne, reside in Hartford and are the parents to two children, Truman, a student at the University of South Dakota, and Eleanor, a student at West

Central High School.

**Deidre Deculus Robert, USDA State Director, Rural Development, Louisiana**

Deidre Deculus Robert was born and raised in rural Mamou, Louisiana. She has been immersed in agriculture and rural development her entire life; her mother retired from the U.S. Department of Agriculture and father served on the Farm Services Agency State Committee. Robert has over two decades of legal, administrative, and executive management experience. Her legal career began in the Parish Attorney's Office of the City of Baton Rouge-Parish of East Baton Rouge as an assistant city prosecutor. During her 11 years with the City-Parish, she advanced to become the first female African American section chief. She worked for over six years as an assistant attorney general with the Louisiana Department of Justice, where she served as deputy director of the Public Protection Division, deputy director of the Litigation Division, and special litigation counsel assigned to defend the Louisiana Judiciary.

Recently, Robert served as the executive counsel for the Louisiana Department of Transportation and Development. Her responsibilities included managing legislative affairs on the federal, state, and local levels and supervising the innovative procurement/alternative delivery, and human resources of the agency. She collaborated with state and local partners advance infrastructure needs including rail, broadband, and bridges throughout the state. Previously, Robert served as general counsel of the Southern University and A&M College System, the only HBCU college system in the country. Robert has focused her passion for service with the Louisiana State Bar Association Diversity Committee and House of Delegates; the Louisiana Bar Foundation as a fellow and board member; the Louis A. Martinet Legal Society; Junior League of Baton Rouge; Arts Council of Greater Baton Rouge, and more. She and her husband James reside on their ranch in Glynn, Louisiana with their two sons.

**Lucas Ingvolstad, USDA State Director, Rural Development, Nevada**

A native Nevadan born and raised in Reno, Lucas Ingvolstad attended the University of Nevada, Reno where he earned his Master of Science degree in Land Use Planning Policy in 2011 and a Bachelor of Arts in Psychology in 2005. In 2016, Ingvolstad was acknowledged as the Young Alumni of Year by the College of Science and Mackay School of Earth Sciences.

Ingvolstad's professional experience includes public policy, public affairs, legislative relations, stakeholder engagement, and business development. Ingvolstad previously served as the Senior Director of Government and External Affairs for Eolus North America, a utility-scale renewable energy developer focusing on solar, wind, and battery storage projects throughout the Mountain West. Ingvolstad directed legislative and regulatory strategies and closely engaged with elected officials and administrators to promote renewable energy development, to combat climate change and promote economic development.

Before joining Eolus, Ingvolstad served as a senior advisor to U.S. Majority Leader Harry Reid (D-NV), where he focused on energy, agriculture, and natural resource issues. Ingvolstad was responsible for regularly communicating with Nevadans and stakeholders on issues relating to energy, public lands, water, natural resources, and economic development, and worked directly with Native American tribes. Ingvolstad developed strategic outreach initiatives by collaborating with local governments, industry, nonprofit organizations, and advocacy groups, and played a key role in organizing the Lake Tahoe Summits and the National Clean Energy Summits. In Ingvolstad's spare time, he loves spending time with family, is an avid cyclist, and enjoys being outdoors, backyard gardening, and cooking.

**Erin Oban, USDA State Director, Rural Development, North Dakota**

Erin Oban grew up in a farm family in Ray, North Dakota, a small, rural community in the heart of Bakken oil country. Oban moved to Bismarck to further her education and received a bachelor's degree in Mathematics Education at the University of Mary. Oban's professional career began as a middle school math and technology teacher before gaining experience in nonprofit management, politics, and public service. She is currently employed as the Director of Community Engagement with the Central Regional Education Association where she supports efficiencies and effectiveness in education through partnerships between school districts and local, regional, and statewide organizations and agencies to provide programs and services for the students, families, and educators in their communities.

Oban was elected in 2014 and re-elected in 2018 to represent central Bismarck's District 35 in the North Dakota State Senate. Oban has become an effective and respected leader, rising most recently to the position of Assistant Senate

Minority Leader. Throughout her two terms in the legislature, she has served on the Senate's Education, Energy and Natural Resources, Agriculture, Government and Veterans Affairs, and Political Subdivisions Committees. Oban has been thrice elected by her peers to serve on the powerful Legislative Management Committee and was twice appointed with bipartisan support as chairwoman of the legislature's Interim Education Policy Committees. Her leadership in the Senate on issues of importance has been recognized by many local and statewide associations. Oban makes her home in Bismarck with her husband, Chad, and their 5-year-old son, Evin.

#### **Nikki Gronli, USDA State Director, Rural Development, South Dakota**

Nikki Gronli grew up in Aurora, South Dakota. She received her Bachelor of Science degree from the University of Minnesota, and began her career in advertising and marketing in Minneapolis. She returned to South Dakota in 2001 and continued to work on some of the best-known brands in the region, including South Dakota Tourism. Gronli will be leaving her role as Marketing Specialist at SDN Communications where she oversaw the brand, traditional marketing, and educational events. This professional experience helped her achieve board positions with Dakota State University's Cybersecurity Industry Advisory Board and formerly, President of the Department of Defense STARBASE program. In her current role, Gronli has been an advocate for broadband expansion in South Dakota. Gronli understands extending critical broadband infrastructure to under-served communities and tribal areas is key to diversifying South Dakota's economy.

Gronli is active in her community through numerous board and committee positions such as Minnehaha County Housing Redevelopment Committee, Siouxland Heritage Museum Board, and LEAD South Dakota, and recently served as vice chair of the South Dakota Democratic Party and chair of the Minnehaha County Democratic Party. Gronli and her husband Brian live in the rural Dell Rapids area, where they raised their four now-grown children. They are proud grandparents of two. In their downtime, they enjoy travel, hiking, and fishing – even in the winter.

#### **Perry Hickman, USDA State Director, Rural Development, Virginia**

Perry M. Hickman grew up in Tappahannock, Virginia and still resides in this small rural community. Hickman is a 1985 graduate of Virginia Commonwealth University and received a Bachelor of Science Degree in Business Administration and Management with a concentration in Real Estate and Urban Land Development.

Hickman has more than 20 years of combined sales experience in mortgage lending and telecommunications services. Hickman started his federal career with USDA Rural Development in April 2008, and he has primarily worked in the Rural Development Community Programs division to assist rural municipalities, non-profit corporations, and Tribal entities that seek federal financial assistance to enhance their ability to provide essential services for the orderly development of a rural community. Hickman has been a Rural Development National Office Senior Loan Specialist where he planned Public, Private, Partnership (P3) events with commercial lenders and other private sector partners. Annually, these P3 events accounted for obligating more than \$200 million of congressionally appropriated funds through the Rural Development Community Facilities Direct Loan Program. As the Virginia Community Programs Director, Mr. Hickman managed a \$750 million portfolio.

#### **Ryan Thorn, USDA State Director, Rural Development, West Virginia**

Born, raised, and educated in West Virginia, Ryan Thorn grew up the son of a coal miner and learned early in life the importance of hard work, serving others, and dedication to creating opportunities for rural communities. Thorn has 15 years of professional experience in the private and public sectors, working in the fields of public and government affairs and economic development. He previously served more than five years as Economic Development Manager for the Office of U.S. Senator Joe Manchin III (D-WV). In this role, he worked with local, state, and federal stakeholders to attract new and expand existing businesses, strengthen public infrastructure, develop a skilled and ready workforce, and create economically diverse and resilient communities across the state. Thorn is the first in his immediate family to graduate from college and is an advocate for lifelong learning. He holds a master's degree from West Virginia University, a bachelor's degree from West Virginia Wesleyan College, and is a board member of the Southern West Virginia Community and Technical College Foundation.

#### **FEDERAL EMERGENCY MANAGEMENT AGENCY (FEMA)**

Regional Administrators lead FEMA's 10 Regional offices and coordinate directly with the FEMA Administrator to support

state, local, tribal, and territorial (SLTT) communities in their geographic area of operations delivering frontline services across the spectrum of preparedness, mitigation, response, recovery, and continuity programs. The Regional Administrators play a critical role in delivering timely, efficient, effective, and accessible federal assistance.

**Thomas Sivak, FEMA Regional Administrator, Region 5**

Thomas Sivak serves as the Deputy Director of Operations for Cook County, Illinois Department of Emergency Management and Regional Security. Sivak's key areas of emphasis are preparedness, planning, logistical response capabilities, information sharing and operational coordination across 135 municipalities. Throughout Sivak's 15-year emergency management and public safety career, he has proudly served both private and public sector organizations. He is skilled in and recognized as a subject matter expert in safety, security, emergency management, disaster relief, pandemic response, and coordination.

Throughout his career, Sivak has served in leadership roles during major Emergency Operations Center and incident management activations as a result of major incidents and events. These include the 2012 Super Bowl, 2018 Mercy Hospital Active Shooter Incident, COVID-19 pandemic, civil unrest in May and August 2020, and Presidential Election Consequence Management. Sivak is a Certified Emergency Manager through the International Association of Emergency Managers and a graduate of the Executive Leadership Program at the Naval Postgraduate School Center for Homeland Defense and Security. He holds a Master of Science in Public Service Leadership from DePaul University, a Bachelors of Arts degree from Marquette University, and is originally from East Cleveland, Ohio.

Region 5 serves Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.

**DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (HUD)**

Regional Administrators lead HUD's 10 Regional Offices that directly serve state and local organizations. Regional Administrators oversee field offices across each state in their region and ensure the Department directly serves local communities. Regional Administrators play a key role in leading assignments of housing assistance funds within the region and coordinating those assignments with HUD headquarters.

**Juana Matias, HUD Regional Administrator, Region 1**

Juana Matias is a member of the Massachusetts Bar Association and served as the Chief Operating Officer for MassINC, a nonprofit, non-partisan public policy think and action tank and civic news organization. In this capacity, she oversaw the organization's internal operations, policy and advocacy strategy, development, and communications, and served as the main spokesperson with elected officials, policy makers, and the media. She also led efforts to strategically advance MassINC's research in policy areas which included the K-16 education continuum, housing choice, criminal justice reform, transit-oriented development, and racial and economic justice.

Previously, Matias served as the State Representative for the 16<sup>th</sup> Essex District, becoming the first Latina immigrant elected to the Massachusetts House of Representatives. During her time at the State House, she secured an 81% increase in local funding for her district, and sponsored key legislation that protected immigrant rights, stimulated the production of new affordable housing, promoted access to minority-owned and women-owned businesses, addressed inequities in our public-school systems, and expanded opportunities for working class Americans.

Region 1 serves Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

**Candace Valenzuela, HUD Regional Administrator, Region 6**

Candace Valenzuela is a mother, an educator, and a former school board trustee. She credits HUD and public education with giving her the stability she and her family needed to thrive as she experienced food and housing insecurity throughout childhood. After becoming the first in her family to graduate college, Valenzuela has since devoted her life to fighting for opportunities for others. She first ran for her local school board to improve Texas schools, becoming the first Latina and first Black woman to serve on the Carrollton-Farmers Branch school board. While on the board, she worked to ensure that faculty and staff would be able to afford to live in the district they served, and that students would have a strong education

to help them overcome life's challenges. Valenzuela was the Democratic nominee for Congress in Texas' 24<sup>th</sup> District in 2020. She previously worked as a development manager for Metrocrest Services, a half-century-old non-profit that has worked hard to fight hunger, housing insecurity, and unemployment in her community.

Region 6 serves Arkansas, Louisiana, New Mexico, Oklahoma, and Texas.

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White House Press Office · 1600 Pennsylvania Ave NW · Washington, DC 20500-0003 · USA · 202-456-1111

**From:** White House Press Office  
**Subject:** [EXTERNAL] Press Briefing by Press Secretary Jen Psaki, March 14, 2022  
**To:** Coley, Anthony D. (PAO)  
**Sent:** March 14, 2022 10:06 PM (UTC-04:00)



**FOR IMMEDIATE RELEASE**

March 14, 2022

**Press Briefing by Press Secretary Jen Psaki, March 14, 2022**

James S. Brady Press Briefing Room

3:25 P.M. EDT

MS. PSAKI: Hi, everyone.

Q Hello. Good to see you.

MS. PSAKI: Good to see you. Okay, I have nothing at the top for you.

Josh, what is on your mind?

Q Thanks, Jen. Two questions. First, after the Rome meeting, since the war began, has China provided any military or economic aid to Russia or expressed any specific intentions to do so?

MS. PSAKI: I'm not in a position to confirm or detail any intelligence from here at this point in time.

Q Okay. Moving on to the Russia-Ukraine talks: What does the U.S. see that would be a sign for optimism that some kind of ceasefire could be reached? And which carrots and which sticks do you think Putin is most responding to, if that's the case --

MS. PSAKI: Sure.

Q -- most likely to respond to?

MS. PSAKI: Sure. Well, as you've heard us say in the past, we certainly will continue to support the Ukrainian participation in these talks and conversations as long as they choose to continue to participate in them, of course. And we are trying to boost them by providing a range of not just economic and humanitarian assistance, but military assistance that we believe strengthens -- strengthens -- strengthens -- excuse me -- their positions in these talks.

Our view continues to be that, despite words that are said in these talks or coming out of these talks, diplomacy requires engaging in good faith to de-escalate. And what we're really looking for is evidence of that. And we're not seeing any evidence, at this point, that President Putin is doing anything to stop the onslaught or de-escalate. But that is really what we would be looking for.

Go ahead.

Q Thank you, Jen. To follow up on the Rome meeting, what are the consequences for China if they do aid Russia?

MS. PSAKI: Well, I'm not going to get into specific consequences. I think what we have conveyed and what was conveyed by our National Security Advisor in this meeting is that should they provide military or other assistance that, of course, violates sanctions or supports the war effort, that there will be significant consequences.

But in terms of what the specifics look like, we would coordinate with our partners and allies to make that determination.

Q Okay. But Jake Sullivan certainly communicated that there would be consequences?

MS. PSAKI: Yes, as we have also said publicly a number of times.

Q Okay. And then, is there anything you can share about the President's potential meeting -- potential trip to Europe in the next couple of weeks? Who he might be meeting with and really what the point would be of going to Europe?

MS. PSAKI: Sure. Well, we are, of course, closely engaged with our NATO partners and European allies, as you heard us say a number of times, about the next steps in diplomacy, whether that's providing additional humanitarian or security assistance or the mechanics for future conversations.

But there's not been any final decision about a trip, so I don't have anything to preview about what that would look like if he were to take a trip.

Q Okay. Thanks, Jen.

MS. PSAKI: Go ahead.

Q Thanks, Jen. The President said back in February that the U.S. would respond forcefully if Americans were targeted in Ukraine. Brent Renaud was killed over the weekend. One of my colleagues was injured today. We're still waiting to hear if he's okay. So what is that response going to look like?

MS. PSAKI: Well, let me first say: Your colleague, Benjamin Hall -- I know there's not final reports yet or we would wait for your news organization to confirm those -- but our thoughts, the President's thoughts, our administration's thoughts are with him, his family, and all of you at Fox News as well.

In terms of specific actions, I think you have seen the President lead the world in taking -- putting in place consequence -- consequences, putting in place repercussions and steps in response to the actions of Russia -- the brutal actions that have certainly impacted Ukrainian people and now have certainly impacted some Americans.

But in terms of next steps or what the next consequence would be, I don't have anything to preview for you at this point in time.

Q But we've seen the President been, so far, unwilling to draw a red line on the kinds of atrocities that we're going to watch from the sidelines. We've seen maternity wards being bombed, illegal weapons being used, pediatric hospitals being targeted.

President Obama drew the red line for Syria at chemical weapons. So is there any thought process about what we're willing to watch happen before there's --

MS. PSAKI: Well, Jacqui, I think it's important to reiterate as often as we can that what we're seeing is horrific, what we're seeing is barbaric. And the steps that the President has taken and led the world in taking have essentially led the Russian financial system to be on the brink of collapse. We have provided more military assistance to the Ukrainian military and the Ukrainian government than any other country in the world and more historic assistance than any other year to Ukraine in history. And we're doing that so that we can support them in this difficult moment.

So I would say that, at this moment in time, we have been hardly on the sidelines. We have been leading this effort around the world to respond to every step and every escalatory step that President Putin and the Russians are taking.

Q But isn't there a concern that if we don't draw the line at something like chemical weapons, that it'll make it easier for malign actors to use them in the future, because they'll just go unpunished?

MS. PSAKI: Well, Jacqui, I think that you heard the President say on Friday that there would be severe consequences and the world would respond if they were to use chemical weapons.

And what we have been doing over the course of the last several weeks, if not months, is providing as much information to the global community, to the media, and to others about what to expect.

And when you have President Putin suggesting -- and Russian -- Russian officials suggesting that the United States and Ukrainians are the ones who are working on a chemical weapons program, it's clear that this is a pattern that we've seen in the past of them trying to set up a predicate for their own actions.

Q But what does -- what does that end up looking like if the world responds? Because so far, we've heard the President talk a lot about what the U.S. is not going to do, in terms of, you know, not wanting to trigger war with a nuclear power. But do we believe that Putin is, you know, a rational kind of person who, you know, would pay attention to something like that? I mean, he didn't need provocation to, you know, invade Ukraine. Why wouldn't we think that he would just create a pretext that is fabricated for something like that?

MS. PSAKI: We do. That's why we've talked about it.

And I think, Jacqui, what's important here is -- and then I'm just going to move on to get to more people -- is that for any President, you have to weigh how you can lead the world, how you can make very clear that actions are horrific, that they are not acceptable, they're not aligned with global norms, while also thinking about our own national security interests. And starting World War Three is certainly not in our national security interests. Putting U.S. troops on the ground in Ukraine to fight a war with Russia is not in our national security interests.

Go ahead.

Q I do have one -- one quick --

MS. PSAKI: I just have to move on because I -- otherwise I'm not going to get to other people.

Go ahead.

Q It's a follow-up to what you had said though about misinformation and Twitter.

MS. PSAKI: Yeah.

Q Because, last year, the President worked with Twitter specifically to address misinformation on vaccines, called it a "wartime effort." Has there been any conversations with Twitter to address misinformation as it pertains to chemical attacks and that kind of thing, given that the -- you know, Russia has banned this platform within the country and they're using it to, obviously, target eyes outside of the country, including within the U.S., to spread propaganda and misinformation?

MS. PSAKI: We were the ones who told you all about that.

I agree. I don't have anything to read out for you in terms of private conversations with Twitter or any other social platform. But I'm happy to check and see if there's more.

Go ahead.

Q Back on the Rome talks. Have you seen any -- or did you -- your colleagues see in this meeting any sign that China got the message, that they are going to heed your warnings?

MS. PSAKI: Well, what we're going to be watching closely, of course, is actions. So beyond that, I think, as my colleagues just -- just read out for you in a call that we delayed the briefing slightly to make sure you could all participate in: It was an intense seven-hour session reflecting the gravity of the moment. And it was an opportunity to be very clear about what you've heard our National Security Advisor convey publicly but more directly about what the consequences would be.

Q And, you know, your colleagues have said that your deep concerns were conveyed about what would happen if China were to align more closely with Russia. Just, big picture: If China does not heed the U.S.'s warnings, if they do move forward with this, how concerned are you that this is inching closer to the world war that the President has been warning of?

MS. PSAKI: Well, I think what we're looking at here -- one is: If China were to decide to be an economic provider, or to take additional steps, there to Russia, they only make up 15 percent or 20 -- 15 to 20 percent of the world's economy. The G7 countries make up more than 50 percent. So there are a range of tools at our disposal in coordination with our European partners should we need to use them.

But, again, we are -- don't have anything to update you on in terms of an assessment. This is obviously an area we're watching closely.

While this meeting has been planned for some time as a follow-up from the November call that pres- -- the President had with President Xi, it was a timely -- an important moment to have this conversation, especially given the reports we've seen and -- and the invasion, of course, of Ukraine.

Go ahead. Oh, one more? Go ahead..

Q Just one quick follow-up, actually, to Jacqui's questions --

MS. PSAKI: Sure.

Q -- about chemical weapons. You know, the President, as you noted, said on Friday that Russia would pay a severe price. What would that price look like? Are we talking in the realm of more sanctions? Can you give us sort of any big

picture about what that would entail?

MS. PSAKI: That would be a conversation that we would have with our partners around the world.

But there's no question if Russia were to decide to use chemical weapons, there would be a severe reaction from the global community.

Go ahead.

Q So when you talk about, kind of, the possibilities for China if they don't go along with what you've asked, would you say, like you've said with Russia, that "everything is on the table," including ending trade negotiations, sanctions? Is that all on the table?

MS. PSAKI: I'm just not going to be in a position to detail it further from here. We'll see. We'll keep having this conversation over the coming days.

Q But you won't do nothing if China decides to provide military support?

MS. PSAKI: We've been clear there would be consequences.

Q And that you would -- you all would initiate?

MS. PSAKI: Yes.

Q Okay. And then, what's kind of your end -- thinking about what an endgame looks like, as far as these conversations with China, do you want them to shift their strategic priorities and not have a relationship with Russia that it does now? Or are you looking for something more modest?

MS. PSAKI: It's less about changing their mind and more about making clear with them what the consequences would be should they take additional actions to support this invasion.

MS. PSAKI: Go ahead.

Q On the additional \$200 million in security assistance --

MS. PSAKI: Yeah.

Q -- the President signed off on this past weekend, an official said that part of it would go to anti-armor and anti-aircraft systems. I know the Pentagon says it's still kind of in process right now. Are these -- are we talking about weapon systems that have already been delivered, or is there consideration of new types of weapon systems in this tranche of funding?

MS. PSAKI: It's a good question, Phil. My understanding -- and just to give you all more detail: This weekend, as I think you all saw it, we announced -- and I think this is why you're asking -- the President authorized an additional \$200 million of security assistance, which utilizes the maximum amount of funding available to provide Ukrainians with the type of weapons they are using so effectively.

It's really a continuity, as I understand it -- let me double check this for you -- of the type of weapons that they have been using very effectively on the ground to push back on Russia, both in the air and on the ground.

So that includes, as you -- as you noted, anti-armor, anti-tank, and air defense capabilities and ammunition of other types, and other types of assistance to address the armored, airborne, and other threats that they are facing.

But my understanding, Phil, is it's a continuation of the types of security assistance that we have been providing. And, of course, the President is looking forward to -- there's a significant amount of funding, as I think you all have noted, in the omnibus for Ukraine, which would enable us to provide even additional assistance to add to that package.

Q Okay. And then just a quick follow-up to one of Josh's questions. The Deputy Secretary of State this weekend said, quote, she'd seen some signs of "willingness to have real, serious negotiations." I think that differed a little bit from what we've heard from officials about the Russian posture up to this point.

Can you elaborate on what the signs may have been -- may have been seen in terms of giving the Deputy Secretary of State that view of things?

MS. PSAKI: Well, she also said that they would have to back any words with actions, essentially, which I think is an important context. Right?

They did have talks today. There have been reports that they will have additional talks. We've been very appreciative of the efforts of our allies -- France, Germany, Israel, and Turkey, and others -- to be participants in these talks at times or engage in these talks at times.

But, again, diplomacy requires both sides engaging in good faith and to deescalate. And what we're really looking for is specific delivery of actions.

I think it's important to remember that there have been five or six attempts to implement a humanitarian corridor. Those have not been effective. Those have not worked. You've seen, through video footage and others' reports, that those -- that has not been abided by. So that is where we are keeping our eye and focus.

Go ahead, Kelly.

Q Do you get a sense that as this conflict with Russia and Ukraine is happening, that other actors that are adversaries to the United States -- China, Iran, North Korea -- are also testing the West, with China's work with Russia, as you're dealing with that, perhaps with Taiwan; Iran with its rockets; North Korea also showing its provocative nature?

Is there a test of the West coming from some of the adversaries of the United States?

MS. PSAKI: We have not assessed those to be related, as you have said. I mean, if you look at the Iran -- the missile strike that we saw over the weekend, no U.S. facilities were hit, no personnel were harmed. We were not the targets of that.

We've obviously seen tests and information we put out publicly as it relates to North Korea. We've seen dozens of tests over the course of past administrations as well. So I would say we are not assessing it through those -- that prism.

Q Has the administration reached out to American companies that have property, infrastructure in Russia -- to expect that to be nationalized by Russia and to lose those assets in Russia?

MS. PSAKI: We have been, of course, engaged with U.S. companies -- not encouraging them; obviously, we've -- publicly applauding them. But they're going to make their own decisions as private sector companies.

We've also conveyed, as we did publicly, I think on Friday, that there would be -- we would certainly look to consequences should that happen.

Go ahead.

Q The former White House COVID Advisor, Andy Slavitt, has a Twitter thread today in which he talks about the

potential for an increase in COVID cases this spring. He says, "Based on European case increases, the U.S. could see a new rise in COVID cases..." Are you confident the administration has the real-time data it needs to provide the best information possible to the public?

MS. PSAKI: To pr -- to assess data?

Q Yes.

MS. PSAKI: Yes, we are. I would note that -- I did not see his tread -- his thread, but let me note -- and I'm not sure if it was related to the BA.2 variant. Was it related to the BA.2 variant?

Q Yes.

MS. PSAKI: Okay. What we do know about the BA.2 variant, which I think is important context for people, is that it's circulated in the United States for some time. We've been watching it closely, of course. We currently have about 35,000 cases in this country. We expect some fluctuation, especially at this relatively low level, and, certainly, that to increase.

I would also note that while BA.2 is more transmissi- -- is a more transmissible version of Omicron, the tools we have -- including mRNA vaccines, therapeutics, and tests -- are all effective tools against the virus. And we know because it's been in the country.

And so, as we're watching, and I think a lot of the reporting has been about, of course, the UK but also China. And China has a zero-tolerance policy, as you all know, but they also did not conduct their vaccination and booster campaigns with mRNA vaccine. So that is important context, too, as you're seeing the impact.

What I would note, just to go back to your earlier part of your question, is that we are still pressing -- the place where it is concerning is the fact that we need additional COVID funding. And we have talked about this -- we talked about this a little bit in the past, but -- last week -- all running together.

But -- but without COVID response resources and additional money, there could be immediate impacts on testing capacity; the uninsured fund, which offers coverage of testing and treatments for tens of millions of Americans who lack health insurance; and on our supply of monoclonal antibodies. And that means that some programs, if we don't get funding, could abruptly end or need to be pared back. And that could impact how we are able to respond to any variant, of course.

Q I do just want to ask you one more --

MS. PSAKI: Yeah.

Q -- quick question.

Q We noticed the President, when he came on stage today at the Marriott, had a mask on. Is that something he has been advised to do, or is that something he just feels more comfortable doing?

MS. PSAKI: Often he does that when it's required by a specific event, as he did when he went to Texas last week. I can certainly check on that. He was tested yesterday and tested negative.

Go ahead.

Q Thanks, Jen. So, on Ukraine, the President has made clear that he sort of has a red line with Russia, in terms of not wanting to do anything that would get into a direct confrontation or lead to World War Three, as he puts it.

I'm curious -- I know you're not sharing specifics, but in broad strokes, does he have a similar red line now with China

assisting Russia? And are -- is the -- does he not want to get into a direct confrontation with China? And are there certain things he's not willing to do because of that?

MS. PSAKI: Let me see if I can answer your question, but tell me if I'm not.

We don't like red lines around here, so I'm not going to use that phrasing. But you are obviously correct that what he is -- he's been very clear and consistent about his -- that he does not have the intention of sending U.S. troops to Ukraine. That has not changed.

I would look at -- while we are certainly watching closely the actions of China, whether -- whether that is support of any kind -- in support of any kind for Russia, and certainly there would be consequences to that -- I do think we look at it through a slightly different prism. I mean, Russia is invading Ukraine actively. So, I'm not -- but I'm not sure if I'm answering your question or not.

Q Well, sort of. Just to follow up, I mean -- right, no ground troops in Ukraine, but also, there have been other things, such as not enforcing a no-fly zone or not providing the fighter jets --

MS. PSAKI: Yeah.

Q -- that the President has been reluctant to do. So, again, you said you're not sharing specifics. You said Jake Sullivan said "significant consequences" for the Chinese. But I'm wondering if there are certain things that you will not consider because it could lead to a direct confrontation with China that you're reluctant to get into, the same way you are with Russia.

MS. PSAKI: I just think we look at it slightly differently. I mean, what I'm talking -- what we -- why the President has been so clear about not sending U.S. troops is obviously because that would be a military conflict. We're not fighting, obviously, in a -- there's no military conflict at this moment with China, nor do we -- nor are we predicting that. So I think we just -- it's slightly different.

Q And one just on a --

MS. PSAKI: Sure.

Q -- different topic. How high is the administration expecting gas prices to go? And how much -- is there a limit -- not a red line but a limit at what you think -- (laughter) -- the U.S. public can bear?

MS. PSAKI: Just flows off the tongue. (Laughs.) It's okay.

So it's a good question. We don't have -- I don't have a prediction from here, in terms of what it could look like. There are outside predictors, of course. And, obviously, what we're trying to do is mitigate the impact. You know, and you've seen, of course, you know, the price of oil go down a little bit. And the President will continue to look at a range of steps that he can take, whether it is engaging through his team, or through even himself personally, with big global producers, or it is looking at a range of domestic options.

But we've seen it go up. I mean, we look at a lot of the same data you look at -- AAA and other data -- that shows us how much it has gone up since the period of time when Russian troops lined up on the border.

But in terms of how far -- you know, we still believe it will continue to go up, but we're trying to take steps we can take to mitigate that and reduce it.

Go ahead, Mara.

Q Thank you. I understand your reluctance to lay out what the consequences would be if Russia used chemical

Q I thank you. I understand you don't want to lay out what the severe consequences would be if Russia used chemical weapons, but I guess what I'm confused about is we know there's not going to be any U.S. troops, no jets, no no-fly zone. Other than the things you've already done, which you have already described as severe, could you give us some examples of what more you can do since you've ruled out all these things?

Just -- when you talk about severe consequences, what does that mean, given that we know what it doesn't mean?

MS. PSAKI: Sure. I --

Q Yeah.

MS. PSAKI: I understand your question. I'm just not going to outline that from here. Those are conversations that will happen -- continue to happen with our national security team and with our partners and allies around the world.

Q But what you're asking us to believe is that there are severe consequences that you haven't used yet but that are not on the "no" list?

MS. PSAKI: Correct.

Q Okay. But you won't tell us what kinds of things those might be?

MS. PSAKI: We're going to have those conversations privately through our national security team and with our partners around the world.

Q Okay. But -- but do you -- I guess what I'm wondering -- what about the argument that there just aren't any more severe consequences for you to use because most of the severe ones you've ruled out?

MS. PSAKI: That's inaccurate.

Q Okay.

MS. PSAKI: Go ahead.

Q Just on the Fed nominations --

MS. PSAKI: Yeah.

Q Nice try, Mara.

Q -- does the White House have any assurances from any Republican senators that they would support Sarah Bloom Raskin's nomination? And did Senator Manchin give the President or anyone in the administration a heads up about his opposition to her -- to her nomination? I'm trying to figure out if that was a surprise.

MS. PSAKI: Sure. I understand your question. We were aware of his position in advance of his -- of Senator Manchin's announcement. We are -- she is one of the most qualified individuals to ever be nominated to this position. And so where we are now is -- our focus is on continuing to work with Chairman -- Chairman Brown to garner bipartisan support. But I don't have anything to read out for you on that front at this point.

Q How did Senator Manchin make you aware that -- of his opposition? Was there a call to someone in the White House? Did the President know? What did that look like today?

MS. PSAKI: I'm just not going to detail more specifics.

Q Okay. And just one last question, if you don't mind.

MS. PSAKI: Yep.

Q How is the administration preparing to respond to the potential supplies chain shock -- excuse me -- posed by China's decision to lock down the tech production hub in Shenzhen?

MS. PSAKI: So we are, of course, monitoring this incredibly closely, and our team is quite focused on it. What I will say is that, because of the steps we've taken and a number of steps we've taken to better -- better prepare and strengthen the supply chain, you know, we -- we feel that that has helped us -- will help us sustain.

But in terms of -- right now, we're basically in the stage where we're monitoring with the State Department. What we're looking at is, of course, as you know, the impact on some of these ports around where -- the impacted areas of China.

And we know here that, of course, our Port Action Plan and the work of our Supply Chain Disruptions Task Force, that we have a strong inventory that we can rely on. It's about 90 percent of goods at groceries and drugstores are in stock currently. And we've also reduced the number of import containers sitting at the docks for over nine days by over 60 percent.

But in terms of specific impacts of ports in China, we're monitoring it, and we don't have a new assessment at this -- in addition -- up-to-date assessment, I should say, at this point in time.

Go ahead.

Q Thanks, Jen. Is it the U.S. assessment, just to be clear, that Russia is deliberately targeting civilians in Ukraine?

MS. PSAKI: Well, this is part of our assessment and review as we're looking at how we're -- whether we will designate as a war crime. And we look at this through a legal process internally. Obviously, the targeting of civilians -- and we have seen a range of very concerning video reports -- other would be categorized in that -- through that as -- in that phrasing, but we have a process that we're still working through here.

Q And then, last week at a briefing, you told us that us, as reporters, should, quote, "not focus a lot" of our conversations "about the future of the United States importing oil at this point...from Venezuela." Were you ruling out that the U.S. would import oil from Venezuela (inaudible)?

MS. PSAKI: I was saying it's not an active conversation at this time.

Go ahead.

Q Hi, thanks. Does the White House have any reaction to Ginni Thomas acknowledging that she attended the January 6th rally?

MS. PSAKI: I do not.

Q And just kind of on that: Does her attendance there raise any kind of concerns about the independence of the Supreme Court, potential conflicts of interest, anything like that?

MS. PSAKI: I just don't have any more comment on it at this point in time.

Go ahead.

Q Hi, Jen. For the second time in two weeks, a group of hundreds of Haitian migrants has landed by boat in the Florida

Q -- Yeah, for the second time in two weeks, a group of hundreds of Haitian migrants has arrived by boat in the Florida Keys. Given the surge we saw last year in Del Rio of Haitian migration, what is the administration's reaction to these landings? Are there any plans to send any assistance either to Haiti or Florida?

MS. PSAKI: I'm sure we can get you an update on the humanitarian assistance we provide directly to Haiti. We are the largest, if not one of the largest, providers of humanitarian assistance in the world. In terms of the individuals arriving, I think in Florida, as you said --

Q Yeah, the Florida Keys.

MS. PSAKI: -- I would really point you to the Department of Homeland Security. We are still applying Title 42, and so that applies no matter which country you're coming from.

Go ahead.

Q Hi, yeah. The President of Colombia said last week that he had offered President Biden the possibility of supplying more Colombian oil to the U.S. as an alternative to Venezuelan oil. Is that an option that the White House is considering?

MS. PSAKI: We are continuing to talk to a range of producers on the importance of maintaining global supply. This is not, as you know, about just the supply in the U.S. but about ensuring there is supply for the global market. And we do appreciate our partnership with Colombia. And President Biden did discuss a range of issues like economic recovery, energy security during their conversation. But beyond that, I don't have an update on what that might look like.

Q Would you say that it is under active consideration as --

MS. PSAKI: Again, they had a -- they had a wide-ranging conversation, a very constructive conversation. This is really about supply in the global markets. But I don't have an update at this point in time.

Q Yeah. And as a follow-up, Chevron is preparing to take operating control of its joint ventures in Venezuela -- Reuters just reported that -- in case the U.S. would grant them a special license to operate. Is that something that's on the table?

MS. PSAKI: I think I just answered it a few minutes ago.

Go ahead. Go ahead.

Q Oh, yeah. Thanks, Jen. You said earlier in the press briefing that nothing has been decided about President Biden traveling to Europe." Can you confirm that such a trip is under consideration?

MS. PSAKI: We discuss a range of ways and mechanics for engaging with our friends and partners around the world, but I don't have any more specifics for you at this point in time.

Q Okay. And this morning, Leader Schumer and Speaker Pelosi announced that Zelenskyy -- President Zelenskyy of Ukraine --

MS. PSAKI: Yeah.

Q -- will be delivering an address to the full House and Senate on Wednesday morning. What's the White House reaction to this address? Are there any concerns that the White House has about the Ukrainian President speaking directly with Congress as opposed to the White House on its various positions and requests?

MS. PSAKI: We speak frequently with President Zelenskyy. The President spoke with him -- had a lengthy conversation with him directly on Friday, and we're in touch with Ukrainian government officials nearly every day -- not every day.

We certainly support leaders in Congress inviting him to address a joint session. And I would again reiterate that there's strong, bipartisan support for Ukraine, for the leadership, and the bravery of President Zelenskyy. And we'll all look forward to watching his speech on Wednesday.

Q And then, finally, on Sarah Bloom Raskin and Senator Manchin's announcement that he doesn't support her confirmation: Does the White House still see a path to getting her confirmed in the evenly divided Senate?

MS. PSAKI: We are going to continue our work with Chairman Brown to garner bipartisan support. But again, she is one of the most qualified individuals ever to be nominated to this position. So that's where our focus is.

Q So you are pushing her forward still and --

MS. PSAKI: Yes.

Q -- and believe that you can get her --

MS. PSAKI: Yes.

Q -- confirmed? Okay.

MS. PSAKI: That is where our focus is. We wouldn't be pushing for bipartisan support if she wasn't still our nominee.

Go ahead.

Q Thanks, Jen. Two questions on WNBA star Brittney Griner. Last week you had said you couldn't comment on the case. Is there any update you can give now on the efforts the administration may be taking to secure her release?

MS. PSAKI: We do not have a Privacy Act waiver.

Q Okay. And does the White House have any reason to believe that Griner is being used as a political pawn by the Russian government? Or does the administration see this strictly as part of the Russian criminal justice system?

MS. PSAKI: We just can't speak any more to the reports of this case.

Go ahead.

Q Hey, Jen. Thank you very much, Jen.

MS. PSAKI: I'll come back to you. Go ahead.

Q Thank you. On the possible trip to Europe: Is President Biden considering visiting, maybe, perhaps the Ukrainian border and visit refugees -- Ukrainian refugees -- like other foreign leaders are doing? Is this something you'd like to do?

MS. PSAKI: I just don't have anything more on the reports. Again, we have a range of conversations with our NATO partners and European allies about the next steps in diplomacy, but I don't have anything to confirm for you in terms of the report.

Q And just one more.

MS. PSAKI: Yeah.

Q Not just China but some of the biggest countries in the world, like India or Brazil, some countries in Latin America like Mexico, they're not part of this economic war -- warfare against Russia. Is this something that undermine the efforts from this White House and European countries?

MS. PSAKI: I would say it doesn't undermine our efforts. We've been working to build a global coalition far beyond the G7 and our NATO partners, and had a great deal of success in that. And every country has to decide where they want to stand, where they want to be as we look and the history books are written.

Go ahead.

Q And you believe the --

MS. PSAKI: I think we've got to move on. We've got to get around.

Q Just very quickly.

MS. PSAKI: Okay.

Q Do you just believe this economic pressure will stop Vladimir Putin from his invasion?

MS. PSAKI: Well, I think as we've seen, the impact of the President's leadership on the global stage and the economic consequences that have been put into place have led Russia and the Russian economy to be on the brink of collapse. And there's no question that, over time, that will have an impact.

Go ahead.

Q Oh, actually -- thank you. Furthering that point, you did mention at the top of this briefing that there has been no action on the part of Putin to stop the onslaught; you haven't seen any action.

MS. PSAKI: Mm-hmm.

Q And that is after, again, all of these severe economic sanctions have been levied. And so, you know, I'm wondering why the administration thinks that this threat of further severe action that is vague, that is unnamed will deter him from using chemical weapons.

MS. PSAKI: Well, I think the reason that we spoke out last week about chemical weapons is because we felt that it was important for the global community to understand that they had the capacity, the capabilities, and that they have used them in the past. And at the same time, they were accusing, inaccurately -- they were spreading false information about the U.S. and the Ukrainians' intentions. That was the origin of why we were so outspoken last week.

So, this is more about us making clear to the world what we've seen as patterns in the past and what their capabilities and capacities are.

Go ahead.

Q Thank you, Jen. President Biden has repeatedly said, "No U.S. troops inside Ukraine."

MS. PSAKI: Mm-hmm.

Q Are there any U.S. troops still training Ukrainians outside Ukraine? And if not, could that be a thing, as we move forward, if this turns into (inaudible)?

MS. PSAKI: You mean in neighboring countries?

Q Yeah, like bases outside Ukraine. And if it becomes a long-term conflict, as obviously many predict, would that be a thing the United States does?

MS. PSAKI: Let -- let me check with the Department of Defense. We obviously had trainers on the ground for a period of time. We hadn't -- then we pulled them back. We obviously have a significant military presence in a range of countries in the region, but I can see if there's anything that we are looking ahead to.

Q That wouldn't be considered an escalatory type of thing? You know, a bit like the MiGs, which got complicated because no one knew kind of how to get them to the Ukrainians. Like, if you had Ukrainian soldiers going into Poland --

MS. PSAKI: Sure.

Q -- being trained by U.S. troops to go back and fight Russians.

MS. PSAKI: I mean, I think, really, our focus right now is on providing them and continuing to expedite the military assistance to them. And the good news is that we still -- through our coordination with them and our NATO Allies, we're able to get them that assistance on the ground. They're actively fighting now, so that's where our focus really is at this point in time.

Go ahead.

Q Yeah, on the Federal Reserve: Would the administration then support the four nominees, who seem to have the votes to be confirmed, to go forward and deal with the Raskin nominee after?

MS. PSAKI: Well, there's enough support to move all five nominees through the committee. So we think the Republicans should show up so that they can vote them through the committee.

Q And on -- one last thing. The fact that China is in the conversation about helping Russia, should U.S. companies then look at maybe decoupling from China with their investments there and be cautious? What's the message that you have? Can you trust the Chinese?

MS. PSAKI: I don't think it's about trust, but we have not made an ask or a request at this point of that.

Go ahead.

Q Jen, thank you. At the Democratic retreat in Philadelphia last week, some of my colleagues were hearing a lot from Democratic lawmakers who want the President to do more by executive action, whether it's on immigration or whether it is on some of the other priorities of the administration. Did he have any conversations with the members there about possible further executive actions? And is there anything else -- I think you're hearing from the members in those meetings with the Black Caucus and other members of Congress in the last week or two -- that may be coming forward?

MS. PSAKI: Well, I would say all of these members can speak for themselves on what they're interested in and what they're requesting from the President and from this administration.

We have a range of executive authorities -- the President does, I should say, has a range of executive authorities. I think there have been some reports about some that are under consideration, including one on policing, which we have talked about a bit in the past.

So, sure, we still continue to consider what steps we can take through executive actions, even as we work with Congress to see what we can move through there as well.

Q And I take it that there's no update beyond the legal review continuing on the student loan question.

MS. PSAKI: I don't have an update at this point in time. No.

Go ahead in the back. Go ahead.

Q Thank you. Me?

MS. PSAKI: Okay. And then I'll go to your friend next to you.

Q Thank you very much. On North Korea, it is reported that the North Koreans' ICBM launch is imminent. Do you have anything on the North Korea's imminent launch (inaudible) ICBM?

MS. PSAKI: I don't have anything on that report. I've not seen that report. What I can tell you is that, you know, as you know, last week, we proactively decided to reveal information publicly about recent tests and share it with allies and partners as well as Congress.

We have seen North Korea escalate its testing in different periods over the last four presidents. And this time, North Korea hid these tests, unlike the fanfare over past tests.

But I don't have anything to predict in terms of the future.

I said I'd go to -- go ahead.

Q Japan and some of the other treaty countries are increasingly alarmed after Afghanistan and this recent situation. Could you let the Japanese government know that the Security Treaty will be honored?

And then second, for those of us that were embedded during the war, the whole situation with Afghanistan is quite personal. There's a large number of our people that helped us that are still left. Could you just update us on -- almost six months -- whether they'll be able to come back?

MS. PSAKI: Well, I would say on the second part, that that is one of the reasons that we've worked so closely with our Qatari -- with the Qataris to maintain a diplomatic presence there so that we continue to engage with neighboring countries to bring people home and help some of our partners and allies who stood by our side, fought by our side over the course of the 20-year war. That's ongoing.

In terms of the numbers, I would point you to the State Department who would have the most up-to-date numbers.

I'm not sure I understand your first question.

Q Well, just a reassurance to Japan and a lot of the countries that have treaties with us that are worried -- you know, if a situation like this develops, if those treaties are going to be honored.

MS. PSAKI: Which situation? How would it relate to Japan?

Q Well, Afghanistan is a long partner of ours. And so, you know, the whole situation that's happening now -- Taiwan -- there's a great concern that if you have a treaty and it comes to a difficult situation, whether it's really going to be honored.

MS. PSAKI: We've never stepped back from the commitments we've made under the Taiwan Relations Act. And the President stands by those.

Go ahead, James.

Q Thank you very much, Jen. Two questions on Russia/Ukraine. Prior to February 24, the President, our NATO Allies, and the EU were embarked on a deterrence project. That's exactly the word that you and other senior U.S. officials used at the time.

Quite clearly, the invasion was launched on the 24th of February. And so we can say, as a factual matter, that that deterrence project failed. Is it the view of the White House that Mr. Putin could not be deterred by any set of steps? Or are you willing to concede that perhaps some other set of steps by the President and our allies might have deterred the invasion?

MS. PSAKI: You know, James, I would say that when we put in place the threat of sanctions and the threat of consequences, we never thought that that would be failproof or that would be 100 percent effective. We did that because we wanted to lay out the clear consequences should President Putin proceed in invading Ukraine, even as we predicted, quite consistently, that that was very much his intention.

And what we have done since that point in time is implement those sanctions and implement those consequences, far beyond what I think most people's expectations were in the world about what those would look like.

I don't think it's -- I don't think I can look in a rearview mirror, or any of us can, and predict what would have been different. What we did is we took steps to rally the world to stand up to the aggressions of President Putin. And we have implemented them and followed up on what we committed to since that point in time.

Q One key decision made by the President early on was to remove strategic ambiguity from this equation. Never really was Mr. Putin forced to wonder what consequences he would face. He was told at the outset he would never face military intervention by the United States and NATO, that the full range of the punishments he would face would amount to diplomatic and economic sanctions.

I think a lot of people wonder why a greater effort wasn't made to leave Mr. Putin in doubt about the consequences he might face.

MS. PSAKI: Because the President is the President of the United States of America, and he felt it was important to be clear with the American people about what his intentions were and what they were not.

And his intentions were not to send men and women, their sons and daughters to fight a war in Ukraine against Russia.

Go ahead.

Q Thank you. On Iran.

MS. PSAKI: Okay, I'll do bo- -- go ahead. Ladies first. Okay, go ahead.

Q Thank you. On Iran: The Iran talks appeared to have stalled amid some last-minute demands by Russia. Are the Iran talks dead? And if not, what now?

MS. PSAKI: Well, right now, the negotiators are back home in their capitals. We'll see what happens in the days ahead with diplomacy around the deal.

We continue to believe that, you know, obviously, a diplomatic path forward is the best path forward. But this is a natural part of the process. It is also standard for the most difficult parts of the conversation -- negotiations to be happening at the end.

Q And then, just on Ukraine: South African President Cyril Ramaphosa says he's been asked to mediate between Russia and Ukraine. Would the White House support that, endorse that, in any way assist with that, especially since the African model kind of tends towards, like, restorative justice, truth, and reconciliation instead of, you know, traditional justice?

MS. PSAKI: I'm happy to check with our national security team on his role.

What I can tell you is that there have been a half a dozen global leaders who have been meeting with both the Russians and the Ukrainians and engaging, of course, directly through diplomatic channels and trying to come to a diplomatic conclusion here.

We have been engaged directly with them on the front end and back end of those conversations, and encourage them to also make sure they are engaging with the Ukrainians and not just the Russians.

But I will check if there's any specific --

Q (Inaudible) South Africans about this offer (inaudible)?

MS. PSAKI: I'm happy to check specifically. But again, there's a range of countries that are already playing this role. So --

Go ahead. In the -- go ahead.

Q With the COVID -- thank you, by the way.

MS. PSAKI: Sure.

Q With COVID funds falling off the omnibus --

MS. PSAKI: Yeah.

Q -- and it may take a bit -- you know, if Congress kind of (inaudible) get done -- has the White House ask changed at all? Have they come back to, you know, lawmakers and said, "Hey, while it's going to take a while, you know, we need more," or it's in a different place? I'm just curious how that --

MS. PSAKI: You mean in terms of asking for less money or something like that? Or --

Q Or more?

MS. PSAKI: Or more money. Yeah.

Q You know, my question is: What is the timing -- and does the timing change the needs of the White House?

MS. PSAKI: Well, the time -- I mean, we're asking for money to meet exactly the needs that are going to start to come up soon in the coming -- in the coming weeks even, and in supporting a number of the programs that have been pivotal to people across this country, especially people who are uninsured, people who are relying on access to free treatments, testing, vaccines.

Obviously, these are programs that it's not only in the United -- in the U.S. government's interest to continue, but it's in the interest of the American people, especially people who don't have the resources to cover and pay for a lot of these different treatments.

We had originally -- we had requested \$22.5 billion, I think you're aware, for immediate and urgent COVID response needs

because that is the funding we felt we needed. That does not mean it would cover the needs in -- forever. That would just be the needs we have at this moment in time.

So these conversations are still ongoing with leaders in Congress. We are -- but we want to be very clear about the fact that some of these programs could abruptly end and be pared back without additional funding.

Q A real quick follow-up. Just -- you mentioned the uninsured, about the HRSA program that reimburses from uninsured funds. You guys previously said that would end this month. Is that timeline still there? I mean, is that --

MS. PSAKI: You mean if we don't have funding?

Q Yeah. Is it still the end of the month they shut that down?

MS. PSAKI: A lot of these programs could end quite abruptly. So, it could. But I will check and see if that specific one would.

Go ahead.

Q Jen, real quick on Title 42 -- two related questions.

MS. PSAKI: Yeah.

Q One of them: Democratic senators and congresspeople and activists are criticizing the President. During the campaign, he said that this Trump-era policy was inhumane, yet he's keeping it, even though the country is opening again. But then, a few days back, the CDC decided to let unaccompanied minors in. So the fear is that this is going to make a lot of parents just send their children by themselves and lead to another humanitarian tragedy at the border.

MS. PSAKI: Well, I would say, first -- I mean, as you've noted, the CDC makes determinations about Title 42. I think, as it relates to the recent decision, I'd have to talk to the Department of Homeland Security specifically about that and how they're applying it or implementing it.

As you know, our intention is certainly not to put more children at da- -- in danger or put them -- incentivize parents sending kids on a journey that's treacherous and dangerous across the border.

But the President -- you know, he is implementing this because we are still in the middle of a public health crisis. That continues to be the case, as ~~designed~~ [designated] by the CDC.

Q But he still plans to reopen the border and make more humane policy, like he promised?

MS. PSAKI: That is -- that is what he proposed on his first day in office. And we are very supportive of the efforts in the Senate to do exactly that.

And just because it's not done yet, it doesn't mean that we aren't going to stay at the fight to get exactly that accomplished and done.

Q Jen, is there any reason why you have not condemned racism against Africans in Ukraine? I understand that Ukrainians are the victims here; they are being bombed by Russia, and they are being killed. But a lot of Africans, they are facing racism. I know you are providing a lot of financial assistance to Poland and to Ukraine, but Africans there are being banned from even entering Poland. Why have you not officially -- the White House -- issued a statement condemning racism against Africans in Ukraine?

MS. PSAKI: We have, and I believe the State Department has. But we have spoken out against that and expressed

concern about any reports of discrimination or -- at the border.

Q And then finally, if I may: I'm trying to understand where you're trying -- your endgame in Ukraine. You're not going there. You're not sending troops there. There will be no fly -- no no-fly zone over Ukraine. And are you -- will it be a fair assessment to say that you are pushing these guys to commit suicide, knowing that Russia has a superpower and, eventually, it will capture the main cities, Kyiv and Kharkiv, and other these cities around there? What's the endgame?

MS. PSAKI: Well, the endgame is really a question for President Putin. We have -- we have completely crushed his economy. We have provided military assistance, humanitarian assistance to the Ukrainians, enabling them to fight back for far longer than the Russian leadership anticipated.

And, again, he has to -- he has to determine what the path forward looks for -- like for him.

Thanks, everyone.

Q Jen, can you confirm or deny the rumors that there are Russian hit squads in Kyiv going after journalists?

MS. PSAKI: I don't have any details on that for you.

Q But you've heard of it?

MS. PSAKI: I can see if there's more.

4:10 P.M. EDT

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**From:** White House Press Office  
**Subject:** [EXTERNAL] ICYMI: Ketanji Brown Jackson Endorsed by Fellow Supreme Court Clerks  
**To:** Coley, Anthony D. (PAO)  
**Sent:** March 4, 2022 9:57 AM (UTC-05:00)



**FOR IMMEDIATE RELEASE**

March 4, 2022

**ICYMI:**

**Ketanji Brown Jackson Endorsed by Fellow Supreme Court Clerks**

A group of Supreme Court law clerks from across all chambers who previously served with Judge Ketanji Brown Jackson have released a letter urging her confirmation, vouching for her “exceptional intellectual gifts” and “unimpeachable character.”

The letter is signed by three other fellow former Breyer clerks from her year, as well as clerks for Chief Justice William Rehnquist and Justices Anthony Kennedy, Antonin Scalia, Clarence Thomas, John Paul Stevens, Ruth Bader Ginsburg, Sandra Day O'Connor and David Souter.

"We hold diverse points of view on politics, judicial philosophy, and much else. Yet we all support Judge Jackson's nomination to the Supreme Court," the group writes, "because we know her to be eminently qualified for this role in intellect, character, and experience."

***Read more below:***

**ABC:** [Ketanji Brown Jackson endorsed by fellow clerks, Supreme Court insiders](#)

[3/3/22, Devin Dwyer]

They labored together in the shadows of legal giants on the nation's highest court, seeing firsthand what it takes to be a justice. Now, a group of two-dozen former law clerks from the 1999 Supreme Court term want one of their own to don a

black robe.

In a letter to the Senate Judiciary Committee, obtained first by ABC News, the former clerks extoll the intellect and character of Supreme Court nominee Judge Ketanji Brown Jackson with whom they served.

"We hold diverse points of view on politics, judicial philosophy, and much else. Yet we all support Judge Jackson's nomination to the Supreme Court," the group writes, "because we know her to be eminently qualified for this role in intellect, character, and experience."

The letter comes as Jackson faces questions about her experience and qualification following nomination by President Joe Biden last month as the first Black woman ever elevated to the Supreme Court.

Jackson, who currently sits on the U.S. Court of Appeals for D.C., is a former clerk of Justice Stephen Breyer. The letter is signed by three other fellow former Breyer clerks from her year, as well as clerks for Chief Justice William Rehnquist and Justices Anthony Kennedy, Antonin Scalia, Clarence Thomas, John Paul Stevens, Ruth Bader Ginsburg, Sandra Day O'Connor and David Souter.

"During our Term at the Court, we had the opportunity to work closely with Judge Jackson on a host of some of the most significant and contested issues of the times," the group writes. "We came to know Judge Jackson as someone of exceptional intellectual gifts and unimpeachable character who approached her work with great care and professionalism."

While clerks are not always ideological carbon copies of their bosses, justices in recent years have increasingly tended to select young lawyers who are "ideologically compatible," research shows. Jackson's boosters say the endorsement by former clerks of conservative justices corroborates a cross-cutting appeal.

Several highly respected conservative legal luminaries have also endorsed Jackson in recent days, including former federal appellate judges J. Michael Luttig and Thomas B. Griffith, and attorney William Burck, who represented several former Trump White House officials.

Jackson began a blitz of introductory one-on-one meetings with Republican and Democratic senators on Capitol Hill this week ahead of televised confirmation hearings later this month.

Biden has said he hopes to have Jackson confirmed to the bench with bipartisan support before Easter, though she would not be sworn in until Breyer retires at the end of June.

Clerks, who are recent law school graduates at the top of their classes, assist the justices with legal research, preparation of questions for oral argument and drafting opinions. Each justice accepts three to four clerks per term.

"A clerkship does give you an inside look on the dynamics of the court," said Rachel Barkow, a former clerk to Justice Antonin Scalia and former Harvard Law School classmate of Jackson. "In the year that you're there, you can witness how personalities may matter, sometimes how you run your chambers might matter and how cases are presented to you."

Six of the nine current Supreme Court justices were clerks on the high court before they were later nominated and confirmed.

###

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**From:** White House Press Office  
**Subject:** [EXTERNAL] Press Briefing by Press Secretary Jen Psaki, February 1, 2022  
**To:** Coley, Anthony D. (PAO)  
**Sent:** February 1, 2022 7:00 PM (UTC-05:00)



**FOR IMMEDIATE RELEASE**

February 1, 2022

**Press Briefing by Press Secretary Jen Psaki, February 1, 2022**

James S. Brady Press Briefing Room

2:27 P.M. EST

MS. PSAKI: All right. Kristen, welcome back.

Q Thank you, Jen. I appreciate it.

MS. PSAKI: Okay. We missed you.

A couple of items for you all at the top. I know there was some good questions yesterday about the status of the infrastructure law implementation, so I just wanted to bring you a few updates that are hopefully helpful to all of you.

In the 79 days since the bill -- the law was signed, our team has hit the ground running to get money out the door, engage partners, and provide comprehensive resources to help municipalities unlock funding opportunities so no community is left behind.

To date, over \$80 billion has already been allocated and is headed out to states, territories, and local governments. That includes over \$50 billion to states for highways and roads; \$14 billion for 500 Army Corps projects; over \$5 billion for -- to states for bridges; over \$7 billion to states for water infrastructure; \$3 billion to repair and rebuild over 3,000 airports; \$1 billion to support Superfund cleanup to 49 sites; and \$239 million in Port Infrastructure Development Grants.

And this is just the beginning, and we'll do our best to provide you all updates in here on the status of these funds being

allocated. State, local, Tribal, and territorial governments will receive over 90 percent of funding from the Bipartisan Infrastructure Law to rebuild their communities.

We mentioned yesterday -- or I talked a little bit yesterday about this large guidebook we had put out to provide guidance and information to communities to apply for the part of this that will be through competitive awards.

As we did with the American Rescue Plan, we also know that local leaders have the best sense of where the communities need funding. And the formula funds in the Bipartisan Infrastructure Law include flexibility to deal with unique local and state challenges.

As we've also said many times, with flexibility comes great responsibility to use funds wisely. So, to ensure accountability and transparency, Mitch Landrieu and the infrastructure team convened a meeting with inspector general -- inspectors general -- general from all agencies with funding from the infrastructure law to discuss oversight and transparency. He called for each state to appoint an infrastructure implementation lead, and we are committed to showing transparency on how money is allocated and spent.

Also, one other update for all of you at the top. As you know, the President is headed to New York City on Thursday, and I wanted to give you a quick preview of his trip.

He will be joined on the trip by Attorney General Garland to talk about the steps the administration has taken so far to reduce crime -- gun crime, and how we can be a strong partner for New York City and other cities grappling with increased gun violence over the past two years.

The President and the Attorney General will join with law enforcement officials alongside elected leaders, including Mayor Adams, Governor Hochul, at the New York Police Department headquarters to discuss the work that federal, state, and local law enforcement officials are doing to quickly take guns and repeat shooters off of our streets.

Afterward, President Biden, Attorney General Garland, Mayor Adams, Governor Hochul, and other elected leaders will visit with community violence intervention leader -- leaders in Queens to talk about the community-led work to interrupt gun violence.

The President outlined a comprehensive plan last year to tackle gun crime that includes giving cities historic funding through the American Rescue Plan to put more cops on the beat and support community violence intervention programs, as well as initiatives like afterschool programming, creating economic opportunities, and reducing recidivism to address the root causes of gun crime.

The President's budget also doubles federal support for community policing, with \$300 million more for cities plus another \$200 million for community violence interventions -- a total of a half a billion dollars for these strategies that are proven to reduce gun crime. And he's going to continue to urge Congress to act on that.

Finally, the Department of Justice continues to step up their efforts to combat violent crime and gun trafficking, including through five strike forces launched last year in New York City and other regions.

As the Department of Justice reported just last week, those efforts have resulted in thousands of guns and violent criminals being taken off the streets over the past year. But they will, of course, have more to say on Thursday.

Why don't you kick us off?

Q Thanks, Jen. It's been a busy news day so I have a few. Off the top, Senator Manchin just said Build Back Better is "dead." Was the White House aware that he felt this way? And what's the path forward for some of those Democratic priorities?

MS. PSAKI: Well, as you know, as a policy, we're not going to get into private conversations we have with Senator Manchin or any other senators about this piece of legislation or our efforts moving forward.

What I will note and where there is strong support moving forward across the Democratic Caucus is on taking steps to lower costs for childcare, for healthcare, for eldercare; on making sure that Medicare can negotiate the cost of prescription drugs; and ensuring the tax system is fair. Whatever you call that, there is strong support for that, strong passion for that, a lot of advocacy for that, and there are a lot of members having continued conversations about it.

Q And then Russian President Vladimir Putin just said today that the U.S. is ignoring its top security demands but that Moscow is still open for more talks. Is the U.S. open to more talks? If not, what is the step forward with respect to Russia?

MS. PSAKI: Absolutely we are. The door to diplomacy remains open. We don't know what decision President Putin will make. While we've seen the buildup of troops on the border, Secretary -- our Secretary of State, Tony Blinken, just spoke this morning with Foreign Minister Lavrov, and he reiterated our commitments and openness to a diplomatic path forward.

Let me give you a little bit more of a readout of that. And I can give you more of an update of some of the other conversations we've been having with a range of counterparts as well.

So, Secretary Blinken -- I know the State Department did a bit of a background call on this, but let me give you some highlights: The Secretary emphasized the U.S. willingness, bilaterally and together with Allies and partners, to continue a substantive exchange with Russia on mutual security concerns, which we intend to do in full coordination with our partners and Allies. He reiterated the United States commitment to Ukraine's sovereignty and territorial integrity, as well as the right of all countries to determine their own foreign policy and alliances.

He also urged immediate Russian de-escalation and the withdrawal of troops and equipment from Ukraine's borders, and was clear that further invasion of Ukraine would be met with swift and severe consequences and urged Russia to pursue a diplomatic path.

Our National Security Advisor, Jake Sullivan, also met with his German counterpart today as part of our regular consultations with our Allies and partners. But certainly, the door to diplomacy remains open. As we've said many times, de-escalation will, of course, make that diplomatic path easier moving forward.

Q And then one more on HHS. Last week, there was a GAO report warning that HHS may not be prepared for a future pandemic and that it had fallen short in a number of ways in this pandemic. There have also been reports about White House officials being frustrated with Secretary Becerra's leadership. So does the President still have confidence in Secretary Becerra? And has he talked to him about any changes he might want to see at HHS or about his leadership of the department?

MS. PSAKI: Well, you know how we feel about anonymous sources around here.

Q They weren't all anonymous. There were some experts that are publicly criticizing the way HHS has --

MS. PSAKI: From -- from within the government, I'm referring to.

Q Sure.

MS. PSAKI: I would just reiterate that the President remains confident in the role of Secretary Becerra. He is somebody who is an important partner. He has been leading a range of efforts from the Department of Homeland Security -- I mean -- Homeland Security -- the -- from the Department of Health and Human Services. And we have strong partnerships from the very top down with HHS.

We're less focused on -- not at all focused, I should say, on palace intrigue, as much as we are on vaccinating more Americans, fighting the Omicron surge, expanding testing capacity, and getting more therapeutics out to the American people. And that's how we believe we and the leadership of the Cabinet will be judged.

Go ahead.

Q A couple of follow-ups here. On Ukraine, we've seen some of the major European allies talking directly with Putin. Emmanuel Macron has spoken with him twice. The Italian Prime Minister has spoken with him. Boris Johnson is now traveling to Ukraine. Why not have the President have a -- you know, take more direct involvement like some of these other allies are?

MS. PSAKI: Well, the President remains certainly open to that if there's a determination that that is the appropriate and most constructive step moving forward. We also have a very active and engaged Secretary of State, who has had a number of conversations with his counterpart, including this morning, and that's the channel that those conversations are happening through at this point -- as well as at many other levels, I should say.

Q And on the question about Senator Manchin: He also said that no one has reached out to him. He hasn't been having talks about trying to do this "in chunks," as the President has suggested may be the path forward. Why not?

MS. PSAKI: I'm not going to outline from here conversations that we are having with a range of senators and a range of senators are having with each other, but I can assure you we've been in touch with and hav- -- with every member of the Democratic Caucus.

Q And just some housekeeping on the Supreme Court pick. The Times is reporting that Doug Jones will be the sherpa on the Hill. Can you confirm that and talk about that decision?

MS. PSAKI: I don't have anything to confirm yet at this point about what the team will look like that we bring in, as has been done historically, to help sherpa through our nominee whenever that person is selected.

I can reiterate that we intend to have that team in place before the President makes a selection, and that team will be more than one person.

Go ahead, Kristen.

Q Thank you, Jen. And thank you for the welcome back. Following up on the Supreme Court decision, a number of Republicans, as you know and as you've been asked about, have spoken out about the President's pledge to pick a Black woman for the High Court. How do you respond specifically to Ted Cruz who, overnight, called it "offensive" -- offensive to Black women that he would make that pledge?

MS. PSAKI: Well, here's what I would say first: Just over a year ago, the previous president also promised to select a woman for the Supreme Court. Not only were there no complaints about choosing a nominee from a specific demographic -- from the same corners -- but there was widespread praise of now-Justice Barrett on those grounds with Republican lawmakers widely highlighting that they thought this was positive for women in America.

So, take Senator Cruz himself: He had no objection to Donald Trump promising he'd nominate a woman in 2020. I repeat: No objection at all. In fact, he praised her on these grounds during -- praised her on these grounds -- the nominee. During her confirmation hearing, Senator Cruz said, quote, "I think you're an amazing role model for little girls. What advice would you give little girls?"

When President Reagan honored his campaign pledge to place the first woman on the Court, he said it symbolizes the unique American opportunity. There is no outcry around that.

The President's view is that after 230 years of the Supreme Court being in existence, the fact that not a single Black woman has served on the Supreme Court is a failure in the process, not a failure -- or a lack of qualified Black women to serve as Supreme Court justices.

Q And broadly speaking, we just heard from the President on how he is viewing this pick. He says he is taking the "advise and consent" role very seriously --

MS. PSAKI: Yes.

Q -- of the Senate. If he thought -- and I know you've been getting questions around this, but just to kind of put a finer point on it: If he thought that a nominee could get more Republican support, how would that weigh on his decision?

MS. PSAKI: I talked with him about this exact question this morning because I know a lot of you are asking about it. And what he reiterated to me is that his focus is on picking the person who is eminently qualified, who is ready to serve and prepared to serve in a lifetime appointment to the Supreme Court, not in navigating the legislative process.

Q Just yesterday -- on different a topic, HBCUs: A number of them have gotten more bomb threats today. You ca- -- yesterday said that the bomb threats were disturbing. Can you update us on what, if any, more information the White House, the President has about these potential threats? And is there a concern that it is, in fact, linked to Black History Month?

MS. PSAKI: Well, we don't have an assessment at this point. We are continuing to evaluate. Our homeland security advisor here in the White House, Liz Sherwood-Randall, is providing regular updates to senior staff, to the President as well. And he certainly is aware of the latest instance of bomb threats not just yesterday, but also those this morning.

And let me just reiterate that we condemn these disturbing threats, and our thoughts are with the students, faculty, and staff of these storied institutions.

We have been long supporters and have made historic investments in HBCUs and deeply value the significant role they continue to play in advancing opportunity for Black students across America. But, right now, we don't have any assessment or new assessment right now.

Q Any chance that the President -- or are there any discussions about the President visiting one of these HBCUs to reaffirm the commitment that the White House has to the protection of the students (inaudible)?

MS. PSAKI: He has certainly visited HBCUs in the past, Kristen. Obviously, right now, our focus is on ensuring we are working in close coordination with our law enforcement authorities and ensuring that the leaders of these institutions and the students know that we are watching closely and that we are standing with them as they face these threats.

But I don't have any trip to predict at this point in time.

Q Jen, can I follow on that, please? Just one --

MS. PSAKI: I'll go to you next, April. Let me just finish Kristen's --

Q One more, really quickly.

Q Tomorrow is the one-year anniversary of the Family Reunification Task Force. As you know, Secretary Mayorkas has told NBC News that the White House is 100 percent supportive of permanent legal status for families separated at the border. Is that a true statement? Is that a (inaudible)?

MS. PSAKI: We stand by Secretary Mayorkas.

Q Okay. Thank you.

MS. PSAKI: Go -- April, go ahead. And then, I'll come back to you. Go ahead.

Q Okay. So, Jen, back on the HBCU bomb threats. There is a historic issue when it comes to bomb threats in the Black community.

MS. PSAKI: Mm-hmm.

Q And with that said, you have people like Lee Merritt calling it "terrorism." And he's asking for the DOJ, Homeland Security, and U.S. Attorney's Office to investigate -- to form a task force, particularly specifically on these issues. Is there talk around the White House for this to happen?

MS. PSAKI: Well, what I can tell you, April, is that we take these threats incredibly seriously; that, again, our homeland security advisor is in close touch with law enforcement authorities at a federal and local level. And we are assessing what we think the origin, the reasoning, the motivation behind it is. We don't have an assessment of that quite yet. And I don't want to get ahead of that process.

But we absolutely are behind these HBCUs. We are -- want to make very clear that we take these threats seriously and we deeply value their contributions.

But it's important for law enforcement authorities and others to make an assessment before we make any determinations about next steps.

Q And does the White House see the irony in this moment with these continued bomb threats of HBCUs, particularly as much of the power structure up and down Pennsylvania Avenue are graduates of HBCUs, starting with the Vice President, Howard University; Cedric Richmond, Morehouse; Joyce Beatty, the head of the CBC, Central State; the House Whip, James Clyburn, South Carolina State. So, is there irony in this moment?

MS. PSAKI: I'm not sure I would say -- call it "irony," April. But I would say that it is -- it is scary. It is horrifying. It is terrible that these students, these faculty, these institutions are feeling under threat.

Now, again, we don't know more details at this point in time, and I don't want to get ahead of law enforcement authorities. But certainly, given the history you referenced, you know, this is something we're very mindful of and that is why we're so focuses on providing regular updates and seeing what our law enforcement team assess.

Q And lastly, on the policing executive orders: Reverend Al Sharpton says that there is now a move to break apart the George Floyd Justice in Policing Act for standalone pieces that could possibly go up for a vote and, one way or another, pass or fail. And they're doing that because the executive orders don't have as much teeth as a law. What do you say to this effort to break apart the George Floyd Justice in Policing Act and make each portion a standalone bill?

MS. PSAKI: Well, what I can't assess from here, April, is whether there'd be support for getting that across the finish line and signed into law.

As you know, the President very much wanted to sign the George Floyd Justice in Policing Act into law, and we did not take executive actions because -- at the time, because we wanted to leave room and space for that process to proceed in a bipartisan manner.

So, I'd really point you to leadership and committee chairs in Congress to see what is possible on that front.

And certainly, we agree, a law is more permanent than executive orders. That is absolutely true. But we have not even

finalized, nor do I have a preview of exactly when it would be, a police reform executive order. So, I would also encourage people to wait to assess what that looks like.

Go ahead, Weijia.

Q Thank you, Jen. Back to the Supreme Court.

MS. PSAKI: Sure.

Q I know the President said he wanted to seek the advice of the Senate, in addition to consent. Is there anything you can share about his conversation with Senators Durbin and Grassley, and whether he shared his list of potential candidates with them?

MS. PSAKI: Well, I think they were still meeting when I came out here, or I had not spoken with him yet if it was breaking, so I have not gotten a rundown from him quite yet.

I think he wanted to have an open and engaging conversation with them. In terms of what specific information he shared, I think it was more of him looking to listen to them and hear what they had to say about -- there are a range of names, a range of candidates out there. But also look to them for their advice and their counsel.

As we have noted before, Senator Durbin has been through seven confirmation hearings for Supreme Court justices. Senator Grassley is certainly a veteran of these committee processes. The President takes his role seriously and, as he said today and as your referenced, takes the role of consent of the Senate seriously. But I don't think we're going to read out too many specifics other than to say he was looking forward to having an engaging conversation.

Q And since Justice Breyer announced his retirement, has the President spoken personally with any of the candidates who he might be considering?

MS. PSAKI: We're not going to give a process update or assessment from here, just as a policy. But I can tell you that what we're focused on now is -- obviously, the President is continuing to consult with leadership in Congress, as is evidenced -- as was evidenced by this morning. He'll do more of that this week.

There is obviously an ongoing process as we look to name and nominate a Supreme Court justice before the end of this month. As is, you know, related to Mary's earlier question, we'll also be announcing soon a team that we will be bringing in from the outside. So, there are a number of steps that are happening at the same time. But we're not going to be going into specifics of confirming the internal processes.

Q And you mentioned just a bit ago that he is looking for -- to someone who will obviously serve for a lifetime. Will age be a factor as he considers who to nominate so whoever it is can have a longer imprint on the Court?

MS. PSAKI: I'm just not going to get into more specifics of what he's looking for. I mean, I think the President outlined, when he spoke earlier, that he's looking for somebody who is qualified -- who is eminently qualified, who is prepared to serve in this role.

There is a range of candidates he's been reviewing bios of for some time now. But beyond that, I'll let him speak to more specifics.

Q Thank you. And then one more question on Russia: How soon could the U.S. move troops to the eastern flank? And just to clarify: When the President said "it will happen in the near term," did he mean troops that are already stationed in Europe? Or would some of those troops be the ones based here at home?

MS. PSAKI: Well, I think we've said previously that there's NATO troops, of course; there's 8,500 of them that we've

committed to the NATO -- the NATO effort. That would be a decision made by the Alliance. Some of those troops are in the United States; some are in Europe.

I don't have anything to preview for you in terms of any additional troops. Obviously, there are troops currently that are stationed in Eastern European countries. Some of those troops, of course, are not -- many of them are not under the NATO Alliance.

But I don't have anything to predict for you at this point in time.

Q Thank you, Jen.

MS. PSAKI: Go ahead.

Q Thanks, Jen. A couple quick ones on the Supreme Court first. Last week, I know you said you'd look for an answer on whether you thought the Vice President could break a tie on a Supreme Court vote. Have you guys come to a determination on that?

MS. PSAKI: So, the Vice President has been the tiebreaking vote for a number of judicial appointments -- or nominees in the past. But our intention is, of course, to get broad support for an eminently qualified nominee.

Q In the Oval, the President evoked the Ninth Amendment as he was talking about the qualifications he's looking for for a judicial nominee. In the past and in committee hearings, he's certainly brought that amendment up in the context of abortion rights. Is it a fair reading that that is what he was specifically saying that he was looking for from a candidate here?

MS. PSAKI: I'm just not going to give any more detail on any qualifications he's looking for at this point in time. I'm sure we'll have more conversations about that in the days ahead.

Q And there was a kind of long New Yorker story over the weekend in which a former NSC aide, Andrea Flores, made two claims. One was that Susan Rice and Ron Klain had opposed expanding asylum access for political reasons, and that the White House, partially because of that, wasn't doing contingency planning for the lifting of Title 42 whenever we get to that point in the pandemic and hadn't, kind of, built out capacity to do that.

So I was wondering if you could kind of respond to, I think, those two points that would suggest that immigration policy has shifted within the White House from the campaign.

MS. PSAKI: Well, what I can tell you is that -- I did not work with Andrea Flores, so I don't know her well, nor can I speak to her role here -- but that our policy as an administration has been entirely consistent with what the President committed to on the campaign. And his effort has been to build a fair, humane, and lawful immigration system and bring it into the 21st century.

Hence, he obviously proposed an immigration bill on his first day in office. And beyond that, he has taken steps to protect DACA recipients, ended the Muslim ban and the Public Charge Rule, put together the Family Reunification Task Force, restarted the Central American Minors Program that the previous administration ended, extended or newly designated Temporary Protected Status for a number of countries, and worked with DHS to give clear guidance for internal enforcement.

It's also true that we're still in the midst of a pandemic. And that is not something, of course, as we've talked about here a bit in the past, that everybody anticipated still being at, at this point in time. The CDC is obviously the determinant of having Title 42 in place, and that still is in place because of the pandemic that we're in.

But I would also note that we have -- and I think this was noted, I believe, in the story -- but that we have also been very clear about our vision for the MPP program and have been very clear about our vision about the inhumanity of the prior administration and

clear about our view on the MPP program and very clear on our view about the inhumanity of the prior administration and how they handled immigration and that we had every intention of implementing a different approach.

Q And one last one. There's been a bit of a controversy this week on the other side of the pond. Prime Minister Johnson and the actions of him and his staff -- a report came out this week.

I'm wondering: Is the President aware of what's going on? Is he at all worried that that political controversy is impacting, you know, the U.S. and UK's ability to, sort of, press President Putin on the Ukraine situation? And, you know, has he ever been "ambushed by a cake"? (Laughs.) How --

MS. PSAKI: Has the President ever been ambushed by a cake? (Laughs.) Not that I'm aware of.

Q But just what his reaction is, sort of, to this controversy that's been blowing up.

MS. PSAKI: You know, I have not spoken with him specifically about the reports in the UK. But what I can tell you is that he is confident in the important partnership we have with the United Kingdom, the role they play as an important partner in making clear to Russia the unacceptable nature of the buildup of troops and their bellicose rhetoric as it relates to Ukraine. And that certainly has not changed, despite cakes in anyone's faces.

Go ahead.

Q Thanks, Jen. Starting quickly just with Ukraine. You guys keep holding up this, kind of, diplomatic path for Vladimir Putin. But as he noted today, you've already rejected both of his, kind of, central demands. So, what exactly is this a diplomatic path to if you've already rejected what he's asked for? And can you kind of sympathize with the fact that he may be feeling like he's strung along and wants to pursue things on another battlefield?

MS. PSAKI: As in invading a sovereign country? Which would be the alternative, right? Right? Is that what you're saying?

Q Perhaps. Perhaps.

MS. PSAKI: Okay. Well, here's our view: We don't know what President Putin is going to do. And it is our responsibility to -- and it's an imperative to keep the door to diplomacy open. That does not mean that we are going to not stand by our own values, which includes the -- our belief that -- and the belief of NATO countries -- that it should be up to NATO members to determine who is able to join NATO and that the door to that should be open.

So if that is one of their claims, we have reiterated the same thing privately that we have reiterated publicly.

In our view, do we have sympathy? I mean, this is -- you know, Secretary Blinken has used some of these analogies in the past, but when the fox is screaming from the top of the henhouse that he's scared of the chickens, which is essentially what they're doing, that fear isn't reported as a statement of fact. And as you watch President Putin screaming about the fear of Ukraine and the Ukrainians, that should not be reported as a statement of fact.

We know who the fox is in this case. We have seen the buildup of troops at the border. We have seen them move troops to Belarus, on another border.

And our role in the United States is to work with other countries around the world to keep that bor- -- door to diplomacy open, because certainly all of our preference is to de-escalate and to prevent an invasion from happening.

But that is up to President Putin to make that decision.

Q And do you think a possible endgame here could be just mutual de-escalation and then live to talk --

MS. PSAKI: De-escalation in what regard?

Q -- about the issues another day?

MS. PSAKI: "Mutual de-escalation" -- tell me more what you mean by that.

Q I mean, it's up -- I suppose it's up to you to define. But I mean, you guys have asked for him to move troops back from the border.

MS. PSAKI: But here's what I'm getting at: We are defin- -- it's a mistake, I would say, to define things by the terms that President Putin is defining things. This is a country and a leader who has, you know, used chemical weapons, who has invaded multiple countries in the past several years, who has taken aggressive steps on the global stage on many occasions.

So, when we talk about mutual de-escalation, Russia has 100,000 troops on the border; they are the aggressor. We are working with NATO countries to make sure they feel secure in this moment. NATO is a defensive alliance. It is not the same thing. And I think we need to be careful about comparing them as the same thing.

Q Thank you. And just to switch gears to Supreme Court. You guys, obviously, have got this big nomination that you're working on, but there's also huge existential questions hanging over the Supreme Court. Does the President plan to decide what he's going to do on Supreme Court reform before he makes this nomination?

MS. PSAKI: He is reviewing the Supreme Court Commission report. I don't have a prediction of when he will conclude his analysis of that.

Q And I just asked because the report includes suggestions about things like changing the number of people on the Court, and you would think he would want to know who -- if he's going to increase the size of the court, who he's going to put on first. Right?

MS. PSAKI: I think, Trevor, his focus right now is on going through a process that takes it -- that values the seriousness of the role he has as president, that cons- -- where he consults, as you saw today, with Democrats and Republicans to select and nominate an eminently qualified Black woman to serve on the Court. That's his focus right now.

Q And finally, there have been some ethical questions about Supreme Court Justice Clarence Thomas. His wife is -- has a number of political affiliations with groups that file amicus briefs before the Court, have other business before the Court. It's his choice whether or not to recuse himself from those cases; he hasn't. Does the President feel that there is an ethical issue there that he'd like to see dealt with?

MS. PSAKI: I have not had a discussion about that with the President or our counsel's office. I will see if there's any comment we have from here, or it might be a Department of Justice comment. I'll get back to you.

Go ahead.

Q Hey, Jen. How's it going?

MS. PSAKI: Good.

Q The Center for American Progress put out a memo today focusing on specific priorities for a more narrow Build Back Better bill, but not listed is the extended Child Tax Credit. Could the White House (inaudible) support a revised bill that didn't include the extended Child Tax Credit?

MS. PSAKI: Well, I'm not going to make a prediction or negotiate from here. Obviously, the President proposed an extension of the Child Tax Credit as you know because it helped cut the -- child poverty by 40 percent last year. It's

extension of the Child Tax Credit, as you know, because it helped cut the child poverty by 40 percent last year. It's something he would absolutely like to be extended.

There is a question here as to what 50 members of the Democratic caucus will support. And they support, as we were talking about a little bit earlier, some big fundamental goals, which is important: lowering cost of childcare, healthcare; negotiating prescription drugs. That's important. But I can't predict for you here what all 50 of them will support.

Q Sure. Last week, the Surgeon General also was asked on MSNBC about Joe Rogan's vaccine comments on Spotify. And he said that tech companies have an "important role to play" in stopping misinformation because he -- they are the "predominant places" where misinformation spreads.

Spotify is putting out advisory warnings on episodes that have to do with COVID-19. Does the White House and the administration think this is a satisfactory step? Or do you -- do you think that companies like Spotify should go further than just, you know, putting a label on there to say, "Hey, go do your own -- you know, check this out. You know, there's more research you can look at -- you know, scientific research regarding COVID"?

MS. PSAKI: Sure. Well, last July, I -- you probably know, but the Surgeon General also took the unprecedented step to issue an advisory on the risk of misinformation and public health, which is a very significant step. And amid that, he talked about the role social media platforms have.

So our hope is that all major tech platforms -- and all major news sources, for that matter -- be responsible and be vigilant to ensure the American people have access to accurate information on something as significant as COVID-19. And that certainly includes Spotify [sic].

So, this disclaimer -- it's a positive step. But we want every platform to continue doing more to call out misinform- -- mis- and disinformation while also uplifting accurate information.

I mean, look at the facts, right? You are 16 times more likely to be hospitalized if you're unvaccinated and 68 times more likely to die than someone who is boosted if you're unvaccinated. That's pretty significant. And we think that is something that unquestionably should be the basis of how people are communicating about it.

But, ultimately, you know, our view is it's a -- it's a -- it's a good step, it's a positive step, but there's more that can be done.

Q And I have another tech question for you --

MS. PSAKI: Sure.

Q -- which is: There have been some recent reports that the White House is planning to issue a series of executive actions on cryptocurrencies in the next few weeks. Can you give a timeline on when those are coming and what actually might be in those executive actions?

MS. PSAKI: I would have to check with our NEC team on that and see if that's something that is coming down the road. But I will check and see if there's anything to predict for you.

Go ahead, Brian.

Q Thanks a lot, Jen.

MS. PSAKI: I wanted to first follow up on something you said about the Supreme Court process.

MS. PSAKI: Sure.

O You said that President Biden has been looking at bios for some time now. How long has that been that he's been

looking at bios of potential candidates?

MS. PSAKI: Since last year.

Q So that was something that started in the transition process? Or --

MS. PSAKI: No, since last year, not during the transition process.

Q And what prompted that for him to start looking at bios last year?

MS. PSAKI: He takes his role incredibly seriously. And we certainly know and he committed, of course, to the American people he would nominate a Black woman -- a qualified Black woman to serve on the Supreme Court. And so he's just been reviewing a range of bios.

Q And Justice Breyer notified him on the 27th of January. Did he get advance notice before that --

MS. PSAKI: I'm not going to get into any more details. If Justice Breyer wants to get into details about our communications, he can certainly do that.

Q And I have a question on Russia as well. This is -- the jailed Russian dissident, Aleksey Navalny --

MS. PSAKI: Yeah.

Q -- in an interview with Time Magazine, said that the U.S. is repeatedly falling into Putin's traps -- that Putin makes escalations, like he's doing now, and then seeks concessions.

I want to quote Navalny here, where he says, with Putin, the U.S. is acting "like a frightened schoolboy who's been bullied by an upperclassman." What's President Biden's reaction to this? Is he -- is the U.S. reacting like a "frightened schoolboy"?

MS. PSAKI: Well, I would say, first, that we have great respect for Aleksey Navalny and the role he's played in speaking out and being vocal, even under duress himself. And that's to be hugely admired.

I think the President's actions, the administration's actions that have been broadly supported in a bipartisan manner speak for themselves, whether it's our engagement and leadership on the global stage, having more than 200 engagements, leading an effort to have a unified front and making clear about the severity of economic consequences there will be should Russia decide to invade, or whether it is making clear that we are going to continue to stand up for what is a global value, which is the fact that no country should be able to invade another country and take their territory.

I'll let others define that. I don't think that's a "frightened schoolboy."

Q So when the President talks about economic actions that -- and economic consequences for Russia if it does invade, why not enact some of those sanctions now? Why not enact those economic consequences now? Why wait for an invasion?

MS. PSAKI: Well, we have enacted some sanctions. But I would say that we think it's an important point of leverage in the discussions.

Go ahead.

Q Thanks, Jen. To clarify something you said earlier about the BBB talks --

MS. PSAKI: Yeah.

Q -- you know, to the extent that you're going to tell us about them: You said that -- you know, rest assured the President -- you said, "We've been in touch with every member of the Democratic Caucus." "We've been in touch..."

MS. PSAKI: We in the White House.

Q So that's the leg affairs team, mainly, and the --

MS. PSAKI: The leg affairs team and senior members of the White House. We're just not going to detail more specifics.

Q So you can't say if the President has been involved personally in any of the conversations with (inaudible)?

MS. PSAKI: The President has talked to a range of senators. He always does.

Q Okay. On the Ukraine-Russia stuff, any plans in the works for another conversation between the President and President Zelenskyy?

MS. PSAKI: He has talked to him a couple of times in the last few weeks, and we've been in regular contact. We also are in very close contact from Jake Sullivan's level and Secretary Blinken's level. So, certainly, it's possible. We've been in regular touch, but I don't have any call to predict at this point. He just talked to him a couple days ago.

Q Sure. And one other question. Today, obviously, is the start of Black History Month. The President issued a couple of tweets about that.

MS. PSAKI: Yeah.

Q I wonder what the administration -- the President's response is to what has been happening in Texas and other states where a number of books have been banned by school districts. These are, generally, books that have focused on slavery, on Jim Crow, on civil rights, even on the Obamas. Does the White House have a position on the books that are being banned by these local school boards?

MS. PSAKI: I have not discussed this with the President, but I can tell you that, as an administration, we believe in the freedom of speech and expression. And certainly, we have never been advocates of preventing people from understanding and reading history.

Q And does the President plan to do more to recognize -- commemorate Black History Month this month?

MS. PSAKI: Absolutely. Let me see if we can get you some more details.

Go ahead.

Q Good afternoon, Jen.

MS. PSAKI: Good afternoon.

Q A couple of questions for you. Back to the Supreme Court.

MS. PSAKI: Sure.

Q How will the debate over abortion shake the President's selection process?

MS. PSAKI: The President is going to select an eminently qualified Black woman to serve on the Court, someone -- and he's going to do that through consulting with a range of members of Congress, through outside experts, and obviously through engagement with them directly. But I don't think I'm going to give you more specifics from here.

Q But that person -- will that person have to be pro-abortion?

MS. PSAKI: I think somebody asked a similar question. I'm not going to outline litmus tests from here today.

Q Okay. Following up on that, the President has said in the past he does not believe that life begins at conception. When does he believe it begins?

MS. PSAKI: You know the President's position. He believes in a woman's right to choose.

Q But that's not the question I asked. I said --

MS. PSAKI: And he's spoken -- he's spoken to this in the past. And I know you ask this every time you come in here, which is your --

Q (Inaudible.)

MS. PSAKI: -- your absolute right, but I don't think I have anything new to --

Q But I -- that's not -- that's not --

MS. PSAKI: -- reveal for you.

Q The question is: When does he believe life -- and essential to the debate over the question of a baby's viability, pro-life Americans -- don't you agree? -- should know where the President stands on his thinking on this. It's a fundamental question.

MS. PSAKI: The President believes in a woman's right to choose.

Q But his -- when does he believe life begins?

MS. PSAKI: Go ahead. I think we're going to move on unless you have another question. Go ahead.

Q Oh, let's do another question. One more question --

MS. PSAKI: Go ahead.

Q -- unrelated to that.

MS. PSAKI: Okay.

Q Following up on the question for -- on the expanded Child Tax Credit.

MS. PSAKI: Yep.

Q You have said time and again that this has taken lots of kids and families out of poverty.

MS. PSAKI: Yeah.

Q A tremendous success there.

MS. PSAKI: Yeah.

Q But with that now gone -- it looks like it's gone, dead -- inflation creeping up, high gas prices, high food prices, how quickly are those same kids and families going to go back into poverty, do you fear?

MS. PSAKI: Well, how it's implemented -- first, the President is going to continue to fight for the Child Tax Credit. It's something he very much believes in. I just can't predict what a package will look like and what there will be support from 50 senators on.

What I can tell you is that as individuals who are eligible file their taxes, they will get the other half of the Child Tax Credit benefit from last year. That is not a forever solution, but that is something that many can look ahead to.

The other part of the Build -- the President's Build Back Better Agenda that's important, as you're talking about rising costs for people: You know, we have -- we have a proposal -- the President has a proposal, many Democrats across the board support it, which is -- that will lower costs for Americans across the country and all the issues you talked about, things that really weigh on people's family budgets, whether it's healthcare, which is a huge -- has a huge impact on people's budgets; childcare, which is contributing to preventing 2 million women from rejoining the workforce. That's the Build Back Better plan, and that's something that we know will help lower costs for families.

Q And finally, does the President have a message for those struggling families who are very worried right now not seeing that extra \$500 or \$1,000 a month or whatever that are saying, "I can't afford the groceries. I can't afford the gas. This is getting very stressful"? A message from the President to those families.

MS. PSAKI: The President would say, "I am here to fight for you, and I -- that's why I'm going to continue to fight to pass legislation that will lower your costs." And that is a top priority for him.

Go ahead.

Q Thank you, Jen. I want to go back to what you said in the beginning about the money that's going to be flowing down to states and that there's going to be an appointment of --

MS. PSAKI: Infrastructure?

Q Infrastructure. Mm-hmm. An infrastructure lead. Can you tell me more about who is -- who's going to be appointing that person in each state? Because there may be concern over states when you get to, like, Florida, where you have Governor DeSantis saying that the President is trying to implement "woke-ification" policy and saying that there is no racism within some of the (inaudible) that have been in the past. How can there -- when you talk about accountability, how is that process going to go? And what information may be accessible to the public as far as reporting?

MS. PSAKI: Well, we have a huge -- several -- 100-page book that we put out yesterday about how people can apply for a range of funding. And I just outlined for you the money to date that has been allocated. And we have taken steps, and we will continue to, to make sure that is as transparent as possible.

Now, some of these -- the funding in this package -- as I mentioned, 90 percent of it will go to local, Tribal, and territorial governments. So, that really gives the opportunity for a range of leaders to apply for funding. And the book is meant to give them the information and access they need so they don't have to hire lobbyists to do that, so that they can do that on their own. And we're doing that in part to ensure that equity is at the central -- is central to how we're implementing this bill.

Q My final question is: What do you say to many organizations -- I've talked to several civil rights organizations -- on the

process of selecting a Vice President? They feel like some of the desires of the Black community have been put on the backburner. So, when it comes to selecting a Vice President, why is there no need or no push to speed up the process? The President has said he --

MS. PSAKI: You mean a Supreme Court justice?

Q A Supreme Court justice.

MS. PSAKI: Sure.

Q I'm sorry. I'm sorry.

MS. PSAKI: No, it's okay.

Q A Supreme Court justice. Why is there no need to speed up that process --

MS. PSAKI: Of selecting a nominee? Well, he's going to --

Q He's going to name one (inaudible).

MS. PSAKI: He's going to name one this month.

Q Right -- name one this month. But there has been a little bit of pushback as far as comparing the process -- the timing to Amy Coney Barrett, as opposed to what the President is going to do during this time.

We've heard Chuck Schumer say that, but is the -- does the President feel the same way as far as moving -- how long, how quickly and expeditiously he wants to move this process along?

MS. PSAKI: I just want to make sure I'm answering the right question. So, you were saying there's unhappiness in the civil rights community about the pace? Or are you talking about the Schumer call for the 38 days?

Q Well, is the President going on board with that to push -- to push it that fast?

MS. PSAKI: Well, the President takes the decision to select an eminently qualified individual to nominate to the Supreme Court very seriously. He wants that to be a thorough process. And he's still doing that expeditiously by nominating someone this month.

And he wants, of course, the Senate to move forward expeditiously, but we're not setting artificial deadlines beyond that.

Go ahead in the back. Okay, we actually have two more, so let me get to them quickly. Go ahead.

Q Thank you, Jen. I have a couple of questions on two different topics.

MS. PSAKI: Sure.

Q One is Russia and then immigration. On Russia, I know the President has -- spoke with the Amir of Qatar regarding the role of that country exporting natural gas to the European Union. But is the U.S. considering increasing its role as a natural gas exporter to the European Union to serve as an alternative to Russian gas?

MS. PSAKI: We are having a conversation with not just countries but also suppliers about how to help meet any shortage of natural gas that could come about if -- if there's an invasion.

Q Also on Russia: Since Ukraine is not a NATO member, according to the North Atlantic Treaty, NATO cannot really respond militarily to Russia in Ukrainian territory. But are U.S. unilateral military actions on the table to support Kyiv?

MS. PSAKI: You mean sending U.S. troops to Ukraine?

Q Yeah.

MS. PSAKI: No.

Q Okay, no.

And on the other topic that I wanted to ask real quick: This administration is now sending Venezuelan migrants arrested at the U.S.-Mexico border to Colombia under Title 42. What agreement has been reached with the Colombian government? Is it similar to the MPP with Mexico?

MS. PSAKI: Well, I think what we tried to do from the beginning is ensure that, for Venezuelans who are coming -- who were coming from a third country, right? -- that they were able, at some point, to return to that country.

So, in this case, pursuant to Title 42, we began repatriating Venezuelan nationals who had attempted to unlawfully enter the United States to Colombia, where they had previously resided. So, it was, you know, a place where they had been living before.

Flights to Colombia with Venezuelan nationals who have legal status are expected to take place on a regular basis and will be operated by U.S. Immigration and Customs Enforcement. Of course, that requires agreement with the government.

Q When did that started? And how temporary is that supposed to be -- this program?

MS. PSAKI: Well, it's -- it's just starting now. And I can -- I'm sure I can get you a timeline of when it actually started to commence.

Q And is there a deadline until when this will be implemented?

MS. PSAKI: I don't believe we've set a deadline, but I can -- I can get that information for you as well.

Go ahead. Last one.

Q Thank you, Jen. One on the Supreme Court and two on COVID, if you'll indulge me.

MS. PSAKI: Sure.

Q First, on the Supreme Court: Does President Biden have plans to talk to Senator McConnell -- McConnell at all today or this week?

MS. PSAKI: I expect he will have many more consultations with Democrats and Republicans. I don't have anything yet for you at this point, but hopefully we'll have more in the next 24 hours.

Q Okay. And then two quick ones on the pandemic. First of all, I was wondering if you'd be able to provide an update on the free mask program that the White House was doing? I'm just curious if there's an update on the how many of the -- of the hundreds of millions of masks have been distributed already.

And also, is there a way for Americans to know, you know, if there are masks in their area, if they've been delivered to the area pharmacies -- just, you know, sort of, when -- when they know that they can go find them in their area?

MS. PSAKI: Sure. So, we just announced this last week, but we've already cranked up our shipments. We've shipped 100 million N95 masks [sic] -- masks so far, which is incredible progress. They're available at thousands of locations around the country.

The initial wave of health centers or for people who are looking to see if they're available near them is available on the Health Resources and Services Administration's website.

And the program, we -- we're working to expand it to make it available across all health centers over the coming weeks.

Q And then lastly, one from our colleague who couldn't be here. At NewsNation, they reported hearing from people who signed up to receive the free COVID tests through the website -- the government website, but they had issues where either the tests were shipped to the wrong address or they never received a confirmation email.

So, what should people do in that case? Is there a way for them to rectify that? Does the White House have, like, a response team in case somebody never gets a test that they ordered or anything like that?

MS. PSAKI: Yeah. There's a -- there's a -- there's a "Help" component on the website. Hopefully, it should be easy for people. There's also a phone number -- I'm sure we can get that to you after the briefing -- as well that people could call should they have any concerns.

I will note that we confirmed last week that 60 million tests have been -- had been ordered as of then. I don't have an updated number. Tens of millions of tests have gone out the door and reached the right -- right doors. I think that's the vast, vast, vast majority.

That is earlier than we were scheduled and were planning to get those tests out the doors.

But we can -- we can get you the phone number and you can publicize that in your publication.

Thanks, everyone.

Q Can you make sure we all get a list of what's going on for Black History Month?

MS. PSAKI: Sure.

Q Thank you.

3:13 P.M. EST

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# Senate Judiciary Committee hearing Closing Guantanamo: Ending 20 Years of Injustice, sked FINAL

December 7, 2021 2:10PM ET

## TRANSCRIPT

December 07, 2021

## COMMITTEE HEARING

SEN. RICHARD J. DURBIN, D-ILL.

SENATE JUDICIARY COMMITTEE HEARING CLOSING GUANTANAMO: ENDING 20  
YEARS OF INJUSTICE

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SENATE JUDICIARY COMMITTEE HEARING CLOSING GUANTANAMO: ENDING  
20 YEARS OF INJUSTICE

DECEMBER 7, 2021

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SEN. PATRICK J. LEAHY, D-VT.

SEN. SHELDON WHITEHOUSE, D-R.I.

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WITNESSES:

BRIGADIER GENERAL JOHN BAKER, CHIEF DEFENSE COUNSEL FOR  
MILITARY COMMISSIONS, DEPARTMENT OF DEFENSE

MAJOR GENERAL MICHAEL LEHNERT (RET.)

KATYA JESTIN, CO-MANAGING PARTNER, JENNER & BLOCK

COLLEEN KELLY, CO-FOUNDER, 9/11 FAMILIES FOR PEACEFUL TOMORROWS

JAMIL N. JAFFER, FOUNDER AND EXECUTIVE DIRECTOR, NATIONAL  
SECURITY INSTITUTE

CHARLES "CULLY" STIMSON, MANAGER, NATIONAL SECURITY LAW  
PROGRAM, THE HERITAGE FOUNDATION

DURBIN: The Senate Judiciary Committee will come to order.

Fyodor Dostoevsky is often quoted as saying that, the degree of civilization in a society can be judged by entering its presence. For the last two decades, the most notorious prison in America has been Guantanamo. We know it today and we knew it when the Senate Judiciary Committee held its first hearing on closing the detention center at Guantanamo in 2013, eight years and three administrations ago.

I chaired that hearing as chairman of the Subcommittee on Constitution, Civil Rights and Human Rights. At the time, many senior military officials, national security experts and lawmakers on both sides of the aisles agreed that it was far past time to close Guantanamo Bay. It saddens me that this hearing today is even necessary. The story of Guantanamo is a story of a nation that lost its way.

It is a story of unspeakable abuse and indefinite detention without charge or trial. Elements that are just counter, intuitive when you consider our constitutional values. And it's a story of justice delayed and denied again and again and again, not only for detainees, but also for the victims of 9/11 and their loved ones.

Before we get started, I'd like to share some of these stories with the following video.

(UNKNOWN): First, I'd like to end Guantanamo, I'd like it to be over with.

(UNKNOWN): If it was up to me, I would close Guantanamo not tomorrow, but this afternoon and close it.

(UNKNOWN): What is the moral superiority of the United States of America if we torture prisoners.

(UNKNOWN): According to President Bush, by his second term, the detention facility had become a propaganda tool for our enemies and a distraction for our allies.

(UNKNOWN): Our 42 retired military leaders wrote the leadership of the Senate Armed Services Committee and forcefully argued for the closure of this facility, stating there is near unanimous agreement for our nation's top military intelligence and law enforcement leaders.

(UNKNOWN): Close Guantanamo.

(UNKNOWN): Close Guantanamo.

(UNKNOWN): Close Guantanamo now.

(UNKNOWN): Our enemies act without conscience. We must not.

(UNKNOWN): Nearly 20 years after the attacks on 9/11 the long wait for justice continued. The CIA has admitted to subjecting Khalid Sheikh Mohammed to repeated waterboarding, a technique that simulates drowning.

(UNKNOWN): Majid Khan claims he was sexually assaulted and nearly drowned by his CIA interrogators who he said threatened to rape his sister.

(UNKNOWN): The detainees treatment has been a major impediment to resolving the remaining Guantanamo cases. In his statement, Khan also cast doubt on the effectiveness of the CIA program. Nothing the interrogators were doing was effective. Whenever I was being tortured, I told them what I thought they wanted to hear.

(UNKNOWN): But the survivors and family members of the victims it's a process that has taken far too long.

(UNKNOWN): Justice delayed is justice denied. And now we're 20 years later with no justice.

(UNKNOWN): My son gave his life and it does not honor him that we violate our Constitution in retaliation for what happened on September 11th.

(UNKNOWN): We have a constitution, we have a bill of rights and it applies to all persons.

DURBIN: Stories of torture that have come out of Guantanamo and CIA black sites around the world are shocking and shameful. One detainee whom we saw in the video, Majid Khan, recently testified during his sentencing hearing before a jury of high ranking active duty U.S. military officials. During his testimony, Mr. Khan detailed torture that he suffered at the hands of the United States government, including waterboarding and sexual abuse. When Mr. Khan's testimony concluded, seven of the eight jurors signed a handwritten letter recommending clemency.

Now make no mistake, Mr. Khan should be held accountable for his actions. But as the members of the jury wrote eloquently, and I quote, Mr. Khan has been held without the basic due process under the U.S. Constitution. He was subjected to physical and psychological abuse well beyond approved enhanced interrogation techniques, instead being closer to torture performed by the most abusive regimes in modern history. This abuse was of no practical value in terms of intelligence, or any other tangible benefit to U.S. interest. I might note, as I said earlier, seven of eight jurors wrote this handwritten letter to the court. All of them were career U.S. military officials.

For nearly 20 years, 20 years, the detention facility at Guantanamo has defied our constitutional values, and the rule of law. Too late today, we live in a world in which the war in Afghanistan our nation's longest war has finally come to a close and yet Guantanamo remains open. Thirty nine detainees remain. And more than two-thirds of them have never been charged with a crime. Let that sink in, two-thirds have never been charged in 20 years. How can it possibly be justice? The other 12 detainees are in a military commission system that has failed time and again, in sharp contrast to our criminal justice system. For instance, the case against alleged 9/11 co-conspirators who were detained in Guantanamo has never gone to trial more than 20 years after the attack. There is no end in sight for these military commissions. They will not provide justice or closure that the families of those who died on 9/11 deserve.

At the same time since 9/11, the Department of Justice has successfully prosecuted nearly 1,000 individuals on terrorism related charges. And they have been securely detained by the Federal Bureau of Prisons. We can and we must do better. President Biden transferred his first detainee in July, but at that pace, one detainee every 10 months, there will be dozens of detainees at Guantanamo even a President Biden is elected to a second term.

To finally close this facility, we need to take a new approach. Senator Leahy and I send that letter to President Biden in April 22 of our colleagues, including eight members of this committee, laying out the key steps the administration should take to close the prison. Getting this done will demand strong and effective leadership from the White House as well as a Special Envoy at the State Department to negotiate transfer agreements for the detainees who are not charged with crimes, and it will demand swift and decisive action from the Justice Department with which has yet to bring its legal positions in line with the President's goal of closing Guantanamo.

In July, send a letter to Attorney General Garland urging him to revisit the Justice Department's defense of the government's authority to indefinitely hold detainees without charge or trial and without due process at Guantanamo. I'm disappointed, disappointed that the President and Attorney General have yet to respond my letters. And I'm disappointed the administration declined to send a witness to testify at today's hearing on how they're working to close Guantanamo. I'm going to continue to press this administration to take action and to end this injustice.

The delays in closing this facility are not cheap, in terms of our reputation, and in terms of our treasury. Every day Guantanamo retains, remains open, damages, our moral standing and credibility, weakens our national security and waste taxpayers dollars. How much does Guantanamo cost us, \$540 million every year to keep it open, \$540 million for 39 detainees. Worse yet, as I mentioned earlier, Guantanamo has failed to deliver justice to families who deserve it the most.

One of those family members is with us today. I want to thank Ms. Colleen Kelly. I want to thank her because she's here today making a sacrifice to appear. And of course, she comes to us as a person who lost her younger brother Bill in the 9/11 attack. Thanks for your courage and your willingness to speak before the committee. Families like yours deserve better. It's time for us to live up to the ideals our troops risked their lives to defend every day. It's time at long last to set partisanship aside and work together to close the detention for some of the Guantanamo.

I'll now turn to Senator Grassley for his opening remarks.

GRASSLEY: Yup. Thank you, Mr. Chairman. And thank you to all the witnesses that have come. We know that you have to put in a lot of extra time to get ready for these things. And thank you for doing that.

Today, we have 35 men in the Guantanamo Bay. They include the mastermind of September 11th attack, take the Khalid Sheikh Mohammed and the mastermind of the attack on the USS Cole al-Nashiri KSM and al-Nashiri are being prosecuted for their crimes in front of military commission. In 2010, under President Obama, the current National Security Division Assistant Attorney General Matt Olsen led to a review of the 240 detainees still and Guantanamo at that particular time. Only a small portion could be prosecuted due to legal and evidentiary challenges. Some were set for transfer to other countries. And some were so dangerous that the task force recommended continued detention.

President Biden has committed to closing Guantanamo by the end of his term. He is not the first president attempt to do so. But as the taskforce report explains, simply prosecuting or transferring a deterring he is not an option in every case. Assistant Attorney General Olsen is not here to say whether he has changed his conclusions about continuing law of war detention at Guantanamo. There is no representative from the State Department to say what countries are newly able to provide adequate security for transfer detainee.

No one is here from the intelligence community, which has assessed that nearly 32 percent of the Guantanamo detainees are believed to have rejoined their war on the United States. The intelligence community isn't here to say that the top tier leaders still at Guantanamo are safe for release. No one from the administration has come to defend the President's plan to close Guantanamo. And I'm not sure that there is a plan.

Setting a goal, a policy goal with no plan only invites disaster. Over the summer, we watched no plan approach unfold in Afghanistan. To meet a deadline by at the end of August, President Biden ordered an American withdrawal over warnings from his own senior advisors. I fear that his plan to withdraw from Guantanamo detention facility might be no different.

In making decisions on whether on matters of national security, we must be asked if a course of action make Americans more safe or less safe. Are we protecting the American people? Creating a potential safe haven for al-Qaeda and ISIS in Afghanistan doesn't protect the American people. Bringing terrorists to the United States doesn't protect the American people. Releasing terrorists who will only seek to attack us, again, doesn't protect the American people. The safety of Americans is not the only question, though it is a top priority. Another question is that of accountability.

I'd like to enter into the record a letter from Terry Strada. Terry is a mother of three who lost her husband Tom on 9/11. Today, she's an active member of the 9/11 Families United, which serves thousands of families and survivors of the 9/11 terrorist attack. She states that she and her family, and all of us, deserve justice for what happened. Like many victims' family members, she believes that means staying the course at Guantanamo.

I'd like to read from her letter, quote, that the war in Afghanistan has ended or that a new Administration is in charge, none of that changes our need to prompt justice -- for prompt justice. None of that changes our need for an accounting based on the evidence collected over the years, evidence that may not be available anywhere else. Rather than lose the opportunity to attain a modicum of justice for all those lost and all of us left behind, the military trial should continue to proceed under the guidelines of a military tribunal, uninterrupted and as swiftly as possible. The evidence amassed needs to be heard for justice to be served and this dreadful chapter of our lives closed, end of quote.

The victims of terrorism are not just those we lost on 9/11, like Terry's husband Tom. Over 4,000 servicemembers have given their lives in the war on terror, in Iraq, and in Afghanistan. The veterans of those wars have given life and limb to protect Americans from terrorists like those at Guantanamo Bay. I hope we will honor that sacrifice.

I yield.

DURBIN: Thanks, Senator Grassley.

FEINSTEIN: Mr. Chairman? Oh, excuse me.

DURBIN: Yes, Senator?

FEINSTEIN: Are you calling others?

DURBIN: I would be happy to defer to you.

FEINSTEIN: Well, thank you very much.

DURBIN: Yes.

FEINSTEIN: I care a great deal about this issue. I have visited Guantanamo when I was chairman of intelligence, we released a report, which was a study of the detention and interrogation program. And this report detailed the enhanced interrogation techniques used against Guantanamo detainees at that time. It has changed since but there are still real problems.

In 2021, I introduced the Bipartisan Due Process Guarantee Act, which would clarify that a generalized Authorization for Use of Military Force cannot by itself authorize detention without charge of a United States citizen or lawful permanent resident. I believe then, and I believe now that this bill would help ensure the rule of law by preventing the indefinite military detention of U.S. persons without cause. Senators Whitehouse, Cruz, Lee and Collins, are co-sponsors of the bill.

I am really concerned about having an offshore detention facility, which is subject to a consequential day trip to get there and probably does not receive many visitors in a given year. In October of 2021, seven of eight U.S. military officers serving on Mr. Khan's military commissioned jury wrote a letter recommending that he received clemency and I just want to read what they wrote. Mr. Khan's abuse was of no practical value in terms of intelligence, or any other tangible benefit to U.S. interests. Instead, it is a stain on the moral fiber of America. The treatment of Mr. Khan in the hands of U.S. personnel should be a source of shame for the United States government.

So, I am very concerned that things like this have in the past happened. I know firsthand about the isolation of the facility, and they can happen at any time. To me, it makes no sense to house our prisoners there whatsoever. And one of the things that I hoped many years ago, when I went there was that we would have the ability to close down that facility. So, I hope that this hearing may lead to that.

Thank you very much.

DURBIN: Thank you very much, Senator Feinstein.

We're now going to turn to our panel of witnesses. Today we welcome six witnesses. I'll introduce the government majority witnesses then turn to the ranking member Senator Grassley to introduce the minority witnesses.

We're pleased to be joined today by Brigadier General John D. Baker, the Chief Defense Counsel for the Military Commission's Defense Organization. General Baker is going to be retiring at the end of this year after more than 32 years of service to our country. Thank you very much General for caring for America that way.

Our first majority witness is Major General Michael Lehnert, who served on active duty in the Marine Corps for 37 years. After 9/11, he served as the first joint task force commander at Guantanamo, where he was tasked with preparing the base to receive the first detainees who arrived on January 11, 2002.

We will also hear from Colleen Kelly. Ms. Kelly is a family nurse practitioner from the Bronx, New York the mother of three kids, co-founder of 9/11 Families For Peaceful Tomorrow's. Ms. Kelly's brother Bill Kelly lost his life in the north tower on September 11, 2001.

Last but certainly not least, Katya, did I -- is it Katya or Katya?

JESTIN: It's Katya.

DURBIN: Katya. Katya Jestin is co-managing partner at Jenner & Block and former Assistant U.S. Attorney for the Eastern District of New York. Ms. Jestin was -- has represented Majid Khan, a detainee at Guantanamo Bay for over a decade.

Ranking Member Grassley would you like to introduce the minority witnesses?

GRASSLEY: Yeah. Professor Jaffer, (inaudible) ...

DURBIN: Turn (inaudible).

GRASSLEY: I'm sorry, I didn't turn on my microphone. Professor Jaffer, currently serves as Founder and Executive Director of the National Security Institute, and is an Assistant Professor of Law and Director at the National Security Law and Policy Program at the Scalia Law School George Mason University. Professor Jaffer previously served as Chief Counsel and Senior Adviser to the Senate Foreign Relations Committee Senior Counsel to the House Intelligence Committee Associate Counsel to President George W. Bush and Counsel to Assistant Attorney General for National Security at the U.S. Department of Justice.

Mr. Charles Stimson is a Deputy Director at the Edwin Meese Center for Legal and Judicial Studies, and Manager of the National Security Law Program at the Heritage Foundation. Before joining the foundation in 2007, Mr. Stimson served as Deputy Assistant Attorney -- Assistant Secretary of Defense for Detainee Affairs. He advised then Secretaries of Defense Donald Rumsfeld and Robert Gates and coordinated the Pentagon's Global Detention Policy Operations including at Guantanamo Bay and Iraq and Afghanistan.

Mr. Stimson has also served as a Military Prosecutor, Defense Counsel and recently he served as Deputy Chief Judge Navy Marine Corps Trial Judiciary. He continues to serve as the rank of captain as Commanding Officer of the Preliminary Hearing Unit.

Thank you both for coming.

DURBIN: Thanks, Senator Grassley.

After we swear on the witnesses, each witness will have five minutes provide opening statements, and then rounds of questions each senator having five minutes. Please try to remain within your allotted time. So could first get all the witnesses please stand to be sworn in? Kind enough to raise your right hand. Do you affirm the testimony you're about to give before the committee will be the truth, the whole truth and nothing but the truth? So help you God? Let the record reflect that the witnesses have all answered in the affirmative.

General Baker, will you proceed with your opening statement please.

BAKER: I thank Chairman Durbin and the members of the Senate Judiciary Committee for inviting me to testify today. I'd like to emphasize at the outset that I'm testifying solely as the Chief Defense Counsel for the Military Commission's Defense Organization, and not on behalf of any accused. Moreover, to be clear, the views that I am about to express do not reflect the views of the United States, the Department of Defense or any defense department agency, other than my own. My views do reflect however, 32 years of service in the United States Marine Corps, as a supply officer and as a judge advocate, including as a prosecutor and as a military judge.

As you noted, I do I retire at the end of this year after six and a half years as the Chief Defense Counsel for the Military Commissions. The title of this hearing is Closing Guantanamo, Ending 20 Years of Injustice. Because my authority is limited to oversight of the Military Commission's defense function, and not on other detention operations, I will not address the issue of closing Guantanamo. However I can, and I will speak to ending 20 years of injustice. The only path to ending injustice in the military commissions for the defendants, for the country, and above all, for the victims is to bring these military commissions to as rapid a conclusion as possible.

Notice, I don't say as just a conclusion as possible. It is too late in the process for the current military commissions to do justice for anyone. The best that could be hoped within 20 years after the crimes were committed is to bring this sort of chapter of American history to an end. And that end can only come through resolutions negotiated in good faith by the parties. Whatever the intentions, no one today can seriously argue that the Military Commissions in Guantanamo have been anything but a failed experiment. And they're almost 20 years of existence under four different presidents. The military commissions have produced one final conviction. To be sure there have been seven other convictions, but three were overturned in their entirety, and the other four have not completed the appeals process. The victims have waited 20 years in vain to see justice done.

The 9/11 conspiracy was originally charged in 2008, almost 14 years ago, and there is no date set for trial. The fact that the military Commission's had been unable to bring the man charged with the worst criminal act and United States history to trial 20 years after the fact is alone enough to indict the system as a failure. In fact, none of the active cases have a trial date set.

These delays are a direct result of the government's decisions that have corrupted the process from the outset, and have made legitimate convictions and fair sentences virtually impossible. The ultimate source of the Commission's problem is their original sin, torture. The United States chose to secretly detain and torture the man and now seeks to punish. This torture impacts and undermines every aspect of these prosecutions. More specifically, the government's fear that the truth will become public is what has been the most destructive to a fair process. And the government has effectively refused even to disavow its use of torture by adopting morally indefensible positions, like arguing for the admissibility of torture derived evidence in pre trial proceedings.

As I discussed in my written testimony, there are a multitude of flagrant and potentially reversible legal violations infecting the Commission's cases that I don't have time to discuss here. But it is on the basis of this record, with these sorts of due process errors baked in that federal appeals courts will decide whether the Military Commission's defendants received a fair trial, and whether their sentences including any death sentence can be allowed to stand.

Even if these previous -- even if these proceedings were otherwise fair, which they manifestly have not been or if the defendants had not been tortured cruelly by the United States, which they were, it is unconscionable that the government is gambling closure for the victims, along with extraordinary resources and endless delays in an attempt to attain such fragile verdicts and dubious death sentences. The more humane route for all parties is negotiating resolutions that give the victims at least a modicum of justice and the closure they deserve.

Now, I will conclude on a more optimistic note by assuring you that as long as the military commissions remain open, the Military Commission's Defense Organizations, defense teams will continue to be the voice for justice at Guantanamo Bay.

I thank you again for your invitation and for your time and attention.

DURBIN: Thank you General. Ms. Colleen Kelly.

KELLY: Thank you. Good morning, Chairman Durbin, Ranking Member Grassley, members of the Committee. Thank you for this opportunity to share my story.

I'm a family nurse practitioner in the Bronx, New York and the mother of three grown children. My younger brother Bill was killed in the North Tower of the World Trade Center on September 11th. Bill was 30 years old and starting to really come into his own. He was a decent chef, bartender and ever hopeful duck hunter, and a guy as comfortable in surfing shorts as in a business suit. Bill worked at Bloomberg trade book and his four sisters would fight over who got to be Bill's date at the annual holiday party. Bill work at the Trade Center, he happened to be there for a conference that he had repeatedly asked his boss for permission to attend. Bill's boss acquiesced, so in a twist of fate, Bill was in the wrong place at the wrong time.

Bill sent messages to his co-workers saying he was trapped. And at first he was hopeful that the Fire Department would save him. Three hundred and forty three firefighters lost their lives that day, attempting to do just that. I tell you this to emphasize that each of the 2,977 people murdered on September 11th has a family, has co-workers and friends. And for all of us in this country, there has been no justice or no accountability as yet.

Bill, my sisters and I grew up in a divided household of sorts. My mom is a Democrat and my dad's Republican. So I feel pretty comfortable sitting here today in another divided household. This feels like my family's dinner table with a few extra friends. Last week, I asked my 84-year-old father for his thoughts about the 9/11 Military Commissions. His reply, this is not justice. After 9/11 I co-founded September 11 Families for Peaceful Tomorrows each of our 260 members lost a relative of 9/11. We believe that the rule of law is a bedrock principle of our nation. And after 9/11, we expected our government to uphold the rule of law in seeking accountability for our relative desk, yet this has failed to happen.

Peaceful Tomorrows obtained official observer status in the Commissions because we felt it was important to bear witness not only for our loved ones, but for the outside world. So, I come to the following conclusions having observed the Commissions both firsthand at Guantanamo and at family viewing sites. Five men in Guantanamo stand accused of planning and supporting the 9/11 attack. A trial has not begun. Instead, we have heard nine and a half years of argument in pre-trial hearings. And instead of learning how and why the attacks that killed our family members were carried out, we have listened to seemingly endless litigation largely concerned with obtaining classified information about the defendant's torture.

Families have watched in frustration as one judge after another has been replaced. There is a new acting chief prosecutor assumed to be new chief defense counsel, and new learned counsel for one of the five defendants, and numerous other changes. I have lost count of the number of convening authorities. But I know it's more than 10.

In May of 2012 I sat with my dear friend Rita Lasar watching the arraignment of the 9/11 accused. Rita's brother Abe died when he stayed behind to assist a disabled coworker on the 27th floor of the North Tower. Rita is now deceased. In 2017 I was on the plane to Guantanamo with Lee Hanson, the only 9/11 family member to be deposed in the pretrial hearings. Lee Hansen lost his son, his daughter-in-law, and his granddaughter on Flight 175. Mr. Hanson is now deceased. In 2019 I was on a boat crossing Guantanamo Bay with Alice Hoagland, mother of Flight 93 hero Mark Bingham. Alice Hoagland is now deceased.

The point is that family members want a measure of accountability and justice before our death. Today I'm asking this commission to acknowledge the military commissions have failed and to help us gain some form of resolution through plea agreements in the 9/11 case. We understand that in exchange for guilty pleas the government would likely drop the death penalty. What we would hope to finally get, however, is answers to our questions about 9/11, information we been denied for two decades. Some may not see this is justice. Indeed, it is not the outcome that our organization advocated for at our founding. But it is a way forward.

Twenty years ago, while people around the globe watched the towers burn, I watched my brother Bill being murdered, one agonizing moment after another. My family still does not have any of my brother's remains. So I'm asking this committee to deliver the next best thing, a resolution to the 9/11 cases that provides justice for the deaths of our family members, answers to our questions, accountability for unlawful acts, and a path to closing Guantanamo. Perhaps then this long-festering collective national wound can finally begin to heal.

Thank you, and I look forward to discussing further.

DURBIN: Thank you, Ms. Kelly.

Mr. Stimson.

STIMSON: Mr. Chairman, Mr. Ranking Member, and members of the committee, thank you for the opportunity to testify today. My name is Charles Stimson. I'm a senior legal fellow at the Heritage Foundation, but I am testifying on my own behalf and not that of the Heritage Foundation, the Navy, or the Department of Defense, or any other organization. Although my views do reflect my 29 years in uniform as a defense counsel, prosecutor, and military judge, as an assistant U.S. attorney, and my time at the Pentagon as the head of detainee policy during the Bush administration. Let me say what a privilege it is to be testifying with each of the panel that's here today, each of whom I hold in the highest esteem, especially my friend John Baker, who has given 32 years of distinguished service to this country and whose written testimony I would like to associate myself with.

I'd like to make five quick points. First, the United States remains in a state of armed conflict. And as such, we are entitled under domestic and international law to detain opposing enemy forces for the duration of the hostilities, including the terrorists currently at Guantanamo Bay. This is the first war in history, as we celebrate the 80th anniversary of the bombing of Pearl Harbor, where we've let the enemy go during the war. And because of the hard work by the Bush and Obama administrations, we know who each of the 39 detainees are, the threat that they pose, and the risk that they would -- that we would need to accept if we decided to transfer any more of them before the conflict ends.

Second, since at least 2005, the detention facility at Gitmo has been a safe, secure, and humane detention facility for law of war detainees in compliance with common article 3 to the Geneva Conventions. That's not my opinion, that's the opinion and findings of both the Bush and Obama administrations. In fact, when the -- after the deputy head of the Organization for Security and Cooperation in Europe, Alain Grignard, visited Guantanamo in 2006, he told a newspaper in Belgium the following, quote: "At the level of the detention facilities, it is a model prison where people are better treated than in Belgian prisons," unquote.

Now there was, as is well-documented, detainee mistreatment when the facility was first opened. That was inexcusable. It was unacceptable and not consistent with our values as Americans. But since then, detainee care and treatment has been improved. And since President Bush's second term and beyond detainee care and treatment, including medical and dental care, nutrition and the like have far exceeded that required by law.

Third, the president has wide discretion as the commander-in-chief to decide where to detain opposing enemy forces, how long to detain them, and whether and when to release or transfer them during an ongoing armed conflict. It's ironic on this 80th anniversary of the attacks on Pearl Harbor that we are debating the location of where to keep enemies of the United States, or whether we should even consider detaining them during an ongoing armed conflict. Twenty-one percent of the detainees transferred during the Bush demonstration are confirmed to have re-engaged in terrorist activity, according to the DNI.

Fourth, the debate over closing Guantanamo has been overtly political. The year 2009 was the most opportune time for an administration to close Guantanamo. President Obama won the White House promising to close Gitmo. Democrats held a 57 to 41 majority in the United States Senate. Similarly, in the House of Representatives, the Democrats enjoyed a 257 to 178 advantage. If the president needed any legislation to close Guantanamo, which is debatable, or simply the political backing of the parties - the majorities of both houses of Congress, the stars were aligned for him to do so. But he failed in large part because some members of Congress failed to show the political courage of their own convictions, as I detailed in my written testimony.

Finally, I conducted the first classified study of how to close Gitmo back in 2006 when I ran detainee policy in the Bush administration. I was prepared to help close the facility then, if ordered to do so, and I would have supported its closure in a responsible way. And in fact I spoke to the Obama detainee policy task force when they took office early on, and advised them how to close it responsibly. And as I detailed in my written remarks, to close Guantanamo in a responsible manner, an administration must focus on the legal, logistical, political, and diplomatic challenges as I detailed in my testimony, and then spend the political capital and show courage to get it done.

Thank you, and I look forward to your questions.

DURBIN: Thank you very much, Mr. Stimson.

Major General Michael Lehnert.

LEHNERT: Chairman Durbin, Ranking Member Grassley, members of the committee, thank you for the opportunity to appear before you.

The goal of terrorists is to change our behavior and make us live in fear. By that metric they have accomplished their mission. Each of you will recall those terrible days after 9/11. Some of you were here. Others among you wore the uniform of your nation's military, as I did. All of us felt an incredible responsibility to the American people we'd sworn to protect. Constituents demanded answers and action. I was a newly appointed brigadier general assigned to command a force of 8,000 marines and sailors at Camp Lejeune, North Carolina, when the world changed. As we began to take captives in Afghanistan, the question about what to do with them became imperative. The Bush administration settled on Guantanamo.

I had previously commanded a force charged with securing 18,000 Cuban and Haitian migrants at Guantanamo. Because of this background, the urgency of the situation and the Marine Corps' ability to deploy rapidly, I was chosen to lead a joint task force to build secure facilities to hold the first 100 detainees. We received deployment order on Friday, January 4th, 2002. We were given 96 hours to deploy to Cuba and build the first 100 cells. My mission to set up at Gitmo and run it until the Army could take over lasted about 100 days.

The speed of Guantanamo's creation and the urgency to gain information had bad consequences. The legal ambiguities that make Guantanamo an attractive choice for some policymakers sets up extraordinary challenges for soldiers, sailors, airmen and Marines who must execute these policies. We do not shed our oath to the Constitution or responsibility to adhere -- to adhere to U.S. laws and the international norms when we deploy.

The subsequent decision to subject detainees to enhanced interrogation techniques and to avoid application of the Geneva Conventions, except when it suited us, cost us international support and aided the cause of our enemies. Speaking plainly, we are here to -- where we are today because of those misguided policy decisions to cast aside our values and the rule of law. I am not an attorney, but even I know that when you forgo generations of legal thought and precedent, bad things happen.

The vast majority of the 780 men sent to Guantanamo never should have been there. Among the 39 prisoners who remain in Guantanamo, there are some who need to pay the price for their crimes. But what we have now is not justice. There is no justice for the detainees, but more importantly, the relatives of the victims of 9/11 and of other terror attacks deserve justice and they deserve closure, and they aren't getting it.

Who gains by keeping Guantanamo open? Not America. Those who would harm us are the ones who gain. They point to the existence of Guantanamo as proof that America is not a nation of laws. They use Guantanamo as a recruiting tool. They do not want us to close Guantanamo. Some of you might be thinking, "My constituents don't ever ask me about Guantanamo," and you'd be correct. Most of America has forgotten about Guantanamo. But hear me when I tell you that our enemies have not.

Closing Guantanamo responsibly restores the reputation of America, ensures accountability for those who have committed crimes against us and provides closure for the families of those they have harmed.

The issue -- issue isn't whether to close Guantanamo, but how? So how do we close it? Here are some suggestions.

First, make someone in the White House currently responsible for closure and give them fine -- a finite period of time to make it happen. I was given 96 hours to open it; 96 days to close it seems reasonable. Whoever gets this thankless job needs to have the authority to direct the necessary elements of our government to make it happen.

Second, there also needs to be a senior officer -- official at the State Department in charge of negotiating transfer. More than two thirds of the remaining detainees, 27 of them, have not been charged with any crime. These detainees must be transferred either to their country of origin or a willing host nation. Thirteen have already been approved by transfer by our Defense and intelligence agencies. Continuing to hold these uncharged detainees costs the U.S. taxpayer \$13 million annually per detainee, ties up troops that could be used elsewhere and makes a mockery of our system of justice. Let's stop admiring the -- admiring the problem and transfer these detainees out of Gitmo without further delay.

For the remaining 12 who have been charged, it is time that we recognize that the commissions have failed. I have little sympathy for these men and a great deal of empathy for their victims, but by any objective standard, the military commissions have failed, while our federal courts have been remarkably successful holding our enemies responsible in securing significant sentences for terrorists. The victims of these men deserve justice. They deserve closure. They do not find it through military commissions, even though some very good people have tried to make them work.

At this point, we must make -- bring these cases to close through negotiated plea agreements, even if we want to see resolution in our lifetimes. It may require taking the death penalty off the table. If that is the case, so be it. The death penalty serves no useful purpose other than providing martyrs for our enemies. Again, I am not a lawyer, but I understand that plea deals could be reached within the commissions themselves or by video in federal court. In those agreements, the parties can make arrangements for where convicted defendants will serve out their sentence.

Now, some of you are going to worry about, detainees who are released might turn around and try to harm us. The question of risk is real, and I acknowledge it. My life as a Marine involved managing risk, but in my view, the damage caused by continue -- continuing to ignore the rule of law and gifting a recruitment tool to our enemies far outweighs the risk that some of these aging and sickly detainees might one day reengage in terrorism.

It is hard to overstate how damaging the continued existence of Guantanamo has been to our national security and the fundamental values we stand for as a nation. Who we are cannot be separated from what we do. It is past time to close Guantanamo and reaffirm who we are as a nation. Thank you.

DURBIN: Thank you, General.

Mr. Jamil Jaffer? I hope I pronounced it correctly.

JAFFER: Thank you, Chairman Durbin, Ranking Member Grassley, members of the committee. I appreciate the opportunity to testify today and discuss the detention of terrorists at Guantanamo Bay, Cuba, and the current threat facing our nation from terrorists.

Members of the committee, the fact of the matter is the war on terror is not over. The director of the FBI, the director of the National Counterterrorism Center, the director of national intelligence, our chairman of the Joint Chiefs of Staff and the commander of USCENTCOM have all made that abundantly clear.

Worse still, our enemies have made that abundantly clear. They continue today to plot terrorist attacks both here in the United States, as well as abroad.

It is in that context that we are discussing the question of what to do about the detainees remaining in Guantanamo Bay. We know today that ISIS and Al Qaida continue to aspire to conduct major terrorist attacks here in the homeland. To be sure, their capacity to conduct attacks -- such attacks has been reduced, including over the last two years, by the sustained counterterrorism pressure that has been brought to bear by this administration and the prior administrations before it.

That being said, new ungoverned spaces continue to rise in places like Afghanistan, where our precipitous withdrawal has allowed the Taliban to return to power, terror supporters of the Haqqani Network to remain members of the government -- in the Taliban government and ISIS-K, ISIS Khorasan to continue to plot terrorist attacks, including the deadly attack conducting -- killing 13 American soldiers at Hamid Karzai International Airport earlier this year.

So we know that our enemies continue to target us. We know that the war on terror continues. Question then is, what do we do about these detainees?

We know also that these detain -- these detainees currently remain in Guantanamo Bay. Some of them represent the most hard-core, the most committed of the terrorists we've captured in this conflict. To be sure, these individuals have aged with time. They've been out of the fight, some for two decades. That doesn't change the fact that they represent some of the most committed terrorists out there.

And this takes place also in the context of the fact that we know that individual terrorists and their release and their return to the fight can have a huge impact on the operations of terrorist networks.

One need only look at Al-Qaeda in the Arabian Peninsula, which began as a cavalcade of small groups that came together under the leadership of Anwar al-Awlaki and the inspiration of Samir Khan, both Americans, who took to the fight there in Yemen and made Al-Qaeda in the Arabian Peninsula one of the most threatening terrorist groups to Americans here at home. The number of attacks that AQAP conducted, both in Yemen and threatened against the United States in the aftermath of just two Americans joining the fight, was - was significant.

And so when we consider what to do with these (inaudible) - continue to detain them, transfer them, plead them out or the like - the question must become "what happens if eventually they do return to the battlefield?"

And this is not a theoretical threat. We know because of what the (inaudible) Director of National Intelligence has told us, that over the 800 detainees that have been - the 700 plus detainees that have been released from Guantanamo Bay, one-third - fully one-third have returned to the fight or are suspected of having returned to the fight. So these are not theoretical questions we face, these are very real questions.

To be sure, the situation at Guantanamo Bay is not ideal. It has not been ideal since the beginning and the things that have taken place both at Guantanamo Bay and in other places during the detention - capture, rendition and detention of terrorist suspects have been a challenge to our nation and its character.

At the same time, when we consider what to do with the remaining 39 individuals, we must ensure that the American people are fully and adequately protected. So if we think about bringing these detainees to the United States, we must ask ourselves what rights will they get under our laws? What opportunities will they have that they don't have today?

We know that at Guantanamo Bay, the Supreme Court has said these detainees have the right to habeas corpus but they have no other rights under our Constitution. They are foreign nationals held during an ongoing conflict. If we bring them voluntarily into the United States, there is a possibility that they'll receive significantly more rights and significantly more opportunities under our own laws.

And as a result, as we think about these very hard and difficult questions, we have to consider both the individuals at Guantanamo Bay, their status and the continued ongoing War on Terror.

Thank you for the opportunity to present my views. I look forward to your questions and ideas.

DURBIN: Thank you very much. Ms. Jestin?

JESTIN: Chairman Durbin, Ranking Member Grassley, members of the committee, thank you very much for the opportunity to address you here today. My name is Katya Jestin and I'm a lawyer at Jenner & Block in New York.

I've spent my career practicing criminal law, both on the defense side and as a federal prosecutor. Through my experience as a prosecutor, I developed a deep respect for the rule of law. And there can be no serious dispute in 2021 that Guantanamo is a failure. It harms our national security, undermines the rule of law and weakens our international standing.

As the title of today's hearing correctly states, Guantanamo has produced 20 years of injustice. The military commission system is a glaring example of that injustice. The system has failed in virtually every respect. It has shamefully failed the victims of terrorism and their families. It has been 20 years since 9/11 and this chapter needs to be closed.

I have spent months in the detention facility in Guantanamo. For over 10 years, I have represented Majid Khan, a man who committed serious crimes. Majid also spent years in CIA black sites and suffered unspeakable acts of violence and abuse, torture.

But notwithstanding the very un-American treatment that he received at the hands of U.S. personnel, Majid determined to resolve his case in the military commissions. He took responsibility for his crimes and he'd pled guilty.

He became a cooperator and he has been assisting the United States for decades. And given his cooperation, he is to complete his military commission sentence in February of 2022 and will need to be transferred then from Guantanamo to a place and in a manner consistent with the way government - the government treats cooperators in important cases.

But Majid's case charts a course here about how the government can and should resolve the remaining military commission's cases, which is a critical part of fulfilling the government's policy objective of closing Guantanamo.

The remaining contested cases currently pending in the commission system are going nowhere. Let's be honest - these cases are as far from a trial now as they were when they began, most many years ago. Put bluntly, the congested (ph) proceedings in the military commissions as opposed to negotiated guilty pleas are doomed to fail for at least two reasons.

First, the commissions lack legal clarity. They are perpetually mired in unsettled, complex legal issues that scuttle any effort to conduct trials of pace.

Second, there is the issue of torture and the cloak of secrecy surrounding it that the Executive Branch still fights to maintain. Torture infects almost every aspect of a commission's proceeding. It is the third rail in the system.

The quagmire of the commission is a miscarriage of justice for the victims of terrorism and their families, like my co-panelist Colleen Kelly, who lost her brother on 9/11, and Colleen deserves better from our government. The victims and their families deserve transparency about what happened and who was involved in 9/11 for a modicum of closure.

And make no mistake, unless the White House proceeds with a comprehensive Guantanamo closure policy, this quagmire will - will remain and the shameful status quo will continue. The commissions is merely a thin veneer of a legal process - process that serves one objective, and that is to keep the detainees under wrap so that they cannot describe what happened to them in CIA detention, and that, above all else, appears to be the goal of the military commissions - not truth, not justice, not accountability. They exist merely to keep the dark chapters of our recent history in the shadows, and continuing to litigate the contested cases is the legal equivalent of a road to nowhere.

And what of the 27 other men there who have not been charged with any crime? They need to be transferred. How can we, as a nation, indefinitely charge human beings with no charge and no trial for 20 years without any foreseeable end? What does this say about our adherence to democratic principles and the rule of law?

In closing, I want to remember the words of Senator John McCain in 2008, when he asked a question that I ask each of you today - what is the moral superiority of the United States of America if we torture prisoners?

What makes this country great, what makes me proud to be an American is what we aspire to be, and Guantanamo falls far short of those aspirations.

Thank you.

DURBIN: Thanks so much for your testimony, and I'll begin the questioning.

Let me say at the outset, General Baker and General Lehnert and to all of the members of the panel, this is some of the most powerful testimony I've heard. And the credibility that General Baker and retired General Lehnert bring to this issue really makes it even more powerful and forceful.

Both of you have enjoyed the responsibilities command - commanding our men and women in uniform and also accepting assignments - as you mentioned, General Lehnert, 96 hours to set up something like a Guantanamo detention facility is an incredible assignment.

But in reading your testimony, particularly General Baker, it -- it's very clear to me what's happened. You say at one point the military commissions have been unable to bring the men charged with the worst criminal act in United States history to trial 20 years after the fact and 14 years after they were first charged. This alone is enough to prove that the system has failed.

It seems to me that we put these prisoners, these detainees in a black hole on an island which we could claim was not part of the territory of the United States and decided that we would treat them in some kind of unusual legal manner with these military commissions. As the testimony has made clear, that experiment failed, and you said as much, General Baker, in your opening statement.

So General Lehnert has suggested there will come a point where the best we can hope for to finally put an end to this chapter is some sort of plea negotiation in terms of the outcome and where these prisoners are held, if they're held, from this point forward. General Baker, would you like to comment on that suggestion?

BAKER: Yes, sir. I -- I would agree that a plea negotiation resolution is the only way out. I became the chief defense counsel in 2015. We're further from trial today than we were when I started. So the -- this legal quagmire, I just, I don't see a way out. The status quo is not working.

DURBIN: I'd like to ask you, General Lehnert, to respond to Mr. Jaffer. Is any type of resolution for these detainees being held going to give aid and comfort to the enemy and put America at risk?

BAKER: I think that what's putting America at risk is the status quo, is -- is continuing down this road.

DURBIN: General Lehnert?

LEHNERT: Senator Durbin, I -- I agree with General Baker, and I -- I'd also add the point, and -- and -- and with respect to our minority witnesses, who I thought did a remarkable job.

You know, I serve -- I had held 13 separate commands in 37 years, and with command comes a remarkable power and authority. And one of the questions I would always ask myself is not can we do something, but should we do something?

And I think in this particular case, we have a responsibility here today to ask ourselves how history -- history is going to judge the United States in the long term. And in -- in my view, it is time to close Guantanamo, sir.

DURBIN: Ms. Jestin, it was an extraordinary thing when the seven of the jurors in your client's case created this handwritten letter, which we have a copy of. Can you explain the circumstances behind that?

JESTIN: Thank you, Senator. Yes, at Mr. Khan's sentencing hearing that occurred this year at the end of October, Mr. Khan, through agreement with the government, was given the opportunity to speak for about two hours about what happened to him while he was in CIA custody. He did so and it described in a fair amount of detail what he was subjected to while in the black sites.

At the end of the proceedings, the military panel of jurors was given the opportunity to not only render a decision on his sentencing, but to suggest clemency, should they wish to do so, and they -- they made the decision to do so and supplied that written clemency letter that you quoted from at the beginning of these proceedings at Mr. Khan's sentencing. It was remarkable to us, Senator, given their position in the military and given the fact that they had had an opportunity to hear everything at the sentencing hearing, including the entire stipulation of fact to which Mr. Khan pled guilty to and took responsibility for.

So the clemency letter was delivered in the context of full information about the seriousness of his crimes, his contrition, his guilty plea and then what happened to him in the CIA while he was in the black sites.

DURBIN: Thanks, Ms. Jestin.

I might say, Ms. Kelly, I'm going to remember for a long time as you recounted all of the survivors' families who've passed away, waiting for a moment of resolution or some sort of explanation of what happened to their loved one. It -- it is, I -- I think stark testimony as to why we finally have to bring this to a close. Thank you for your testimony today.

Senator Grassley?

GRASSLEY: My first point will be directed to Professor Jaffrey (sic). In light of the poorly-planned withdrawal from Afghanistan, administration officials have testified that a strengthened Al Qaeda or ISSA (sic) could launch attacks against us from in Afghanistan as soon as six months. It's particularly important to ensure that the worst of the worst at Gitmo do not rejoin those efforts. The Office of Director of National Intelligence has reported that nearly a third of Gitmo detainees re-engaged in terrorism. At least a dozen have launched attacks against the United States or U.S. forces in Afghanistan, killing at least a half a dozen Americans.

So to you, what is the effect of Afghanistan's fall to the Taliban and the creation of a safe haven in Afghanistan on the dangers of releasing these detainees?

JAFFER: Thank you, Ranking Member Grassley. I think the -- the situation in Afghanistan and our precipitous withdrawal, the detriment of that cannot be understated. The Taliban, who hosted Osama bin Laden on the day of the attacks -- on the day of the 9/11 attacks, are now -- have now returned to power. Within their ranks, the Haqqani Network, the leader of the Haqqani Network, is a senior minister in their government, is the deputy head of the Taliban. They have refused to comply with all but one of the conditions of the Doha Agreement reached in order to facilitate the withdrawal of the United States from Afghanistan, including the condition required to renounce and reject Al Qaida. They have not done so.

We're still -- ISIS Khorasan is now present. No doubt, they are fighting with the Taliban for -- for primacy within Afghanistan. But they are a serious terrorist group, and they are responsible for the deaths of 13 Americans at Hamid Karzai Airport.

Other terrorist groups, too, are returning to Afghanistan as they see this ungoverned space as an opportunity to once again consolidate their efforts and fight against the West. They seek to connect to attacks in the United States, in Europe and against Americans around the globe. The terror threat today is worse specifically because we withdrew from Afghanistan in the way and the manner which we did.

GRASSLEY: To Mr. Stimson, the final report of Obama's review task force, which was completed under the direction of Assistant Attorney General Matt Olsen, notes that there are many challenges to prosecuting Gitmo detainees in Article III courts. These include statutes of limitation, lack of jurisdiction at the time the offenses were committed. Of the 240 cases that the task force reviewed, only 36 were deemed suitable to investigate further for charging, and only 12 were recommended for charging in either our court system or the military commissions.

So to you, sir, for the remaining Gitmo detainees, is prosecution of the United States Civilian Court there an option?

STIMSON: Thank you, Senator Grassley, for your question. The - the answer really is it's hard to tell from where I sit today. I mean, as Ms. Jestin and I both have had the privilege of being federal prosecutors, I'm clearly a fan of - of a use of federal courts in appropriate cases.

And to your question, Matt Olsen and his team scrubbed the evidence available in the Gitmo detainee files, to assess whether, one, they were law of war detainees, two, whether or not the appropriate disposition of them would either better be done in federal district court or in military commissions, and they recommended one - you know, some for one and some for the other.

The problem, Senator, is that these detainees were not captured in a place like in a city, where there was crime scene tape and preservation of evidence and the rest of it. And so it's very likely that the evidence may not even exist to be able to prove the case beyond a reasonable doubt in federal district court under the statutes available to even prosecute them.

So although they may be and are law of war detainees, I think that the chances of their being able to be prosecuted in federal district court are - are low.

GRASSLEY: Professor Jaffer, what are the - some of the risks of bringing Gitmo detainees to the United States? What could happen, for example, to their immigration status? Is "released in the United States" even a possibility?

JAFFER: Well, Senator Grassley, I think these are very serious questions. We don't know today what the Supreme Court would do if we were to voluntarily bring these detainees into the United States and hold them here, try them here, whether a law of war detention or otherwise.

We know that in a limited fashion at Guantanamo Bay, the Supreme Court has afforded certain rights to these detainees - again, foreign nationals captured in an ongoing conflict. So they may get additional rights. If we bring them to trial in federal court, as Mr. Stimson correctly pointed out, what about the Fourth Amendment? What about chain of custody? What about the rules of evidence?

There are dozens and dozens of questions that, attached to bringing these detainees into the United States, even in law of war detention, that are unanswered and we don't know what will happen and it raises the question of if these detainees are tried and exonerated, what will happen to them?

Will they be held then in immigration detention because they are in the U.S.' custody but aren't entitled to stay in the United States? If so, what happens if, like at Gitmo, they're ineligible for transfer, we can't get the right security assurances and they remain in immigration detention for a long period? Then we have the potential for the Supreme Court prior precedent to suggest they may have to be released into the United States.

Now, the odds of that, to be sure, are quite low. That being said, they are not zero, given the Supreme Court's precedent on the question of detention in the United States, rights for detainees, and immigration detention. And so we have to consider those facts also as we think about what to do with these detainees and whether bringing them to the United States at this point makes good sense.

GRASSLEY: Thank you.

DURBIN: Thank you, Senator Grassley. Senator Feinstein?

FEINSTEIN: Thank you, Mr. Chairman. I've thought a lot about Guantanamo from the time I visited. I've served in my past - on boards that sentenced women convicted of felonies in the state of California - did that for more than five years - and sentenced a lot of people. I know prisons.

And when I saw Guantanamo and realized its isolation and came on the small boat to where it was, I began to understand that this was a facility that is really almost designated - I'm not - have no proof of abuse, I know the statistics - but for abuse and does not really belong in the modern day criminal justice system.

I think the detention at Guantanamo was not thought through. It's been subject to major legal challenges and it has ultimately served as a rallying cry and recruitment tool for our adversaries. It's nearly 15 years ago, I introduced the legislation calling for its closure, and it went nowhere. And I watched it since then. The annual cost is \$540 million. It's \$13 million per detainee each year. And there are 39 detainees remaining. That's what this is all about today.

For this modern body to support an "isolated criminal justice system," in quotes, is just plain wrong, and I would hope that the votes are here finally to change it. I just wanted to say that because this is an aberration on the United States of America. It's not what we represent. We don't support this kind of isolation in criminal justice. And I'm grateful for the people that had the courage to come here and, in many different ways, say the same thing.

That's all my comment. Thank you.

DURBIN: Thank you, Senator Feinstein. Senator Graham?

GRAHAM: Thank you, Mr. Chairman. Let me set the stage, as I see it. 20 years after 9/11, the Taliban are back in charge. Does everybody agree with that on the panel, of Afghanistan - the Taliban are now in charge of Afghanistan? Everybody agrees.

Five of the people in the Taliban government are former Gitmo detainees. The Minister - Deputy Minister of Defense, the acting Minister of Borders and Tribal Affairs, the acting Intelligence Director, the acting Minister of Information and Culture, the new Governor of the Southeastern Province of Host (ph) are all former Gitmo detainees and we're talking about releasing people. 229 of the 729 people released from Gitmo have gone back to the fight and we're talking about releasing people. This is nuts.

One thing I can say about the 39 that are at Gitmo, not one of them has attacked the United States. And if I have my way, none of them ever will. Bringing them to justice, I understand that very, very much, but here's what I have been fighting for 20 years now almost - I don't want anybody to be tortured by American military personnel or our government officials or contractors because that makes the war harder to win. That's why, along with Senator McCain, myself and many of my colleagues, we fought hard to hold those accountable who lost their way.

But having said that, I've never accepted the false choice of try them or release them. We're at war, General Baker. We're not fighting a crime, do you agree with that? This is not a criminal enterprise, this is a war, and we're applying the law of war. Is that correct?

BAKER: Sir, what I've - you know, my - my sphere of influence is overseeing the military defense function.

GRAHAM: Yes.

BAKER: Policy decisions are decisions by ...

(CROSSTALK)

GRAHAM: Well, let me just ask you this. As a military lawyer, doe the United States have the ability to hold a member of the enemy forces as an enemy combatant under the laws of war?

BAKER: In certain circumstances, yes, sir. But that's not what we're talking about here today.

GRAHAM: Everybody at Gitmo went to through a combat status review tribunal hearing, is that correct?

BAKER: Yes, sir. But what we're talking about...

(CROSSTALK)

GRAHAM: What did that -- no, no, what we are talking about here is that these people have been determined by a process consistent with the Supreme Court determination that they are in fact part of the enemy force. There was a hearing held for all 39 combat status review tribunal under the law of war required by the Supreme Court. And everybody was found to be a part of the enemy forces. Is that true or not, General Baker?

BAKER: But what we're talking about today, sir...

GRAHAM: That's -- my question is simple...

(CROSSTALK)

GRAHAM: ... are the people at Gitmo -- have they gone through a process and been determined to be part of the enemy force?

BAKER: Not a process that is fair, no, sir.

GRAHAM: Well, that's your opinion.

BAKER: Yes, sir, it is.

GRAHAM: That's an opinion. You're the defense guy. And I admire the hell out of you. This is a hard job. You are doing to the government of the American people great service by being willing to defend these folks. You are doing a fine job. But we're here as policymakers to make a decision on what we should do. I think it's absurd to criminalize a war. You can hold somebody until they die as an enemy combatant if it's unsafe to release them if the war is not over. Does anybody doubt we have the ability today to kill somebody who is part of al Qaeda if they're up to no good? Can we kill them?

Mr. Stimson, can we kill them?

STIMSON: We can use deadly force under the 2001...

(CROSSTALK)

GRAHAM: We did it last week. Well, is it -- what absurd conclusion would there be that you can kill somebody but you can't capture them, and once you've captured them you have to let them go if you don't have the evidence necessary to prosecute them at a criminal venue? No war has ever been conducted that way for a reason. The reason we've never done war that way is because it's stupid. We're not fighting a crime, we're fighting a war. I don't want to torture anybody, I want to give them due process consistent with being at war and, if necessary, I want to hold them as long as it takes to keep us safe or we believe that they are no longer a threat.

To the 39 at Gitmo, I believe all of them are a threat. If we can try them, great. If we can't, let's hold them. This idea of closing Gitmo, I embraced it with President Obama. Here is the problem, I couldn't get the administration to agree that if he moved them back to the United States, indefinite detention would still be available. I don't care where you house them, you can house them in Illinois, as long as you don't let them go if the circumstances and the law of war prevent them from being let go. We could never cross that bridge. There is not one member of the Biden administration on this panel, and all of you are great Americans, thank you for giving your opinions and your counsel to the committee, but I find it stunning that not one member of the administration would come before this committee to talk about closing Gitmo.

DURBIN: Thank you, Senator Graham.

Senator Whitehouse.

WHITEHOUSE: Thank you, Chairman. The torture program that was run by the CIA has left a lasting stain. I want to recognize, while we're discussing it, the work that Chairman Rockefeller and Chairman Feinstein did on the Intelligence Committee, which was persistent and determined work against considerable executive opposition in both the Bush and Obama administrations.

I want to also recognize the work the Judiciary Committee did. We had the hearing in this committee with the FBI interrogator who was extracted by the FBI and the Department of Justice when the FBI and Department of Justice got wind of the abuse that incompetent CIA contractors were applying in an effort to extract intelligence when they were in fact interrupting successful intelligence-gathering by trained professionals.

Senator McCain has been mentioned, and I want to thank particularly the Armed Services Committee under Chairman Levin and Senator McCain who gave us on Intelligence, where Levin and McCain sat as the chair and ranking members, and us in Judiciary considerable support, moral and political support for getting to the bottom of the torture program. And what we're hearing now is that the torture program bedevils our ability to resolve the remaining detainees.

This was always a problem. I believe that the Bush administration itself released more than 500 Gitmo detainees. So it's hard to say that this was a seamless successful project of identifying and collecting really dangerous people when the people behind that, the Bush administration who set this up in the first place, released more than 500 out of Guantanamo. And now we're down to these last 39. And maybe our solution is like "The Man in the Iron Mask," we put them in dungeons forever with -- de-identify them and hope that they all just go away. But that would be dramatically inconsistent with American values.

My question to our two members in uniform is, describe what symbolic significance. Guantanamo now has as a tool for our enemies and adversaries?

LEHNERT: Thank you, Senator Whitehouse. I think the best way to describe it to you is a conversation I had with a young soldier when I was down there at Guantanamo. And I would show up in the middle of the night because I wanted to make sure that we were treating the detainees properly. We did not indulge in enhanced interrogation techniques during that short period of time I was there. And I would not allow it. But the soldier asked me, he said, young 19-year-old kid, he says, sir, why are we treating them so well? We would -- they wouldn't treat us that way. And I said, soldier, you are exactly right. But if we treat them as they would treat us, we become them. And I would offer that we have, during this period of 20 years, surrendered our moral authority.

BAKER: Sir, I agree with everything that General Lehnert just said. There is one point that you raised that I would like to address, and that's this myth out there that the FBI engaged in these clean team statements, that the FBI and the CIA were involved hand-in-fist throughout all this intelligence gathering that we're learning through these hearings down at Guantanamo Bay. And we're hiding all of that behind the secrecy of classified information.

WHITEHOUSE: Well, I think the -- the key problem here, I think, Ms. Jestin described it, is that the continuing effort to keep this horrible secret is interfering with our ability to process these cases because we don't want the information to come out. And in return for hiding the horrible secret, we have to cut deals with the detainees.

If we simply came clean about what was done, Ms. Jestin, what would that do to the process going forward in terms of speeding things up and allowing greater clarity?

JESTIN: Thank you, senator.

In the case of my client, Mr. Khan, we were able to negotiate a guilty plea, whereby he agreed to enter his plea pursuant to a long stipulation of facts that provided the clarity and the modicum of closure that we think is appropriate for the victims of these terrorist acts. So in that respect, through negotiating a guilty plea, we were able to achieve some measure of clarity and closure for the victims.

In terms of his torture, it was years of negotiation with the government, at its height this year preceding his sentencing, to enable him to give an unsworn statement that described what he was subjected to at the hands of the CIA. And for him that was very important. And for the country it's very important to have the measure of accountability that that can bring about.

WHITEHOUSE: Mr. Chairman, I'm over my time. But I want to thank you for holding this hearing and for the attention that you're giving to the Department of Justice.

A lot of this began, as you know, with completely inappropriate opinions offered by the Office of Legal Counsel. How do we know they were inappropriate? Because once they were public, the Department of Justice itself under the same administration disavowed them. And that was in some respects the original sin.

And I don't think we've yet solved the problems at OLC that keep that original sin from repeating itself. And we're in active conversation about that, as you know. But thank you for your leadership, making sure that the Department of Justice doesn't get abused that way again.

DURBIN: I don't know if I'll be here eight years from now. Maybe somebody else can take on that responsibility. But eight years ago we raised this question, and had we closed Guantanamo at that point we, I think, would be better off as a nation.

Senator Cornyn?

CORNYN: Thank you, Mr. Chairman. Obviously, if this were easy -- four presidents, 20 years -- we would have figured this out.

But what was unprecedented was the terrorist attack that occurred on our soil that took the lives of 3,000 Americans. And the American people demanded a response. And the American people demanded that we stop future terrorist attacks.

But I think part of the -- part and parcel of the confusion here is we still have people arguing that this is a -- this should be subject to the usual rules in a criminal trial. And for obvious reasons, that's not possible for many of them. That's not -- don't take my word for it, it's what the Obama commission concluded in 2010.

But just -- Mr. Jaffer, you -- you alluded to this, but can you talk about what -- we all agree that the rule of law should apply here. But can you talk about why the rule of law applies differently to a non-citizen captured in the battlefield during a war?

JAFFER: Absolutely. Thank you, Senator Cornyn. The Supreme Court has held that in an ongoing conflict the United States can hold enemy combatants for the duration of the conflict.

Now, there are debates today about what the -- with the war -- the war on the battlefield in Afghanistan having come to an end with our precipitous withdrawal, does that change things.

The answer clearly is no. Joint Chiefs Chairman Mark Milley and CENTCOM Commander General McKenzie both testified here in the Senate less than -- less than two months ago that, in fact, the war on terror continues.

And our enemies believe the war on terror continues. They continue to plot attacks both here in the United States and against our allies around the globe. And so, the war continues and, therefore, the ability to detain continues.

As Senator Graham correctly pointed out: if we have the ability to kill an enemy on the battlefield, is it not more humane to actually capture them and detain them, even though that detention may be indefinite?

How can it be that we have the authority in a ongoing conflict to kill an enemy but not detain them for any amount of time? It simply doesn't make sense to me.

And as a result, we have to assess these GITMO detainees in the context of whether we're going to be able to detain them for a long period.

CORNYN: And that's essentially the ruling of the United States Supreme Court in the Hami cases and in other -- other cases, is that correct?

JAFFER: That's correct, the plurality in Hamdi plus Justice Thomas' view in Hamdi. Yes, sir.

CORNYN: What I'm trying to understand is what -- what is being asked for here, when people say they want to close Guantanamo, in terms of the outcome for the families who lost loved ones on -- on 9/11. Because I heard Mr. Stimson -- you and Mr. Jaffer, talk about the difficulties of prosecuting these individuals in a court of law, assuming you chose to do that -- could do that, even though the law of war allows indefinite detention, as Mr. Jaffer said, for the duration of hostilities.

But it seems to me that there are insurmountable problems with trying to try these detainees in an Article III court. And can you explain, Mr. Stimson, your thinking about that? And also, would simply an acquittal and letting these detainees go and avoid any sort of consequences for their -- for their terrorist acts, would that be justice in your -- in your opinion?

STIMSON: Senator Cornyn, thank you for your question.

The argument about closing Guantanamo among the moral arguments is that if you change the ZIP Code and move them to the United States or elsewhere, it eliminates the original sin, quote/unquote.

And as Senator Graham pointed out, that if you deal legislatively with the issue of whether they can be detained under law of war detention and nothing more in the United States, you really don't change anything but the ZIP Code because it's clear that our enemy is on the march. They're clearly in power in -- in -- in Afghanistan.

And if you change the ZIP Code only -- and change nothing more, and prosecute those who you can in court, then our enemy will simply turn their ire and proxy to the new ZIP Code. And so, to close Guantanamo in a responsible way, you have to deal with the fact that we are at war.

And that law of war detention is the guiding principle. And that if you can prosecute some that can be prosecuted, do that too. And then transfer the remaining if you can get adequate security assurances from the receiving country, which we haven't really gotten the best security assurances from some of the countries where we sent detainees to. That's the conundrum.

CORNYN: Thank you.

DURBIN: Thanks, Senator Cornyn.

Senator Blumenthal?

BLUMENTHAL: Thank you, Mr. Chairman. Thank you for holding this hearing.

Ms. Kelly, I want to thank you for being here today and sharing your really powerful testimony about your personal experience and about the 9/11 families' quest for basic justice and accountability, as you say.

I've worked with a number of the 9/11 families. You make reference to one of them, Lee Hanson, in your testimony who was from Connecticut. Connecticut was particularly affected because we're close to New York and many of our family members were there, as was your brother Bill.

And I've been so deeply moved and impressed by the efforts of 9/11 families to seek the truth about what happened on that day, as you put it. To seek answers to the questions that you've raised.

A number of the families have sued Saudi Arabia, as you know. The Congress in a very bipartisan way, Senator Cornyn and I have helped to lead efforts through JASIT (ph) to enable those families to seek their justice.

You've done it very heroically through Peaceful Tomorrows. And I was struck by the reference in your testimony to the concealment in affect through the states' secrets privilege, through classification of information that really belonged in the public realm. And this point has been a continuing one that I've tried to make.

I wonder if you could elaborate a little bit on what kind of answers you're seeking and how the over classification and maybe the unnecessary and sometimes irresponsible use of state secrets privilege has contributed to the concealment that has really aggravated the injustice to your families.

KELLY: Sure. Thank you -- thank you for the question. I want to start by saying that the common ground that I've been hearing so far and I've been listening very carefully is adherence to the rule of law.

And the common ground that I've been hearing about rule of law is that the military commissions, the rules for military commissions do allow for pretrial agreements. So one way to get to many of the answers that we're seeking and one way to get to information would be a pretrial agreement, not where people are released but a stipulation of facts to actually what occurred and perhaps the ability of family members to ask questions. Could that be written into a pretrial agreement so we could have our questions answered.

The defendants would have to admit to what exactly happened and what their role was in the attacks. So I think there's a lot of large complex questions before this committee but I also think that there's a simple solution for the 9/11 case and that would be pre-trial agreements, understanding secrets that are long hidden and gaining information.

BLUMENTHAL: I think that point is so powerful because of any of us who have been involved in trials or litigation or law enforcement know that one of the purposes of a trial, of any legal proceeding is to get to the truth.

KELLY: The truth.

BLUMENTHAL: To get to the truth of what happened in any kind of action that may give rise to legal responsibility. And what you're asking for is really one of the core functions of the rule of law to -- to seek answers about what happened and who was responsible for it without the overlay of government censorship in affect.

And that kind of pretrial agreement as you've -- as you said would be a way to do it. And do you think that kind of information or answers would be a source of relief to the families?

KELLY: It's hard to imagine what the source of relief will be at this moment in time. But I would imagine feeling that I did right by my brother. I would imagine that I have -- there'd be some resolution for my mother and father and for my children and important that there would be some sense of ending resolution (ph) for this country, which I really believe we so desperately need.

BLUMENTHAL: Because you spoke to your dad before you --

KELLY: Yes.

BLUMENTHAL: -- came here. Maybe you can tell us --

KELLY: It was an interesting conversation.

BLUMENTHAL: -- a little bit more about what he said.

KELLY: Yes. I mean my family is probably very exemplar of what most families in this country are about. You know we have differing opinions and lots of different viewpoints and some are quite loud. But this is who we are. This is what this country is. But what we did agree on is that there's a better way. There's a better way to get to some sense of resolution and it's gone on too long. We all agree on that here in this -- in this hearing as well.

BLUMENTHAL: I was also struck by your reference to your family as a divided one --

KELLY: Yes.

BLUMENTHAL: -- between Democrats and Republicans in the reference to feeling right at home here because we're divided too. But I wish we were a little more like your family rather than what we sometimes are.

KELLY: I won the family lotto. I come from the greatest family in the world.

BLUMENTHAL: Thank you very much for the talk (ph).

KELLY: Thanks.

DURBIN: Thanks, Senator Blumenthal. Senator Tillis.

TILLIS: Thank you, Mr. Chairman. Thank you all for being here. Generals, thank you for your service. Ms. Jestin, what did -- what crimes did Mr. Kahn plead guilty to?

JESTIN: Thank you, Senator. Mr. Kahn pled guilty to several law of war crimes including murder, spying, conspiracy.

TILLIS: Mr. Stimson and Mr. Jaffer -- Mr. Jaffer, I was the person in the Senate Armed Services Committee that asked General Milley and General McKenzie if the war on terror was over and they both gave a categorical no as an answer.

It was either in that hearing or a subsequent hearing that we also assessed that with the precipitous withdraw from Afghanistan that the United States is likely to suffer an attack from ISIS-K over the next six to 12 months either on the Homeland or against U.S. assets worldwide.

And Al-Qaeda probably following behind them between one to two years. So there's a real serious threat to future detainees and I happen to agree with Senator Graham. Now there's a great incentive to simply kill them on the battlefield and not detainee them. And that seems like a perverse incentive.

Mr. Stimson, I think you mentioned when you were in the Bush Administration you looked at -- you were tasked with looking at the possible closure -- a responsible closure of Guantanamo Bay. What was the ultimate conclusion there?

STIMSON: Well, the -- thank you for the question Senator Tillis. The -- the -- the hearing -- the study is classified but I categorized it in an unclass format in my written testimony and it fell into four categories that number one, it can be done.

And if the four categories are legal, logistical, political, and diplomatic; each of the four you have to work on simultaneously. The logistical is the easiest part now with 39 people. One plane load would do it if you were to take them together to one place.

The legal part you've heard several of my colleagues talk about some of the conundrums there and the difficult aspects, especially if you brought them to the United States. Many of those answers haven't been put forth in OLC (ph) or other opinions.

Political is tough. And that has been the long pole in the tent, as far as I'm concerned, because I think the table was set back in the Obama administration to get it done, people were for closing it until they were against it, when it turned out ...

TILLIS: Isn't it also true the table is more or less set the same way right now? The President has the authority to do it and there's no - no way that those of us who would've opposed closing it could stop it here in Congress?

STIMSON: Well, as I detailed in my written testimony, Senator, things have changed somewhat because since 2009, this body and the other body across the Hill have put forth into law certain notification and other requirements before you transfer somebody off of the island. There are spending limitations, et cetera. And so those would have to be adhered to before it was closed.

But yes, it's always been the prerogative of the President, whether it's President Bush or any President, to close Guantanamo in a responsible way but Congress plays an important part in that and would have to join in on that.

TILLIS: They - you know, I'm wondering, when we're talking about a responsible transfer to another jurisdiction, we're not being particularly successful with doing that. So isn't that a - kind of a global acknowledgment? I know on the one hand, we say we're suffering reputational damage for having Gitmo open, but the fact that we can't find other jurisdictions to responsibly relocate them almost seems like a de facto approval of this is the - the - the worst option except for all of the other options that we've tried to pursue - pursue. Am I wrong about that, Mr. Jaffer?

JAFFER: Well, Senator, I think you're - I think you're right in the sense that we can't get the right security assurances. There are - a third of the detainees currently at Guantanamo Bay are - are - are designated for transfer but we can't get countries to take them and give us assurances that they'll keep an eye on them and make sure they don't return to the fight.

And given that we know that 30 percent roughly have either returned to or are suspected of returning to the fight ...

(CROSSTALK)

TILLIS: ... five - five are actually in the Taliban administration?

JAFFER: Exactly right. And - and one point on that - on that - you know, those detainees who are in the Taliban administration were actually transferred in violation, GAO found, of the congressional prohibition on transfer notification under the Obama administration. They were - they were transferred in violation of the law.

And then the one last thing I'd say, Senator, to your question is, you know, we've talked a lot about the reputational effects of Gitmo, and there's no question that there have been significant reputational effects, but other things have also (inaudible) reputation effects - the way we've handled our withdrawal from Afghanistan, the abandoning of our Afghan allies who fought alongside us, right?

Those have had massive reputational effects today, in that ongoing ungoverned (ph) space in that battlefield, and you can be assured that our terrorist adversaries are using those facts against us today also in their recruitment efforts.

TILLIS: Thank you all.

(UNKNOWN): Senator, could I add something to my answer that you asked me about earlier? You asked me what Mr. Khan pled to, and - and while he pled to very serious crimes, I just think it's important to note that he took responsibility for his actions and he's been cooperating with the United States of America for over a decade and has done everything they have asked, in assistance of investigations and prosecutions of folks who have been charged with terrorism.

TILLIS: I think - I think that's a fair point in representing your client but the fact of the matter is he's responsible for murder and pled to those crimes. So we're not talking about potentially innocent people of the 39 down there, we're talking about people who have done grave damage to human life, engaged in the battlefield, and we can't forget that that's the nature of the people that are down there and why we have to be very careful.

And if Guantanamo Bay is closed, it has to be done in a responsible way. There's four administrations that haven't figured it out yet.

DURBIN: Thank you, Senator Tillis. Senator Hirono?

HIRONO: Thank you, Mr. Chairman. I - I thank all of the witnesses, and especially I would like to thank Ms. Kelly for your years of - of commitment to obtaining justice for your family and that of the other 9/11 families.

I look at the numbers and, you know, it - it's not that there are 39 people who have even been charged. So you have 39 who remain at Guantanamo, 13 have been approved for transfer, 14 continue to be held without charge. We haven't even managed to charge these people in decades. So what we're left with are 12 who are currently in the military commission system, which witnesses have testified does not work. So out of the 39 who remain at Guantanamo, 27 should be transferred.

780 men were detained since January 11th, 532 were released by President Bush, 199 - 97 were released during the Obama administration. So the bottom line is we have 12 people who are in the commission system, costing the American taxpayers almost \$14 million per detainee, per year, compared to about \$78,000 per year for prisoners in a supermax prison in the United States.

I don't see how you can escape the conclusion that there has got to be a better way. And the - I - I know that President Bush wanted to close Guantanamo Bay. We've had different administrations wanting to do that. We talk about responsibly closing Guantanamo and one of the suggestions made by Ms. Kelly and others is that we pursue plea agreements.

So I have a question for General Baker - would a plea agreement be a feasible alternative for the 12 detainees who are in the commission system?

BAKER: So thank you for your question, Senator. I - I want to preface my answer with I don't represent any of the - any of the 12 that are charged.

HIRONO: Could you - could you speak into your mic please?

BAKER: Yeah. I want to - I want to clarify that I don't speak for any of the 12 that are charged, they have their own defense counsel, but the answer to your question "could a plea agreement resolve these cases?" Yes.

HIRONO: And could you talk about, with the (inaudible) experience you've had, the time that it - would be needed to reach a possible plea agreement versus the time that would be needed to complete the military commissions' proceedings?

BAKER: I'm sorry to laugh but that's a - that's a great question because we don't know how long it's going to take to finish these cases. The - this - a lot of focus is on, you know, when are the trials going to be over? That's just stage one. There's an appellate process too. So you can add, you know, 15 to 20 years.

I think a - Ms. Jestin is actually probably better - better positioned to answer how quickly you can reach a plea agreement because she successfully - she - she successfully did so almost 10 years ago.

HIRONO: Would you like to add to this conversation, Ms. Jestin?

JESTIN: Thank you, Senator. It really is something that is a - is possible to be accomplished if there's a will to do it. In our case, the military prosecutor with whom we worked was a detailed Department of Justice national security prosecutor who had a lot of experience in Article 3 courts prosecuting terrorists.

One thing that we've heard a lot - a lot about during this hearing is federal court prosecution of people charged with terrorism crimes, and I'd like to just note for the record that since 9/11, over almost 1,000 cases have been indicted in the federal courts. These prosecutors are experienced and they know how to handle these cases. It is a very effective system and it is a system that is in conformance with the Constitution and follows the rule of law.

In the military commission system, if there is a will to accomplish this I would recommend to the administration that they involve DOJ and get DOJ prosecutors involved to negotiate these dispositions because I think it will move more quickly.

But the bottom-line, Senator, is that if there is a will this can be done and it can be done quickly. But there has to be the will.

HIRONO: What you're describing is the better way in (ph). And by the way is there anything that currently prohibits the government or Defense Counsel from reaching a negotiated plea agreement? General Baker?

BAKER: Absolutely not.

HIRONO: Noting?

BAKER: Nothing.

HIRONO: Thank you very much, Mr. Chairman. There is a better way. I think it is time for us to get our heads out of the sand regarding Guantanamo or close Guantanamo. Thank you.

DURBIN: Thanks, Senator Hirono. We understand that two Republican Senators are on their - three of them are on their way. Does anybody want to volunteer what on their way means? Have they all voted? I ask the panel if they don't mind to just stand - sit at-ease for a moment we'll see if we can catch-up with our colleagues.

Just in time, from the State of Missouri, Senator Hawley.

HAWLEY: Thank you very much, Mr. Chairman. Thanks for your patience. Thanks to the witnesses for being here. Let me just start, if I could, with a question for Mr. Stimson or Mr. Jaffer, either of you can answer this. But I want to go back to something I think Senator Grassley asked you about. I was just rereading this morning some of the Supreme Court's cases regarding Guantanamo Bay.

Back to the Boumediene case which was the 2007 term, October term (ph) 2007 if memory serves. In that case in particular the court noted that Guantanamo Bay has a unique status, jurisdictional status in American law. But the court also noted that when you move aliens, enemy alien combatants in this case, to American soil, to territory that is indisputably part of the sovereign territory of the United States, the Constitutional rights increase and there's a long line of cases dealing with this.

So can I just ask you for your view. I mean one of the consequences of closing Guantanamo Bay and moving enemy combatants to the United States and I realize that the court - the Supreme Court has found of course that Gitmo itself, the prisoners presence (ph) in Gitmo does confer certain rights on them and particularly in habeas context. But moving them to the United States where there's - you don't need to have a functional balancing test, it's not a sort of halfway U.S. territory halfway not.

If you move them to this country what would the effect be on their Constitutional rights particularly if you involved them in traditional court proceedings in the criminal justice system? And that is not in the enemy combatant system. So I'll - maybe both of you can answer but go ahead, Mr. Jaffer, we'll start with you.

JAFFER: Yes, Senator Hawley, that's a great question. We don't know the exact answer. What we do know I think as you correctly described is that there is likely to be significantly more rights that the detainees would have if they brought here even under law of board (ph) detention then being held at Guantanamo Bay because (inaudible) turned on the fact and the unique status of Guantanamo Bay even in giving that - than that limited right to habeas.

So it's highly likely that the U.S. government were voluntarily to bring these individuals into the United States, even admitting them for limited purposes, paroling them in for the purposes of a trial or detention, they're going to get a certain number of rights that they wouldn't otherwise had at Guantanamo Bay.

And the question is then what's the scope and how board? Does the Fourth Amendment attach? Does the Fifth Amendment attach? How much of it, in what context? What about the right to confront witnesses? What about the evidence brought at trial?

Remember as Mr. Stimson correctly described, a lot of this evidence was gathered - because he said (ph) there is evidence on the battlefield. There's no chain of custody, there's not the usual things you would need in a federal trial or even in a - even in a commissions trial or other alternate procedure that doesn't - that has some additional constitutional protections. And that's what's particularly problematic about bringing these detainees to the United States at this point in the ballgame.

HAWLEY: Very good. Mr. Stimson?

STIMSON: The only thing I would add, Senator, is that you recall since you've waded through the Boumediene decision, which was handed down in 2008, I recall, was the whole discussion by Justice Kennedy on de jure versus de facto jurisdiction. There's no doubt that once they're here in terra firma that anyone will challenge all sorts of other aspects to their law or detention including probably bringing tort suits against people in their personal capacity.

And so I don't think anyone wants to see those types of things happen. And so unless and until, for example, this body and the body across the Hill came together and passed legislation to cabin (ph) the rights that they would have if they were brought to the United States and reaffirm the fact they are in law aboard (ph) detention and that's the applicable law only.

I think to Professor Jaffer's point, it's really an open question as to whether the right would accrue to them.

HAWLEY: So just to - just to point a fine-point on that. Unless Congress acting there would be at the very least an argument to be made that were detainees moved to United States soil, to what is indisputably the sovereign territory of the United States we could be looking at all kinds of new legal rights and legal proceedings.

To you point, Mr. Stimson, about tort suits that they could then bring, be at capacity to bring. I mean we could be looking at a whole different set of legal rights and outcomes that are currently not even imaginable and considerable in Gitmo.

Let me ask you this, Professor Jaffer, you testified, I think, before the House Judiciary committee, subcommittee on Constitution civil rights and civil liberties that other concerns with civilian trials included and I'm quoting you here. This is from about 10-years ago, "The physical security of civilians living in the area, the judges and staff working on those cases and the jurors selected for trial."

Is that something, those concerns, those security concerns is that something that we should still be concerned about in your view?

JAFFER: Absolutely and it's not just my view it was actually Majority Leader Schumer's view at the time that the Obama administration was interested in bringing some of the 9/11 plotters including Khalid Sheikh Mohammed to New York to try them and it was - it was an issue hotly discussed and debated in public and ultimately the Obama administration decided not to do that.

But these concerns about the security of individuals, if the detainees are brought to the United States, not of the detainees themselves they're well secured but of those that support them and their supporters of the United States could be hugely problematic. And remember the biggest threat to the United States from international terrorists is homegrown violent extremists who were inspired by Al-Qaeda and ISIS.

Imagine if we had brought the inspiration to the United States and tried them here it could be hugely problematic.

HAWLEY: Very good. Well my time is expired. Thanks to the witnesses for being here. And thank you for waiting for me, Mr. Chairman.

DURBIN: Thank you Senator Hawley. Senator Blackburn.

BLACKBURN: Thank you, Mr. Chairman. And thank you to you all. I've been monitoring and listening to this hearing online and - up in my office and it so interesting to me to get your different perspectives on this. I really appreciate that.

And a couple of times there has been mention of President Obama's efforts to close this. But as I was sitting there thinking through this and listening to your responses my question is simply this. With the 39 - it's 39 detainees that are left there. So since that effort was made to close it what has changed in regard to the danger that these 39 individuals pose to the United States? What has changed that would say, yes, we can let these people go, we can do something different?

JAFFER: Well, Senator Blackburn, certainly there is a process for reviewing all of the detainees that the Obama administration set up with the periodic review boards. And at least 13 of these detainees have been determined qualified for transfer. The issue, of course, is when you transfer them you want to ensure that they are probably secured wherever they go. And knowing that a third of these detainees have either returned to or are suspected of return to the fight, we want to make sure that these particular ones, if they do get released somewhere, are -- are held in appropriate security assurances.

So but -- but all of these 39 have been determined by the Obama administration to be -- continue to be held or tried at military commissions.

BLACKBURN: So nothing has made them less dangerous?

JAFFER: That's right. Some may be able to transfer...

(CROSSTALK)

BLACKBURN: See, and I think that gets lost in this discussion. There is nothing that says they have been rehabilitated, that there is evidence that shows that many go back...

JAFFER: That's right.

BLACKBURN: ... to creating terror. So the withdrawal from Afghanistan and then the Taliban takeover, how does that affect these detainees? And what does that do to if they were released, their probable future?

JAFFER: Senator, I think it's hard to understate the creation of this new ungoverned space in Afghanistan where new terrorists are returning to the fight, are are now encouraging others to come there. You've got al Qaeda are returning there. You have the Taliban government, the same government that -- that supported and hosted Osama bin Laden the day of the 9/11 attacks. You have the Haqqani network. You have ISIS-K. So you have a very detrimental and problematic mix of terrorists in the Afghanistan region. And you have additional inspiration coming from the way in which we withdrew from Afghanistan. The fact that we abandoned our allies, the fact that we have not brought out the SIVs and the like that we made -- that we made commitments to, all of that contributes to the fact that Afghanistan is a...

(CROSSTALK)

BLACKBURN: So the environment that we have created post the Afghanistan withdrawal actually encourages activity from terrorists?

JAFFER: Absolutely.

BLACKBURN: And if we release the -- OK.

Let me ask you this. The countries that have accepted transfer and some these in the past, and, Mr. Stimson, I think this is -- I'm going to direct this to you. Have they been able to ensure that these individuals do not return to terrorist activity? And what kind of agreement did we have with them to get that insurance that they won't go back to creating these -- these attacks?

STIMSON: Senator, to my recollection, we've transferred detainees, or released detainees, two different processes, from Guantanamo to 39 different countries. I could be wrong, but I think it's somewhere around that. The big three populations were the Afghans, the Saudis, and the Yemenis, but dozens of other countries too. And in each one of those transfers, except for the -- the Afghans, we had negotiated on a detainee-by-detainee basis with the receiving country and sought assurances that they would mitigate the threat that that particular detainee would pose.

And I think we've had...

BLACKBURN: And I think it's important to note this is done on an individual...

STIMSON: It is.

BLACKBURN: ... basis.

STIMSON: It is.

BLACKBURN: One at a time.

STIMSON: Right. And we were doing that in the Bush administration, of course, the Obama administration did that as well. The Bush administration transferred or released 532 detainees. The Obama administration transferred 197 detainees. And each one of those transfer negotiations is a laborious, sometimes years-long process. And some countries are very frank with us saying, you know we can only detain this person for about X period of time and then we can't assure you that they will be held under our domestic law.

And so, to Professor Jaffer's the DNI under two successful administrations have tracked the number of detainees who are confirmed to have reengaged and who have been suspected of reengaging. And I can tell you as a former prosecutor I think the number's got to be higher. Because you only know what you know and you don't know what you don't know. So there are people who slipped through the cracks.

BLACKBURN: So these countries that agreed to take these detainees, they make a best effort and they are not always successful in that effort. And the data that you have shows that. Correct?

STIMSON: Yes. The data that the DNI has shows (ph) that.

BLACKBURN: All right, so releasing these just like the 5,000 that got released from Bagram Airfield makes the world more contentious and more dangerous and enables the Taliban or other terrorist organizations to fill their ranks. Correct?

STIMSON: Yes. The purpose of the wartime detention is to shorten the war and deprive the opposing enemy forces of fighters. By resupplying them with their own fighters the war gets worse.

BLACKBURN: And the war continues?

STIMSON: Yes.

BLACKBURN: Yield back.

KLOBUCHAR: Thank you very much. Ms. Kelly I understand that your brother Bill was killed in the North Tower on September 11. I'm so sorry for your loss. Thank you for taking the time to appear before us today. And I understand that in memory of your brother you spent the last 20 years trying to get justice for him and all those lost on 9/11.

Can you speak about your experience having watched over a dozen military commission proceedings, whether justice is being done, and what's the best thing we can do to ensure justice for Bill and those lost on 9/11?

KELLY: Thank you for the question. So the arraignment of the 9/11 accused happened May of 2012. and family members are permitted to watch these hearings from several sites on the northeast or five members -- five family members are chosen by lottery to travel to Guantanamo to observe the hearings that way.

Our organization applied for an NGO observer status in 2015 specifically so we could send one family member to each hearing to closely observe what was happening. And through out time there and we're now the high 30s, maybe even into the 40s now of how many hearings have occurred, we've watched delay after delay after delay, then COVID delay and more delays.

So, in 2017 we began exploring seriously what a pre-trial agreement may mean. We talked to legal advisors, we talked to federal prosecutors, we've talked to people with legal expertise and it seems at this stage in time we are not really closer in the commissions. We're still in pre-trial hearings and at this moment in time pre-trial agreement could make things happen and could bring some resolution to the families.

KLOBUCHAR: That would bring some resolution?

KELLY: Absolutely.

KLOBUCHAR: All right. OK. Thank you. Brigadier General Baker, thank you for your 32 years of service in the U.S. Marine Corps. Can you speak to how concluding the military commission proceedings can be done in a way that protects the security of the American people? And do you agree with President Bush's assessment that the detention facility became a propaganda tool for our enemies?

BAKER: Thank you for the question and thank you for thanking me for my service. The negotiations of the pre-trial agreements that have been talked about would be -- needed to be done in good faith by all the parties and there's been a demonstration that that can be done.

The not doing that seems to be -- seems to be the worst possible option. I do want to -- I want to talk a little tiny bit about the delay that you -- that you asked Ms. Kelly about. There really are three aspects that are causing -- that are causing the delay in these proceedings.

The first and I use the acronym DID, the first is the death penalty. The death penalty is just -- is just keeping these cases going on and what seems to be in perpetuity. The second I -- the second is intrusion. So, it's just been a history of government intrusions in the attorney/client relationship.

And the third is the discovery. The overclassification in hiding of information that we can read about in the newspapers is just -- has just put these -- put these cases -- it's really kind of stopped them in their tracks. But you can -- we can overcome -- we can overcome the DID acronym through negotiated plea agreements.

KLOBUCHAR: In your testimony you actually described several violations of attorney/client privilege including the seizure of documents clearly marked as privileged, the placement of hidden recording devices in rooms where detainees conferred with their attorneys. What affected these attempts, you mentioned it briefly, to violate attorney/client privilege have on your staff and other attorneys serving as counsel for the detainees?

BAKER: It has set -- I mean, these intrusions have set the hearings back literally years at a time. There was a hearing last month that was a closed, classified hearing that looked at and looked into intrusions that occurred in 2017. So it's delaying the procedures and it is -- and we're hiding secrets that we read about in the newspaper.

KLOBUCHAR: Yes. Last question Major General Leonard. Thank you for your 37 years of service, my staff just told me. Since the Bush administration presidents have expressed their intent to close the detention facility at Guantanamo Bay, with President Biden being the latest to state his intent to do so. And yet was we just discussed, despite the efforts of multiple administrations the facility remains open. Can you please talk to us about the steps that need to occur to finally close the facility and how we as a Congress can act to ensure that it is closed in a way that maintains the security of the American people?

LEONARD: Well, I'll be brief, Senator. But first, put somebody in charge with the authorities to work with all of the various government agencies who have actually done a pretty credible job. But there needs to be somebody within either the NSC or the White House that can do this.

The second part and obviously I think General Baker and Ms. Jestin have discussed this, is the piece of bringing in the federal courts and negotiating plea agreements. And I -- and I do believe, I am not an attorney, but I have been told that those federal courts can still operate on Guantanamo Bay's soil through video teleconferences and things of this nature once we've taken the death penalty off the table.

It seems to me that the desired outcome here, particularly for the families of individuals like Ms. Kelly here is to get closure and I would offer that once we have convictions and sentences, and by the way, I have no empathy for those individuals that committed these -- these horrendous crimes.

If they are locked up for the rest of their lives so be it. But let's give the families closure, and let's demonstrate to the rest of the world that we use the laws to hold our criminals accountable. Thank you.

KLOBUCHAR: Thank you very much, and thank you all. And I -- also I wish I had more time, I'd ask the other witnesses question. But for those that I spoke to thank you for your clear and measured response.

This is not easy, especially for you Ms. Kelly, but for anyone. And I appreciate how you've thought this through as a way to protect security but do this in a way that gives the families the closure that they need. So, thank you. Senator Cruz.

CRUZ: Thank you, Madam Chair. For more than a decade there has been a focus by Barack Obama and Joe Biden and their administrations. A focus that I find inexplicable as it has been catastrophic on freeing terrorists from American detention.

In 2009 the Obama/Biden foreign policy team decided to close the detention facility at Camp Bucca in Iraq. By 2014 as ISIS was forming, it became clear that over a dozen of the group's top leaders had been freed from Camp Bucca. Those included Abu Bakr al-Baghdadi, his deputy, and Abu Mohammad al-Golani, the founder of al-Nusra front.

Having learned nothing that same team repeated the exact same mistakes. This time with the Bagram Prison in Afghanistan as part of the administration's catastrophic withdrawal. Now, the images that Americans remember of that catastrophe are of chaos and carnage.

Over 100,000 Afghans, many of them unvetted and unvettable loaded onto airplanes to be deposited into the United States. Taliban terrorists overrunning U.S. and Afghan Army positions, seizing unaccountable numbers of advanced weapons and technology, and parading them for global audiences.

And, of course, the August 26th terrorist attack on the Kabul Airport in which an ISIS-K bomber killed 13 American service members. What is less well known is that that bomber had been imprisoned in the Bagram Prison, which until that summer had been under American control.

The Biden administration made a conscious decision, again inexplicably to abandon that critical position and with it, the high-security prisoners housed there. Having still apparently learned nothing, releasing terrorists, seeing them killing Americans, releasing more terrorists, seeing them killing more Americans.

The Biden administration is talking about doing it again. Now they're talking about closing the facility at Guantanamo Bay. I think before that's even contemplated we should have some sense of the toll that these catastrophic decisions have had.

For instance, "The Washington Post," hardly a right-wing organ, has reported quote, "At least 12 detainees released from the detention camp at Guantanamo Bay, Cuba have launched attacks against U.S. or allied forces in Afghanistan, killing about a half dozen Americans."

So you have terrorists freed at Camp Bucca, Americans murdered. You have terrorists freed from Guantanamo, Americans murdered. You have terrorists freed from Bagram, Americans murdered. And now the Biden administration wants to free more terrorists. And we know to an absolute medical -- metaphysical certainty the results of that will be more Americans murdered.

I want to ask the witnesses, I recognize that the Biden administration declined to send a government official charged with explaining the administration's policy. But let me ask all the witnesses assembled here. Does anyone the panel know a full account of the number of terrorists who were released from Camp Bucca that went on to fight for ISIS or the Al-Nusra Front?

So we don't have that in the information. All right, how about this. Does anyone know an accurate count of the number of U.S. service men and women that had been murdered by individuals we've set free from Camp Bucca, from Bagram or from Guantanamo?

So we don't know how many service men and women have been murdered, but yet the Biden administration's preparing to go down this road once again. And it's worth noting that the terrorists we find returning the battlefield are just some of the ones we've released. There's good reason to suspect they're not the only ones who've returned to violence and terrorism.

Before we free more terrorists we should get to know where the past ones have gone and where future ones are likely to go.

Professor Jaffer, is there a rough estimate of where the terrorists freed from U.S. run facilities have gone? And to what extent and at what levels are those numbers tracked?

JAFFER: So Senator Cruz, I think the answer is that with respect to the terrorists that we transfer to other countries we have security assurances from those countries for some period of time.

Those security assurances are not forever, as Mr. Stimson correctly laid out. They're negotiated typically on a one-to-one or one-to-few basis. But those we have a sense of. But once they get out from those security assurances we don't know where they are. And the others that we've released we don't necessarily know where everyone ends up.

What we do know to a certainty is that -- is that 33 percent roughly -- 32 percent, 31.5 are either -- have either returned to the fight, are known to return to the fight or suspected of it. Those are statistics from the Director of National Intelligence, so we know that. And that's a real problem.

So if you think about the 700 and whatever odd number of people that have been released from GITMO, 229 have either returned to the fight or suspected to return to the fight somewhere on the globe.

CRUZ: Wow. OK, final question. Of the 39 detainees that remain at Guantanamo Bay, roughly 20 are from nations without a fully functioning government, 14 of them are from Yemen where enormous swathes of the country are ruled by terrorists. To what extent, Professor Jaffer, as such countries able to track and secure terrorists and prevent them from murdering Americans?

JAFFER: They are not able, which is exactly why we cannot transfer them to those countries.

CRUZ: Thank you.

DURBIN: Thank you Senator. The DNI, Director of National Intelligence assesses that only 5 percent - five of detainees transferred since 2009 when current rules and processes for transfers were put in place are, quote, "Confirmed of reengaging," close quote, in terrorist activities.

That's 10 persons total, two of whom are now deceased. Five percent -- not 30 percent. But even that number's misleading because it only takes 51 percent likelihood that a detainee is subsequently engaged in terrorist activity to count them as confirmed.

The claim that there's 30 percent, and I've heard it attributed to the DNI, which is inaccurate, the claim that there is 30 percent recidivism rate among former Guantanamo detainees is misleading.

That number includes individuals that are merely suspected of engaging in terrorist activities, including based on a single source or hearsay. And it includes transfers that occurred before the current security arrangements used today were in place.

The most recent DNI report showed that 729 detainees have been transferred out of Guantanamo since it's opening. According DNI, 125 of them were confirmed of reengaging in terrorist activities, but the vast majority of those, 115 of 125 were transferred during the President Bush administration, before today's processes were put in place.

And I'd like to say a word about the Taliban and Afghanistan. If I recall correctly the negotiations with the Taliban for the final withdrawal of American troops began under the previous administration.

It was President Trump who was negotiating with the Taliban and reached an agreement which would protect the Americans and forces left in Afghanistan until a certain date. It was President Biden who inherited that negotiation. To say that there is no plan in place is to misstate the situation as it occurred.

If I remember correctly they were going through a process of discussing the evacuation of Americans and American troops when the government of Afghanistan left the premises and their departure created an emergency situation.

What the Biden administration did do was execute a plan for evacuating 130,000 evacuees from Afghanistan in a very brief period of time. To put that into comparison, the total number of evacuees in Vietnam 50,000. President Biden evacuated some 130,000.

So that, I hope, will clear up the record a little bit in that regard.

I wan to thank the entire panel, witnesses for both sides for a good hearing, bringing out the major issues that most Americans would ask about in the course of considering the same question if they do. And I sincerely hope they do.

My feelings on the Guantanamo situation are well known.

Particular thanks to Ms. Kelly, appreciate you coming.

KELLY: Thank you.

DURBIN: You speak -- you speak for a lot of people who unfortunately were victimized by that horrible day we'll never forget. I hope we can bring this to closure for you and your family and all of others likely situated.

I'm going to do everything in my power to, as chairman of this committee, to put this dark chapter behind us, but with some truth and some light as we bring it to conclusion. Thank you all very much for joining us today.

The committee stands adjourned.

END

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Senate Committee on the Judiciary Hearing on Judicial Nominations

Wednesday, May 10, 2017

Senate Judiciary Committee, Antitrust, Competition Policy and Consumer Rights  
Subcommittee Hearing on Oversight of the Enforcement of the Antitrust Laws

Wednesday, October 3, 2018

Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights  
Holds Hearing on Antitrust Laws Oversight

Tuesday, September 17, 2019

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Senate Committee on the Judiciary Hearing on Judicial Nominations

Wednesday, May 10, 2017

**GRASSLEY:** Normally, I don't start until a ranking member or members get here. In this particular instance I can start, but I'm going to stop wherever we are when the ranking member gets here so she can make an opening statement.

Good morning. I'm pleased that we can hold this nomination hearing for three very well qualified nominees to three important positions in our government. Noel Francisco, nominated solicitor general -- he'll be the first ever Asian-American Senate-confirmed solicitor general after confirmation; Steven Engle, assistant attorney general for the Office of Legal Counsel, an office that functions as legal advisor to Executive Branch agencies and the president; Makan Delrahim, nominated to be assistant attorney general for Antitrust Division at DOJ. Makan immigrated to this country when he was ten, and if confirmed, he'll be the highest-ranking Iranian- American official in the Department of Justice. We all know Makan because he was staff director for our friend, Senator Hatch here, and as former staff director, he knows, of course, what it's like to sit on this side, and now he's going to find out what it is on the other side.

**So I congratulate all of you, and especially your families. I didn't welcome the families and friends of the three nominees, but obviously, you're very proud of them, and -- and probably most of you has something to do with them getting as far as they have.**

**So would you three folks stand, and be sworn, please?**

**Do -- 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?**

ENGEL: I do.

FRANCISCO: I do.

DELRAHIM: I do.

[...]

**GRASSLEY: OK. Makan, some of your antitrust experience comes from representing clients in the private sector, which is quite common for individuals nominated for the position you have. For example, the last two Obama appointees represented large tech and media conglomerates in the antitrust matters. Their clients included companies like Comcast, General Electric, Netscape, and eBay. Because you, like others who have led the Antitrust Division, have had clients in the private sector, conflicts may arise. If confirmed, what recusal policy would you follow to avoid conflicts?**

DELRAHIM: Senator, I take the recusal and the ethical obligations of this job very seriously. As has been the tradition, I would consult with the career ethics officials of the department, as well as the Antitrust Division, and recuse myself both in accordance to the law and the ethics pledges that I have committed to.

**GRASSLEY: You have represented Anthem on an antitrust matters (sic) before. Currently, their merger with Signa is in ongoing litigation. If confirmed, will you recuse yourself from investigations and department action involving Anthem:**

DELRAHIM: Senator, I -- I am -- I will be recused. I've recuse myself from the Anthem/Signa merger. I have -- I understand it is now on appeal to the Supreme Court, and we will see what happens. But I will be recused from that matter.

[...]

**KLOBUCHAR: Thank you very much, Mr. Chairman. Before I turn to the nominees, I want to join Senator Feinstein in making some brief remarks on the president's dismissal of FBI Director Jim Comey yesterday.**

**I've known Jim Comey for years. We were classmates at the University of Chicago Law School, and I know that he has the respect of many in law enforcement. The president's dismissal of the FBI director, smack in the middle of a major investigation into Russian interference in our election raises serious questions, especially as Trump campaign officials are now under investigation by the FBI. And in fact, Director Comey was set to testify in just -- tomorrow before the Senate Intelligence Committee on general issues, but Russia was bound to come up.**

**The American people deserve the facts, and to know that decisions made by the Department of Justice are based on those facts, no matter who, and no matter what they might lead to. This is clear. We need a special prosecutor, which I have long advocated for, to get to the bottom of Russian interference in our election, and what happened. And we also need an independent commission. I have called for that on January 4, stood with Adam Schiff, and Ben Cardin, and Elijah Cummings, and we have introduced legislation calling for that commission.**

**Now, I'd like to turn to the nominees, and Senator Lee and I were going to chair the hearing for Mr. Delrahim, and that got postponed, and so I'm going to focus my questions, and for the other two nominees, we'll ask questions on the record.**

**Mr. Delrahim, I appreciate that you stated explicitly in your questionnaire, and then again reiterated to Senator Grassley that you would recuse yourself from Anthem's proposed acquisition of Signa. Could you reiterate again what approach you will take for other matters, as to whether or not you will recuse yourself?**

DELRAHIM: Sure, Senator. As is customary with the Department of Justice posts, we -- there's a number of recusals, including past clients, and clients of my former employer, my law firm. And I will be -- one of the first things I will be dealing with, if I'm fortunate enough to be confirmed, is meeting with the career ethics officials at the Justice Department within, I believe, it's seven days, and going through, in more detail, exactly what the contours of the recusals are. I will be consulting with them. A number of these are Title 18, Section 208 requirements. I have three little children. I have no intention of going to jail.

**KLOBUCHAR: OK. (LAUGHTER)**

**KLOBUCHAR: We all know that at this time -- very good -- that maintaining the integrity of the Antitrust Division is critical, yet we've heard the White House has commented on some pending mergers. What would you do, if you're in this job, if the president, or the vice president, or a White House staffer calls, and wants to discuss pending investigation of an antitrust matter?**

DELRAHIM: Senator, the -- as you know, the -- the role of the AEG for antitrust is a law enforcement function. Take that -- I think the independence of the decisions made in prosecuting, and -- and reviewing mergers, as well as other conduct, is a serious one that should be free from any political influence. They will be free if I'm fortunate enough to be confirmed. There are procedures long standing at the Justice Department in communications with the White

House. There are procedure in the White House in how you communicate with the Justice Department, and who are the -- there -- there's a handful of senior officials who can communicate through the White House Counsel's Office, and senior officials at the Justice Department for any pending matters. But as -- as the attorney general has also reiterated, politics will have no role in the enforcement of the antitrust laws.

**KLOBUCHAR: Credit Suisse is one of the most significant Supreme Court antitrust decisions. It's received criticism for limiting the scope of antitrust laws. You wrote an amicus brief in this matter. Can you describe the position you took in the brief, and your view of the decision?**

DELRAHIM: Sure, Senator. That was an important matter, dealing with some alleged immunities from the antitrust laws in the Second Circuit. The Second Circuit, during my time at the Justice Department, had asked for views of the U.S. government, the views of the antitrust Division diverged from the views of the SEC. The solicitor general, Paul Clement, at the time, convened a meeting. They authorized a brief where the views of the Antitrust Division, in that case, in the Second Circuit said that the implied immunity would not be appropriate. The Second Circuit wrote a well-reasoned opinion. The Supreme Court spoke in an eight-to-one decision, where Justice Thomas dissented that implied immunity applied in that case.

**KLOBUCHAR: And your -- your brief, just to be...?**

DELRAHIM: Oh, it -- it was, you know, it got overturned. Our brief was supported, and supportive of the -- of what ultimately became the Second Circuit's view on that, and, you know, not that it's necessarily relevant, because it is what the law is. But I'm an open book on this issue. In my views on the Antitrust Modernization Commission, if there are immunities from the antitrust laws, I think it should be done by this body, not impliedly from the courts.

[...]

**LEE: Mr. Delrahim, how would you -- how would you characterize, how would you evaluate the Antitrust Division, as it's operated over the last eight years, since January 2009?**

DELRAHIM: Senator, not being privy to any of the facts and the evidence that would have gone into enforcement, just decisions, it probably would be inappropriate for me to comment on decisions taken by the division. By and large, the antitrust laws are relatively well settled. They have been enforced. There's close to 700 dedicated career attorneys and economists at the -- at the Antitrust Division. I know they take the cases very seriously. They investigate them, and that was my experience then, and I will hopefully, if I'm fortunate enough to be confirmed, will continue that.

**LEE: You've confirmed any particular policies or procedures within the Antitrust Division that you would change, or that you would implement in a -- in a manner that's different than how they have been in the past?**

DELRAHIM: From -- going back from my experience, I -- I was fortunate enough in the -- in the role of the deputy, where I had the international, the appellate, and the policy development responsibilities. One of the -- the greatest exports out of the United States has, unfortunately, been antitrust laws, and we now have over 130 agencies who are around the world, who are new to the anti-trust regime. They are doing what they think is right.

In some cases, I've heard reports that there might be, you know, protectionism or discrimination in the application of those laws, to -- to U.S. companies in particular, or they might be misapplying the laws, like we did in the -- in the 1970s, for example, before the advent of some of the economic thinking.

I would like to focus particularly in that area. I -- I think, you know, having a deputy that is focused on the international area would be -- would be an area that I would like to look to and see how we can pay more attention to that.

**Senate Judiciary Committee, Antitrust, Competition Policy and Consumer Rights**  
**Subcommittee Hearing on Oversight of the Enforcement of the Antitrust Laws**

Wednesday, October 3, 2018

**LEE: Thank you very much.**

**We'll now go into questions and I will kick that off.**

**Chairman Simons, you noted in your written testimony that the agencies have updated their jointly issued antitrust guidelines for licensing intellectual property last year. Those guidelines were silent on the issue of patents incorporated into technologic standards known as Standard Essential Patents.**

**Differences between how the Antitrust Division, the Department of Justice on one hand and the FTC on the other hand have viewed enforcement relating to Standard Essential Patents has become more pronounced in recent years. As I said in my opening remarks, the lack of clarity or consistency on this issue has the potential to undermine U.S. leadership on antitrust issues and also opens the door, I fear, for other nations to exploit those differences to their own unfair advantage.**

**Mr. Delrahim, you've voiced concerns that antitrust enforcers have gone too far in accommodating concerns of technology implementers who participate in standard setting organizations relative to the concerns of intellectual property creators whose participation is equally essential to the pro-consumer mission of standard setting bodies.**

**And so, I want to ask both of you a couple of questions about these issues.**

**Mr. Delrahim, first, how what's the Antitrust Division doing to ensure that the antitrust laws are being enforced in a manner that fosters competition while respecting strong intellectual property rights?**

DELRAHIM: Thank you, Mr. Chairman. As you've noted, we have discussed this issue in a number of public speeches and encouraged a debate, a vigorous debate on this really important issue. And it's important not only in the United States but abroad because what I'm concerned about is the misapplication of the antitrust laws could take away the incentive for the innovation that I see that provides the dynamic competition that we need here.

And there had been some talk about patent holdups and whether or not in a standard setting organization certain kinds of conduct should be treated as an antitrust violation. And in these discussions, I tried to engage not only the academic community but various folks in the economics arena to have a more robust discussion and look at not only patent holdup but patent holdout.

And that's where -- what we really should be worried about is concerted action where it creates a monopsony effect and lowers the potential recovery that an inventor makes in the R&D to create that innovation in the first place. And we want to be sure that they are properly -- that the incentives are there so we think we should focus our attention on the concerted action whether it's by patent owners products patent users and the issues such as contractual obligations to licensure patent under what some people call FRAND or fair, reasonable and otherwise could be treated just as you would in a contract case. And there are multiple cases around but not to be treated with the blunt force of antitrust.

**LEE: So, on that point, what do you say to those who would respond to your statements highlighting the dangers of holdout by implementers as in overcorrection and enforcement priorities?**

DELRAHIM: I would respond that they're wrong. But I respectfully want to receive more criticism because that's the only way we'll improve our policies. I would also point to a number of academics including Judge Doug Ginsburg as well as Judge Michel who used to be the chief judge of the Federal Circuit and a number of other folks who have supported the policies that I have advanced on behalf of the U.S.

[...]

**KLOBUCHAR:** Thank you very much, Mr. Chairman. Thank you.

**I'm going to start with something that I hope will help both of you and I don't think this is a partisan issue at all. This is about making sure we have an even playing field as we have these increasingly complex industries and mergers that you have staff that or you're staffed up enough so that you're able to review them. And this is the Merger Enforcement Improvement Act which would address the ability of the antitrust agencies to conduct enforcement in light of this current wave of consolidation.**

**As you know, the bill would ensure that bigger deals which often are more complex and more costly to review pay their fair share. For deals worth more than \$1 billion, the filing fee would amount to less than a tenth of a percent of the deal value. And it would be practically nothing for the merging parties but it would be a huge help for enforcement.**

**Do you think that this would be helpful if we would update the filing fees? Either of you can start.**

DELRAHIM: I certainly don't think it would hurt and I think it's important to continuously look at these and see if there's a more equitable allocation of our resources. When you have \$100 billion merger that requires 40 of our lawyers and God knows \$100 million in expert fees, should they pay the same amount of those resources.

Those are important policy considerations for this committee and not necessarily for us but we would dedicate any of our resources, our statistics to help provide any technical assistance you need to better allocate that.

[...]

**KLOBUCHAR:** Okay. Very good.

**The vertical mergers and this is for you, Mr. Delrahim, how would you describe your agency's approach to vertical merger enforcement and what lessons if any has your agency taken from the AT&T-Time Warner litigation. I know this is still on appeal so I don't expect you to reveal big details but...**

DELRAHIM: Without commenting -- thank you for that -- but without commenting on that particular matter, we have reviewed a number of vertical mergers including Bayer and Monsanto where we secured I think one of the larger if not the largest divestiture to address the issues that farmers and consumers would have faced in that transaction. We commend the parties for working with us on that matter.

I think vertical mergers, there's agreement that by and large they don't pose the same competition concerns that horizontal transactions would but that doesn't mean they're per se legal. And there was I think during the trial and leading up to it, there was a perception that was created by maybe hundreds of new vertical merger experts on television that...

**KLOBUCHAR: That sounded a bit sarcastic.**

DELRAHIM: Just a little bit sarcastic.

**KLOBUCHAR: That's okay and good.**

DELRAHIM: ... that all of a sudden they were saying that oh, we've never challenged a transaction in 40, 50 years but that's just not true. There have been multiple challenges where parties have sought whether that have been divestitures or consent decrees and that's an important part.

[...]

**KLOBUCHAR: Okay. This is during Judge Kavanaugh's confirmation hearing, I asked him about issues on Philadelphia National Bank and which he declined to apply in a major antitrust case. And the reason I asked was because the case is foundational authority for structural presumption, the market concentration-based rebuttable presumption that the agencies and courts have relied on for decades.**

**And this as you know, Mr. Delrahim, plays a key role in merger cases are absolutely litigated and eliminating it with result, I think, in a decline in merger enforcement. And in fact, one of the bills I have would codify the principle that a merger that leads to a significant increase in market concentration would be presumptively unlawful. But that isn't the law now that's what's in this bill.**

**Now, this is only a presumption and it can be rebutted with evidence. But as a practical matter, how important is a structural presumption in merger enforcement and I note that a number of prominent industrial organization scholars have voiced support for the continued use of market concentration-based legal presumptions and what is your view?**

DELRAHIM: It certainly helps us if we want to challenge transaction to have that presumption in court. It's an important tool for enforcement and provides a bright line for not only the business community but for the courts to follow.

There has been scholarly criticism of it because Congress didn't necessarily create that presumption and the courts provided that, so could a future Supreme Court overturn that and say just go prove your case, you don't deserve a presumption since Congress hasn't, that's certainly possible in the future but that is the law.

[...]

**HATCH:** Well, thank you, Mr. Chairman and Madam Chairman.

**Mr. Delrahim,** as you know, Congress recently passed and sent to the president the Orrin T. Hatch Bob Goodlatte Music Modernization Act. Now, this landmark legislation will update our music licensing laws for the digital age. Among other things, the bill establishes a formal consultation process between Congress and the Department of Justice regarding department reviews of the ASCAP and BMI consent decree.

It also directs the department to notify Congress a reasonable time before moving to terminate one or both of the decrees. Now, I entered some remarks into the Congressional record regarding this provision of the bill which I would refer you to.

The Music Modernization Act's formalized consultation and notification process reflect the judgment by Congress that before the ASCAP and BMI consent decrees are terminated, there needs to be a legislative framework in place to govern the market that follows.

Now, I've long been a critic of the decrees. I because they are outdated, but I also believe that tearing them up without a replacement framework in place would be misguided. Will you commit to work with Congress as required under the Music Modernization Act before moving to terminate the ASCAP and BMI consent decrees?

**DELRAHIM:** Senator, thank you and congratulations to you for your leadership and to the Senate and the House for passing an important bill to continue to modernize our laws. As you know, those consent decrees have been on the books for over 75 years and they are very important in multiple sectors of that industry and many who rely on them.

We have embarked on this effort to review over 1,300 of these consent decrees that date back almost 100 years, and we're systematically examining these, providing public comment meeting with all the interested parties. We'd be happy to continue to brief you and other members of the committee throughout this process and we will have advance notice on our website and seeking public comment before we take it. We recognize fully the disruption that it could cause with just terminating them without proper transition period.

**HATCH:** How do you anticipate complying with the act's consultation and notification provisions?

**DELRAHIM:** We will certainly comply with the act and we very much appreciate the changes and modifications provided into that amendment. As you know, there were some issues that the Office of Legal Counsel had provided to the committee with respect to its constitutionality, but with respect to notification, we'd be delighted to do that. I don't think anybody has any intentions

to disrupt this industry, but provide for a smooth transition towards a market- based solution for how songwriters are compensated.

[...]

**LEE: Welcome back. Thank you for your patients while we voted. We'll now continue with the questioning.**

**Mr. Delrahim, I want to get back to this issue related to Standard Essential Patents as I was discussing with Chairman Simons. Within this world of Standard Essential Patents, if antitrust enforcers work to focus their enforcement efforts exclusively on holdup -- on hold by patent holders, what do you see is the likely impact for innovation and ultimately for consumers? And do you have any examples of that, what that would look like?**

DELRAHIM: So I would refine that into two issues on holdup. One is, is it a concerted action in that standard setting by multiple patent owners who might hold up somebody or is that a unilateral act by a patent holder.

So if it's concerted, absolutely, we should be concerned. We should get engaged and if there is a violation of the antitrust laws and apply them. If it's a unilateral that's where I start to think is it a matter of policy, I don't think Congress has provided us the authority under the antitrust laws and there is more appropriate remedies.

The concern is if you do that, we now begin removing, so for example, there have been cases and there are cases abroad where folks say, your refusal to license to your competitor or just the mere allegation that it violates some reasonableness standard, what is that? Who knows? If they haven't set the price, what is reasonable.

And there should be left to fact finders in a court. What reasonable royalty should be or non-discriminatory. If you say that by your refusal to license, where there is no such duty under the antitrust laws, I think -- I don't think there's a single case where there is a unilateral refusal and unconditional to license your patent, there's a duty to do so. By imposing antitrust penalties you're now completely changing that fine balance and I think Congress doesn't and repeatedly changes the anti -- the patent laws to provide that proper incentive.

[...]

**LEE: Good point.**

**Mr. Delrahim, I realize this is an FTC issue, but do you have any thoughts about competition issues being developed by rulemaking rather than by litigation?**

DELRAHIM: It depends what those rules are. I think if those were bright line rules that are informed by I think mainstream economic thought, that could be positive, but to begin regulating into an industry without the rigors of the economics and then not being able to change those rules and be -- and have the flexibility we currently have in antitrust law to adapt to new technologies, new markets and new thought might actually cause more consumer harm. So having that flexibility to be able to change that would be really important.

**LEE: And certainly in the content of litigation you've got an added feature in that you've got multiple parties there to be able to hash out the issues, that makes a difference, right?**

DELRAHIM: Right.

[...]

**LEE: Okay. Thank you.**

**Let's -- Mr. Delrahim, let's get back to the ASCAP, BMI issue for a minute, the division look that the ASCAP and BMI decrees during the Obama administration, issuing a closing statement in August 2016 announcing that it had determined that no modification was warranted at that time.**

**What factors do you think the Antitrust Division will rely on in judging whether legacy decrees should be -- that should be terminated?**

DELRAHIM: We will look to see -- first of all, I think we will be moving from a presumption that those decrees that were put in place prior to 1979, after 1979 there's a 10-year period and a 10-year term from most of these consent decrees.

But most of these, we should take a look at to see how they are being implemented in the marketplace. Are these actually causing market divisions? Are they preventing new innovation and that's what -- that is the mission we're on as far as getting the public comment from the multiple parties and stakeholders in this.

**LEE: I'm slightly over time, with your indulgence, Senator Klobuchar, I want to ask one more follow up question on this. What if anything has changed in music licensing -- in the music licensing market since 1941 that would suggest these legacy decrees might no longer be required or current**

DELRAHIM: Well, since 1941, probably the innovation of 8-track, cassette, CD, streaming, downloads...

**LEE: What I still listen to.**

**KLOBUCHAR: Going to make him feel bad.**

DELRAHIM: I hope I -- did I answer the question or is it (inaudible)?

**LEE: Really subtle, so I'm still wrestling.**

DELRAHIM: Thank you.

**LEE: But Senator Klobuchar?**

**KLOBUCHAR: Okay. Assistant Attorney General Delrahim, last week you announced a series of changes to expedite the division's merger review process with the goal of resolving most investigations within six months I understand, assuming cooperation between the merging parties. I also support increasing the efficiency of the review process. But setting an explicit deadline, there's concerns by some that would sacrifice accuracy and thoroughness.**

**What would you say to those who are concerned about the implications of this six-month goal for resolving investigations?**

DELRAHIM: Well, first, I think we did not and I've mentioned it in the speech. We did not unilaterally disarm here. It is six months as a goal to work to and I think that's plenty of time for us to do the work we need to do, assuming we're focused on exactly what the harm is rather than on a broader fishing expedition.

And most of even some of the more complex transactions, like Disney-Fox, we were able to get to an answer within six months. I think within those reforms that I announced, I also noted that it requires cooperation, cooperation of data, cooperation of production, not hiding the eighth ball by the parties.

Many of this -- the timing is in the control of the parties. And so to the extent that the markets and the merging parties have an interest in getting certainty as soon as possible, they can help us get there. I think we can do most of them within six months, but sometimes it might be more complex and with the authorization of a Deputy AAG there could be additional processes that may be required in case-by-case basis.

**KLOBUCHAR: I was just reminded when I was -- has had my first and only other government job as the prosecutor county attorney, I set deadlines when I first got in for property cases or something to be resolved and one of the judges sent me a letter that said, "You better start viewing your time as county attorney as more of a marathon than a sprint."**

**And I remember I wrote back and said, "It's both a marathon and a sprint." Because you have to have some sprints as well, so you're saying that the cases may be different. The reviews may be different but you would like to expedite a good portion of them, is that what you...**

DELRAHIM: Exactly. And sometimes parties sit on third-party CIDs that we issued to them. They won't get us the data. And it was along with those, Congress has given us the power to enforce those CIDs in court. We will begin doing those.

**KLOBUCHAR: And did the Antitrust Division confer with the FTC on this issue?**

DELRAHIM: On the broad, no, although we did follow what some of the reforms that they have done that for example some of the transparency and having the timing agreement on their website are things that we learned and were illuminated. We have some different processes and procedures between our two agencies.

[...]

**KLOBUCHAR: Okay. Most favored nation clauses or MFNs are contract provisions in which one side imposes limits on the other side's ability to deal with third-parties by ensuring that the side imposing the provision will always receive the best price or terms of trade.**

**While some MFNs may be pro-competitive, I've heard complaints about the common use of MFNs in certain industries, which may limit competition such as the unconditional MFNs imposed by television and video content distributors that's imposed on content providers.**

**What can you tell us about your agency's recent enforcement efforts related to MFNs? Anyone?**

DELRAHIM: I'll be happy to address. MFNs can be pro-competitive but they can also be anticompetitive...

**KLOBUCHAR: Right.**

DELRAHIM: ... for example, they can raise new barriers to entry or stabilize what would otherwise be effective price competition. The DOJ did examine, I believe it was 2012, 2013, they had a workshop on the effect on the MFNs and with respect to the Time Warner, the cable merger, that was an issue that was addressed in a consent decree with the use of the MFNs.

We've also done it in the health care, in the Blue Cross Blue Shield in the Michigan Hospitals case. That was even a more egregious use of the MFN because that's the -- it was an MFN plus.

Because they said that you may not license to a competitor and if you do you have to give us an additional 10 or 20 percent lower than what the favored nation cost would be. And that was one that was litigated and Michigan passed the law to outlaw that.

So it's one that we are on the lookout for and continue to examine their effect in the marketplace.

[...]

**KLOBUCHAR: Okay. Following up on what I asked of the chairman before, I'll give this to you Assistant Attorney General Delrahim, what has the Antitrust Division have been doing to assess the impact of technology platforms on competition?**

DELRAHIM: We have also been thinking about. We have convened internally with our 50 or so economists. We have also invited speakers from the outside who are experts both economists as well as our folks who think about these from the venture capital community and others to come and explain some of these issues to us.

They're important factors. It's something the attorney general himself has also expressed an interest and invited as you know some of the -- a number of state attorney generals that came into it for a meeting last week to discuss this issue. We continue to study it, beyond that I probably shouldn't comment.

[...]

**BLUMENTHAL: ... and I apologize for my absence before now and I apologize if I may be repeating some of the ground you've already covered. Let me ask Mr. Delrahim, as you well know, as we all know in this room, corporate consolidation doesn't just threaten consumers. It threatens workers as well.**

**If you live in a one-company town, as some people still do, it's easy for a company to keep wages low and force people to accept working conditions that may be substandard. When was the last time, so far as you're aware, that you cited labor market considerations as the basis for rejecting a merger?**

DELRAHIM: That's a good question. I don't know if labor markets, when the last time it would have been, but I do know and as you know we have been quite active in this area and thank you for your support in the no-poach area where competitors engage in not only price fixing but anti-poaching agreements amongst themselves.

We announced a number of them dealing with the Westinghouse Labtech merger and a number of mergers, we have actually, now have software with the documents that are produced for mergers. We go through all those documents and identify no-poach agreements that might have come and we have several investigations that are ongoing, some of which are criminal.

**BLUMENTHAL:** I've been very supportive of those efforts as you have mentioned and I think they are important. I am glad to hear that you have investigations underway.

**I am aware of no past case where labor market considerations were cited as a basis for rejecting a merger but I would respectfully suggest that it should be.**

**Do you have an idea as to what the threshold level of monopsony powers that would raise concerns?**

DELRAHIM: If it's a horizontal merger where such a market would be posed I presume it would be the, say, Philadelphia National Bank thresholds that we would apply and we would look at it whether it's a monopsony effect or a monopoly effect here just as the merger guidelines would allow. And, you know, it certainly can be a consideration.

We also recognize that sometimes if the wage issues are not a consideration that the merger itself could provide for a certain growth and efficiencies that could create more jobs.

[...]

**BLUMENTHAL:** Thank you.

**Let me ask a question about search algorithms. Search engines like Google and Yelp use algorithms to produce search results that guide users to particular restaurants or shops. These algorithms can have profound market effects. For example, consumers often choose the restaurant that appears at the top of the search results, smaller businesses that offer high quality products at low prices may be less tech-savvy and as a result these algorithms might guide users away from them and away from the best option at the cheapest price.**

**So let me ask you what resources and authorities do you have to scrutinize the fairness of algorithms and artificial intelligence systems as a potential misuse of market power?**

**Mr. Delrahim?**

**And then...**

DELRAHIM: The use of search algorithms to cause the anticompetitive effect could take two forms. One could be if, you know, a use of an algorithm where there two parties, potential competitors might agree to use that and it's a way of either policing or effectuating a price fixing scheme that they might have.

We actually have a case that's a criminal case that is going to be coming into a conclusion in the next coming, in the next two weeks I think and that we can make -- we will make public of the

use of that. And I believe it's the first of its kind. But it's an important issue that we are struggling with both here in the United States, in Europe, about how that is done.

So whereas the monopolization case where there's a platform that uses a single-firm conduct, if there is the market power and there is discrimination that is hurting either new innovation, new entry or a threat to that market power through the use of that algorithm it certainly could be a violation of the antitrust laws.

**BLUMENTHAL: Are you going to make us hold our breath and wait in suspense for the announcement of the...**

DELRAHIM: It's an interesting case. Yes, it's a criminal case that I can't comment on...

**BLUMENTHAL: But it heightened our interest even more.**

DELRAHIM: I think it is a fun one. The facts of that are very interesting.

**BLUMENTHAL: Thank you.**

DELRAHIM: Sure.

[...]

**BLUMENTHAL: Would you, Mr. Delrahim, be open to the Justice Department investigating these allegations against Google?**

DELRAHIM: These are matters between the two agencies, of which agency it takes the lead. The justice Department has investigated some Google transactions in the past. The Federal Trade Commission has investigation monopolization and other transactions, and so, the chairman and I will discuss the jurisdictional issues. But one will either do it or the other, depending on...

[...]

**BLUMENTHAL: The recent news of hackers breaching of 50 million Facebook users raises, again, concerns about how online platforms are securing their data. Very sadly powerful technology companies like Facebook are able to impose their preferred privacy terms on customers. There's little that customers can do to fight back and protect their own data given the power of Facebook to dictate those terms.**

**Mr. Delrahim, in an April speech you described this dilemma with a very apt question for this hearing, quote, "Our consumers who believe that their data is digital currency facing a monopoly seller or a monopsony buyer with structural barriers to competition and entry." End quote.**

**With that in mind, let me ask you, do you believe that violation of a consumer right to privacy, digital privacy qualifies as a consumer harm and what can and should Congress do to boost competition and increase consumer awareness about this or their data?**

**I know these are two questions, big questions, I invite you to begin and answer here but I would welcome a fuller answer in writing if you wish to do it that way.**

DELRAHIM: Absolutely, no. And not only are they quite deep questions or important questions, that every consumer in America grapples with right now. It's an issue -- in that speech as I discussed is one where, you know, the issue of revealed preferences may show if there's going to be a competitor in place.

So some consumers gravitated to SnapChat when it first came out because they thought it had this disappearing text after 24 hours. And so, there was I think a consumer preference being revealed towards that and maybe there was a solution there.

Specifically with respect to, you know, kind of the privacy and data breaches that's an issue that we don't have the direct statutory authority to be enforcing our friends at the Federal Trade Commission do some of that. And when it gets to be criminal I presume our criminal division of the Justice Department will do that.

But the power that they might have is important. And are they doing -- are they taking any action to preclude a new innovator who could provide the consumer that safety and security they might want and they might wish. And that is an antitrust issue, that is something that we should be concerned about.

[...]

**BOOKER: Mr. Chairman, thank you very much.**

**I recently visited farmers out in the Midwest in Kansas, Nebraska, Missouri, Illinois and I was stunned with the testimony I got from farmers about the challenges with corporate consolidation and how it's transformed the heritage of this country and really hurt a lot of them. There are really harmful effects that are facing farmers on all side of the political spectrum. This is an American crisis in my opinion.**

**And so, I recently introduced legislation to place a moratorium on any new large mergers in the food and agricultural space. And just some of the data is stunning. Today's nearly 70 percent of all pork, 53 percent of all chicken and 84 percent of all beef is slaughtered by only four companies. These processes are exploited by their contract growers and locked out of the market access for independent livestock producers.**

**In poultry for instance 97 percent of the chicken consumed in the U.S. was grown by contract farmers. These farmers must accept whatever prices a company sets. The poultry farmers are paid in opaque ranking systems with little to no transparency to pay farmers more at the expense of their very neighbors, creating very unfortunate environments for competition that's not constructive.**

**In 2010 the Antitrust Division of DOJ and USDA hosted a series of workshops which was really constructive, exploring competition in the agricultural sector. The DOJ stated in 2012 that a clear lesson from these workshops was that antitrust enforcement has a crucial role to play in fostering a healthy and competitive agricultural sector. And I say anecdotally this concentration we are seeing as our farmers are getting squeezed from below with seed folks, and other suppliers and from above from a lot of these processing companies is just driving farmers out of business at rates that are stunning and even farmer suicide rates right now I did not realize it's as bad as it is.**

**And so, Mr. Delrahim, your statements DOJ's recent antitrust enforcement actions in the crop and seed protection sector. But what is the DOJ currently doing as it relates to the antitrust enforcement in the packing sector that so many farmers around this country have complained about to me and others?**

DELRAHIM: Thank you, senator.

Certainly the agricultural industry and particularly the plight of the farmer is an important factor and something that we are concerned about at the Justice Department. We have a whole section that is just dedicated to, you know, the transportation and agricultural sectors.

With the seed and seed treatment I was referencing largely the Bayer-Monsanto merger where we got one of the largest divestitures and it kept the competitive balance in the marketplace the same in reviewing that transaction. And we have I think a very strong consent decree and enforcers, and we just appointed with the court, former Attorney General Mukasey as the trustee to make sure that the parties live up to the commitments on that one.

In addition to that the Packers and Stockyards Act which is largely enforced by the Department of Agriculture. However we get involved in a system with it. So those are issues that are even more specific to the competitive concerns of farmers than antitrust but it is one where we worry about both the monopsony effect which harms the farmer and getting recovery for their crop or their animals that they raise from the process. But also the monopoly effect that they could cause to the consumer.

**BOOKER: And so, what was stunning to this what I found out that many of these most powerful entities in the sector are actually foreign corporations. Given the administration's interest in modifying trade relations with countries like China is the DOJ taking any action to evaluate foreign influence over farming and food related or antitrust issues?**

DELRAHIM: So we apply the antitrust laws and the standard for Section 7 of the Clayton Act regardless of the nationality of the merging parties, and we expect that from our foreign countries as well on how they address their antitrust laws.

When there's a national security issue dealing with foreign investment in important areas and certainly farm and food stock is one. And I know Bayer Monsanto for example did go through the CFIUS process which is chaired and run by the Treasury Department but the Justice Department participates in that to ensure that there is -- national security interests are raised or if there are they can be addressed.

**BOOKER: Yes, thank you and I hope that my office can learn more and may have some more questions for the record because it's really stunning to me to see what a lot of these large multi-national corporations are doing to American heritage and to American farmers.**

DELRAHIM: I would be delighted to follow up.

**BOOKER: Thank you, sir, very much. I want to switch to something that my colleague Senator Blumenthal from one of the best states in the Northeast that's proximate to New Jersey. He asked about privacy issues and some of the recent scandals are reflective of a much more pervasive set of problems, really, regarding social media and other online services.**

**There's a manipulation and misuse of user information. The distribution of misleading or even illegal content and the ability to engage in criminal activity with relative anonymity, these are just to name a few of the challenges that I know that you are aware of.**

**And so, perhaps maybe Mr. Simons and Mr. Delrahim, you both can maybe answer some of these questions and I will put a couple of them out there.**

**Number one, do you think that new laws are necessary to promote consumer privacy and then fairness in competition?**

**And I'd like to really understand your view in the connection between privacy and competition in this forum. And so, yes or no, do you agree that protecting consumers' privacy ensures a level playing field and therefore promotes fair competition?**

**And maybe, Mr. Simons, I will start with you?**

SIMONS: Yes. So that's a great question. So privacy, I think we need to do something about privacy. And the FTC has been involved and a leader in this field for a long time. And we would

like to continue in that role but we would like both -- and we need to get this right and we need to do it with you, with you and the Congress.

So I couldn't agree more that we need to do something.

Second, the one thing we need -- the one thing we need to be careful about though is we don't want to have a situation where more privacy equal less completion. We want to do privacy in a way that doesn't hinder competition. Or else it will be, you know, it will be at counteractive purposes. So that's another really important factor.

**BOOKER: Mr. Delrahim?**

DELRAHIM: I support that. And we have a live example right now in Europe where GDPR has been enacted. It adds new regulation, however usually it's the incumbents who have the resources and the power to utilize the new regulatory burden and for that entrants to come in. So how that is done is there's a good way, how that will be done in Europe will be a good way for us to learn about what not to do.

[...]

**LEE: Thank you, Senator Booker.**

**Okay, Mr. Delrahim, I want to go back to the music issue, I was over time so I couldn't get past your hilarious comment there. The technology definitely has changed there's no question about that.**

**My question for you is with the changes in technology, the advancements that have been made since then how has that changed the incentives, the relative incentives of licensees, of licensors and how does that impact the way you view an antitrust enforcement generally or the consent decrees specifically?**

DELRAHIM: This whole technology has done a lot for the consumer. There is greater consumption of music. You now have streaming revenues outpacing any other form of revenue that is coming in to the artists, on one.

Two, you have some new -- you have two PROs that perform in rights organizations that on the consent decree with the DOJ but you have two and perhaps others that may prop that are not under that same consent decree. And you have different methods of price setting by that.

There might be new efficiencies. For example an identification of the song in a repertoire that technology can provide with data that we weren't capable of doing just even 10 or 20 years ago that might address some of the efficiencies, considerations of the Supreme Court announced or

observed in upholding some of those consent decrees that the arrangements -- that the ASCAP and BMI had to justify what they do.

So it's an area that is very fluid. We have a number of new services but we also have a new second circuit interpretation of the consent decrees with respect to fractional rights that have changed the landscape just within the last year.

**LEE: Thank you. Thank you.**

**I want to pick up on a couple of topics that were covered I think by Senator Blumenthal and Senator Booker just about the Consumer Welfare Standard. For more than decades, more than four decades our approach to antitrust policy has been based on empirically grounded economic analysis.**

**Today, there are some critics of centrist antitrust policy that are complaining that this is too focused on economics and focused too little perhaps on the accumulation of political power that is capable of creating and then sustaining monopolies wielding significant market power.**

**Some of these critics claim that the data suggest that the economy has become dramatically more concentrated over the last 40 years, and would very much like to see antitrust policy solve problems for a whole range of issues, including income inequality, wages, labor issues, and so forth. So, I'll start with the question, what do you make of claims that the economy is suffering dramatically because of lax antitrust enforcement? We go -- we'll go to you first, Chairman Simons.**

SIMONS: Thank you, senator. So, we have had a very strong bipartisan consensus on how to do antitrust enforcement and policy in this country until very recently, it existed probably for 25 years, and now recently, people are raising the concerns that you just articulated, senator, and they're doing it in a way that is more thoughtful I think than had been done previously.

And so what we've done in the FTC is we've initiated these hearings in large measure to get information and to talk about these concerns with the people who are making them, among ourselves, among other antitrust stakeholders. And as a -- as a part of a process to try to put back together the strong bipartisan consensus that we've had previously, which I think was a huge service to the agency itself and also to the country.

**LEE: Mr. Delrahim, you've warned going up on this topic that abandoning the Consumer Welfare Standard and opening antitrust policy into a broader range of objectives would quote, "make the antitrust agencies more open to the exercise of corporate influence and capture." What are your -- what are your primary concerns about recommendations made to modify or even abandon the Consumer Welfare Standard along these lines?**

DELRAHIM: I agree with Chairman Simons as far as the Consumer Welfare Standard, it has been one that has served us well, it's flexible enough, abandoning it might not have those principles that we -- that there's the basic principles to follow that ultimately, the actions we take should benefit the consumer, and keep the markets free, let them go back to FDR and Justice Jackson, many of us might recall Judge Bork as you know in his 1979 book, and he wrote it in 1969, but you go back 30 years before him, Justice Jackson was the one who argued against price controls by the government, and let the market decide the price and consumers benefit from that.

And I would adhere to that, I don't think we need changes every now and then, we do have to study, and I commend Chairman Simons, and we've had some workshops, but continuously examining, do we know enough here? We're learning more about vertical mergers for example, but some of the cases that we have and we're dealing with and we're going to learn more what the -- what the courts as some of these cases are litigated, but I commend the committee also for examining this issue.

[...]

**KLOBUCHAR: Okay. With a more specific question Assistant Attorney General Delrahim, you announced last week that you were withdrawing 2011 policy guide to merger remedies as part of reassessing the division remedy policy, have the division and FTC considered working jointly on an updated joint policy guide? And are there reasons for the two agencies to have different policies in this area?**

DELRAHIM: The remedies, the merger remedies, going back to 2004 have been specific to each of the agencies, I would welcome the input for my colleague and see if there is one way it makes sense given our different procedures about whether or not a merger I think, to the extent we do these jointly, we're better off and provide better certainty to the business community.

But I think that mergers remedy guide is probably one where we don't need to diverge, because I don't think the differences in our structure and our procedures would allow for that. In withdrawing the 2011, we in the interim have placed in back the 2004 guidelines which call for structural remedies as a preferred mode rather than behavioral remedies until we update those.

And by the way, we'll probably look at the vertical merger guidelines in the coming future, since those have been in place since 1984, and most of us would not even understand the if we read them today.

**KLOBUCHAR: Okay.**

DELRAHIM: So, they don't really have much use.

**KLOBUCHAR: I brought up the CREATES Act early on my opening and this bill with Senator Grassley, Leahy, and Senator Lee, and myself that we introduced. Can you talk about quickly what the FTC is doing now to address these issues?**

SIMONS: Yes, sure. Thank you.

**KLOBUCHAR: The sampling and other things.**

SIMONS: Yes, so, yes. So this is something that we get note -- we get notification from CMS or HSS, I can't remember which one. And we look at these things, and we are looking for a good case to bring. But having said that, I think this is an area...

**KLOBUCHAR: That's very out there, I like that.**

SIMONS: I'm sorry?

**KLOBUCHAR: That's a good thing to warn people that you're looking for.**

SIMONS: Yes. We're it looking, but having that said that...

**KLOBUCHAR: Okay, good.**

SIMONS: Having said that, I think it make sense in this area for what that -- to do a legislative solution, so I think what you're doing is very important and we support it.

**KLOBUCHAR: Yes, and this is about the sampling of being able to get more generics on the market, to get more pharma competition. So, now that you've been in your roles, because I have to leave shortly, I may have to leave before my colleagues do, as you look at your roles here. What would you say are your two or three biggest challenges right now as you head into this new arena we're in and with all of the consolidation and also some market dominance that we're seeing in the online platforms, the pharmaceutical issues? I guess I'm giving you ideas, but what do you see as your challenges and resources?**

SIMONS: Well, those three things I think would be at the top.

**KLOBUCHAR: Okay.**

SIMONS: The other thing that I think is really important also which is being addressed hopefully by these hearings that we're having, which is really to get antitrust community and all of our stakeholders to talk to each other, and developing better bipartisan consensus.

KLOBUCHAR: Yes, and I do think we have an opportunity, Mr. Delrahim and I have talked about this with the administration's interest in this issue, and I have talked to Mr. McCann about

this that, you know, maybe we have a chance to move forward with some policy and legislative changes.

SIMONS: And I also want to commend the two of you for the way you conduct this committee.

**KLOBUCHAR: Oh.**

SIMONS: On such a bipartisan basis.

**KLOBUCHAR: Thank you.**

DELRAHIM: But the only challenge I would add to that, obviously resources are, because as some of these transactions are larger, more complex, much more resource intensive, how we address them, and some of the legislative proposals you put forth, I think merit action, but it -- on the international front, the international front is becoming...

KLOBUCHAR: Good point.

DELRAHIM: ...a more challenging area, we just had our bilateral meetings with a European commissioner, Commissioner Vestager, and her staff, that we held on Thursday, largely a good meeting, and cordial, those continue, and are ongoing.

We have at a minimum try to promote these due process rights, and code of conduct that we -- every agency can sign on to, so that our companies are not discriminated against, there are basic procedures that they could accord to their subjects, and we hope to advance those. But the challenges we're seeing internationally, potentially discrimination against U.S. companies, could be a real issue.

[...]

**BLUMENTHAL: Thanks, Mr. Chairman, I will brief, I know you had a long afternoon. I hope you agree that having a fair and open Internet is critical to both free discourse and to free markets, and effective competition.**

**Unfortunately, the FCC has declared that it will abandon net neutrality even though states like California have stepped in to preserve net neutrality principles, the DOJ is now suing to block them. I hope that the DOJ will reconsider this decision which in my view will harm ordinary Americans.**

**Some of the FCC and the FTC's responsibilities with regard to net neutrality are overlapping as you know, for example the FTC has the ability to prevent providers and distributors from providing preferential treatment to their own content, net neutrality has as one of its goals to prevent that kind of discrimination.**

**So, as our top antitrust officials, you have an important role to play in ensuring that there is in fact a fair and open Internet. Let me ask you very directly, were you consulted before the FCC rolled back the net neutrality rules?**

DELRAHIM: It might have been before I was confirmed, so I don't know if the Antitrust Division was consulted prior to my arrival, but I personally was not, sir.

**BLUMENTHAL: Would you ask and inform this committee whether you were -- whether the -- whether the division was?**

DELRAHIM: I will -- I will do that.

**BLUMENTHAL: And how about the FTC?**

SIMONS: I don't know, but I can find out for you.

**BLUMENTHAL: Thank you. Now that the FCC has abandoned its role in preserving net neutrality, are you considering enforcement actions that would consider preserving the free and open Internet?**

DELRAHIM: So within the antitrust laws, if there is market power and certain conduct that incumbent would take, that would -- that would cause anticompetitive harm, it's an area that we would, where we stand ready to do so, part of our case against the combination of AT&T and Time Warner tried to address some of that particularly with new competition coming on with online MBPDs, the virtual MBPDs that would be there, and to what extent harm would be caused by those types of consolidations, so that is one.

And then, I should also mention since you mentioned the Justice Department's suit against the state of California, that is one that the FCC and the Civil Division of the Justice Department brought that suit on the constitutionality under the supremacy clause of that, and one that the Antitrust Division is not involved in.

**BLUMENTHAL: I recognize that fact, and I would've asked you to withdraw...**

DELRAHIM: I wanted to clarify.

**BLUMENTHAL: If I thought you were involved in it. But let me ask the -- Mr. Simons, whether you feel that lawsuit is well justified?**

[...]

**LEE:** Thank you, Senator Blumenthal. I want to turn back to the Consumer Welfare Standard for a minute to discuss another topic. Some have argued that the Consumer Welfare Standard with its focus on price theory is incapable of adequately addressing issues, certain issues arising in the high-tech industries, especially those involving so-called big data.

So, I have a question for both of you, just want to get your reaction to a couple of questions actually -- does the Consumer Welfare Standard need nuancing to address markets in which the product doesn't have an actual price tag paid by the consumer that's attached to the product?

But such as is the case where services are provided for free, but consumers sort of pay for those services by relinquishing a certain amount of their personal data, and I guess a related question to that is, do you think an individual has a property right in his or her personal data? We'll start with you, Mr. Simons and go to Mr. Delrahim.

SIMONS: Thank you. So, In terms of the property right, I think that's a very difficult question. And one -- and that may -- that may put us in a situation where we have to be very sensitive to whether more privacy results, you do it in a way that more privacy results in less competition. So, I think this is one of the things that's really important that we need to think about, and we need to get right, and this is something that I would very much look forward to working with you and other members of Congress on.

In terms of the Consumer Welfare Standard, my view is it's very flexible, and so for example, and it develops, and accounts for new things over time. So, for example one thing that like -- that is relatively new in the economic field is multi-sided platforms. There's now a whole literature that deals with that, that didn't exist 20 years ago. And there's probably other types of examples and I'm not thinking of off the top of my head.

But one of the things where -- so one of the things where we could probably use some help and kind of new developments in the consumer welfare model would be how to deal with just these markets that you're describing, where the product is essentially given away for free either for people watching to get their eyeballs so you can advertise to them, just like in the television model or for the situation where you're describing where you get personal data.

**LEE:** Thank you. Mr. Delrahim?

DELRAHIM: I agree with the same challenge that we should be consider -- concerned with is how do we treat that particularly when it deals with the doctrine of predatory pricing where we have to look at after the Supreme Court precedent, even if it's below a certain level of cost pricing, which zero presumably would be, but is that the proper way of looking at it when a consumer is turning over something valuable, how do you assess value to that information that they're providing in exchange for certain goods?

I don't think there's a question about some of the pro-competitive consumer benefits of some of these services that are out there, but how do you value that? And in one of those speeches that you referenced, it was this issue can we wait as a matter of public policy and we deferred to you, and would be delighted to work with you, can we wait for a period of time until there is revealed preferences by consumers to address that? And how do we value that in an antitrust setting? Or should there be policies earlier to place a value on that consumer data through a privacy regime?

But it's one where some folks have raised the issue that we should look at the data when the consumer goes online as a, and assign a value to that. I don't know the clear answer to that, obviously courts have not addressed that quite yet, but I do believe that the Consumer Welfare Standard is flexible enough for us to -- within that framework to work on that, and address the competitive concerns it might raise.

**LEE: I guess, you're saying assignment of value sort of connects back to the question of whether or not there is a property right attached to a person's -- or is there, did you answer that part of the question?**

DELRAHIM: Not so much the property rights. No, I did not address that, is there?

**LEE: Do you think there is -- there is -- there is a property right?**

DELRAHIM: I think it's a difficult question because right now how we treat it is -- there is a right that folks by whether it's through a click through where you give consent to your information being collected as a condition of using that, and if there's a violation of that then there -- that's our friends at the FTC would come in and say, you violated this commitment.

However when there is no such click through, and there's no commitment made by the company, if the consumer still uses that, and the data is collected, what happens in the absence of a commitment of what to do with that, there is no action, I presume. Unless there is some kind of a property right associated with that, so then there would be a trespass I presume.

**LEE: I wonder if Pearson v. Post could offer some insight into this case with the Foxes, so I've looking for an opportunity to cite Pearson v. Post since law school.**

DELRAHIM: We will examine that.

**LEE: Seemed like as good of a time to do it as any.**

**Mr. Simons, in May I introduce the Smarter Act which seeks to ensure that the fate of a proposed transaction would be determined solely by whether raises competitive issues under the law, and not on the basis of which federal antitrust law enforcement agency happens to be assigned to the transaction in question.**

**Among other things, this proposed legislation, the Smarter Act would require the FTC to litigate a merits of a merger challenge, of any merger challenge in federal district court rather than before an FTC administrative law judge. So, Mr. Chairman, at your confirmation hearing you indicated that FTC should generally file merger challenges in federal court, and if the agency loses in federal court it should not proceed to administrative litigation.**

**The practical effect of differences between the DOJ and FTC has recently come up in the FTC's attempt to block Tronox's proposed acquisition of Cristal, two manufacturers of titanium dioxide, important things but not necessarily something that your average consumer is aware of on a day to day basis.**

**Now, in that case, the FTC held a full merits trial in administrative litigation before ever appearing in federal court. The differences in agency merger procedure is a prolonged resolution of this case and it resulted in a duplicate cost because the FTC had to argue the same issues in two different forums.**

**So, Mr. Chairman, had the FTC been required to file in federal district court like the Department of Justice does in similar circumstances, is it fair to say that that would have promoted a faster resolution of the case and thus lower cost to the -- to the taxpayer and ultimately to the consumer?**

SIMONS: And so that case is in active litigation, so I really can't comment on that specific case, but let me say this, so I'll repeat, as a general rule, we should go to court, if we lose in court on appeal, we shouldn't file an administrative case. If on the other hand we find out about a transaction after the fact, we've done this several times previously, that is appropriate for administrative litigation. So that -- those would -- those would be the kind of the general framework that I would -- that I would prefer.

**LEE: Okay. And you would agree certainly that passage of the Smarter Act would avoid these kinds of issues, because the Smarter Act would require the FTC to challenge mergers in federal court just the same way that the Department of Justice does that?**

SIMONS: Yes, just be clear, I'm not agreeing with the premise of your earlier question.

**LEE: Okay. No, I understand, as the particular litigation you don't comment on that?**

SIMONS: Yes, right.

**LEE: So, let me rephrase my question in a hypothetical scenario in which something like that happened, wouldn't passage of a Smarter Act result in you having to follow the same process that the Department of Justice goes through?**

SIMONS: Yes, I'm not, you know, I'm not so familiar with the details of the legislation, my understanding of it primarily was that it would -- it would serve to make sure we have the same standard in federal court for the FTC cases as for the DOJ cases, so I hadn't really focused on the impact on the administrative litigation.

**LEE: Okay. One moment. Let's talk about vertical merger guidelines, do they need updating?**

SIMONS: That's a fun -- that is a funny thing the way you said it, because they need updating, because the old ones are so old that no one's ever looked at them in probably 20 years, so my sense is we -- I haven't even looked at them in a very long time, we probably have to start from scratch.

**LEE: If you believe efficiencies are a legitimate merger defense?**

SIMONS: And they're certainly something that needs to be considered, we now use complex economic models that for any horizontal merger will predict a price effect, unless there's some efficiency. So, if you're using those types of economic models, you really need to consider efficiencies.

**LEE: Mr. Delrahim, any response that?**

DELRAHIM: You know, I think efficiencies as long as they are merger specific and verifiable rather than pie in the sky, certainly can be used to overcome the anticompetitive concerns of a merger.

**LEE: But the -- do you think -- do you think language in some earlier Supreme Court decisions on efficiencies is dicta or is it Supreme Court precedent that efficiencies cannot be considered a defense to an otherwise illegal merger?**

DELRAHIM: I don't -- I don't think I subscribe to the view that there is Supreme Court precedent that it cannot be otherwise overcome an anticompetitive merger, but I think, you know, with the way we would approach it would be consistent with the -- with the guidelines that we would have to take a look at balance, and I'm not aware of a single merger where it has overcome the anticompetitive concerns of a transaction, but it is one where if they are merger specific, they should be considered.

**LEE: Now, given differences in how various lower courts have interpreted Supreme Court case law on efficiencies, and given the unlikelihood of any merger case reaching the Supreme Court any time soon that involves that specific issue, should an efficiencies defense perhaps be codified and put into law?**

DELRAHIM: It could be, it could also be used, it could be applied in a -- in a certain way through the discretion of the enforcement agencies that we -- how we apply that, but whether it's codified into law consistent with some of the precedents that we have, I'll have to think about that, but I don't -- I don't know if there's any problem with that, of providing greater certainty and guidance to the business community.

**Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights**  
**Holds Hearing on Antitrust Laws Oversight**

Tuesday, September 17, 2019

**LEE: Thank you very much, to both of you. We will now begin five-minute questioning rounds.**

**In response to my first three questions, I'd like a simple yes or no answer from both of you. We'll start with Mr. Simons and then go to Mr. Delrahim for each of these three questions.**

**Mr. Simons, do you believe that your agency could benefit from more resources to enforce the antitrust laws.**

SIMONS: Yes.

**LEE: Mr. Delrahim.**

DELRAHIM: Yes.

**LEE: Would it be a waste of resources that you have within your agency for your agency to be investigating the same conduct in the same company at the same time, as something that's already being investigated by the Department of Justice?**

SIMONS: Yes.

**LEE: Mr. Delrahim, likewise with respect to the FTC.**

DELRAHIM: Yes.

**LEE: Mr. Simons, are you aware of any instance, any matter, prior to 2018, in which your two agencies were investigating the same company for the same conduct, at the same time.**

SIMONS: No, Senator.

**LEE: Mr. Delrahim.**

DELRAHIM: I don't recall.

**LEE: Okay, thank you. Let' move on to clearance. Back in June, news reports suggested that your agencies had divvied up review of the dominant tech firms. But in July, The Justice Department announced that it is conducting a broad review of the leading online platforms.**

**It sounds to me, in context, like your two agencies are covering the same ground, at least, in very significant part. In fact, the Wall Street Journal reported, yesterday, that the Justice Department may conduct its own antitrust monopolization related investigation of Facebook, despite the fact that the FTC is already investigating Facebook under a monopolization theory.**

**Chairman Simons, are the FTC and the Department of Justice still operating under the clearance-under a clearance system to avoid duplicative efforts or have things broken down on this front?**

SIMONS: For the vast majority of matters, we continue to operate under the existing clearance agreement.

**LEE: I'll take that as a yes, things have broken down, at least, in part. I'm not suggesting--**

SIMONS: --Yeah, I would agree with that.

**LEE: Mr. Delrahim, what can you tell us about that? Have they broken down? Are you still using it? Do you agree with Mr. Simon's suggestion?**

DELRAHIM: Well, the clearance process and the agreement is a process we are continuing to use.

**LEE: But you'd acknowledge that it's broken down in, at least, some cases.**

DELRAHIM: I would acknowledge that there is, over the last 20 years and you might recall that Chairman Muris and Assistant Attorney General James, when they faced this back in 2002, I believe, entered into an arrangement that could have solved a lot of the problems because this has been going on, not recently, but in the past. The Senate Appropriations Committee put a provision in preventing the agencies from implementing that orderly agreement.

But it was one of the two agencies that resolved and it might have prevented some of these problems. But I cannot deny that there are instances where Chairman Simons and my time is wasted on those types of squabbles.

**LEE:** Thank you for your candor on that point. As I mentioned in my opening statement, I don't think there is a sound basis. I don't think one can conceive of a sound basis for splitting up a monopolization investigation, between your two agencies.

**Any monopolization investigation must look at the totality of the company's efforts in attaining or in maintaining monopoly power. That cannot be done piecemeal. It doesn't work. It's something that doesn't exist in the abstract and certainly isn't going to work in practice.**

**Mr. Delrahim, have the Department of Justice and the FTC ever split a monopoly investigation between themselves, before?**

DELRAHIM: I'm not sure if there was.

**LEE:** You can't think of any.

DELRAHIM: I can't. And you know, certainly not in the last two years that I discussed. But I want to clarify one thing. It's not so much the monopolization cases because, I mean, frankly, most of the antitrust laws, in Section 1 and 2 of the Sherman Act, maybe a Section 8 of the Clayton Act and outside of the merger, Section 7. But we would look at different conduct, perhaps, of the same companies and that might be what we might be talking about, here.

[...]

**LEE:** Right, and as you both acknowledge, both of you could use and desperately need more resources. That being the case, makes no sense to me that we should have duplication of effort when that has a tendency, inevitably, to undermine the effectiveness of what you're doing.

**Mr. Simons, I appreciate your acknowledgment a moment ago about how this may be tripping things up but it inevitably does.**

**Let's suppose, hypothetically, that you were asked for advice on setting up an antitrust regime, within another country, within some foreign jurisdiction that didn't already have one. Would you, in any circumstance, recommend that they follow the U.S. model and that they have two separate agencies responsible for civil antitrust enforcement, the same way we do here?**

SIMONS: No, I wouldn't.

**LEE:** Mr. Delrahim, what's your answer to that same question?

DELRAHIM: It would be hard to imagine a system being designed, at the first instance, like we have today in multiple. Now, and as Chairman Simons says, not only do you have two federal agencies, you have, well, I guess I learned recently, with the state AG's, 52 states who also enforce the antitrust laws. And all of them, you know, based on Supreme Court precedent enforce the exact same federal law that we do, in addition to their state laws.

So, it's not the best model of efficiency.

**LEE: Thank you. I see my time's expired. Senator Klobuchar.**

**KLOBUCHAR: Yeah, I just look at this in such a different way. I just see there's investigations going on all over the place. All of these AGs have taken it on and I'd rather have a split investigation than no investigation.**

**And I assume part of the reason that why you split this is you don't have enough resources, individually, to take this on yourselves, while you're doing your other work. Is that possible?**

DELRAHIM: You know, I think, just as sometimes we work with the states, both working together. As many of you know Microsoft was something that began with the Federal Trade Commission. Later, because of a 2/2 tie, that the Justice Department took that on. That happens in other matters so, the process--

**KLOBUCHAR: --Okay, that's fine. What are you guys investigating, exactly, with tech?**

SIMONS: So, I can't talk specifically about individual investigations but it's, we have a technology task force that we formed in the Bureau of Competition and they are focused purely on high technology platforms.

**KLOBUCHAR: And can you say it's a--**

SIMONS: --And they are very active. They're, anyone who has a complaint about a high-tech platform, we are all ears. Please call us.

**KLOBUCHAR: And can you say the companies you are investigating?**

SIMONS: The only one I can say that's publicly disclosed is Facebook because they disclosed it, themselves.

**KLOBUCHAR: Okay, do you want to add something?**

DELRAHIM: I, you know, if you follow the same model, the one that has disclosed it is Google, upon whom we have served CIDs. And I'll refer you also, to the press statement the Justice Department put out of looking at, you know, broad review, our technology section of the

antitrust division at the main justice, in addition to our San Francisco field office, who has been an expert in this area, are the two that are splitting up the work we have, close to several dozen attorneys who are working on this matter.

**KLOBUCHAR: And what do you think about the state attorneys general and what they are doing? Do you think that's helpful?**

DELRAHIM: We've had very productive discussions and cooperation. I think at the early stage, we've got to make sure that we're not tripping over each other. And so, the more coordination there is, the better.

We do that with almost every one of our investigations, depending on the states involved. We'll see, at the end of the process, I do note that California attorney general decided not to join the tech investigations. And they have been a significant player with a significant interest in this matter, I would think.

**KLOBUCHAR: Okay, well speaking of California, and I think, I think both of you know how focused I am and I will get back to this, if we have a second round on these tech investigations because we've been blocked from doing really legislations. That's one of the reasons I've introduced legislation on privacy, political ads, as well as the work that needs to be done, in general, on antitrust, so that our laws are sophisticated to be able to deal with the current competitive landscape.**

**But speaking of California, so, the New York Times is reporting, and maybe other news, as well, at 2:28 today, that in fact, the Trump administration will end California's authority to set stricter auto emission rules tomorrow.**

**And I would like to know, and this is for you Mr. Delrahim, are you aware of any contacts between or efforts to exert influence by the president, any employee of the White House, or any advisor to the president and any Justice Department official or employee relating to any investigation into the automakers negotiations with the state of California, regarding vehicle emissions standards?**

DELRAHIM: You're referring to the Justice Department's report investigation?

**KLOBUCHAR: Yes.**

DELRAHIM: None, whatsoever. Nor have I had a communication with anybody, outside of our building. There's been reports that, somehow, we coordinated this with the EPA, DOT. And I would refer folks to the first report of this. Our inquiry and letter to the car companies was sent a couple of weeks before and the letter from those agencies went the day the news reports publicized our inquiry.

**KLOBUCHAR: Are you aware of any contacts between officials at the EPA or the DOT and your officials, none from those agencies or from the White House?**

DELRAHIM: I am not. And you know, I also should say that, you know, the Justice Department often works with different agencies in enforcing their rules so, you know, I don't--

**KLOBUCHAR: Well, how about other people at the Justice Department like the attorney general or did--**

DELRAHIM: I am not. Nor did I communicate with them. And you know, there's a lot of miscommunication--

**KLOBUCHAR: Well, why would you be focusing resources on this when we've just discussed all these huge investigations that should be going on, on four automakers that are simply trying to work with one state to figure out what the auto emission standard should be, when the administration is so clearly opposed to this?**

DELRAHIM: So, that's a very fair question. Let me say why. And this is not unique, in this particular instance.

We read about the car companies working together in an agreement. There's been multiple Supreme Court cases, Justice Stevens had said that, you know, we have chosen a policy of competition, not collusion.

There's nothing wrong with these companies, individually, to announce, you know, higher emission standards, if they wanted to.

There may not be anything wrong with them agreeing with the state to do so. In fact, there might be certain immunities, like state action doctrine, to do so.

They cannot cooperate amongst themselves. And I can name at least four or five other investigations, which are similar, as far as collusive activity, after which we have inquired.

**KLOBUCHAR: This is in the wake of so many other administration related comments, related to antitrust that I'm just so fearful that it's going to undermine our laws, undermine the work of the department. And this gets me to one specific merger, Team Mobile, Sprint. Why--I disagree with the outcome of that, of course.**

**And why risk the harm to competition, when the simple solution would be to block the merger and leave Sprint, a company that is rolling out 5G, as we speak, in the market, as a competitor?**

DELRAHIM: So, we investigated that transaction for about 13 months. And that's not the conclusion we reached. In fact, there was two chunks of mid band spectrum, Sprint holding about, I think, 100 MHz of 2.5 spectrum, very valuable in this space for 5G. And Dish is sitting on 95 MHz of spectrum for several years, which probably would have been going into litigation, next March.

What we did, and then, you have two major providers in AT&T and Verizon, who together, had over 75 percent--

**KLOBUCHAR: --Dish doesn't even have a mobile network, right now, right. They just have a spectrum. They haven't even done this, before.**

DELRAHIM: --They do not but--

**KLOBUCHAR: It's just this hope and a prayer that they're going to build this 5G network.**

DELRAHIM: Well, I don't think it's a hope and a prayer. Our consent decree, not only commits them to doing so, they also narrowed the use, the flexible use licenses they had with the FCC.

In addition, you are now going to have Sprint, Team Mobile combined with the remedies that we put in, providing real competition to AT&T and Verizon, for the first time, to consumers. On top of that, the 5G that Dish has, now look, they've spent \$20 billion on the spectrum and probably committed to spend another \$10 billion-\$15 billion in building it.

I don't think they are doing that to fail. I hope it's not and there's going to be a number of provisions and a monitor in there to do that. So, I actually think there's a number of ways of looking at it. I think the consumer, particularly in the rural area, is going to win at the end of this, if the merger goes forward.

[...]

**GRASSLEY: Okay. And I don't mean to be disrespectful but you've always been Makan to me. So, Makan, the NOPEC bill, the No Oil Producing Exporting Cartels Act, would explicitly authorize the Justice Department to sue oil producing cartel members for antitrust violations and clarify that courts shouldn't decline to hear a case, based upon sovereign immunity or an act of the state or foreign sovereign compulsion or political question doctrine.**

**I've written to you, twice, about getting the antitrust division's views on NOPEC. I haven't gotten any response. What is the antitrust position on NOPEC? Do you support the bill?**

DELRAHIM: Well Senator, I think, as you've stated and your bill addresses cartels in any way, you know, can harm and do harm American consumers.

The legislation and the activities of NOPEC implicate other foreign policy implications and we don't have an administration clear position. You've seen my personal positions on this matter, in the past of what we could be doing and I don't think the current law, current precedence, and the Justice Department's filings and private cases in the past, preclude the department from bringing such a case, should a deterrent decide to bring one against commercial actors involved in OPEC.

But as we see some other foreign policy matters, including over the weekend, I think it implicates certain diplomatic relations that other departments of the administration have weighed in on and would be. I look forward to seeing if we can resolve that and get a views letter to you, soon.

**GRASSLEY: Well, you just answered my last question. So, I'll get an answer in my letter.**

DELRAHIM: I hope so.

**GRASSLEY: What do you mean, you hope so. You run that show, don't you?**

DELRAHIM: Well, it's the Justice Department and then, it goes and there's an interagency process on this view. But I can assure you that it is an area that we've given a lot of time and resources, as has the White House.

**GRASSLEY: Okay, also Makan, earlier this year, I introduced a bill to provide anti-retaliation protection for antitrust whistle blowers. The bill implements the recommendations of the July, 2011, GAO study to increase greater criminal antitrust violation detection and deterrents. Versions of this bill have passed the senate several times.**

**I hope you're familiar with the bill. If you are, do you believe it would be helpful in going after antitrust violators?**

DELRAHIM: I think it would be helpful and I believe we have expressed support for that bill. I will check on that and get back to you but I think it is a sound policy that would complement and further enhance our cartel enforcement activities.

[...]

**GRASSLEY: Okay. And then, to both of you, I wrote a letter to the FTC, last October, highlighting potentially anti-competitive contracting practices by hospitals and insurers. The Wall Street Journal reported so-called anti-steering contracts that prevent insurers from steering their members to lower cost, higher quality care providers, simply because the dominant hospital doesn't want to face competition.**

**Chairman Simons, has the FTC looked into these practices in more detail, since my letter, last fall? Are they problematic? What actions, if any, has the FTC taken?**

SIMONS: We are very interested in looking at unilateral conduct by hospitals that are problematic under the antitrust laws. But generally, when we do that, we find that they are nonprofits and we don't have jurisdiction over them. And so, that's another reason why we've been asking the Congress to eliminate our exemption for nonprofits.

**GRASSLEY: Gosh, I never gave that any thought. We ought to consider that.**

SIMONS: Yeah, please do.

**GRASSLEY: Okay.**

DELRAHIM: So, I can address that, as well, since we do. You have, Congress has given us the authority to look into nonprofit hospitals. Perhaps, another example of things you probably wouldn't start from the beginning.

But we've had two enforcement actions on exactly that type of practice, the anti-steering. One involved a North Carolina Atrium Healthcare, to which we were prepared to litigate that had been in investigation for over three years. And we entered into a consent decree, where the hospital system terminated those practices, just this past year.

And then, the second one was in Michigan, a hospital system that had done that. I can also report to you that there is a working group, within the administration, to look at if there's a regulatory way to address these types of anti- steering provisions and the White House has expressed a lot of interest in this issue.

[...]

**LEAHY: Thank you, Mr. Chairman. I know Senator Klobuchar has already raised the questions on the environmental standards in California. Of course, as an average American, it appears to be totally political, especially, when the president is going out for a political event in California and would announce that he will set aside a California law as sort of, the Emperor is here, let's go with this.**

**And a law that Californians are in favor of because it protects their environment. I mean, the whole thing, if you had it on a TV show doing that, you'd say that's ridiculous or ludicrous. It goes beyond the pale. It has no credibility.**

**But be that as it may, aside from that question on decision, I do worry about the president using the levers of law enforcement to target political opponents. Earlier this year, it was**

**revealed that President Trump, personally, admitted the Justice Department blocked the merger between AT&T and Time Warner, which owns CNN.**

**So then, in the past, such decisions made by the professionals in the Department of Justice. So, they then following what the president said because he was concerned that the news media actually reported some of the things he had said.**

**They unsuccessfully, tried to block the merger in court. Now, it's worrisome because those of us who are lawyers, who have been prosecutors, think of the Justice Department being independent. And I know the Justice Department recently refused to turn over documents related to the AT&T, Time Warner merger to the House Judiciary Committee.**

**So, let me ask you this. As Assistant to the Attorney General the antitrust division, has the White House directly or indirectly ever communicated its preference to you regarding any enforcement or potential investigative action?**

DELRAHIM: I can, unequivocally, say no, Senator. And in fact, with the AT&T matter, there were, I think it's been public, there were, at least, five different settlements, which would have had AT&T buy CNN. And they would have resolved the competition concerns. In addition to the president, there were at least, I think 14 Senators from this body who also wrote to me with concerns about that transaction.

I have committed to you and this committee, as well as, both in person and in writing that I don't view politics having a role into our enforcement decisions, nor should it have a role from us abstaining any enforcement precision.

**LEAHY: Okay, Senators have written, too. But nobody from the White House did that, nobody from the White House, directly or indirectly, indicated their preferences, that's correct?**

DELRAHIM: Correct, Senator.

**LEAHY: That's your answer.**

DELRAHIM: That is my answer. And in fact, you mentioned the documents not being turned over to the House Judiciary Committee. There were many documents that were, you know, that were not privileged for one reason or another or document that were confidential that were turned over, not only to them, but through FOIA requests, to multiple parties.

And in fact--

**LEAHY: --During your tenure, has the antitrust division ever changed the scope or substance of any investigative enforcement or litigation decision, based on input from the White House?**

DELRAHIM: No.

**LEAHY: None.**

DELRAHIM: None.

**LEAHY: The--I asked you this because there is this appearance that the president has successfully influenced specific enforcement decisions. And the day after Team Mobile, for example, announced its intended merger with Sprint, senior executives at Team Mobile began booking rooms at a hotel the president owns here, in Washington, D.C.**

**A lobby in the Trump administration approved the merger but they spent some money at that hotel, \$200,000. Must have been a nice room.**

**Were you or any other Justice Department officials made aware that Team Mobile executives' decision to stay at the Trump Hotel before that information was reported publicly?**

DELRAHIM: No, Senator, I was not.

**LEAHY: Did the White House express its preferences with regards to the Team Mobile merger to DOJ?**

DELRAHIM: Not that I'm aware of. Not to me, certainly, and nobody that I know of in the division.

**LEAHY: Well, if they had, you would have been aware of it, correct?**

DELRAHIM: I would have been.

**LEAHY: Just coincidence that Team Mobile repeatedly returned to the Trump Hotel, running up that tab while seeking the Justice Department's approval for its merger.**

DELRAHIM: I would direct you to the Team Mobile executives of why they did. I could give you one reason they might have. The Trump Hotel is right next door to the Justice Department building. So, I think, as a matter of convenience, it might have been. But I have no idea.

**LEAHY: So is the Marriott, the Willard and several others.**

DELRAHIM: It's literally, next door, Senator, at the Justice Department. So, I have no idea why they did, nor did I, does that factor into my decision.

**LEAHY: I've actually been to the Justice Department. I've been in that area. I know where it is. I know that it's very important that to them they be able to have somewhere they could walk to in a matter of seconds because none of them have cars available to them or anything else.**

DELRAHIM: Senator, I can assure you that my decisions are not based on the hotel stays of any merging parties. I can tell you that. You know, my enforcement decision is not bought by a couple hundred thousand bucks of hotels and--

**LEAHY: Did you commit to comply with a notice of reporting requirements provided in the Music Modernization Act, before you took any action in DOJ's review of the ASCAP and BMI consent decrees?**

DELRAHIM: We have, Senator, those are important decrees but we have complied with the provision of the Music Modernization Act, which states that we should within reasonable notice, notify the committee, should we decide to terminate.

We've done even more than that. Before we published this for public comment, we notified the four, the Ranking Member, Chair of the subcommittee, as well as the full committee, here, and in the House, before we decided to do anything. We have communicated that.

I'm no stranger to this committee, having had the great privilege of serving on the staff of the committee. So, I know full well the importance.

**LEAHY: I had the opportunity to be on that committee, on this committee at the same time you were here.**

DELRAHIM: I had the great honor to serving alongside of you, Senator, both as Chairman and Ranking Member.

**LEAHY: I will submit some other questions, if I might, for the record and I have for both, Mr. Simons and for you, sir, and ask that you respond to them.**

DELRAHIM: Thank you.

[...]

**HAWLEY: I mean, here's my question. Just what I see from your agency is, frankly, a culture of paralysis. I'm tempted to call it a culture of capitulation and I worry about**

**agency capture. I just wonder, is there something--I don't have the answer--but is there something structurally problematic at the FTC?**

**I mean, what is it that the FTC is really doing with its time? I mean, I think it's fair to ask. And I don't know the answers to these questions but I think that it's time that we ask them. I don't know why we would authorize more personnel and more money for an agency that doesn't seem to be vigorously enforcing the laws.**

**Now, you both have talked about the overlap in jurisdiction. Maybe we should clean up that overlap in jurisdiction by removing it from one of your agencies. I mean, is that, what do you think about that? Would that be something that would make the process better?**

**Mr. Delrahim, let me ask you to, give you the chance to weigh in, here. I mean, should we clearly designate enforcement authority to one agency, so that we don't have these clearance problems and this seeming lack of enforcement we've been seeing?**

DELRAHIM: Well, as an administration official, I don't have a view on that. But I think it's perfectly an appropriate area of inquiry for this committee to take a look at the overall system that we have in this country.

I mean, we have, I was privileged to serve as a Commissioner on the antitrust modernization commission. There were a number of recommendations and that, 10 years ago, 12 years ago, now, that were there.

But that was one of the very small areas that we looked at. But there's a number of areas of inquiry that, I think, are worthy of your attention.

[...]

**BLUMENTHAL: Words. Let me ask, because my time is limited, to move to another topic. On the issue of the Ticketmaster Live Nation consent decree. Is the Department of Justice considering extending the merger conditions?**

DELRAHIM: Senator, that's a--the consent decree expires next year. We have been examining allegations of violations. Beyond that, I can't comment about what we are finding or intend to do. But rest assured, it's one that we heard you loud and clear in your letter, as well as several folks.

One of the challenges that I fixed, when I arrived, is that all of our consent decrees going forward, since I've been confirmed, include provisions that forces the parties to agree to a lower standard for review.

The current, the organic standard for a violation of a consent decree, which is probably why we haven't seen enforcement of consent decrees, too many of them, is, was that a term has to be

clearly unambiguous and you have to prove in the court by clear and convincing standard. I don't need to tell you how difficult of a standard that is.

**BLUMENTHAL: That is a difficult standard, I would agree but I hope you would agree with me that the merger conditions have been, largely, ineffective and there's a need for scrutiny and further review, here.**

DELRAHIM: Absolutely.  
[...]

**BLUMENTHAL: I have one more question and it concerns the automobile industry investigation that has been discussed.**

**To quote the former chief counsel to the DOJ antitrust division, Gene Kimmelman, I'm sure you both know him, he has said quote "it has never been considered a violation of antitrust law for companies to get together and promote a policy decision".**

**Now I'm stating an axiom of antitrust law. Well known to both of you, that if manufacturers or retailers or anybody else get together to talk about a policy position, it is not a violation of the antitrust law.**

**How do you justify this investigation?**

DELRAHIM: I'll take that one step further.

It's not even a violation of antitrust law should they go to an agency and seek regulation or legislation. Supreme Court has said the antitrust laws don't trump the right to petition your government of the First Amendment.

However, it's been a clearly violation when there's collusive activity. In fact, there's a case in Michigan where auto dealers had agreed amongst themselves not to open on Sundays so they could observe church hours. The courts found that to be a violation.

Attorneys agreed amongst themselves to increase the standard of representing indigent defendants. A goal that we all--

**BLUMENTHAL: They're simply agreeing they're going to follow existing state law.**

DELRAHIM: So, we don't know, all I know is what was reported in there. That's not what they have said, and they don't need to agree amongst themselves to do so.

They could tomorrow disband the agreement and say, "You know what, I'm going to agree to higher emission standards."

We don't have a problem with that, we would encourage that. I don't know why they need to agree amongst themselves to lower output. There's been an established policy to not do that and a policy towards competition rather than collusion regardless of the outcome.

We've seen that in Maricopa County where the physicians got together to set a max price for healthcare. Something we all support is lowering healthcare.

The Supreme Court said no, that's illegal you don't do it collusively. So that's--

**BLUMENTHAL: --I hate to--have a longer discussion but I appreciate the chairman permitting me to ask that question.**

**LEE: You bet. Happy to do it but we've got a clock is ticking down on a vote.**

**We rely on the good mercy of the cloak room staffs but Senator Whitehouse I understand you'd rather go first than after we recess and reconvene.**

**WHITEHOUSE: If you don't mind, I'll follow up on Senator Blumenthal's questions because Mr. Delrahim every single example you just gave, it was collusive conduct by the group without the participation of a government, right?**

DELRAHIM: Ah, I--

**WHITEHOUSE: What was your first example?**

DELRAHIM: To be honest--

**WHITEHOUSE: The lawyers getting together.**

DELRAHIM: The lawyers got together probably did not include the bar system but there have been many examples of this, including the North Carolina Dental Board, where the parties have done that.

So, it's not so much that just the government being involved in collusive conduct does not immunize that. The Supreme Court has been quite clear. You need to meet two prongs. There has to be a clearly articulated policy by the state, there also has to be--

**WHITEHOUSE: --That's (INAUDIBLE) state action, that's different. This is like Noerr-Pennington getting together to address grievances.**

DELRAHIM: They--

**WHITEHOUSE: --How on earth is it possible that these four companies which have a very small share of the overall car market sitting down with California in these circumstances and negotiating their fuel standard with California is a violation and what the American Petroleum Institute does in this building every day, plotting and planning to try to defeat renewable energy, clean energy, electric vehicles.**

**All of those groups, the entire fossil fuel industry out to try to damage its competitor. All day long they do this here.**

**The Koch Industries people defending their ability to refine and pollute with fossil fuel, Marathon Oil has fingerprints all over the whole auto cafe standards debacle.**

**It's just bizarre that of all the different political schemes that are going on right now to harm competition, the one you pick out, the one that you pick out is the one in which the White House has gotten itself enraged because its scheme on behalf of the oil industry to bust up the cafe standards got disrupted by the auto industry going to a different government and agreeing to a different rule.**

DELRAHIM: If I may answer you. Two points that you've raised.

First, it's not the one I've picked out. We have looked at the college admission counselors, we have looked at AP's in elite high schools, we have looked at--

**WHITEHOUSE: --college admission counselors were going to a state and asking for permission to do a certain thing or asking for a certain regulation and you went after that as an antitrust violation?**

DELRAHIM: No Senator, the college--

**WHITEHOUSE: --well you're--you're, quite throwing apples when we're talking about oranges.**

DELRAHIM: Well the conduct needs to be examined first. Then the immunity to that type of conduct--

**WHITEHOUSE: --were you looking at the American Petroleum Institute? Have you looked at the fossil fuel industry's effort to combine and collude to manipulate Congress to squelch competition? That's perhaps the most obvious fact of our existence in this building.**

DELRAHIM: I hear your point Senator. Let me just tell you we have not concluded there's a violation. All I have done so far is ask them for--to come in and explain to us if there was communication between them, the context of which and why they need to do that collusively.

**WHITEHOUSE: You don't think that the members of the American Petroleum Institute discuss with each other what they're going to ask their lobbying organization to do?**

DELRAHIM: If they discussed--

**WHITEHOUSE: You (INAUDIBLE) the American Chemistry Council does that?**

DELRAHIM: If they discussed prices and output, you would be sure I would go down on them and send them a letter, do you have any evidence?

There's been no reports that they have done that senator.

**WHITEHOUSE: Fuel standards or prices?**

DELRAHIM: Nor have I got--

**WHITEHOUSE: Fuel standards or prices?**

DELRAHIM: They have come to Congress as far as I know and just like you said that is protected under the First Amendment and I'm not defending them and I would defend their rights, these four car companies if that is what they did but that is not what has happened.

So, if you're telling me I can't even investigate four companies that might have colluded. We don't even know if they have agreed on prices.

We don't know if they have said, look any--

**WHITEHOUSE: --you don't know if they agreed on price? Do you have any information that they've agreed on prices?**

DELRAHIM: I have nothing. That's the purpose of an investigation. Doesn't mean I'm bringing a lawsuit tomorrow--

**WHITEHOUSE: --ever heard of predication? You just fire off letters at random without any evidence that the misconduct is underway?**

DELRAHIM: You fire off letters to ask them for information to see what the next step is. I don't know if you read the letter that I sent. I brought it hear, apparently some in the media have it but I'm going to read it for you because I think it should alleviate a lot of your concern.

**WHITEHOUSE: I doubt it but go ahead.**

DELRAHIM: I'm somebody who's owned two Priuses and one of the first owners of Tesla. I'm not out there and I've lived in California.

Believe me I'm not out there to try to increase pollution into the air, but I have a duty to do and I'm not going to shirk that for political heat.

**WHITEHOUSE: The opposite is my suggestion to you. That you're doing this for political reasons, you're doing this because the administration is fed up and cross that they got their little scheme to bust up the cafe standards interrupted by California.**

DELRAHIM: With respect senator I think once you hear the exact letter--

**WHITEHOUSE: Put it into the record. Put it in the record, my time is up. What I would like to ask you to do though, was a question for the record is to ask for let's say a years' worth of such letters you've sent to other industries.**

Again, this seems really unique. I mean I've been the Attorney General of my state. I've done antitrust work. It was always the gold standard that when a group of companies got together with a government to negotiate what the government standard would be and their adherence to it, that was protected.

So, to me, this rings all sorts of really strange bells. It's really bizarre and in the context of the long saga from the voluntary agreement with the Obama administration to the discomfort with some of the technical terms, to reopening the conversation to suddenly Marathon Oil and other companies barging in and running off with the conversation, forcing the auto industries to find a fair forum someplace to try to work this out.

The fair forum being the State of California, a government and now suddenly with the president evidently furious about having this little scheme disrupted, suddenly this very peculiar letter that doesn't seem to have either basis in Noerr-Pennington or a rationale in predication from you.

It looks an awful lot like scores are being settled here and God forbid that the Department of Justice should ever become the tool for political scores to be settled.

DELRAHIM: I agree with you on that senator and it's not what's going on here.

**WHITEHOUSE: We'll see.**

[...]

**LEE: We now reconvene. I--I apologize sincerely for the delay. It shouldn't take that long to cast four votes and it did. Welcome back. I've got a question I want to ask both of you.**

**So given the dominant role that certain tech companies play in the public dissemination of information, dissemination of information particularly constituting news and commentary. It would be concerning if they were purposely undermining certain points of view. If there was sys--systematically doing so along partisan political lines for example.**

**Should viewpoint bias--political viewpoint bias be the subject of antitrust enforcement?  
Mr. Delrahim, we'll start with you.**

DELRAHIM: (OFF-MIC)

**LEE: Hit the--hit the button if you will.**

DELRAHIM: Sorry. I think senator, it's a--it's an important question as a matter of public policy and it's something that I think every American regardless of point of view should be concerned about. To the extent, it's part of the qualitative analysis of under antitrust law, I think that's a very legitimate question. So is a monopolist, somebody that has market power engaging in any kind of conduct that prevents a competitor who might, you know, have a different viewpoint or allow for different--diverse viewpoints into the marketplace, then I think the conduct that prevents that type of competition will have an impact on the viewpoint that ultimately gets to the consumer.

So I think as if it's--is part of the qualitative analysis of monopolization in addition to price and output looking at, you know, choice and quality, I think it could be outside of that. I think it might be probably a better role. So if it's not within the four corners of traditional antitrust law as we look at it, then it's probably a better role for other public policy tools.

SIMONS: Something similar mice--you know, the antitrust doesn't seem like it's a--like it's a tool that's well sculpted for this type of effort. So you--you know, if somebody just becomes successful and gets a big share because of their success, you could run into the same problems even though they haven't committed any--any--any competitive acts, right. You might also have a problem if, you know, the two biggest news organizations merged, you can have a problem for example. But my--my sense is that this--this would be something that would be better suited for another--another set of tools other than the ones that antitrust brings to bear.

**LEE: Got it. Mr. Delrahim, traditional market definition tools such as the hypothetical monopolist test typically rely on pricing information. Pricing information is either elusive or absent altogether in zero price markets where services are monetized through advertising. So what--what factors should the Antitrust Division consider in that type of market when conducting this type of analysis?**

DELRAHIM: It's a again an important element of our analysis. I gave a speech about zero price products and the division and the Federal Trade Commission for years, we have looked at markets that are priced zero to a set of customers, however there is a price tag. As an example, I'll give you no airplay over the radio for certain music the consumer is not paying for that

however advertisers will, broadcast television is. And so we--we have to look at the tools of what is, you know, is this consumers preferences, are there substitutes for the product and ultimately, who is paying for that?

Somebody is so let's just pick as a hypothetical example, a company that provides search services even though that search to the ultimate customer may not have actual price. The price of the search to the advertiser may be one area we could examine.

**LEE: Thank you that's helpful and so in that respect this isn't no, it's not completely unique, it is--there--there are some models you can look to. As part of your tech reviews, both of your agencies have been actively soliciting third- party complaints. I realize you have the need to talk to third party witnesses to investigate and potentially build a case, this makes sense. What I'm always fearful of is that I would never want to see U.S. antitrust policy start to look like antitrust enforcement in the EU, antitrust policy in the EU where the primary concern seems to be protecting competitors rather than competition itself. Mr. Delrahim, how will the Department of Justice ensure that U.S. antitrust policy in the tech space remains focused on competition rather than on competitors?**

DELRAHIM: That's a very important part of think of our antitrust regime and we would look at that. We have long- standing Supreme Court precedent that says the antitrust laws are not intended to protect competitors but competition itself and that's what we look at and our enforcement actions should be consistent with that we also work with our friends abroad including with the--the European Commission I think more and more we're seeing more convergence of course, they have a different regime both administratively and some of the substantive law under the treaty that they operate in. And so there are some differences but nothing more and more, I've been encouraged about the way they look at antitrust and how they apply it.

**LEE: Mr. Simons, I've heard arguments that data collected by large platforms give those platforms of--an unlawful, unfair competitive advantage and that in light of that competitive advantage, we should give these--we should require these platforms to give their competitors access to see their data. Is it appropriate in your view, Chairman Simons to treat these platforms as essential facilities and--and what--what if any concerns would you have with that kind of approach?**

SIMONS: No, I think it's not--not a good idea at all to treat them as essential facilities or public utilities because one of the great strengths of our system is that it produces innovation unlike anywhere else in the world and subjecting an industry to public utility type regulation runs the serious danger of squelching that.

**LEE: In February, the--the FTC announced the formation of its technology task force to monitor the tech industry. Is it fair to say that the FTC created the technology task force because there are benefits to having a dedicated staff focusing specifically on those issues?**

SIMONS: Yes, absolutely.

**LEE: Why is that?**

SIMONS: Because this--so we do this with a lot of different industries so we have a healthcare shop we haven't--we have an oil shop and those industries are such that if you have a background in the industry, it's easier to do in--a merger and valuation, easier to do an evaluation of any competitive conduct because you understand how competition occurs in that industry already.

**LEE: Did you can get that industry? So if you've got a dedicated pool of staff--of staff who are assigned to look for those factors, know what they're looking for and they know it and they find it?**

SIMONS: Yeah, so they've--they've--they've studied that particular industry, they know how it operates, they know the peculiarities. And--and some of the industries like, you know, hospitals for example, have a regulation overlay which is difficult to understand sometimes, and that's particularly true in--in the context of pharmaceuticals.

**LEE: So this will make you more effective in doing this?**

SIMONS: Yes.

**LEE: Then, if that's the case, if you're more effective in having a dedicated team like that, wouldn't you be more effective if you could consolidate those resources rather than having them split into two antitrust enforcement agencies?**

SIMONS: Sure.

**LEE: Do you disagree Mr. Delrahim?**

DELRAHIM: Hard to disagree with that.

[...]

**BLUMENTHAL: Thank you. I have a question about the FCC's approval of Sprint T-Mobile and the merger head of the Department of Justice. Mr. Delrahim, your division opposed the proposed Sprint T-Mobile merger as it was originally filed and fought to require several large divestitures in the transaction.**

**In its competitive impact statement, the Antitrust Division alleged that without substantial changes, this merger would "would substantially lessen competition for retail mobile wireless service in the United States resulting in increased prices and less attractive service**

offerings for American consumers as the Antitrust Division stated the-- this practice would violate the Clayton Act."

**But months before the Antitrust Division finished its assessment, the FCC chairman, Chairman Pai announced his glowing support for the same merger proposal that your division said would violate the law. And in his statement, he assured the public that T-Mobile's promises were enough and stated that "the sale designed to address--the sale is designed to address potential competitive issues." The FCC required little almost nothing of T-Mobile and provided clearance before your division ultimately approved a merger with condition.**

**This sequence of events strikes me as highly problematic. So my question to you is the does the Department of Justice agree with the FCC's conclusion that the original merger was "designed to address potential competitive issues" and when you originally reviewed the proposed merger didn't your staff find the deal to be ending competitive, anti-competitive, and recommend blocking it?**

DELRAHIM: So senator, the FCC, although Chairman Pai's a fantastic antitrust attorney who is an alumni of the Antitrust Division I should say. They look at their license transfer authority under the Public Interest test. There is some competition elements under the Supreme Court's RCA decision. However, they don't look at it the same matter nor the same markets as we do under the section seven of the Clayton Act had we not gotten--so they did what they did. They're an independent agency that has a different statutory construct and statutory mandate than we do.

We were prepared to sue to block that transaction had we not gotten the remedies that we did and what some of the very important elements of the divestitures is that during the first three years, dish will be able to-- there's an MVNO deal that can offer without any limits on capacity the retail prices. And then there's incentivized structure by which they would have to build their own 5G network.

It's a I think the ultimate resolution is output enhancing. It'll be pro-consumer and with the results it would have, you know--it wouldn't have been necessarily ideal but under antitrust law, the FCC's conclusions to approve that under the Public Interest test would not have had any presidential effect had we chosen to block that transaction and I was prepared to do so had we not gotten the divestiture that we got.

**BLUMENTHAL: But we've been talking here about overlapping jurisdictions. They-- you're the ones with jurisdiction over competition and antitrust enforcement for him to say in those glowing terms that it promotes competition seems to be out of his lane.**

DELRAHIM: Well, you know, the decisions of the Supreme Court with respect to the public interest says that they can look at competition as an element. However, that is not binding on our

decision and had we brought a case, had the parties argued that somehow, the FCC's decision supplants ours, we would have vigorously argued against that.

**BLUMENTHAL:** Well, I guarantee you if you had brought a case, those words would have been stuffed down your throat in a courtroom. Correct?

DELRAHIM: Probably as would have their, you know, three-year price commitments would have been and therefore our modeling would have had to have been different. However, you know, fortunately we were able to get to a resolution that ultimately I think will be better for the consumer.

**BLUMENTHAL:** I have the this one last question Mr. Chairman, thank you. Thank you for that response. I still think there is a an issue here that since we've been talking about jurisdiction needs to be addressed. Chairman Simons, I think the Federal Trade Commission oughta be conducting retrospective reviews to determine the impact of consummated mergers. The Commission really conducts those kinds of reviews in the question for the record I submitted to you last year.

You responded that the Commission is "exploring the feasibility of conducting merger retrospectives in a number of industries." But you stated that the bureau of economic--"the bureau of economics staff have not found a good candidate merger with data robust enough to enable a retrospective evaluation of the labor market effects." My question is have you found a suitable candidate for that kind of retrospective?

SIMONS: So one thing I think we're going to look at is hospital mergers and their effect on labor. So we think that might be a really good--a good choice.

**BLUMENTHAL:** I would thoroughly recommend that review and I would appreciate the opportunity to make some suggestions to the staff within the limits that a member of Congress is permitted to do.

SIMONS: We'd be happy to have your suggestions.

**BLUMENTHAL:** Thank you. That concludes my questions, Mr. Chairman.

**LEE:** Thank you. Chairman Simons, a little while ago, when we talked before we had to leave to go vote, I asked you if you were advising another country on how to set up its civil antitrust enforcement, would you ever set up a system where you had two agencies enforcing the same substantive law? You said no.

I want to get back to that point briefly if we can. In light of that, why would you ever advise against combining the two agencies? Why would you advise against getting rid of the division that we have here?

SIMONS: I haven't thought about that. LEE: Mr. Delrahim?

DELRAHIM: Again, as an administration official, I don't have an administration position but I don't see that we would object as far as looking at that and possibly that'd be a good solution going forward.

SIMONS: Well one thing--one thing I do have to say is we have some characteristics of the Federal Trade Commission that are kind of unique and I think are very helpful.

**LEE: Sure. and you have authority that extends outside of antitrust law.**

SIMONS: Yeah, and so that might not say that you should only have one but if you were only going to have one you might want to have one with those qualities. In other words, if you're just going to have one agency, you might want to have one that looked more like the FTC than the Justice Department.

**LEE: Right, that is probably a conversation reserved-- SIMONS: I reserve the right to object, senator, right.**

**LEE: Well said, I mean, each has some characteristics that the other one doesn't have. The Department of Justice has other tools that you don't have. You have a few tools that they don't have. So I get your point but thank you both for your candor on that point. Mr. Delrahim, the--the ASCAP and BMI consent decrees have been around for many decades and there is a lot of course that's changed in the music industry since then in terms of the way people experience music. But that doesn't answer the question of what--what has changed in the music industry on the licensing site itself that suggests that the consent decrees may no longer be needed.**

DELRAHIM: Senator, it's a great question and it is not lost on us as far as the established reliance and the models that have been created around that. So there have been a couple of recent changes we've had some new Performing Rights organizations that have occurred in the last couple of year, that's a few years. We also have had a recent Second Circuit opinion dealing with fractional ownership and fractional licensing that has created some changes in that whole industry.

We have made no decisions. We have recently as you well know and we informed you before we took any of these steps is that we put it out for notice and comment. From the public, we've received over 800 comments, we've made those public on our website, I think a week or so ago and now, we're in the process of taking a look to see, do those consent decrees. Are they actually serving as an--as an anti--in an anti-competitive matter to prevent new innovation or new licensing? One, two, does it make sense for the Antitrust Division to continue to be the regulator

in this market again. The free market has not has not ruled as far as those. There's been a thumb on the scale with respect to the licensing and licensing rates.

No question, it has provided some certainty within the marketplace given how many licensees there are. The number of radio stations, funeral homes, bowling alleys, hotel owners and--and such. And we are considering all of those. We will be in touch with the committee with this subcommittee and particularly knowing your interest in this and the direction and the music modernization act to communicate any direction we go in this area whether or not it needs to be modified, it needs to be sunset or to do absolutely nothing and I think we owe it to the public to examine that.

**LEE: Is there anything you can tell us about the timing of your review?**

DELRAHIM: We have not. So as I mentioned, we received the public comments, our staff who are the experts in our media and entertainment section are--are looking at it. They have not made any recommendations, they're tabulating the different comments that we have. As you can imagine, where you're drawing lines in the sand different interest within the industry have different points of view, so there's not one cohesive point of view but we have not.

So no my guess is that within the next three to six months, we will have formulated some viewpoints. At least, we have analyzed the comments and at that time be delighted to share that with you.

**LEE: Thank you. Thank you, that's helpful.**

DELRAHIM: Sure.

**LEE: I know you're both recuse from the Qualcomm matter. So I'm not going to ask you to--one of you to comment on the core merits or the theories behind those case but I--I think this case some of what has happened here illustrates the confusion and the wasted resources that can result when your two agencies don't see eye to eye.**

**Now, I want to make one thing very, very clear here. I'm not--I'm not expressing frustration over the fact that you don't always see eye to eye; government agencies are not omniscient, they're not omnipotent, they're run by mortal human beings.**

**Mortal human beings, sometimes, we'll look at the same close issue of law and reach different conclusions. I'm not saying that it's wrong that you've reached different conclusions. I'm saying that it's weird that we have a system set up that pits you against each other because stuff like this is inevitable. Frankly, I--as long as we're talking about things that are--are--are either mortal or immortal or fallible or not, it's nothing short of miraculous that you haven't had more of these instances in the past but I think it is--it would be an act of denial to suggest this is going to be an aberration.**

SIMONS: I think these stem from the same thing that you're--you're thinking about. So one is Qualcomm and one is the friend issue and I think it's the same view about intellectual property that causes the division with respect to both. So it's really those two are manifold and maybe pay-for-delay as well. Those--those things are manifestations of the--the same difference of opinion.

**LEE: No, I get that, I get that. But getting back to what I was saying earlier, one of my colleagues during--during questions suggested that, you know, somehow I was talking about the dual sovereign property. That's not my issue. My issue is not that there are two sovereigns involved in the issue the federal government and the state at issue. My concern is that within the federal sovereign we have two kings, two Caesars, two czars, whatever you want to call your agency.**

**We have two enforcement agencies that are not always going to see eye-to-eye for this or that reason, for perhaps very legitimate reasons. So Mr. Delrahim, before Qualcomm, can you tell me when was the last time that the Antitrust Division of the Department of Justice joined the litigation to oppose the position being advanced by the Federal Trade Commission?**

DELRAHIM: I am--I don't know if there was. However, I can't tell you in my last tour of duty at the department where I was the deputy for appellant international. We did file separately from another independent agency the Securities Exchange Commission. In the Second Circuit, we had two different views where we did not believe that unless there's a repugnant conflict between the two regimes, there should be an implied immunity from the antitrust laws.

The Securities Exchange Commission at the time took a different view, the Solicitor General agreed with our point of view and we filed two separate briefs in the Second Circuit. I also--

**LEE: Yeah, that's messed up but--**

DELRAHIM: It is. I also know that again, back then, when there was the viewpoint also from the Federal Trade Commission that came to the division in the--I believe the Schering-Plough case where I believe it was the Sixth Circuit or the Eighth Circuit where they had--the Federal Trade Commission had lost on a theory that the department did not agree with and they have certain authority to independent litigate in the Supreme Court came to the division, the Solicitor General and the Antitrust Division did not agree with that theory of per se law, you know, the illegality of certain paper delays when it was within the term of the patent and the FTC went up, then the of course the Chief Justice was not unfamiliar with the solicitor's office asked for the cert worthiness view of the Solicitor General and they took an opposite position with the Supreme Court in that same case.

So it has happened, it's unfortunate. I think we--we do our best to avoid that whenever we can but those are--those are important politics. I should also note, it's not just FTC and DOJ, you know, perhaps in the Qualcomm case with the--and the FTC there's there appeared to be at least publicly different viewpoints amongst the commissioners. So, you know, there is dissent but it's not just necessarily just the two agencies.

**LEE: Sure, sure. And within the FTC they do have rules that determine when the Commission is taking a position and when it isn't in the absence of unanimity. You want to identify in other instances like that?**

SIMONS: No, the only--the only one I was thinking of was the Schering-Plough one. That's the only one I'm aware of.

**LEE: So I--I again I want to emphasize the problem is not that these things happen the problem is that they can happen and the fact that they do sometimes happen with other agencies between other agencies other than your two doesn't make it any more acceptable here and that is and ought to be a concern especially in something like antitrust, whereas the civil enforcement agencies for antitrust laws, you have to investigate, you have to reach a conclusion and where you have even the possibility of multiple investigations involving the same conduct, the same actor or actors, the same substantive law, you've got this almost unavoidable opportunity for conflict. It really undermines either agency's ability to do what it needs to do. Senator Blumenthal.**

DELRAHIM: Mr. Chairman, can I just make two quick points for the record so the records can reflect this? First is Senator Whitehouse had asked any instances where there's been collusive activity, where there's been a state actor in North Pennington and there's the case of ally tube (SP) at the Supreme Court is an important one where there was collusive activity this was about standards for, you know, different types of tube to be used. There was state--

**LEE: Tell me about one that was--with you--it's okay if you don't remember.**

DELRAHIM: I do not remember. I want to say in the late 70s--

**LEE: Like 1980.**

DELRAHIM: When was that?

**LEE: It was like 1980.**

DELRAHIM: Yeah, so it was 80 when it was decided by the Supreme Court where the defense of North Pennington because there was a state actor there was advanced and Supreme Court rejected that. So that's one. The other is that you had asked a question about, you know, kind of the tech agencies and the--and the expertise and I agree with the Chairman why it's important to

have that in each agency and--and commend them for creating the technology task force and I just wanted to let the record reflect and for you to know that the division has had what used to be called Network and Technology section.

Senator Blumenthal will know because that's the section that brought the Microsoft case almost 20 years ago and that--they--they were the ones that have continued their activity in this industry and they're the ones who are engaged in--in our current inquiry in the tech industry and it continues to be an important element because they continue to build expertise in that.

Thank you, that's helpful. Senator Blumenthal.

**BLUMENTHAL: Let me ask you about that group within your division. Does it actively and regularly consult with the tech task force that operates within the FTC?**

DELRAHIM: That's a good question. I think the instructions have been in the areas. So I do know that in one of the matters that were involved with that is public and Google, we have been in touch with the FTC as, you know, the FTC in 2000 belief 11 and then 15 had had investigations in Google, they had certain not only documents but expertise that we could benefit from and there has been communication to coordinate on that and I believe that we intend to do that as we do with all the state AG's. Wouldn't it make sense doesn't it make sense for there to be an active and regular protocol of consultation if you're both investigating the same company.

I mean, it's fine for the two of you to express your intent to cooperate but as a practical matter, as we all know, as law enforcers, what really matters is the staff and the investigators and the economists and the people on the ground, getting evidence in your FTC investigation as we discussed earlier, you have evidence that is highly relevant to Facebook's potential use of user information that stifles competition or consolidates and increases its monopolistic power which could be relevant to what your investigation may concern.

DELRAHIM: Absolutely, I think it makes perfect sense. We do a lot of that. There's a number of matters where we do, you know, as I mentioned before, the safe landings, there's a lot that we do jointly to try to increase each other's capacity to be better enforcers.

[...]

**BLUMENTHAL: That is--I'm delighted to hear it. Maybe you can also tell me and I--I join you in commending our present Attorney General for his aggressive pursuit of those criminal and civil potential antitrust violations in the generic market and it makes me miss my old days as attorney general. But can you tell me whether the Department of Justice has an active investigation concerning opioid manufacturers?**

DELRAHIM: It's not--I can't say anything about the with respect to the Antitrust Division or outside of the Antitrust Division. I can say there have been a number of actions on the both of the

civil side as well as others but I'll--I can get back to you broadly from the department's activities in that area.

**BLUMENTHAL: I'd appreciate that, thank you both for being here today and for your testimony. Thank you.**

DELRAHIM: Thank you.

**LEE: Next Tuesday, the subcommittee will be holding another hearing which we'll look at the acquisition--the--look at acquisitions are of nascent or potential competitors by digital platforms. As you both know, many platform markets are somewhat subject to tipping, meaning that the that the firm ends up gaining power, gaining the upper hand, early on often has very significant durable market power.**

**Mr. Delrahim, in your opinion, is--is legislation needed to address this issue or can the agencies already manage this issue through their enforcement of the Clayton or Sherman Act?**

DELRAHIM: Senator, I believe that the guidelines the horizontal merger guidelines could address some of these issues where a company has significant market share and is trying to acquire that. We have recently filed a case in Delaware against Sabre who is a crime--acquiring Farelogix with exactly that theory or some variations of that, we'll let you know how that pairs out.

I think the current laws, you know, in a I--I think with the right theory and the right set of facts a current laws should be able to address that if there is in fact a pattern of acquisition in order to kill what could be the competitor as a violation of the section two.

**Senate Commerce, Science And Transportation Committee Holds Hearing On Pending Nominations**

Wednesday, April 21, 2021

**CANTWELL:** Thank you, thank you. Ms. Khan, one of the things that the committee as ranking member, we did, was issue a report on journalism and the market impacts that local journalism has faced in the transformation to the information age. Google and Facebook play dominant roles as portals to news in media.

**I think you probably understand the challenges that these sectors have--have faced given this--given this level of activity. Do you think that the FTC should review Google and Facebook's use of journalistic content without compensation under the unfair--the unfairness standard that the FTC has?**

**KHAN:** (OFF-MIC) Thank you, senator, and congratulations to you and your staff for such an incisive report—

**NELSON:** You wanna hit your mic.

**CANTWELL:** Yeah, thank you. Thank you.

**KHAN:** Thank you, senator. And, congratulations to you and your staff for such an incisive report. I think you know, we--everything needs to be on the table. Obviously, local journalism is in crisis. And, I think the current COVID moment has really underscored the deep Democratic emergency that is resulting when we don't have reliable sources of local news.

So, absolutely, you know, this would be something that I would hope to focus on at the Commission.

**CANTWELL:** What uncompetitive practices do you see going on?

**KHAN:** So, I think there are two major factors, one of which is the fact that you know, increasingly, news publishers are dependent on a few gatekeepers to disseminate their news and to disseminate their information. And so, a single change in an algorithm can plummet readership and subscriptions for any publisher.

And so, I think there's some concerns generally there about the arbitrary whims and the arbitrary power that these firms can exercise. I think there are also serious concerns about concentration within the digital ad market, as well as, vertical integration that has potentially created some conflicts of interest. Some of the lawsuits that were filed last year, I think underscore these issues, as well as, potential, you know, criminal activity, as well. So, I think it will be important to continue seeing how those lawsuits play out, as well.

[...]

**WICKER:** Thank you very much, senator. And, I hope that optimistic answer turns out to--to in fact be--be accurate and I want to do what I can to help it be accurate. Let me turn quickly, then to Lina Khan. Thank you for your willingness to serve.

**You wrote an interesting paper entitled Amazon's Antitrust Paradox, where you discuss applying common carrier regulations to big tech. Are you familiar with Justice Thomas's recent publication with regard to that? And, do you think common carrier regulations can be applied to social media companies like Twitter, Facebook, and YouTube, and please explained why or why not?**

**KHAN:** Thank you, senator. Yes, I--I did get a chance to read Justice Thomas's concurrence the other week. I think, you know, it prompted a lot of interesting discussions. In--in the Amazon article, you know, I really identified two potential pathways forward, when thinking about these dominant digital platforms. One is enforcing competition laws and ensuring that these markets are competitive.

And, the other is, you know, if we instead recognize that perhaps there are certain economies of scale, network externalities, that instead are going to lead these markets to stay dominated by a very few number of companies.

Then we need to apply a different set of rules. And, we have a long legal tradition of thinking about what types of checks can we apply, when you actually have a lot of concentration. And, common carriage is one of those tools. So, I think fundamentally we need to kind of choose one of these paradigms and proceed accordingly.

**WICKER:** But--but in your view of one or the other, it is--is going to be necessary to fix a broken system. Is that correct?

**KHAN:** Yes, and I should clarify that you know, some of these firms are now integrated in so many markets that you may reach for a different set of tools depending on which specific market you're looking at. So, I think we need to be a bit market specific, but yes, overall, I think we need to choose one or the other.

[...]

**KLOBUCHAR:** Thank you very much. I'll start with you; Ms. Khan, Senator Cantwell was asking about the problems for newspaper publishers and news in general. We all know what happened in Australia where literally Google and Facebook tried to hold a whole country hostage. Didn't work, but they tried.

And so, are you aware of the bill that Senator Kennedy and I have with a companion with Representative Cicilline and Representative Buck, which has Senator McConnell, was one of the co-authors last year, that allows the newspapers and the other news organizations to combine their negotiating power to be able to get better content rates. Just, your thoughts on that.

KHAN: Yes, I am familiar with it. And, I should say thank you so much for that generous introduction earlier. You know, I think these types of exemptions that allow coordination have traditionally been used by Congress in instances where you have deep asymmetries of power within the market.

So, you know, historically, Congress passed an antitrust exemption for workers in order to allow them to coordinate. Similarly, with add co-ops, and so in instances where there just seems to be deep fundamental asymmetry of power; I think that type of tool makes sense, insofar as this is a market where we see that asymmetry, I think you know, it could be one step forward, certainly.

**KLOBUCHAR: I like your answer to Senator Wicker, about how you have to look at different markets and different situations differently. And one thing, we're having a hearing this afternoon with Senator Blumenthal and Senator Lee and others on our antitrust subcommittee on the App Store markets, which I think a lot of citizens would be stunned to know that which I know you know, that for a lot of companies that decide they want to and need to be on either Google or--or Apple's App Store markets.**

**It's 13--30 percent off the top. It's somewhere between 15 and 30 that goes out of the pockets of really consumers into these app stores, to these companies. And it's also kind of stunning to know that they are banned, companies that advertise.**

**I'm one of those app stores, that are banned from telling their customers they could get a better deal on their website. And, I just don't know what argument you can make for that. So, do you want to talk a little bit about this issue as Senator Blumenthal and I head to this hearing this afternoon?**

KHAN: Yeah, certainly. It's a significant issue, and as you noted, it's really the source of the power is the fact that you have you know, basically these two--these two main options, right? And so, that gives these companies the power to really set the terms in this market. In some cases, I think you're absolutely right that certain terms and conditions really lack any type of beneficial justification. And so, I think in those cases we need to be especially skeptical and really look closely.

**KLOBUCHAR: And then finally, something that's really relevant because we're trying to get this done quickly. Senator Grassley and I have joined forces and have a bill that restructures the fees that haven't been done since Hart-Scott-Rodino, for the Mega mergers, and actually reduces them on some of the smaller mergers that are paid.**

**And, in order to give the resources to the FTC and DOJ, anti-trust, which are shadows of their former selves, from even the Reagan era.**

**This was supported by the Trump administration. This bill at the very end of last year's, Chief of Staff Meadows, was trying to help us to get it done, as well as, Megan Delrahim and Chair Simons, the former chair of the FTC, as well as many basically had gotten**

**through the Senate. Impromptu. So, talk about the need for resources to take on the biggest companies that the world has ever known.**

KHAN: Yeah, I mean as you well noted, you know, the--the resources of the commission have not really, really kept pace with the increasing size of the economy, as well as, the increasing size and complexity of the deals that the commission is reviewing. And so, I think you know, measures like the one that you're discussing could make a lot of sense to help out.

[...]

**BLUMENTHAL: Thank you. I--I really welcome that answer. Ms. Khan, you mentioned there are two paradigms. Paradigms are theoretical constructs or models, but the FTC is an enforcement agency and the best paradigms, the best laws are dead letter if they aren't enforced vigorously. And, the FTC right now has a complaint against Facebook. Will you be committed to vigorously enforce that complaint and other laws that are under your responsibility?**

KHAN: Absolutely, senator.

**BLUMENTHAL: And, what do you see is the biggest challenge for enforcement when it comes to big tech? Is it the size of big tech, its resources, and power, lack of resources on the part of the FTC? Can the FTC really enforce the law against behemoth corporations like Facebook, Google, Amazon?**

KHAN: I think one of the challenges is just the deep information asymmetry's that exist between some of these firms and--and enforcers and regulators. You know, I think it's clear that in some instances the agencies have been a little slow to catch up to the underlying business realities and the empirical realities of how these markets work. And so, I think at the very least, you know ensuring that the agencies are doing everything they can to keep pace, is going to be important.

**BLUMENTHAL: And beyond the kind of marquee task of enforcement, big tech, and so forth, there's also the continuing challenges of everyday Americans; I'm reminded of one, Joey Robinson of Stratford, Connecticut, who wrote to me about her struggle to find legitimate PPE, personal protective equipment, to keep safe during the pandemic.**

**She told me that after extensive research, she was still swindled. She wrote quote, "they had my money and I have no PPE. No way to get them to refund me. After literally hours on hold and more than a dozen efforts in writing". In effect, she told me, no one was listening, no one was doing anything and there are at least 451 thousand Mrs.--Ms. Robinson's out there. According to the FTC's own data. I would be interested in your views as to the responsibilities of the FTC to those kinds of everyday American consumers.**

KHAN: Yeah, absolutely. I mean this type of fraud and these scams are obviously a huge issue, especially during a time like the pandemic, where they really have life or death consequences. Congress recently gave the Commission additional civil penalty authority with regards to unfair

or deceptive practices in the context of COVID, and so I would hope at the very least, that the agency would vigorously use that authority.

[...]

**FISCHER:** Thank you, Senator Cantwell. Ms. Khan, I appreciated speaking with you before the hearing and I know we had reviewed your experience on antitrust policy, and you mentioned that you got started studying these issues within the poultry industry context. In my own work, I've been pushing for more transparency and competition in cattle markets. Recently, there's been quite a bit of producer sentiment that the cattle market is on the brink of major vertical integration, following trends that we have seen in poultry and pork industries.

**As we look at the forces that can lead to significant consolidation, what factors jump out to you as red flags, that could indicate the tipping point for an industry? Recognizing, as you mentioned previously, that this may vary by market.**

**KHAN:** Yeah, thanks for the question, senator. And, I really enjoyed our--our opportunity to discuss these issues. I mean, I think agriculture is a sector where we see some of the most extreme examples of these trends, where you both have, you know, concentration and then vertical integration.

In ways that really leave farmers and ranchers dependent on you know, sometimes one entity, and that type of relationship, also, of course, can lead to certain types of asymmetries and the ability to dictate terms. And so, I think all of those factors are really important to look at when trying to assess these issues.

**FISCHER:** If you're confirmed as commissioner, how would you or how would this inform your approach to reviewing competition? And in this, how would you specifically look to mitigate harmful effects for consumers?

**KHAN:** Yes, so the FTC has limited jurisdiction in the context of agriculture markets. It's kind of like retail on wheels, in the food supply chain. So, at the very least, ensuring that the FTC is vigorously enforcing the law over the markets in the food supply chain where it does have authority so that we don't have a situation where consolidation down here, you know, upstream exacerbates consolidation.

I think that'll be--that'll be one important thing to focus on.

[...]

**TESTER:** Thank you, Madam Chair. This is for nominee Khan. And it goes kind of on the same line that Senator Fischer was asked questions. I'm in agriculture. Agriculture is the number one industry in Montana. And, feeding people is really, really important. In fact, I think you can control people with food more than you can control with anything else.

**And, we've had--we've had the luxury of having an incredible production agriculture economy that has fed the world. Not just recent years, but for some time, we've watched consolidation creep into agriculture, and the chicken industry, and the pork industry, in the beef industry, and the grains. We've even seen it in--in pulses and--and crops like that. This isn't Amazon. It's not Facebook. It's not new technology, they've been, the big processor has been doing this for decades and decades.**

**And--and I would say that no administration, Democrat or Republican, has tackled this, in my lifetime. I've seen this consolidation result in rural communities drying up, no competition in the marketplace, both on the--when you sell goods and when you buy inputs. You're--you're totally locked into a group of three or four people who could basically go on a golf course and determine what's going to be paid in the marketplace.**

**Capitalism is not working. So, my question to you nominee Khan, is you're a smart person, you know about consolidation. But I think the reason that many of the administrations in the past haven't dealt with this, is because these companies control a lot of money and they control a lot of power.**

**And, they can put that influence into the reelection campaigns of many people that sit on this panel and a whole bunch of others. How are you--how are you gonna deal with the consolidation issue and how are you going to deal with it from a political stand?**

KHAN: Thank you, senator. As you, as you noted, I think there's a long history of recognizing the ways in which concentration of economic power can translate into political power, and so I think those types of dynamics are ones that you know, we face across the board. In the context of agriculture, more specifically, it's the Justice Department that primarily has jurisdiction in the antitrust domain over some of these markets.

I also think that the Packers and Stockyards Act is a real hidden gem of a statute that in some ways was really designed to really head-on address some of these consolidation issues, in the context of agriculture. So, you know, reviving that statute and its enforcement would be another step forward.

I also think you know; the agriculture markets are a really interesting example of some of the additional effects that concentration has, insofar as concentration of the food supply can also lead to all sorts of fragility issues. Which can, you know, come to the surface in particular during times of crisis. So, absolutely, I think these are really, really, important issues.

**TESTER: So, I want to carry on on this line of questioning really quick, nominee Khan, and that is that you said, for the most part, this is in the Justice Department's realm. Look, what I have seen in my 14 years here on the Hill, is in many different issues, broadband is a prime example, where you have many different agencies that are in charge of putting fiber in the ground, or when you have a couple of agencies in charge of dealing with consolidation in the food. They point the finger at one another. What do you intend to do on the FTC in this realm, that is legal within the law for you to do?**

KHAN: Yeah, I mean, interestingly, the FTC's jurisdiction over agriculture markets was actually stripped after the FTC published a big report on the meatpackers in 1920. So, when the FTC did try to go hard here, you know, its jurisdiction was stripped. But as I mentioned earlier, you know the FTC does have jurisdiction over kind of downstream in the--in the food system.

So, especially in the context of food, retail, grocery, and so insofar as sometimes you know concentration and or consolidation in one part of the supply chain can exacerbate consolidation in another part. I think, at the very least, ensuring that the FTC is--is fully enforcing the law over the food markets, that it does have jurisdiction over, is going to be important.

[...]

**MORAN: For this hearing, I had an opportunity to meet both with Ms. Khan and with Senator Nelson, and I appreciate those conversations. They were valuable to me. I--I don't have any questions for you, Senator Nelson. I wish you well and I look forward to working with you both in the Commerce Committee and the Appropriations Committee in regard to, NASA and our future space opportunities; including aviation and aerospace, in Kansas.**

**Let me ask Ms. Khan a question about social media. I've become increasingly concerned about social media companies that promise to be free and open marketplace for ideas, but they're not in my view upholding those promises to their consumers. I've introduced the Promise Act, that would require social media companies to implement, operate, and disclose information moderation policies, and would prohibit a social media company from making a deceptive policy statement, quote/unquote.**

**Violations of this law under that legislation would constitute an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act. What do you see as the role of the FTC in making certain that social media companies are abiding by their public statements and policies when it comes to content moderation?**

KHAN: Thank you, senator. I think, as I mentioned earlier in the exchange with Senator Blumenthal, I think the information asymmetries are so--here are so deep, and that at the very least, we really need the Federal Trade Commission to be using its information collection capacities to really try and mitigate some of these information gaps.

In, you know, social media, we have black box algorithms, you know, proprietary algorithms that can sometimes make it difficult to know what's really going on. The FTC did in the last couple of years use its 6(b) authority to start trying to get some more of this information. So hopefully, that will provide some more transparency. But in general, I think, you know, the commission's information collection authorities can be useful here.

**MORAN: Thank you. I think our legislation is a means by which we can deal with activities that are contrary to stated policy by the companies without necessarily dealing with Section 230, which has significant consequences for entrepreneurs and small business startups. So I look forward to further conversations with you and the FTC if this legislation in particular moves forward.**

**Let me turn to Ms. Kiernan. SolarWinds cyberattack exposed serious deficits in the country's cyber defenses. The Department of Commerce was one of the first departments to be identified as being breached as part of that attack. SolarWinds compromise was as much an attack on our economic security as it is our national security, and vice versa. My view, it demands a swift and deliberate response by federal agencies.**

**One aspect of improving cybersecurity of the federal government is IT modernization. My MGT Act which was passed in 2017 and funded, allows departments and agencies to upgrade their IT infrastructure. How should the Department of Commerce strengthen its cyber defenses? What role does IT modernization play in this effort?**

[...]

**BLACKBURN: Well, I agree with you on that. And I tell you, I think we're going to hold you to your commitment of back to the moon by 2024, and to Mars by 2030. And I also, for the record, want to state how much I appreciate your focus on the public/private partnerships, and making certain that we are cost competitive as NASA moves forward with different ventures. So thank you for that.**

**Ms. Khan, for--just one question for you. If you had been at the FTC during the Obama years, what would you have done differently in the merger review process?**

KHAN: Senator, I think over the last few years in particular, there's been a lot of evidence that's come to light that suggests that in certain cases, there were missed opportunities for enforcement actions. As I mentioned earlier, I think part of that was due to some of the information asymmetries. Part of that was also because there was an assumption that digital markets in particular are fast-moving, and so we don't need to be concerned about potential concentration in these markets, because any exercise of power will get disciplined by entry and by new competition.

Now, of course, we know that in these markets you actually have significant network externalities and other reinforcing advantages of data in ways that make them much more sticky, such that, you know, you have to be much more vigilant relating to these acquisitions. So, you know, I think in hindsight there's a growing sense that some of those merger reviews were a missed opportunity.

**BLACKBURN: I would like for you to submit in writing a more complete answer as to what you would have done differently. We know what the problems were, but--and you know that I have concerns about your background and lack of experience in coming to that position. So why don't you just submit to me a written answer in that regard?**

**Ms. Kiernan, thank you so much for the time. And just very quickly, I've got 25 seconds left, if you will talk a little bit about where your focus will be on spectrum policy.**

[...]

**MARKEY:** And by the way--and that's why NASA is going to be so important, and it's why Senator Duckworth and I have introduced the Environmental Justice Mapping and Data Collection Act, so that we can see where the harm is occurring and then direct, as President Biden wants to do, the funding towards those communities, towards those

places that have suffered the most environmental injustice. So we're just really looking forward to partnering with you on that.

And Ms. Khan, I recently sent the Federal Trade Commission a letter highlighting evidence that the ed-tech company Prodigy Education, engaged in unfair and deceptive practices. Research shows that Prodigy's online math game manipulates children and families into making purchases by constantly telling kids what items their friends have bought in the game. And in the game, a child user who bought a premium membership floats on a cartoon cloud, while a kid who didn't buy a membership walks on a dirt path.

So can you please commit that if you are confirmed, you'll work to use your full authority under Section 5 of the Federal Trade Commission Act to ensure that we hold companies accountable when they attempt to manipulate and monetize the activities of children?

KHAN: Absolutely, senator. And I think some of these dangers are heightened, especially given the ways in which the pandemic has rendered families and children especially dependent on some of these ed technologies. So I think we need to be especially vigilant here.

**MARKEY:** Thank you. And finally, I authored the Child Online Privacy Protection Act back in 1998. And again, you have just bad actors which are out there always seeking to manipulate and take advantage of children.

Will you commit that if you are confirmed that if there are any updates to COPPA that you're going to prioritize protections for children, not loosening them as many companies seek to achieve in order for--so that they can exploit these kids for their own monetary benefit?

KHAN: Senator, in my view, the previous rule should be the floor and not the ceiling. Not being at the commission, I'm not privy to what the current status of the COPPA review is. More generally as we think ahead about the future of kids privacy, I see your KIDS Act as really an important framework as we move forward.

[...]

**SULLIVAN:** Great, thank you. And Ms. Khan, I want to ask you very quickly. I know there's a lot of issues on tech that you are focused on, that you've been focused on. There's been some recent events that have drawn attention to Major League Baseball's unique judicially created antitrust exemption.

**Why does major league baseball need such an exemption, especially when we see other sports leagues thriving without an antitrust exemption? You're an expert in this area. Do you have a view on that one?**

KHAN: Yes, senator. My sense is that generally, Congress has viewed it as appropriate to grant exemptions when there are deep power asymmetries in the market. I'm not sure that the MLB would really fall into that category, so I can't really--you know, from the traditional set of criteria, I don't think it necessarily, you know, makes sense. But maybe there are other justifications that people thought were appropriate.

**SULLIVAN: So you're a skeptic of that judicially created exemption. Is that what you're saying to me?**

KHAN: I think exemptions are most appropriate, again, when you have deep asymmetries such that like one side of the market needs to coordinate or come together. I don't really, right off the top, see what the asymmetry is with the MLB, like where are they powerless relative to whom. So that's the kind of question that I would ask, to try and figure out if it's appropriate.

[...]

**LEE: Thank you, Madam Chair. Thanks to all of you for being here today. Ms. Khan, I'd like to start with you if that's okay. The Sixth Circuit has previously ruled that former FTC Commissioner Paul Rand Dixon had to recuse himself from a hearing based on the conduct in which he been involved, where he had conducted an investigation as a member of the staff on the Senate Antitrust Subcommittee prior to becoming a commissioner.**

**In light of the fact that you had worked on the House counterpart to that committee, the House Antitrust Subcommittee, and its report on digital markets, wouldn't you be bound to follow that precedent by recusing yourself from any investigation into Facebook, Amazon, Apple or Google?**

KHAN: Thanks for the question, senator. Let me say up front I have none of the financial conflicts or personal ties that are the basis for recusal under federal ethics laws, and I would be approaching these issues with an eye to the underlying facts and the empirics, and really be following the evidence where it took me.

**LEE: Would this create any of the appearance--appearance of impartiality issues, given your work for the subcommittee?**

KHAN: Senator, you know, insofar as there are instances where defendants before the commission petition to have particular commissioners recused, those cases are resolved on a case-by-case basis. There is no categorical decision about that. If it were to arise, I would seek the guidance of the relevant ethics officials at the agency and proceed accordingly.

**LEE: But you don't see the Sixth Circuit case as applicable to your instance? KHAN: I'd want to be more familiar with all of the relevant facts, but—**

**LEE: --I think that case involved not any personal financial connections he had, but rather his work on the Senate Antitrust Subcommittee.**

KHAN: Right, there are set of recusals required in the federal ethics laws where you are making categorical determinations before taking office.

**LEE: Gotcha.**

KHAN: With regards to prejudgment, as I mentioned, those are really recused--those are really resolved on a case- by-case basis.

**LEE: Okay. And I've appreciated our previous conversations and wanted to follow up with you on a couple of things, including your philosophy on the FTC's--any rulemaking power that you believe the FTC may wield. So I've just got a quick series of yes or no questions.**

**Should agencies exercise rulemaking powers, only those rulemaking powers that have been expressly granted by Congress?**

KHAN: Insofar as the FTC has expressed authority under 6(g) of the FTC Act, I think that would be appropriate. LEE: But it shouldn't exercise rulemaking power in the absence of rulemaking power having been granted?

KHAN: I don't have a philosophical view on that. I'd want to think about it. I think in the context of the FTC, I think that question is obviated by the fact that there is expressed authority in the statute.

**LEE: Can the FTC utilize rulemaking power to get around precedent with which it disagrees?**

KHAN: I'm not sure. I mean, you know, Section 5 has a--there's a standalone basis to Section 5 and there is, you know, core precedent noting that the contours of Section 5 are not limited by the antitrust statutes. As we discussed yesterday, you know, there are going to be some questions of first impression here. But generally, you know, there are going to be several checks on the FTC if it does go down this road.

**LEE: Now, you mentioned Section 6(g) of the Federal Trade Commission act. Are there any limits that the commission--to what rules the commission should promulgate under 6(g) in order to define what it means to engage in unfair or deceptive trade practices or unfair methods of competition?**

KHAN: Yes, senator. As you know, the contours--the precise contours of unfair methods of competition rulemaking has been debated at the commission for decades. There are a series of cases from the '80s where the FTC adjudicated and, you know, courts came up with a few standards relating to coercion or oppressiveness.

In practice, though, I think adjudication has not been very successful as a mechanism for defining the contours. And former Commissioner Josh Wright in particular has also written about this, so I think there's some real questions still remaining.

**LEE: As we've discussed in the past, there is some debate currently underway about our antitrust laws and about the consumer welfare standard, which we've discussed a little when the past. It's always important for us to evaluate our laws, and to ensure that our standards for assessing whether particular behaviors and mergers and acquisitions are illegal or should be illegal, or whether they're harming Americans.**

**Do you think the consumer welfare standard is lacking?**

KHAN: My--in my academic capacity, I have critiqued the consumer welfare standard. I've questioned whether it really is a good proxy for competitiveness, especially in the context of digital markets.

**LEE: So when assessing whether a merger or a particular course of conduct is anti-competitive, do you think courts and enforcers should take into account, take into consideration any impact that the action in question might have on innovation?**

KHAN: Yes, absolutely.

**LEE: Consumer choice, also?**

KHAN: Generally speaking, I mean the statute says, you know, substantially lessen competition. Competition is not defined in the statute, so it's--you know, it's up to the agencies and the courts to really figure out what this means.

**LEE: Price, market access, effects on quality, all should be taken into account?**

KHAN: Exactly.

**LEE: And all that's great to hear, and I think that's fantastic. All of these things are already in play, and they play a significant role in our current antitrust law. And they're an aspect--they're all features of the consumer welfare standard. It seems to me that our laws could meet the need if only enforcers brought the appropriate facts and the appropriate evidence in the appropriate cases to the table.**

**Thank you, Mr. Chairman. I see my time is expired.**

[...]

**CRUZ: I think that's right, and one area that I've been very focused on that I look forward to continuing to work with you on is how to incentivize more commercial development on the ISS in space, and how potentially to create a revenue stream for further exploration to come from the commercial developments that the federal government is facilitating. And I**

**think there are lessons in terms of how universities have handled it, incentivizing innovation and developing revenue streams from it that I think on the space side, we could learn important lessons from.**

**Ms. Khan, congratulations on your nomination as well. As you know, I have deep concerns about big tech and the power of big tech, and I believe the FTC should be doing much more to reign in the anti-competitive abuses of big tech, to reign in the blatant censorship and the hubris demonstrated by big tech.**

**What are your views on the risks posed by big tech, both on a competition side and on a consumer protection side? And in particular, the risks posed by censorship and imposition of their views upon the free market of ideas?**

KHAN: Senator, I've been quite public about my concerns about concentrated power in the context of digital markets. I think on the competition side, we are continuing to see a whole range of potential risks. One that comes up across the board is the way in which being able to dominate one market gives these companies in some instances the ability to expand into adjacent markets, and the self-reinforcing advantages of data make it much easier to capture an entire ecosystem.

I think on the consumer protection side, there are some really interesting questions to be asked, specific to behavioral ad-based business models insofar as, you know, these business models really incentivize and enlist vacuuming up of data. I worry that in some cases, you know, some of these companies may think it's just worth the cost of business to actually violate privacy laws. So those are some of the concerns that come to mind. And I think, you know, it seems like these are growing increasingly bipartisan concerns.

**CRUZ: Well, I look forward to working with you on them. And I will say in particular, I think there's a lot more the commission can do in terms of promoting and ensuring transparency from big tech, which right now is incredibly opaque. Thank you.**

[...]

**ROSEN: Well, I can tell you I was one of those kids who watched all through the '60s. We were glued to the TV for every space launch, for landing on the moon, and hey, I became a woman in tech. So maybe it had an impact on me there.**

**But I'd like to move on quickly to data security. So Ms. Khan, as I said, I'm a former computer programmer systems analyst. I understand firsthand the importance of data, cybersecurity, a pandemic that forced all of us to transition to work from home, to telework. Of course, hackers took notice and they've impacted every sector, from healthcare to school to business, you name it, unfortunately.**

**So last year, I introduced several bills aimed at protecting and strengthening our cybersecurity capacity, such as improving telework cybersecurity for small organizations or small businesses hit particularly hard, our school districts with ransomware and the**

**like. And so we need to continue to do that, and we need to work on those collaborative efforts and guidance through support through SISA and the FTC.**

**So Ms. Khan, how can FTC better partner with private entities to build a stronger defense against data breaches? How will you promote that working relationship?**

KHAN: Senator, let me say right off the front, I think you know the harms of lax stack (PH) data security are immense, and I think what we've seen over the last few years is that this is no longer just about identity theft anymore. You know, there are real national security implications, insofar as we've seen some state-sponsored hacks as well.

With regards to the, you know, work of the FTC with private groups, my understanding is that the commission has been doing, you know, as part of its education and outreach campaigns, specific work with small businesses. I haven't had the opportunity to see any empirical data on the efficacy of that work, but I'd look forward to learning more about that.

**ROSEN: Well, I look forward to working with you on that because our small businesses really need a lot of help to do their own cyber hygiene and continue to maintain, upgrade, and patch the commercial software that they use. It's particularly important in this day and age, and thank you for your willingness to serve.**

**I believe my time is up. Thank you, Madam Chair.**

**CANTWELL: Thank you, Senator Rosen. And I think that concludes the number of commerce committee members who wish to ask questions. I do have a question for the panelists that we are making standardized in our request to nominees. And if you could just give me a yes or no answer.**

**If confirmed, we pledge to work collaboratively with this committee, provide thorough and timely responses to our request for information as we put together and address important policy issues, and as you appear before the committee when requested?**

NELSON: Yes.

KHAN: Yes.

KIERNAN: Yes, senator.

July 14, 2021 - Final

**Senate Judiciary Committee Hearing on Pending Nominations:  
Matthew Olsen, Nominee for AAG of National Security**

DICK DURBIN:

The hearing will come to order. Today, we have five judicial nominees and one nominee to the Department of Justice: Myrna Perez, nominated to the 2nd Circuit; Judge Sarah Merriam, nominated to the District of Connecticut; Judge Karen Williams, nominated to the District of New Jersey; two nominees to the D.C. District Court, Jia Cobb and Judge Florence Pan; and Matt Olsen, nominated to serve as assistant AG for the Justice Department's National Security Division.

A number of our colleagues will formally introduce the nominees. And I'd like to make a few observations. First, with these nominees, the Biden administration and the Senate continue to bring diversity and professional balance to the bench. Today's slate includes Myrna Perez, who would be the first Latina to serve on the 2nd Circuit since Justice Sonia Sotomayor.

We will also hear from Florence Pan, who would be the first Asian American woman to serve on the D.C. District Court. The slate also includes professional diversity. We have two sitting federal magistrate judges, a judge of the D.C. Superior Court who was previously an assistant U.S. attorney, and a former D.C. public defender.

And in Mr. Olsen, we have an accomplished national security expert who has spent decades working to protect America from enemies foreign and domestic. We have a civil rights champion in Ms. Perez, who has devoted her career to protecting and defending Americans' right to vote. It is a fitting time for her to join the bench, particularly after late rulings by the Supreme Court.

I won't go into detail here in an effort to make sure that we get to the nominees as quickly as possible. But make no mistake, voting rights are a major issue and will continue to be for some time. I'm thankful for President Biden for putting forward nominees like Ms. Perez who has such extensive experience.

She has an impressive career as a litigator and an advocate and an incredible insight into the impacts that restricted voting laws have on minorities. This type of legal experience is underrepresented on the court. It's rare to see a voting rights attorney nominated to the federal bench. This perspective will bring diversity to our courts.

Ms. Perez's record shows she's driven by her dedication to serving others and the Constitution. Before turning over to Ranking Member Grassley, I'd like to introduce two of the district court nominees. Eleanor Holmes Norton was unable to make it this morning. Jia Cobb and Judge Florence Pan, both nominated to the D.C. Circuit District Court.

Both of these nominees have her support, and she submitted statements for the record. I'm privileged to introduce Ms. Cobb this morning, not only is she an excellent nominee, but she is an honorary

Illinoisan. Having attended college at Northwestern and then clerked in Chicago for my friend, Judge Diane Wood, on the 7th Circuit.

After graduating from Harvard Law, clerking for Judge Wood, Ms. Cobb began her career in D.C. as a public defender, representing indigent defendants charged with criminal offenses. For the past nine years, she has worked as a national civil at the national civil rights firm, Relman Colfax, representing plaintiffs in fair housing, disability rights, and employment district -- discrimination claims.

Ms. Cobb's extensive courtroom experience is undoubtedly prepared her for roles that await her in the U.S. District Court for the District of Columbia. In the past 15 years, and this is remarkable, anyone practicing law today will know it is, Ms. Cobb has tried more than 30 cases to verdict, both criminal and civil, and during her six years as a public defender, she handled more than 200 cases and appeared in the court almost daily.

That's an incredible record, and I wish we could look to that for every nominee who is coming before us. Having represented both sides in the courtroom, I understand -- she understands that she needs to be a voice in our nation's court so that the law is applied even-handedly. Next, I'll introduce Judge Florence Pan, also nominated to the D.C. court here in D.C. After graduating summa cum laude with two master's degrees from the University of Pennsylvania, Judge Pan received a law degree with distinction from Stanford.

Then clerked for Judge Michael Mukasey, well known to this committee, on the U.S. District Court for the Southern District of New York, and Judge Ralph Winter on the 2nd Circuit. Before her appointment to the D.C. Superior Court, Judge Pan spent her entire legal career in public service. She was selected for the prestigious Bristow Fellowship in the Office of the Solicitor General.

She was an attorney in the appellate section of the criminal division of the Justice Department and a senior adviser in the Treasury Department. Finally, she served as assistant U.S. attorney for the District of Columbia for a decade, litigating local and federal courts at the trial and appellate level. In 2009, President Obama nominated her to serve on D.C. Superior Court.

She was confirmed by a voice vote. She was also nominated to D.C. District Court by President Obama and favorably reported out of this committee by a voice vote in 2016. However, the majority leader at the time refused to hold a floor vote on her nomination before the end of the 114th Congress. Upon confirmation, Judge Pan would become the first Asian American woman to serve on the district court for the District of Columbia.

With that, I turn to my colleague, Senator Grassley.

CHUCK GRASSLEY:

Congratulations to all the nominees. I'll start by addressing the nominee of Myrna Perez for the 2nd Circuit New York. Ms. Perez is a civil rights lawyer focused on voting rights. I think it's good for the president to look beyond the usual talent pools and picking judges. President Trump, for example, nominated a number of civil rights lawyers to the federal bench.

Judges like Kyle Duncan of Louisiana, Matt Kaczmarek in Texas, and Sarah Pitlyk in Missouri were all civil rights lawyers for significant portions of their careers. Indeed, should Ms. Perez be confirmed to the 2nd

Circuit, she'll join two other civil rights lawyers of color appointed by Trump: Michael Park and Steve Banafsheh.

Judge Park, of course, led the fight to end racial discrimination in higher education. A fight that's unfortunately still ongoing. Judge Banafsheh, among other things, ended religious discrimination against historically Black colleges at the Department of Education. I think we've seen the court benefit from this diverse perspective, and it all goes to show that civil rights can take many forms.

Now that said, my Democratic colleagues, all oppose those Trump civil rights lawyers, perhaps Democrats didn't think that civil rights that they were fighting for. I think the more charitable interpretation is that Democrats disagreed with their judicial philosophy. Yes, they all protected civil rights, but they also believed in textualism and originalism.

Ms. Perez seems to be the opposite of that. A prominent opponent of voter integrity laws, Ms. Perez seems to be very committed to living Constitution. That obviously concerns me, and I hope to discuss this issue with her today. I'd also like to add one more thing about Ms. Perez. Last night, the committee received a supplement from her.

It was an article she wrote, which the progressive Christian journal, Sojourners, had just published entitled, "The GOP Campaign to Make Elections Less Free." Ms. Perez says that this article was submitted before she was the nominee and that she did not see or approve the title of the article before it was published.

I expect to have a number of written questions about this, but I would make a few points. First, given the content of the article and the timeline of Ms. Perez's nomination, it's very unlikely that Ms. Perez submitted this inflammatory article while under consideration for the seat. Second, while the authors typically don't choose their titles, I have to imagine Ms. Perez could have gotten Sojourners, which isn't The New Yorker or The Washington Post to accommodate a title change.

That would be an insult to half of this committee. I'll also note that this article's outrageous subtitle, "Voters are supposed to choose their politicians, not the other way around" was written by Ms. Perez. Third, regardless of when it was submitted, Ms. Perez is bound by the code of conduct as a judicial nominee, and it's hard to see how publishing this article as a nominee is consistent with Canon 5 of the Code of Conduct.

As to the other nominees, Ms. Cobb seems to have similar problems having in the past called for interpreting statutes based upon their social histories other than their texts, and Judge Merriam seems to have gotten -- had a highly partisan political career. On the other hand, I remember Judge Pan from her last time before the committee.

She seems extremely well qualified for this position, being well acquainted with the challenges faced by the District of Columbia, both as a prosecutor and a local judge. Judge Williams also seems to be well qualified. Lastly, we have Mr. Olsen. I think it's critically important that the National Security Division focuses on protecting us from security threats, and not focus on domestic politics.

I hope that Mr. Olsen agrees with me on that. Thank you, Mr. Chairman.

DICK DURBIN:

Thank you very much, Senator Grassley. We have some introductions, and I note my colleague, Senator Booker, is here. And I believe you are prepared to introduce one of the nominees.

CORY BOOKER:

I am, Mr. Chairman. I know you all always get very excited when there is a New Jersey nominee.

DICK DURBIN:

Always.

CORY BOOKER:

Always. And as does Ranking Member Grassley. I am excited. I think all of New Jersey is especially excited, especially around the city of Camden, New Jersey that I have the opportunity to introduce one of President Biden's nominees to serve as a district judge on the United States District Court for the District of New Jersey, Karen Williams.

Judge Williams is currently serving her second term as a United States magistrate judge, where she has handled thousands of cases and demonstrated her incredible skill as a jurist and her commitment to justice and law. She is in many ways, through many eyes, a local hero. She is a light to many in our community as someone who is showing how to conduct yourself with professional excellence with dignity, honor, and deep empathy for all of humanity.

As part of her many duties including handling both criminal and civil cases, Judge Williams also presides over the District of New Jersey's reentry court, ReNew Camden, which works to assist formerly incarcerated people with their reentry into the community is yet another testimony that she is living with a great American author, another African American woman wrote that "We are each other's harvest; we are each other's business; we are each other's magnitude and bond." Judge Williams recognizes the bonds we have to each other that love your neighbor does not have conditions.

She lives a life of great magnitude. Judge Williams is ready to serve as a federal judge. She has experience, she has skill, she has qualifications, she has empathy, and she has a life that is a testimony to the qualities we want on the bench. The American Bar Association just recently unanimously rated her as well qualified to be a district judge.

She has also the full-throated support of the New Jersey Bar Association, the Garden State Bar Association, and the Association of the Federal Bar of New Jersey. And when, God willing, she is confirmed, Judge Williams will be the first Black woman to serve as a United States District Court judge in the Camden, New Jersey Federal Courthouse.

She is a trailblazer and a history maker should she be confirmed. I am grateful for her commitment to the law. I'm grateful for her commitment to service. I am grateful for her commitment to her fellow humans. And I urge my colleagues to advance Judge Karen William's nomination to serve as a federal judge.

I just want to take a moment, though, if I can. I know I'm stepping out of my lane here, but President Biden's nominee to serve on the 2nd Circuit Court of Appeals, Merriam Perez [Ph], is an extraordinary candidate. I have read about her, and I just want to celebrate her presence here, and I'm grateful that she is someone who has been advocating tirelessly and relentlessly for our democracy's most sacred ideals, which are voting rights.

I'm excited about her nomination and I will vote in favor of her to be another federal circuit judge.

DICK DURBIN:

Thank you very much, Senator Booker. We are in a semi-awkward situation. This is the first time that we are officially gathering in person instead of Zooming in our comments, which was extraordinarily convenient, but disjointed in its presentation. We're trying to get everybody back in attendance. So some of the members are on their way, I am told, which leaves me in a situation where I could give a long speech, but I won't. And I hope my friend will -- I don't think you will.

CORY BOOKER:

Would you like me to say more about Judge Williams?

DICK DURBIN:

I think you've really done a fine job.

CORY BOOKER:

Thank you.

DICK DURBIN:

Don't risk it. Senator Blumenthal is on the way?

UNKNOWN:

Yes, sir. Yes, sir. Yes.

DICK DURBIN:

OK. So there you are. I think we just go ahead with Ms. Perez.

UNKNOWN:

So we could have -- turn the mic off. [Off-mic]

DICK DURBIN:

To the rescue, Senator Richard Blumenthal of Connecticut has arrived in time to say a few words about his nominee.

RICHARD BLUMENTHAL:

Thanks, Mr. Chairman, and thanks for giving me this opportunity. I'm enormously honored and proud to be introducing Sarah Merriam today. Sarah Merriam is the lawyer we all want to grow up to be after we graduated from Yale Law School. And I say that as a dad of a daughter who has just graduated from Yale Law School and would do well to emulate her extraordinary career in the law and in community service.

Senator Murphy and I recommended Judge Merriam to the White House. And I am grateful to President Biden that he has agreed with our recommendation. She received her B.A. from Georgetown University in 1993 and her J.D. from the Yale Law School in 2000. I spent a good deal of my career several decades as a litigator in the federal court, and I have a particular allegiance to the values and ethos of the very highest quality that we should be seeking, as well as diversity in our federal judiciary.

Judge Merriam fulfills those qualifications and expectations and much, much more. Her work in the courtroom began long before she joined the bench. After graduating from Yale Law School, she clerked for two federal judges, both I admire greatly -- Judge Alvin Thompson in the District of Connecticut and Judge Thomas Mesko on the 2nd Circuit.

She was in private practice. She became an assistant federal defender in the District of Connecticut from 2007 until she took the bench in 2015. And I am really just thrilled that federal prosecutors agree with Senator Murphy and myself. Their statement is in the record. So do members of the private bar.

Their statements are in accord. And I will just say that Judge Merriam really embodies the highest ideals and traditions of our federal district court in Connecticut. As a former United States attorney and attorney general for our state, I'm very proud to recommend her to this committee. And thank you, Mr. Chairman.

DICK DURBIN:

Thanks, Senator Blumenthal. Senator Murphy.

CHRIS MURPHY:

Thank you very much, Mr. Chairman. I know you have a busy agenda ahead of you and a number of our colleagues who want to introduce the nominees. Let me just associate myself with the remarks of Senator Blumenthal. I don't know that you're going to see a nominee before this committee who has, I think, a more important breadth of experience in the legal field than Judge Merriam.

She has been an advocate for working people. She has been a very capable lawyer in private practice. As mentioned, she spent the bulk of her career as a federal public defender, and now she has been a very well-regarded federal magistrate, someone who comes to this hearing with deep experience in the federal court system.

So I think her resume and her testimony will speak for itself. I come to you today as someone who has known Judge Merriam for 20 years, both professionally and personally. I will tell you candidly that when I began my time in public service, Sarah was someone that modeled just a unique combination of joy and compassion, hard-headedness, common sense that, to me, caused me to choose to pursue a life in the service of the people of Connecticut.

All of us, I think, have one or two of those people that we were able to interact with earlier in our career that inspired us to decide to pursue a life in public, and Judge Merriam is one of those people for me. And so from a very personal standpoint, I am incredibly humbled to be able to stand here today and to recommend my friend, to recommend one of Connecticut's brightest legal minds to this committee.

Lastly, I'm just so glad that she's here with many of her family members that others are watching from home. As she will mention, they are a big part of the reason why she is here today. They are all good and close friends of mine. And so I welcome the extended Merriam family to this meeting today. So again, a busy meeting ahead of you.

Very, very pleased to add my words of introduction to those of Senator Blumenthal.

DICK DURBIN:

Thanks, Senator Murphy. Senator Menendez.

ROBERT MENENDEZ:

Well, thank you, Mr. Chairman, Mr. Ranking Member, and distinguished members. It's my pleasure to join my colleague, Senator Booker, distinguished member of this committee, to introduce Karen Williams, an exceptionally qualified nominee for the U.S. District Court for the District of New Jersey, where she has served as a U.S. magistrate judge for more than a decade.

If confirmed, she would be the first Senate-confirmed African American federal judge to sit in the District of New Jersey's Camden Courthouse. Yet it is the breadth and diversity of her experience in the field of law that makes her such an incredibly strong nominee. Originally from Long Island, Judge Williams attended Penn State University on a track scholarship, and she's never looked back and started out her career as a wage analyst at the New York University Medical Center.

And after her mother took a job managing labor relations for the Golden Nugget Casino in Atlantic City, she relocated to Egg Harbor Township and earned her J.D. from Temple University Beasley School of Law in Philadelphia, and she has called South Jersey home ever since. Prior to her appointment as a U.S. magistrate judge, she spent 17 years practicing employment in labor law at the firm of Jasinski and Williams.

There, she defended workers' rights, negotiated collective bargaining agreements between unions and local municipalities, and led litigation before state and federal courts. In 1998, Judge Williams successfully argued on behalf of Atlantic City, before the New Jersey Supreme Court, in a case that affirmed the local fire department's ability to discipline a firefighter for hurling racial epithets at a police officer.

Since her appointment as a U.S. magistrate judge in 2009, Judge Williams has displayed an unyielding commitment to the fair administration of justice to equal rights under the law to deference to precedent and to the safety of our communities. Indeed, two of the most notable cases she has presided over involve threats to public safety.

One case concerning an individual accused of planning attacks on synagogues and another involving a defendant who advocated for rioting and looting during protests against police brutality during the death of George Floyd. In addition, Judge Williams has also served as an adjunct professor at Rowan University where her classes on law and justice have undoubtedly inspired many students to pursue the legal profession.

Judge Williams may have been born in New York, but she represents the best of New Jersey. I have complete confidence in her judgment, her values, her intellect, and her capacity to serve as a U.S. district court judge for the District of New Jersey. And as you know, Mr. Chairman, and I appreciate this committee and your leadership in dealing with the emergency of judicial vacancies that exist in New Jersey that has been declared a national emergency.

The committee has been moving through nominees. I urge the committee's support for her nomination as well to help us meet that challenge.

DICK DURBIN:

Thanks, Senator Menendez. And I might say to you and Senator Murphy, I know you have a busy schedule, and if you'd like to leave at this point, it's perfectly acceptable. We now turn to Senator Cardin from Maryland.

BEN CARDIN:

Thank you, Chairman Durbin and Ranking Member Grassley. Thank you for giving Senator Van Hollen and I the opportunity to introduce a proud Marylander, President Obama's nominee for -- President Biden's nominee for assistant attorney general for National Security Division. Mr. Matt Olsen is a proud Marylander.

He hails from Kensington, which is also the home of our distinguished senator, Senator Van Hollen. And we're very proud of his appointment. Matt Olsen has tremendous experience at the intersection of law enforcement and intelligence community at exactly the point where the National Security Division straddles these two distinct government functions.

Mr. Olsen has nearly two decades of experience in a wide variety of roles in the Justice's intelligence community. Mr. Olsen received his B.A. from the University of Virginia and his J.D. from Harvard Law School. He served as a judicial law clerk for the Honorable Norma Holloway Johnson, the first Black woman to serve on the D.C. Circuit.

Judge Holloway became Mr. Olsen's lifelong mentor. After completing his clerkship, he joined the Justice Department's Civil Rights Division where he enforced the Voting Rights Act. He also joined the U.S. Attorney's Office of the District of Columbia where he supervised the investigation and prosecution of domestic terrorism, espionage, and export violation cases.

Mr. Olsen has prosecuted homicide cases, RICO cases, and drug and gang-related offenses. I understand that it was Mr. Olsen's work as a U.S. attorney that led him to serve as special counsel to then FBI Director Mueller where he supported the FBI's national security and counterterrorism work. After departing the U.S. attorney's office and the FBI, Mr. Olsen helped create the National Security Division and served as one of its first officials as both acting assistant attorney general and a deputy assistant attorney general.

He oversaw 125 career professionals and managed intelligence and surveillance operations and oversight activities. In this role, he worked closely with the intelligence community. At the National Security Division, Mr. Olsen led the Justice Department's participation in the interagency Guantanamo Review Task Force created by President Obama to evaluate the status of individuals detained at Gitmo Bay, which as we all know is an extremely difficult assignment.

In 2010, he was appointed as general counsel to the National Security Agency, which is headquartered in Fort Meade in Maryland. At NSA's chief legal officer, he played a critical role in supporting the agency's operation mission. Mr. Chairman, I could go on and on, he has incredible experience in the intelligence community and justice and law enforcement.

He has the whole package. I want to thank him for his willingness to continue to serve the public and thank his family for their willingness to allow him to continue. I'm very proud to recommend his nomination to this committee, and I urge you to consider his nomination. Thank you, Mr. Chairman.

DICK DURBIN:

Thanks, Senator Cardin. Senator Van Hollen.

CHRIS VAN HOLLEN:

Thank you, Chairman Durbin, Ranking Member Grassley, members of this distinguished committee. I'm very proud to have the opportunity to also join my colleague, Senator Cardin, in introducing the president's nomination to serve as assistant attorney general for National Security at the Justice Department, Matt Olsen.

And would like to also welcome his family; his wife, Fern; and their three children, Elizabeth, Nate, and Will; who are here today. President Biden has selected wisely in picking a nominee who has the experience, the expertise, and the sound judgment for this very important position, and he has very wisely selected a Marylander as well.

I'm not going to cover all the details because Senator Cardin went over his very distinguished career, but I would point out that he has 20 years of experience in exactly the relevant areas for the position for which he's been nominated, national security, counterterrorism, and civil rights. I do want to highlight a couple of the areas where he served including the Department of Justice.

First, in the Civil Rights Division and then as acting assistant secretary for national security where Senator Cardin said, he helped establish the National Security Division at DOJ. His service as general counsel at the National Security Agency covering issues like cybersecurity and surveillance law will also prove very important in his new position if confirmed.

In his most recent government post, Mr. Olsen served as the director of the National Counterterrorism Center where he worked tirelessly at the helm of the nation's efforts to combat terrorism at home and abroad by integrating terrorism intelligence and connecting the dots to deter, detect, and disrupt terrorist plots.

In short, his work has helped save American lives. Each of these experiences prepares him very well for the skills that he will need to serve in this role. And there is no question in my mind, members of the committee, that Matt Olsen is ready to take on the important responsibilities as assistant AG for national security.

I was delighted to see that just yesterday 80 former senior officials of the United States Department of Justice who have served under administrations of both parties wrote to this committee expressing their "unqualified and enthusiastic" support for Mr. Olsen's nomination. On a personal note, I can testify to Matt Olsen's good character because I also know him as a good neighbor in Kensington, Maryland.

My wife Katherine and I frequently encounter Matt, Fern, and their children walking in the neighborhood. And the only family member who is not with them today is their dog Kenai, who is a playmate of our dog. Chairman Durbin, Ranking Member Grassley, members of this committee, I am absolutely confident that if confirmed, Matt Olsen will serve our country with honor and distinction.

And I urge you to support his nomination for this important post.

DICK DURBIN:

Thank you very much, Senator Van Hollen. And I think both you and Senator Cardin, of course, you can go about your business if you wish. We'll continue here. We are going to pause momentarily waiting for

the arrival of Senator Schumer who's going to introduce the nominee for the first panel. So if everyone would please relax.

Welcome, Senator Schumer.

CHARLES SCHUMER:  
[Off-mic]

DICK DURBIN:  
The floor is yours.

CHARLES SCHUMER:  
Thank you. Thank you, Mr. Chairman. And I want to thank you and my colleagues on the Senate Judiciary Committee. It's always a pleasure to be back here where I served many happy years. In fact, if you add up my time on the House Judiciary Committee and the Senate Judiciary Committee, it's 1982 to 2016. It's a lot of years.

So it's glad to be back. And it's particularly glad to be back for the reason I'm here today. It's my honor, my true honor to introduce a nominee to the committee for the 2nd Circuit of New York, Myrna Perez, an experienced litigator, one of the foremost election lawyers in the country whom I was so, so proud to recommend to President Biden.

Myrna Perez's wife -- life is a quintessentially American story. The daughter of Mexican immigrants, Myrna grew up in San Antonio, not quite Brooklyn, where her dad served in the Air Force and her mom worked as a waitress and then at the post office. As she will tell you, her upbringing was steeped in the immigrant experience of many first-generation Americans.

There was a constant struggle against racial, social, and language barriers as the Perez family found its place in America. In fact, when Myrna was a kid her aunt would take her to the polls on Election Day. Even in her early years, she saw firsthand how cultural differences and Byzantine rules made it immensely difficult for Americans like her to engage in the political process, foreshadowing a career dedicated to the defense of voting rights and equal representation for all Americans.

And make no mistake about it -- and she -- and it was no mistake rather that she chose the legal profession as a means to achieve that noble goal. Myrna's family will tell you the story of how once, as a kid, she protested that her cousin tried to keep a fish he caught that was technically below the legal size for catch and keep.

Remember what kind of fish it was?

MYRA PEREZ:  
It was probably a trout.

UNKNOWN:  
It was a cod.

CHARLES SCHUMER:

A trout, a trout. We have those in New York, too. It was the innate appreciation for the rule of law that propelled Myrna through Yale, Harvard, and eventually, Columbia Law School. The first in her family to graduate from college. I hear these stories and it gives me such faith in America, but such a strong desire to create greater and more equal justice in this country.

We have so much potential. We are such a wonderful country. We just have to live up to it. And with a nomination like this, we are. After two clerkships on the federal bench, Myrna worked as a civil rights fellow in private practice before joining the Brennan Center for Justice at NYU, of course, named after the great Justice Brennan.

It was at the Brennan Center that Myrna established a reputation as one of the top voting rights and election lawyers in the entire country. For the last 15 years, she's been involved in election-related litigation, everything from voter roll purges, discriminatory voter ID laws, the voting rights of formerly incarcerated people, and protecting the ballot from unlawful rejection.

My colleagues, the federal bench has long been occupied by former prosecutors and corporate lawyers. While many of these people, many of whom I proudly recommended have served admirably, it's past time that the federal bench reflects more accurately the true depth, breadth, and talent that the legal profession has to offer.

It's about time that civil rights attorneys, federal defenders, and voting rights experts like Myrna Perez join the ranks, especially now when our democracy in many ways is in peril. It's crucial that we elevate someone like Ms. Perez to the bench. Someone we can trust to faithfully and equally apply the law to preserve our great democracy.

But it's not only about her experience as a voting rights litigator. After all, she's going to hear all kinds of cases on the 2nd Circuit. What makes Ms. Perez so qualified for this job is not merely her experience, but her legal excellence. Just listen to what a few of her colleagues had to say about her.

Brilliant, one fellow attorney wrote quite succinctly. A force of nature, another said. Another colleague rated her legal skills as simply "off the charts." I would have one additional note to these well-deserved praises. Ms. Perez will serve as the first Latina to sit on the 2nd Circuit Court of Appeals since then Judge, now Justice Sonia Sotomayor, whom I had the great honor of recommending to President Obama for a seat on the highest court.

And let me just say when I met Ms. Perez, she just knocked my socks off. Yes, she was brilliant, amazing. Yes, she had real compassion and depth of experience, and she had a scintillating personality that I'm sure will help her persuade fellow members of the 2nd Circuit to the righteousness of the causes that she will follow.

So I can think of no one, no one more fitting to carry on Justice Sotomayor's legacy on the 2nd Circuit than Myrna Perez. She's amazing. I'm so proud to nominate her. She carries my highest, highest, highest recommendation.

DICK DURBIN:

Thank you very much, Senator Schumer. We appreciate your remarks. And at this point, we're going to ask the staff to prepare for the questioning of nominees. The first panel will be Ms. Perez, who is seeking

a spot on the circuit court, will be before the committee. And then the second panel will include the other nominees.

So Senator Schumer is working this like a high school graduation. And he's attended many.

CHARLES SCHUMER:  
I've spoken to over a hundred of them virtually this year. Congratulations.

DICK DURBIN:  
I'm sure virtuously, too. Ms. Perez, why don't we ask you to please stand to be sworn? Please raise your right hand. Do you affirm that the testimony you're about to give before the committee will be the truth, the whole truth, but the truth -- and nothing but the truth, so help you God?

MYRA PEREZ:  
I do.

DICK DURBIN:  
Thank you. Please proceed with your opening remarks.

MYRNA PEREZ:  
Thank you, Chairman Durbin, Ranking Member Grassley, and members of the committee for considering my nomination today. Thank you, Senator Schumer and Senator Gillibrand, for your support, and Senator Schumer for your kind words of introduction. I also want to thank President Biden for this nomination. It is the honor of my professional life.

I first want to thank my judges the Honorable Anita Brody of the Eastern District of Pennsylvania and the Honorable Julio Fuentes of the 3rd Circuit. While they were appointed by presidents from different political parties, they had a shared commitment to the rule of law and impartial adjudication. I want to thank my friends and colleagues.

It is not possible to enumerate the many ways in which you enrich me. The support you have shown me has meant more than you know. I want to thank my church family, St. Matthew's Evangelical Lutheran Church, my extended church family of Crossroads Prison Ministries, and Grace Van Vorst Episcopal Church for all of their prayers.

They avail with much. In the hearing room is my cousin, Hector Perez, standing in for my many wonderful cousins on the Betasengarza [Ph] side of my family. And of course, I want to thank my many aunts and uncles who played such a big part of my life during my formative years. To my cousins, my aunts and my uncles, my brother, my nieces, and my nephews, thank you for the love from afar.

My husband Mark Muntzel is here. He is a devoted father and a really good sport about going along with my various community projects. Mark also gifted me with a bonus family who welcomed me with open arms. My parents, Myrna Perez and Victor Perez Jr., came in from Texas to be here today. They immigrated from Mexico to the United States as children.

And while I never heard any complaints, I never heard the words discrimination or poverty, even as a young child, I knew that much of their life was very challenging and full of hardships. But to their credit, they never communicated anything but gratefulness for what they had. They taught me to be resilient.

They taught me to be resourceful. They taught me to be independent. They taught me to be self-reliant. And they taught me to set high standards for myself and to work very hard to achieve them. But most importantly, they taught me that on my worst day, I'm still better off than most of the world on the best.

And finally in the room is my beloved son. He is my greatest source of strength, joy, and inspiration. Thank you so much, members, for giving me a moment to thank all the people who got me here today. I look forward to your questions.

DICK DURBIN:

Thank you very much, Ms. Perez. Let me, before we go into a few questions, say a few words about the disclosure yesterday of the article that was published in Sojourners magazine. Let me tell you that I have taken a look at the standards of the committee and believe that you were in total compliance both with the letter and spirit of the rules and law.

You submitted to the committee an article, which had been submitted for publication in May of this year, before your nomination to the 2nd Circuit. And that article was published online yesterday. We have the letter of transmittal from you with the article in a timely fashion. Question 12a of the Senate Judiciary questionnaire requires nominees to provide all published materials, including materials published on the internet to the committee.

The question does not, however, require nominees to produce unpublished materials. So you complied completely as soon as it was published. I might also say that I read it. And having read it, some may take exception, I certainly believe they will. I would gladly give your article as a speech from me personally on the floor of the Senate any day of the week.

I agree with what you said in the letter. And I would also say that is factually correct in every aspect that I'm aware of. So we may disagree on policy, that's the nature of this United States Senate and our body politic, but in terms of the article itself, as I said, I believe that it's accurate and I would embrace it. The only reference to the Republican Party was in the title, and that you said was not your choice, but the editor's choice.

It speaks of issues in state legislatures without any partisan identification on that. But let's go further with this. You've worked with the Brennan Center, and Senator Grassley raised a point, which is entirely valid. We raise this point all the time. Do you come to this really awesome responsibility with a bias?

You know, I think the world of Justice Brennan and what he did on the Supreme Court -- as a matter of fact, I think there's a quote in here. Let me find it because it's worth remembering. It was a quote that said that Justice Brennan was -- Justice William Brennan was probably the most influential justice of the century.

And the source of that quote was Antonin Scalia. So, Brennan himself was a well-respected man. And I have turned to the Brennan Center many times when there are questions of policy that they have looked into. What would you say of your own philosophy, textualist, originalist? I don't know the terminology of the Constitution.

Please, the floor is yours.

MYRNA PEREZ:

Certainly, Senator Durbin. Thank you so much. I think the first place you start when examining the Constitution or a statute is with the text. It is the most probative example of how it should be interpreted. I think if the -- on its face, the text is not clear, you would then look to precedent. And if confirmed, I would be looking to precedent both from the Supreme Court and the 2nd Circuit.

If that still doesn't answer the question, you look to canons of construction, you perhaps approach a legislative history, but there is more than 230 years of jurisprudence in this country. And there is relevant and probative jurisprudence on quite a number of issues. But you start with the text, sir.

DICK DURBIN:

Members of the Senate and many others swear allegiance to that Constitution to defend it. People have given their lives in defense of that Constitution. And yet, I would say my own personal opinion is as great a document as it is, and it is great, it is not perfect. Its treatment of African Americans, women, and others reflected the mores and standards when the Constitution was written.

So, I would just say you don't have to comment that I am not a literalist when it comes to characterizing African Americans as two-thirds of citizens -- two-thirds of a citizen or -- and not including women and the right to vote. That, to me, is a reflection of the times. And thank goodness those times have changed.

Speak to me, if you will, though about the right to vote. That is the central issue that we're discussing. In so many aspects, a group of Texas legislators decided to come to Washington so that they wouldn't make a quorum in Texas over a controversy involving a voting rights law. People feel very intensely about it. Comment on that if you would.

MYRNA PEREZ:

Senator, the right to vote keeps us free. It protects us from tyranny. It is preservative of all other rights. And as an advocate, I have been duty-bound to ensure that the promises this constitution makes about being able to participate in your own self-governance is actualized. The position before you I seek is one of a different role, one in which I would not be involved in questions of policy, but merely evaluating the laws that were put before me alongside the record that the parties put in. But the fundamental core of what is great about our country, the Constitution, and the promises that it makes that we all deserve a free, fair, and accessible vote is something that is timeless and something that is bipartisan.

DICK DURBIN:

I know the answer to the question I'm about to give is very simply yes, but I'm going to ask you, if you would expound on the notion. Have we had any difficulty in the history of this nation in providing the right to vote to all Americans?

MYRNA PEREZ:

Yes, sir. There are times where we have not lived up to the great ideals of the Constitution. And I'm very proud to say that we are improving on that. But it requires vigilance, and it requires all of us Americans being part of the we the people in order to make and continue to make our union more perfect.

DICK DURBIN:

Thank you. Senator Grassley?

CHUCK GRASSLEY:

Yeah. Thank you, and congratulations on your appointment. I want to talk generally about the approach of this administration. So many names, not just yours, but others that we've already dealt with about these nominees refusing to even admit that they have a judicial philosophy, let alone talk about what their own judicial philosophy is. Even Judge Gelpi, who literally wrote a book on the Constitution, didn't seem to want to talk about it. But I think you're uniquely suited to answer these questions because you've spoken many times about the living Constitution concept in connection with your work at the Brennan Center.

What does living in Constitution concept means to you? You obviously agree with the living Constitution as a method of constitutional interpretation.

MYRNA PEREZ:

Senator, Justice Brennan made famous and popular the idea of a living Constitution. Obviously, I've never spoken to him about what it meant or what his interpretation meant. I do think as a nominee, I believe and I'm comfortable saying that the Constitution is an enduring document. Its great values of incredibly important things like equal justice under the law, liberty, the right to free exercise, all of those important attributes of the American experience are still relevant and guiding us today.

And if they continue to guide us, we will continue to be the greatest country in the world.

CHUCK GRASSLEY:

Thank you for your willingness to express that. Others haven't been quite that forthcoming. On May 27, 2021, you spoke on a virtual panel titled Voting Rights in America: Ensuring Fair and Full Voting for All. During your introduction, you spoke about Justice Brennan and his judicial philosophy. You also went on to say, "If you're one of these people who think that we were at our best when our country was first founded and didn't include women or people of color, or people without property in the electoral process, this is probably not the conversation for you." Who were you describing in that description?

MYRNA PEREZ:

Senator, I do speak a lot, so I'm not 100 percent confident that I remember the conversation. If it is the conversation I remember, I was getting a lot of hostile, inappropriate comments in the chat. And I was worried that it was distracting the audience and frustrating the organizers. And so, I was trying to explain to the audience members that I was asked to speak on a particular topic, and I intended to speak on that topic as opposed to engaging with nameless, anonymous people via chat.

CHUCK GRASSLEY:

OK. Let me follow up. Is it your view that originalists think America was "at its best" when people of color couldn't vote?

MYRNA PEREZ:

Senator, I think labels that get thrown around a lot like originalist or inchoate and constantly shifting, and so they're too broad and they're not particularly helpful in terms of answering questions. I will say that I -- the people I have encountered that call themselves originalists, I do believe that our country that is inclusive is preferable than the restrictions we saw when the country was first founded.

CHUCK GRASSLEY:

Can you name any originalists who might hold that view?

MYRNA PEREZ:  
I'm sorry?

CHUCK GRASSLEY:  
Who -- could you name any originalists who might hold that view?

MYRNA PEREZ:  
Who hold what view? The idea that the country's improved when we can all include? We are all-inclusive.

CHUCK GRASSLEY:  
OK. OK. Then let me go on to my last question. This deals with recusal. In your questionnaire, you said you would recuse yourself in matters which the Brennan Center was a party or represented a party. Does this also include matters what you or the Brennan Center advocated a policy position on? Let me follow up that question.

Would -- you have spoken about New York election laws and pending voting legislation in Congress and your positions on those bills are quite clear. Can you comment today to recusing yourself from litigation involving that legislation?

MYRNA PEREZ:  
Senator, I am very comfortable committing to consulting the statute of 28 USC 455 for recusals and talking to the administrative office and proceeding in accordance with those dictates.

CHUCK GRASSLEY:  
Thank you very much.

MYRNA PEREZ:  
Thank you so much.

DICK DURBIN:  
Senator Whitehouse.

SHELDON WHITEHOUSE:  
Thank you, Chairman. Welcome, Ms. Perez.

MYRNA PEREZ:  
Good morning.

SHELDON WHITEHOUSE:  
I am delighted that you are here and look forward to supporting your confirmation. I want to ask you a question regarding the Voting Rights Act. There has been some criticism of your nomination that you have dwelt unduly on issues of race with respect to the Voting Rights Act. Could you let us know why with respect to the voting rights law that is actually a necessary thing to consider?

MYRNA PEREZ:

Thank you, Senator. For the past 15 years or so, I have been an advocate on behalf of an organization and on behalf of clients who seek a free, fair, and accessible vote. As a civil rights litigator, I am duty-bound to be hypersensitive and attune to issues of disparity and racism and to protect and guard against any threats to a free, fair, and accessible vote.

And as such, I have been vigilant about monitoring, and watching, and resourcing, and researching potential threats to a fair vote.

SHELDON WHITEHOUSE:

And in fact, Section 2 of the Voting Rights Act makes it actionable to deny or abridge the right of any citizen of the United States to vote on account of race or color. Does it not?

MYRNA PEREZ:

That is correct, sir.

SHELDON WHITEHOUSE:

So that's actually in the law.

MYRNA PEREZ:

Part of my job, sir.

SHELDON WHITEHOUSE:

Part of your job. And it's part of your job because it's part of the law.

MYRNA PEREZ:

That is correct, sir.

SHELDON WHITEHOUSE:

Yeah. I'm actually, I think, more to your side than to the original side as regards the Constitution. I like your use of the word enduring. I think we do have an enduring Constitution, and we do have principles in it that endure, but that have to adapt to changing circumstances in society, whether it's new means of communication or new economic realities.

And I think too often, originalism is used as a device to try to impose value judgments rather than principle. I think it was William F. Buckley, who years ago said the purpose of conservatism is to stand athwart history, yelling stop. And I don't think the Constitution is designed that way. So, I just want to say I appreciate your perspective.

I tend to share it. And I think your use of the word enduring is a very appropriate one. I don't know if you want to elaborate on that in any respect, but thank you for saying that.

MYRNA PEREZ:

I would say, Senator, that I love the Constitution. I love the principles it sets out. I love that under the Constitution, we are all equal under the law, that we all have a right to life, liberty, and the pursuit of happiness. I love that we all have the right to free exercise. And I am entirely persuaded in the wisdom of the frameworks that sets up, things like the rule of law, separation of powers, and independent judiciary, and federalism.

As part of those frameworks, it allows us as Americans to live up to our ideals. So, those frameworks improve our values, and those values guide our framework. And I think together, the country is getting stronger and can get stronger.

SHELDON WHITEHOUSE:

In the context of frameworks, let me ask a final question here that I ask of a great many of the nominees who come before us because in the framework of the United States Constitution is the jury -- criminal jury and the civil jury, and the importance of the jury was something that was really evident to the founders, was part of the casus belli of the Revolution.

It was mentioned in our founding documents. And I think many historians see it as a way for popular expression of governance by local communities. And so, it's been with some degree of distress and dismay that I've watched jury trials more and more evaporate in the federal system. A lot of it has to do with Supreme Court decisions that have made it easier for big and powerful interests to get out of cases before they, in some cases, even have to properly answer discovery.

In other cases, it's been allowing big, powerful interests to divert people away from juries and into mandatory arbitration, for instance, which is very often a rigged game. Would you say a word about the historic role of the jury and whether you have any hesitation about protecting and defending the institution of the jury as contemplated in the Constitution?

MYRNA PEREZ:

Senator, the jury is an important bedrock position in our judicial system. Certainly, as an appellate court judge, I would not be interacting with juries, but I certainly would apply all of the standards of deference and reverence for the decisions issued by juries.

DICK DURBIN:

Thanks, Senator Whitehouse. Senator Tillis.

THOM TILLIS:

First, Senator Kennedy.

JOHN KENNEDY:

I'm sorry, Mr. --

THOM TILLIS:

Go ahead.

JOHN KENNEDY:

Mr. -- no, you go ahead. It was very timely.

DICK DURBIN:

We can ask you to do it jointly.

THOM TILLIS:

That gives us 10 minutes.

JOHN KENNEDY:

Yeah, really.

DICK DURBIN:  
But you have to fight over the 10 minutes.

JOHN KENNEDY:  
I'll try to not take my whole time here. Thank you, Mr. Chairman. Counselor, how are you? Good morning. Congratulations.

MYRNA PEREZ:  
Thank you.

JOHN KENNEDY:  
Do you think the Constitution should be used to create new rights?

MYRNA PEREZ:  
Senator, I think the Constitution is an enduring document and that --

JOHN KENNEDY:  
Yeah. I agree with you. It's been around a long time. It's enduring. And I'm fond of it. You love it. I'm fond of it, too. But do you think it ought to be used to create new rights?

MYRNA PEREZ:  
Senator, I think it is constantly being interpreted. And the Supreme Court has -- through the 230 years of jurisprudence has found rights in it. And if I am confirmed as an appellate judge, I would faithfully apply Supreme Court precedent.

JOHN KENNEDY:  
Yeah. But are you going to use it to try to create new rights?

MYRNA PEREZ:  
Senator, appellate court judges don't create new rights. They take the [Inaudible]

JOHN KENNEDY:  
Sure, they do. Sure, they do, Counselor. We've been -- we've both been at this a long time. They do it all the time. And that goes up to the Supreme Court. And the Supreme Court says yay or nay, or sometimes they don't say anything. Let me ask this. What barometer should we use to decide whether a federal judge ought to create a new right?

Are the people's elected representatives through a Congress or a legislature? What's the standard you use there?

MYRNA PEREZ:  
Senator, we have coequal branches of government. The legislature does the policymaking. The judiciary --

JOHN KENNEDY:

Yeah. But what's the standard -- I'm sorry to interrupt you. But we had this problem in the last administration, and we have it in this administration. If you could just answer my question because five minutes just goes like that. What standard do you use personally to decide whether new right ought to be created by a federal judge or by the United States Congress if it's a federal right?

MYRNA PEREZ:  
Senator, I would be applying precedent, and precedent has --

JOHN KENNEDY:  
I'll stipulate that you're going to apply precedent. I'll stipulate that. So, let's take that off the table. What standard should be used to determine whether a new right ought to be created by a court, a federal judge, unelected appointed, appointed for life, or a United States Congress?

MYRNA PEREZ:  
Senator, appellate courts have standards of review when looking toward lower court decisions. And I would have --

JOHN KENNEDY:  
Come on, Counselor, you're not answering my question. It's a real simple question. And you're very smart and you know what I'm asking. You believe in a living Constitution, OK. I get that. That's a legitimate point of view. You say you don't understand what an originalist is, but I think not only you're being candid there.

But this is what -- let me ask my question, again. What standard should be used to decide if you're going to create a new right in the Constitution, whether that right ought to be created by a federal judge or the people's elected representative? Very simple.

MYRNA PEREZ:  
Senator, the federal courts are of limited jurisdiction. The appellate courts sit in between a Supreme Court --

JOHN KENNEDY:  
OK. You're not going to answer. I get it. When you were at the Brennan Center -- you're still there, right?

MYRNA PEREZ:  
I'm on leave, sir.

JOHN KENNEDY:  
OK. But when you were there, did you advocate federal courts create new rights under the Constitution?

MYRNA PEREZ:  
No, sir.

JOHN KENNEDY:  
You never did.

MYRNA PEREZ:

No, sir.

JOHN KENNEDY:  
OK. When --

MYRNA PEREZ:  
The right to vote is protected in the Constitution and [Inaudible]

JOHN KENNEDY:  
So, you never asked for new rights. You just said they're already there.

MYRNA PEREZ:  
Yes, sir.

JOHN KENNEDY:  
OK. How do you know when rights are already there if it's not explicit?

MYRNA PEREZ:  
In the case of voting?

JOHN KENNEDY:  
No.

MYRNA PEREZ:  
No.

JOHN KENNEDY:  
No, just in general. If I read your resume and it's not something's on there -- well, that's a bad example. If you look at the Constitution, and it doesn't, let's just say -- let's say, reparations. OK? And it doesn't talk about reparations. How do you know whether a right should be granted if it's not there?

That's what I understand you to be saying with the living Constitution.

MYRNA PEREZ:  
Senator, again, a case would not come before an appellate court unless parties presented an argument.

JOHN KENNEDY:  
I get that. I understand how lawsuits tried. Let me ask you again. How do you know if a right's not explicitly in the U.S. Constitution that it's really there? It's hiding. It's not working, and we just have never seen it.

MYRNA PEREZ:  
Senator, in *Marbury v. Madison*, the Supreme Court said that the Supreme Court interprets the Constitution.

JOHN KENNEDY:  
Right.

MYRNA PEREZ:

I would look to precedent. I would look to see what --

JOHN KENNEDY:

What if there's no precedent?

MYRNA PEREZ:

There's always some precedent.

JOHN KENNEDY:

See, here's my problem, Counselor. This is where I think you're headed. I think what you want to do on the federal bench is advance a social agenda and rewrite the Constitution every other Thursday to advance a social agenda that you can't get by the voters through their elected representatives.

MYRNA PEREZ:

Senator --

JOHN KENNEDY:

Now, that's a legitimate thing to be for. This is America. You can believe what you want, but you spent your whole career doing that. And it bothers me that you're not defending that here, that you're dodging my questions.

MYRNA PEREZ:

Senator --

JOHN KENNEDY:

You're not the only nominee who's done that. It happened under the prior administration. There must be something in the water in the White House. But I'd respect you a lot more if you just upfront said it.

MYRNA PEREZ:

Senator, I believe in the value of precedent. I think it makes our system --

JOHN KENNEDY:

So do I. But that's got nothing to do with our discussion. We both know that. And I understand that you've been advised to say precedent, precedent, precedent. When in doubt, what's -- is it raining outside? Precedent. But it inhibits our ability to have a rational discussion. Thank you, Mr. Chairman.

DICK DURBIN:

Do you want to complete your answer, Ms. Perez?

MYRNA PEREZ:

I'm fine. Thank you.

DICK DURBIN:

Thank you. Senator Tillis? Oh, I'm sorry, Senator Coons.

CHRISTOPHER COONS:

Thank you, Chairman Durbin. Great to be with you, Ms. Perez. The committee received a number of glowing letters in support of your nomination. I was struck by one, in particular, a letter that I reviewed closely from Reverend Canon, Dr. Allison DeFoor of the Episcopal Diocese of Florida. Before his service as a faith leader, Reverend DeFoor practiced law, serving as a county judge, a circuit judge, a prosecutor, a sheriff of Monroe County, and a public defender.

He also sought elected office as the Republican nominee for lieutenant governor. And he emphasized in his heartfelt letter of support for you, and I quote, "Myrna is, as a lawyer and individual, a person of the highest integrity. She's thoughtful and sound in her judgment and committed to principles of justice that transcend politics.

She embodies the true meaning of public service and would be an exceptional federal judge." He adds, "This is an informed opinion." Something many of us in the Senate would benefit from adding on occasion if it were true. Given this informed opinion that I assume is rooted in your close work together, I'd just be interested in learning more about your work with the reverend and former judge and sheriff on criminal justice issues.

What motivated you to engage in that work and what lessons have you taken from that work, which you might apply in your future service?

MYRNA PEREZ:

Certainly, sir. The Brennan Center takes the position that all Americans who are living and working in the communities should be able to have the right to vote. And I have been very fortunate to work with people from all kinds of backgrounds to try and work in the legislative branch primarily to make that so. Reverend Allison is one of the many different kinds of people that I have worked with on this issue.

There are quite a number. And I think it is really encouraging that there are still some issues in which we can get bipartisan support for.

CHRISTOPHER COONS:

We've managed to get bipartisan support for criminal justice reform even on this committee with the leadership of our chairman. Ms. Perez, I was also struck that your work has included extensive litigation experience both at the district and appellate level. And I'd like to give you a chance to talk about your litigation experience and its relevance to your service should you be confirmed in the position for which you've been nominated.

How would your experience with complex litigation inform your service as a judge if confirmed?

MYRNA PEREZ:

It would give me a very strong appreciation for what it is that district courts have to do. It would make me be very faithful to the standards of review. It would remind me every day that the parties are the masters of their lawsuits, and it would also bring to me almost two decades of experience analyzing constitutional and statutory claims, voluminous documents, a massive amount of motions practice, and would allow me to make sure that I am aware of exactly what it is that parties are doing when they are arguing and prosecuting their cases.

CHRISTOPHER COONS:

That's great. Thank you very much. I appreciate your testimony before this committee today. No further questions. Thank you, Mr. Chairman.

DICK DURBIN:

Thanks, Senator Coons. Senator Tillis.

THOM TILLIS:

Thank you, Mr. Chairman. Ms. Perez, thank you for being here, and congratulations on the honor of --

MYRNA PEREZ:

Thank you, sir.

THOM TILLIS:

Being nominated and to your family. And what's your son's name?

MYRNA PEREZ:

His name is Diego [Inaudible]

THOM TILLIS:

Welcome. I've got a quick -- or just a couple of quick questions. I was speaker of the House down in North Carolina when we passed voter ID laws in the state. And you know, I feel like it's difficult for me to understand. I think we have different views about this, but when we tried to do everything we could to make sure that anyone who wanted -- that needed an ID in order to vote that we would even pay for it, that we would make sure that we gave people not only the opportunity to vote but fully participate in civil society.

When I went through TSA, I had to present an ID. When I checked into a hotel two weeks ago, I had to present an ID. When I got to prep for my surgery about two months ago for prostate cancer, I had to submit an ID to be admitted into the hospital. And it just seems to me that -- I'd like for us to get to a point to understand if we want every American to fully participate in every aspect of society, that an ID is a pretty important part of that.

I'm not going to ask you, I know where you are on it, so we'll agree to disagree on that. But I did want to ask you about something I think you argued. And there was a ballot harvesting case in the 9th District down in North Carolina. And in that particular case, it was a Republican candidate. So, I appreciate, again, your consistency on the issue.

But give me an idea on a state like North Carolina where ballot harvesting is not allowed, why you think that that is a suppression -- a voter suppression measure.

MYRNA PEREZ:

Certainly, Senator. I am happy to answer your question. I would, again, recognize that if I am confirmed, I would be taking on a different role and you were referencing work that I did as an advocate. We examined the issue in North Carolina and found that there was a disadvantage that was occurring because of the illegal activity that happened there.

And we responded --

THOM TILLIS:

For those whose ballots were harvested.

MYRNA PEREZ:

Those whose ballots were tampered with and thrown away. And as an advocate, I was duty-bound to call that attention to the public to ensure that I could do everything within my role that those voting rights of the impacted voters would be vindicated.

THOM TILLIS:

Do you -- just on a broader question, again, I understand the limits that you have because matters that may come before you. But wouldn't it also follow then that the same rationale for saying that those votes had been suppressed because they had been tampered with, opens up ballot harvesting to potential fraud?

MYRNA PEREZ:

Senator, the -- striking the balance between how much restrictions you need to ensure fraud doesn't happen is something that's better suited for the legislature. If I am confirmed, I would merely be evaluating the law and the precedent before me as applied to the facts than the record that the parties put before me.

THOM TILLIS:

Thank you. Thank you, Mr. Chair, and congratulations again to the family and the story of your family. Thank you.

MYRNA PEREZ:

Thank you.

DICK DURBIN:

Senator Hawley?

JOSH HAWLEY:

Thank you, Mr. Chairman. Thank you, Ms. Perez, for being here. Congratulations on your nomination. I want to just pick back up where Senator Tillis left off when it comes to ballot harvesting. This is an issue that the United States Supreme Court has recently taken up in the Brnovich case. You've had quite a lot to say about the Brnovich case.

You've had quite a lot to say and quite a number of the Supreme Court's precedents, which you would be called upon to apply. So, I'd like to get your views on those. You seem to be fine and perfectly willing to characterize Supreme Court precedent. So, I'd look forward to your testimony here under oath. You've said that the Brnovich case was a clear-cut case.

The Supreme Court ruled, and you actually characterized that some of the arguments in the case made by Brnovich and made by various amici in support of Arizona as outrageous and harmful, including a brief filed by my colleague, Senator Cruz. So, I take it you think the Brnovich case was wrongly decided.

MYRNA PEREZ:

Senator, my views on the Brnovich case are immaterial because, if confirmed, I would be duty-bound to apply it and I would do so without reservation.

JOSH HAWLEY:

Well, I think they're quite material to get your judicial philosophy. So, let's try again. Do you think the Brnovich case was wrongly decided? You said the case was clear cut, the Supreme Court ruled differently than you thought. So, I take it you think it was wrongly decided.

MYRNA PEREZ:

Senator, I would apply the precedent without reservation.

JOSH HAWLEY:

Do you think the Brnovich case was rightly decided?

MYRNA PEREZ:

Senator, I would apply the Brnovich case without reservation. It is the law of the land, the country that I care so much about depends upon stare decisis and the application of precedent.

JOSH HAWLEY:

Well, that's not what I'm asking you. I'm asking you about your comments on a Supreme Court case, which you will indeed be duty-bound to apply. But I think understanding your view on that case is relevant. Let's try a different one. Shelby County, you said that the Shelby County case gutted voting rights.

So, you think that case was wrongly decided. Will you be able to apply that case faithfully?

MYRNA PEREZ:

Without reservation.

JOSH HAWLEY:

Do you think that the Heller case was wrongly decided?

MYRNA PEREZ:

Senator, Heller is the law of the land as is its application through the states of McDonald. I would apply it without reservation.

JOSH HAWLEY:

Do you think the Brown v. Board was wrongly decided?

MYRNA PEREZ:

Senator, I would apply Brown v. Board without reservation.

JOSH HAWLEY:

Do you think Brown v. Board was rightly decided?

MYRNA PEREZ:

Senator, I think there -- it was rightfully decided. And --

JOSH HAWLEY:

It was rightly decided. Shelby County was wrongly decided, you say. But you won't say about the Brnovich case, you won't say about Heller. What's the line here? How am I to judge how you're going to apply the law if you won't be frank with the committee about what you've said in the past and about your own views now?

I mean, you've been an activist for quite some time. You've commented on many laws. You've called voter ID laws like we have in my state of Missouri, which by the way the voters of my state passed -- directly, the voters passed. You've criticized those as Jim Crow-type laws. That's an extraordinary statement for a judge, someone who wants to be a federal judge, not a -- not an activist, not a constitutional lawyer, federal judge.

You've called the precedents of the United States Supreme Court. You've talked about them as gutting voting rights. You've criticized them in the harshest of terms. You've done this repeatedly. So, I think it's fair game to ask about your view of precedent. So, how are we going to know? I mean, let's come back to the Heller case, the McDonald case that followed on from Heller.

Was that rightly decided?

MYRNA PEREZ:

Senator, I would apply it without reservation. And if I may say, I, for the last 15 years, have been an advocate when under our system requires zealously pursuing the interests of my clients. A judge plays a completely different role. And by accepting this nomination, I am pledging to this body, to the American public before my God that I would faithfully discharge my duties under the Constitution, which required me to put aside any personal policy viewpoints I have and examine what the matter is before me and apply the precedent of the Supreme Court and the 2nd Circuit?

And I do this without reservation. I am willing and able to serve my country in this way.

JOSH HAWLEY:

Do you still think the Shelby County case gutted voting right?

MYRNA PEREZ:

Senator, as a academic, as a researcher, as an advocate, I have done a number of research where I have been able to lift out and identify instances in which policies that passed that were not likely to have passed had it not been for Shelby County. But Shelby County is the law of the land, and I would apply it without reservation.

JOSH HAWLEY:

Let's talk just a little bit about your broader judicial philosophy. You've been an advocate of living constitutionalism. You said in 2021 that if you are one of those people who think that we were at our best when our country was first founded and didn't include women or people of color, or people without property in the electoral process, then this conversation about living constitutionalism is probably not for you.

I take that to be a disparagement of originalism. You've also said that the Constitution is not static or frozen in time, but it has to evolve and be dynamic in order to actualize its principles. So, is this the judicial philosophy you would follow in cases of first impression when you don't have a controlling precedent on point?

You have to construe the Constitution. You would look to dynamic and evolving principles.

MYRNA PEREZ:

Senator, I believe in the conversation that you are speaking of, I was talking about Justice Brennan's definition of a living Constitution.

JOSH HAWLEY:

What would be yours?

MYRNA PEREZ:

I believe that we have a Constitution that is enduring. I think its great values are applicable and relevant and can guide us today. I think they're timeless, and I believe that they make our country strong.

JOSH HAWLEY:

Do you consider yourself a living constitutionalist?

MYRNA PEREZ:

I don't think those kinds of statements are helpful in explaining the approach that I would take, which would be first examining the text, then examining the precedent. And if I needed to go beyond that, I would be looking at the canons of construction, the legislative history, the structure of what was at issue.

And more importantly, I would be bound by the record of the parties that presented the case to me.

JOSH HAWLEY:

Well, my time has expired. So, thank you, Mr. Chairman, for your indulgence on this. I'll just say that, Ms. Perez, in conclusion, I want to echo Senator Kennedy's remarks that I think given your very lengthy record and your very lengthy record of statements about Supreme Court precedent, about many court precedents, I think to come to this committee and to refuse to answer questions about those, to refuse to explain your statements, to say you're not going to comment about decisions, you have commented frequently about decisions.

I just think that -- and with all due respect, that's not candid. I think it's frankly not transparent with this committee, and I won't be able to support your nomination. Thank you, Mr. Chairman.

DICK DURBIN:

And I might add to my friend from Missouri and others, it is not unprecedented. Trump nominees came before this committee for four straight years. And with the exception of *Brown v. Board of Education*, which they acknowledged starting in around 2019, they refused to say to a person, whether other cases or particularly recent cases, correctly decided.

It is a question often asked by the other party in this committee. And the answers you've given are ones we've heard before, and I don't think it come -- it should come as a surprise to my colleagues. Senator Padilla.

ALEX PADILLA:

Thank you, Mr. Chairman, and appreciate the context and background. Ms. Perez, how are you?

MYRNA PEREZ:

Great to see you, sir.

ALEX PADILLA:

Great to see you. You have spent virtually your entire career advocating for greater access to the ballot and stronger protections for our fundamental right to vote. In the course of that work, clearly, you've litigated cases in court. You've advocated for policy changes in states around the country, as well as right here in Congress.

And you and I have worked together in my prior capacity as the chief elections officer for the state of California. So, I know how important advocacy on behalf of the right to vote is. Simply put, we are a stronger democracy when every eligible citizen is able to vote, particularly, free of harassment, intimidation, and without any unnecessary obstacles or barriers.

I have a sort of a bigger picture question in why voting rights -- why have you decided to dedicate your career to defense of our right to vote, number one? And I think, more specifically, and for purposes of this committee, how your views on policy which we're entitled to have, but how would they affect your rulings as a judge?

MYRNA PEREZ:

Thank you, Senator. I think the right to vote keeps us free. I think it protects us from tyranny. I think it is preservative of all other rights. And as an advocate, I have been privileged to work alongside with all sorts of Americans from all sorts of backgrounds to make sure that our ability to govern ourselves is able to happen because we all have a free, fair, and accessible vote.

With respect to policy, that is a role that is an active part of my docket. But by accepting this nomination, I am pledging to no longer participate in policy disputes and instead, I will impartially and objectively review the law, apply it to the record before me, and be faithful to the precedent, both of the Supreme Court and the 2nd Circuit.

ALEX PADILLA:

OK. I appreciate that answer. I thank you for your clarity. I thank you for your commitment, and I thank you for your willingness to serve in this capacity should you be confirmed. I do have another question. And sadly, very timely. At the end of the last election cycle, we saw the rule of law tested when President Trump and his enablers filed over 60 post-election lawsuits, not even counting those that came prior to the election.

Sixty post-election lawsuits, challenging the outcome of the election. Thankfully, court after court rejected President Trump's frivolous challenges, but there's no question that the system was strained by the former president's unfounded assault. As a voting rights lawyer, you saw this abuse of our judiciary up close.

Can you speak to the importance of the rule of law and how you believe that judges can help exemplify and uplift it?

MYRNA PEREZ:

Thank you, Senator. The rule of law is a foundational principle. It is all over the way that our country works in addition to things like an independent judiciary and separation of powers. I think it's one of the genius of our Constitution. And part of the reason why I am very comfortable that I will be able to set aside my past role as an advocate and accept the role of a judge, if I am lucky enough to be confirmed, is because our system requires an independent judiciary.

I know that when I'm a litigant in court, I want to be able to go before a judge that allows me to make the arguments, allows me to make the case, and sets aside whatever personal viewpoints. Our system does not work unless judges do that. I am ready to do that. The country that I love so much depends upon it.

ALEX PADILLA:

Thank you. Thank you for responses, and thank you, Mr. Chair.

DICK DURBIN:

Thanks, Senator Padilla. Senator Lee?

MIKE LEE:

Thank you, Mr. Chairman. I'd like to follow up on one of the questions that Senator Hawley raised with you. Now, you said that you were referring in those discussions about a living Constitution to Justice Brennan's interpretive style. Is that correct?

MYRNA PEREZ:

That is what I believe the quote he was referring to was [Inaudible]

MIKE LEE:

OK. And is this the quote in what you said while you were discussing -- I think this was in a panel discussion just a couple of months ago, that Senator Hawley was asking about, in which you said if you're one of those people who think that we were at our best when our country was first founded and didn't include women or people of color, or people without property in the electoral process, this is probably not the conversation for you?

So, I'd like to know first, what conversation is that? I want to understand the context here. What do you mean what conversation isn't -- are you characterizing people who believe in originalism as believing that we were at our best as a country when we didn't include women or people of color?

MYRNA PEREZ:

Senator Lee, as I indicated to Senator Grassley, I do speak a lot, but if I remember that conversation correctly, I was getting a lot of hostile and inappropriate comments in the chat, and it was causing a disruption to the organizers and the planners who seemed to think that I would be engaging in some conversation with them.

And so, I was trying to set expectations for what the conversation would be like.

MIKE LEE:

I understand that. That's good to know, but I still like to know what you were referring to.

MYRNA PEREZ:

I was trying, if again, that was a conversation that I recall and I believe that it was, it was me attempting to deescalate some people who believed that that conversation was a source of a -- or was a potential for a back and forth over chat, which I was not going to let it devolve into?

MIKE LEE:

OK. Do you believe that's a fair characterization of originalist?

MYRNA PEREZ:

I do not believe that that is a fair characterization of originalist. And I again, if this is the right conversation that I'm recalling, was trying to deescalate folks who were disrupting a conversation via chat.

MIKE LEE:

Now, in response to Senator Hawley's questions a moment ago, you said you were referring -- when referring to the living Constitution, you were referring to Justice Brennan's approach to interpreting the Constitution, and then you said that that would not necessarily be your approach. Is -- did I understand your response to this question correctly?

MYRNA PEREZ:

Senator, I am not a judge. I don't have a judicial philosophy yet, but my approach would be to first look at the text, then look at precedent, look at the canons of construction, and keep myself limited to what the parties in the matter presented before me.

MIKE LEE:

OK, insofar as you were characterizing Justice Brennan's approach to constitutional interpretation, how would you characterize that approach today? What is his approach? What was his approach?

MYRNA PEREZ:

Again, I've never spoken to Justice Brennan. I didn't have the pleasure of meeting him.

MIKE LEE:

But you said a moment ago you were trying to characterize him.

MYRNA PEREZ:

He has had quotes about the Constitution not being static as has Justice John Marshall in *McCulloch* versus *Maryland*. What I believe is true, and I believe it's a truism, is that our Constitution is enduring, that it has great values that are universal and timeless, and that those values make our country stronger.

Values like freedom of religion, values like liberty, values like equal justice under the law.

MIKE LEE:

OK. So if you were confirmed, are you saying you would not adopt the living constitutional approach?

MYRNA PEREZ:

Senator, If I'm confirmed, the first place I would look when evaluating a constitution or a statute would be at its text. That is the most probative offering of what a piece of writing means. If required, I would look to precedent from both the Supreme Court and the 2nd Circuit. If that still didn't answer the question, I would look to the canons of construction, the --

MIKE LEE:

I understand. You know, back in 2014, you described new voter integrity laws, including, as I understand it, voter ID laws as representing "the biggest voting rights rollback since the Jim Crow era." Now, personally, I think it's an insult to the brave Americans who engaged in the civil rights movement to draw any comparison between the heinous race-motivated requirements imposed by the Democratic Party under the Ku Klux Klan's influence, to compare those to today's common-sense race-neutral and often bipartisan election security measures, which according to some polls are supported by a majority of African American voters.

Do you stand by that statement today that voter ID laws are the biggest voting rights rollback since the Jim Crow era?

MYRNA PEREZ:

Senator, I understand and very much believe in the importance of election integrity. Elections are how we resolve our political differences peacefully. The Supreme Court has spoken and provided standards for assessing voter ID in the Crawford case. If I am lucky enough to be confirmed, I would be duty-bound to apply that precedent to any case in controversy that came before me, and I would do so without hesitation or reservation.

MIKE LEE:

I understand that, but I am asking about a statement that you, in fact, made. Do you stand by your statement that it's the biggest voting rights rollback since the Jim Crow era?

MYRNA PEREZ:

Senator, if that is the statement that I recall, it was occurring alongside a great number of pieces of legislation across the country that as an empirical matter looked different than what we had seen since earlier times and that was what the reference was to.

MIKE LEE:

So you were not referring to voter ID laws?

MYRNA PEREZ:

I -- again, if I remember correctly, it was a wide array of laws that would have included voter ID laws because around the time period that you're talking about where we saw a number of them introduced. But again, the Supreme Court has said that within certain confines, the voter ID laws are acceptable. The 5th Circuit en banc also said that there are times when voter ID laws cross the line.

If I am a judge, I would be required to look at all of the [Inaudible] precedent and examine any law that was before me to figure out if unlawful discrimination was present.

MIKE LEE:

OK. I see my time has expired. I do find it concerning that the witness still hasn't distanced herself. I understand sometimes people say things and later regret them, but she still hasn't distanced herself from statements made to that effect a few years ago, and I think that's significant. Thank you.

DICK DURBIN:

Thank you, Senator Lee. Senator Cruz?

TED CRUZ:

Thank you, Mr. Chairman. Ms. Perez, as I look at your career, I see the career of someone who has been an activist. And I believe a radical activist. You have waged litigation campaigns and opposed voter ID laws. You have opposed voter integrity laws. You have opposed prohibitions on ballot harvesting. You have advocated for felons being able to vote.

As I look at your record year after year after year of being an extreme partisan advocate, I'm left with the very likely conclusion that if you were confirmed to the bench, you would likewise be a radical activist on the bench. Voter ID laws, as Senator Lee just pointed out, you described as the greatest rollback of voting rights in this country.

Eighty percent of Americans support voter ID laws. Sixty percent of African Americans support voter ID laws. Do you believe voter ID laws are constitutional?

MYRNA PEREZ:

Senator Cruz, the Supreme Court has said that there are no per se restrictions against voter ID laws in Crawford.

TED CRUZ:

But I asked what you believed. I was one of the parties litigating in Crawford, so I'm very well familiar with that case and led a coalition of states defending voter ID laws, and Justice Stevens wrote the majority opinion upholding Indiana's voter ID law. My question to you is, do you believe voter ID laws are constitutional?

MYRNA PEREZ:

Senator, I believe they are constitutional -- I believe that they can be constitutional because the Supreme Court has said they can be constitutional. And in Marbury versus Madison, the Supreme Court gets to decide. That is what our system depends on. We have a concept of vertical stare decisis. We have rules of law.

We have --

TED CRUZ:

Ms. Perez, just a couple of months ago, in March of 2021, you said that the voter ID laws that had been passed were due to, I'm going to quote you to get your words right, "anxiety over the browning of America and people having anxiety of the fact that certain folks in power are not going to be able to stay in power." Do you believe the 80 percent of Americans who support voter ID laws and the 60 percent of African Americans who support voter ID laws are doing so because they're concerned about the browning of America?

MYRNA PEREZ:

Senator, that quote is clearly referring to politicians. It's not referring to African Americans.

TED CRUZ:

Which politicians here do you believe are concerned about the browning of America?

MYRNA PEREZ:

Senator, that context was with respect to state politicians. And --

TED CRUZ:  
So it's only state politicians.

MYRNA PEREZ:  
Senator, that context that I'm on record for were referring to state politicians.

TED CRUZ:  
All right, well, let's talk about politicians here in this body. As you know, I filed an amicus brief on behalf of 11 senators on the Brnovich case. You made a comment that the brief that I filed was outrageous and harmful. Do you stand by that characterization?

MYRNA PEREZ:  
Senator, the Supreme Court, as you know, issued its decision in the Brnovich case and struck down -- I'm sorry, and upheld the restrictions on Arizona. Brnovich --

TED CRUZ:  
I'd like you to answer my question. Do you stand by the characterization that the amicus brief that I filed on behalf of 11 senators was "outrageous and harmful"? That's how you characterized it.

MYRNA PEREZ:  
Senator, the Supreme Court has issued its [Inaudible]

TED CRUZ:  
I'm going to try again. Do you stand by your characterization? I'm not asking what the Supreme Court did. You described an amicus brief filed on behalf of 11 senators as outrageous and harmful. Do you stand by what you said just a few months ago?

MYRNA PEREZ:  
Senator, what I said as an advocate when it was pending before the court is not relevant to the issue before --

TED CRUZ:  
Do you stand by it, or do you retract it? You have a choice.

MYRNA PEREZ:  
Senator, as an advocate, I [Inaudible]

TED CRUZ:  
OK, you're going to refuse to answer me on that. I assume you also believe the Supreme Court's six-three decision agreeing with the position advocated in my amicus brief, I assume you believe that decision was also outrageous and harmful because that's the language you used.

MYRNA PEREZ:  
Senator, the Brnovich case is the law of the land. It has been settled --

TED CRUZ:

So you're not going to answer that either.

MYRNA PEREZ:

The law of the land has been settled. What I am going to say, Senator, is that I am pledging to apply precedent.

TED CRUZ:

So at the time you discussed the brief filed by a number of senators on this committee as outrageous and harmful, at that time, had you had any discussions with the Biden administration about being nominated to be a judge?

MYRNA PEREZ:

I would need to remember the timing a little bit.

TED CRUZ:

When was the first discussion you had with the Biden administration about being nominated to being a judge?

MYRNA PEREZ:

I need to -- I would need to reference my Senate Judiciary questionnaire because that's where I recorded it. I don't have it committed to memory.

TED CRUZ:

So you have advocated that felons should be able to vote. Do you believe all felons should vote?

MYRNA PEREZ:

Senator, my work and advocacy has been on behalf of persons who are living and working in the community.

TED CRUZ:

Do you believe currently incarcerated prisoners in jail should be allowed to vote?

MYRNA PEREZ:

Senator, I have been advocating on behalf of people who are [Inaudible]

TED CRUZ:

You're not answering my question.

MYRNA PEREZ:

Senator --

TED CRUZ:

I didn't ask what you've advocated in the past. I'm asking what you believe.

MYRNA PEREZ:

Senator, the canons of judicial ethics preclude me from answering that question because a situation may come before me.

TED CRUZ:

So let me ask you this, you have advocated in favor of a living constitution. And indeed, as both Senator Hawley and Senator Lee asked you about, you have disparaged those who believe in originalism as essentially racist and bigots. How do you think you will be able to serve with colleagues on the Court of Appeals if you have disparaged their constitutional interpretation as racist and bigoted?

And secondly, why is it that when you advocate a "living constitution," that somehow the livingness of it always makes the Constitution agree with the policy positions you happen to embrace? How is that consistent with democracy to have a judge able to implement whatever policy positions you believe in?

MYRNA PEREZ:

Senator, we have had more than two dozen amendments added to the Constitution since it was ratified in 1780.

TED CRUZ:

But that's not what a living constitution is. Living constitution means you, as a judge, if you're a judge, can change it to whatever you want and that the voters don't get to speak on it. Isn't that right?

MYRNA PEREZ:

Senator, women now have the right to vote [Inaudible]

TED CRUZ:

It would ask for an amendment for that. That's a terrific victory, and it was done the right way through an amendment. A living Constitution is judges changing it? Why is judges changing the Constitution to meet their policy preferences consistent with any respect for the democratic process and the ability of voters to decide policy issues?

MYRNA PEREZ:

Senator, it is clear that our great Constitution is one that is enduring. It is clear with things like Brown versus Board overruling Plessy versus Ferguson that evolution happens. It is also clear that our great constitution establishes separation of powers. There are bodies like this one that engage in policymaking.

There are judges that review the cases and controversies that are put before them. I am pledging by accepting this nomination that I am going to cease being an advocate and I would impartially, without reservation, objectively apply the law to the facts of the case in controversy before me.

TED CRUZ:

Well, your record is overwhelmingly to the contrary.

DICK DURBIN:

Thank you, Senator Cruz. Senator Blumenthal?

RICHARD BLUMENTHAL:

Thanks, Mr. Chairman. The simple fact of the matter is you've never been a judge before, have you?

MYRNA PEREZ:

That is correct, sir.

RICHARD BLUMENTHAL:

So when my colleague, Senator Cruz, says your record is overwhelming to the contrary, I'm not sure what he is referring to. You have been an advocate, correct?

MYRNA PEREZ:

That is correct, sir.

RICHARD BLUMENTHAL:

And tell me how you view the role of advocate as being different from a jurist?

MYRNA PEREZ:

Thank you. In the great genius of our Constitution, people play different roles. Advocates zealously argue on behalf of their clients in as many for as they can. I have had the privilege and pleasure of doing that. Judges take on a different role. They are limited in what they have jurisdiction over. They are limited in the cases that come before them.

And they are limited to the arguments what parties put before them. And they are limited to binding precedent. I believe that the most important thing a judge can do and must do is, in fact, duty-bound to do is to impartially and objectively apply existing precedent to the facts and the record of the case before them.

RICHARD BLUMENTHAL:

As an advocate, you've had strong beliefs and you have strong values and you've advocated causes strongly. I take it as a member of the Court of Appeals for the 2nd Circuit, you would be able to put those beliefs and values and positions aside and look at the law, specifically the Constitution and the statutes of the United States of America, correct?

MYRNA PEREZ:

Not only would I be capable, sir, I must. The country that I care so deeply about depends upon people playing their roles. And I, if given the chance to serve this country, would not betray its values of an independent judiciary. I would faithfully, to the best of my ability, uphold my duty under the Constitution, which would be to fairly and impartially evaluate the cases and controversies before me.

RICHARD BLUMENTHAL:

And in fact, all of us who have been advocates, and I've argued cases in the Court of Appeals that I expect you'll soon join, as well as the district court and the United States Supreme Court, as well as state courts in Connecticut like you. As an advocate, you don't want to be an objective neutral arbiter, you want to be on the side of your client and your cause.

That's your record. And if you were, in fact, acting as a judicial official while being an advocate, you'd be betraying your client and your cause, wouldn't you?

MYRNA PEREZ:

That is correct, sir.

RICHARD BLUMENTHAL:

So when Senator Cruz tries to argue you shouldn't be a judge because you were a good advocate, in effect -- and I know he -- I think he understands the point I'm making. Your record, in fact, exemplifies your faithfulness to the role that you have been playing as an advocate because our whole system is designed to have fierce and ferocious advocacy on the basis of the law and the facts.

In fact, sometimes, arguing that courts should expand the law by an expansive interpretation. But whatever you have argued as a lawyer and an advocate, you would -- you accept the fact. In fact, I sense you embrace it, that you would have a different role as a member of the United States Court of Appeals for the 2nd Circuit.

MYRNA PEREZ:  
That is correct, sir.

RICHARD BLUMENTHAL:  
Thank you.

MYRNA PEREZ:  
Thank you, sir.

RICHARD BLUMENTHAL:  
Thanks, Mr. Chairman.

DICK DURBIN:  
Thank you, Senator Blumenthal. Senator Blackburn?

MARSHA BLACKBURN:  
Thank you, Mr. Chairman. Welcome.

MYRNA PEREZ:  
Good morning, Senator.

MARSHA BLACKBURN:  
And congratulations --

MYRNA PEREZ:  
Thank you.

MARSHA BLACKBURN:  
To you. I just want to be sure I'm understanding some of the comments --

MYRNA PEREZ:  
Yes, ma'am.

MARSHA BLACKBURN:  
That you have made. And basically, you're saying as you move to the role of a judge, you would set aside all of your previous opinions.

MYRNA PEREZ:

They would not make its way into any courtroom that I was sitting in.

MARSHA BLACKBURN:

So basically, you're saying you would erase all of this activism from your past?

MYRNA PEREZ:

What I'm saying, Senator, is that I would apply the precedent of the Supreme Court [Inaudible]

MARSHA BLACKBURN:

So you're going to say -- what you're going to do is basically when it comes to your philosophy of the law and your philosophy of the governmental structure, you are going to hit the reset button and you will be a neutral and blank slate. Is that what you're telling us?

MYRNA PEREZ:

I will be an impartial and objective adjudicator limited to the subject matter and personal jurisdiction of the case before me and the arguments that the parties have put in front of me.

MARSHA BLACKBURN:

OK, let's do this then. Let's go on to the issue of voter ID because this is something that causes not only me but a lot of people in Tennessee who are viewing your nomination. They're really unhappy about your nomination because most Americans, as you've heard from others today, they support voter ID laws.

They also support the fact that it is up to the state to tend to this. And they are very concerned about where you would go. And you know what, they really don't want activist judges. What they want is someone who is going to be an originalist, who is going to look at the text of the Constitution and look at precedent.

Things you've said you're going to do. But the answers to your question do not indicate that that is going to be what you're going to take. I get this funny feeling that you're trying to hedge us, that you've rehearsed your answers, that you're spouting out what you think will not get you into trouble so that you can go through the confirmation process and then do the happy dance and get on the court, and then go back to your activist ways.

That is what is coming across, ma'am. That is what I'm perceiving. So talk to me just a little bit about what your view is of the elections clause. And then do you agree that the states have the right to conduct the elections in their state in the manner that they see fit?

MYRNA PEREZ:

Senator, states play the primary role in election administration.

MARSHA BLACKBURN:

It is their prerogative, correct?

MYRNA PEREZ:

We have a system of federalism. Within certain bounds pursuant to the election clause and the statutes that this body has created, states play the primary role in the administration of elections.

MARSHA BLACKBURN:

So your previous work in election law and voter ID would not preference any of the decisions that you're going to make?

MYRNA PEREZ:

I would very strictly adhere to the precedent of the Supreme Court [Inaudible]

MARSHA BLACKBURN:

But you cannot give me a yes or no to that?

MYRNA PEREZ:

Yes, I guess if you don't mind rephrasing the question, I'd like to if I can.

MARSHA BLACKBURN:

I said your prior work in election law, that will not influence your decision-making in election law -- election cases.

MYRNA PEREZ:

If what you're asking, Senator, is whether prior policy positions as an advocate that I've taken --

MARSHA BLACKBURN:

Your prior work. That's right.

MYRNA PEREZ:

My -- I am pledging to you that if I am confirmed that I will set aside any personal views I have as to the merits of policy and apply the country's precedent, which includes cases like Crawford, which as we have indicated before says that voter ID laws are not per se unconstitutional, and I would apply Crawford and any other relevant Supreme Court or 2nd Circuit precedent on any matter involving a voter ID law that came before me.

MARSHA BLACKBURN:

OK. I'm going to send to you a question for an answer in writing because I will not have enough time for you to give a fulsome answer. But it deals with felon enfranchisement on voting and the positions that you have taken in that previously. And you did not answer Senator Cruz's question about felons having the right to vote, and you were opposite of Governor DeSantis in having them pay all of their fines.

So I will send that question to you and write for a written answer. And then I'm also going to send to you a question dealing with your qualifications. Mr. Chairman, thank you. I yield back.

DICK DURBIN:

Thank you, Senator Blackburn. Senator Cotton?

TOM COTTON:

Thank you, Mr. Chairman. Ms. Perez, I watched some of the hearing on television earlier. I apologize, I missed Senator Hawley's question because I was on the floor voting. I just want to return to some of the things he said. My crack staff gave me a summary, but I assume it must be incorrect. Was it your testimony that Brown v. Board was correctly decided?

MYRNA PEREZ:

Yes.

TOM COTTON:

Was it your testimony that you cannot say whether Shelby County and Brnovich were correctly decided?

MYRNA PEREZ:

Senator, there's an important distinction that if you will give me a moment of your time, I'd be happy to explain, but that is accurate.

TOM COTTON:

So was *Roe v. Wade* correctly decided?

MYRNA PEREZ:

Senator, it is the law of the land, and I would apply it.

TOM COTTON:

Was *Lochner* correctly decided?

MYRNA PEREZ:

Senator, it is not really the law of the land anymore, but if I had been confirmed during that period, I would have applied it.

TOM COTTON:

Was *Dred Scott* correctly decided?

MYRNA PEREZ:

Senator, it is --

TOM COTTON:

Surely, you'd say *Dred Scott* was incorrectly decided.

MYRNA PEREZ:

Senator, it was incorrectly decided.

TOM COTTON:

So what's the distinguishing line of cases you will say as correctly decided and cases you won't say because it seems like you're willing to say that they're correctly decided if you like them. But if you don't like them, you can't comment on.

MYRNA PEREZ:

Senator, I do appreciate the question, and I think it is important, and I want to clarify this. As a judicial nominee, I am bound by the Code of Ethics to ensure that any prospective litigant before me knows that they are getting an impartial and fair hearing where they will not be prejudged, where they will be given the opportunity to present their case.

I think that it will not happen that a case of the permissibility of de jure segregation in schools would make its way before me. And as such, I am comfortable that I would not be violating my Code of Ethics

by commenting on it. There are a handful of other cases that that may be true. Lobbying is probably one of them, Marbury v. Madison.

Everything else, I would be very, very reluctant to give a potential litigant the wrong impression that they will not get a fair day in court.

TOM COTTON:

What about abortion? That's a live issue in the courts.

MYRNA PEREZ:

And I am not --

TOM COTTON:

You're not going to say whether Roe v. Wade was correctly decided.

MYRNA PEREZ:

That is correct.

TOM COTTON:

OK. Well, you certainly had a lot of harsh things to say in the past about cases like Shelby and Brnovich and some of the issues that were adjudicated there. In fact, we just got notice last night about this article that just was published that you wrote. Title of is The GOP Campaign to Make Elections Less Free.

You noted in the letter you sent with the article that you do not see or approve of the title before it was published.

MYRNA PEREZ:

That is correct, sir.

TOM COTTON:

Which I can understand. The author is not you on the title, so understand that. You didn't say whether you agree with it. Do you believe the GOP is campaigning to make elections less free?

MYRNA PEREZ:

Senator, the entire piece does not mention any political party and that is because I am an advocate for the right to vote and I would criticize any politician who would impede that right irrespective of their political party.

TOM COTTON:

Do you think requiring voter ID is an impediment to vote [Inaudible]

MYRNA PEREZ:

Senator, the Supreme Court in Crawford said that voter ID laws were not per se unconstitutional. However, the 5th Circuit en banc said that a particular voter ID law was illegal. This is a case-by-case inquiry where we are fortunate enough to have precedent on. Precedent that I would apply faithfully and without reservation.

TOM COTTON:

I know that -- I think Senator Durbin said that this article sounded like a speech he would give on the Senate floor. I agree. I don't think it proves the point you may have been trying to prove though, Senator Durbin. Ms. Perez, do you live in the New York City area?

MYRNA PEREZ:  
I live in Jersey City.

TOM COTTON:  
OK. How'd you get down here?

MYRNA PEREZ:  
I took the Amtrak.

TOM COTTON:  
OK. Did you have to show an ID to get your ticket or get on the Amtrak?

MYRNA PEREZ:  
I don't believe so, sir.

TOM COTTON:  
OK. Last time you flew, did you have to show an ID?

MYRNA PEREZ:  
I did, sir.

TOM COTTON:  
Do you think that's an unfair restriction on your ability to travel?

MYRNA PEREZ:  
That is the policy, and I am a rule follower, and I'm happy to abide by it because I can.

TOM COTTON:  
OK. If someone commits a murder, do you think it's fair to call them a murderer?

MYRNA PEREZ:  
If someone has been convicted for murder --

TOM COTTON:  
Yeah, convicted, yes.

MYRNA PEREZ:  
Under -- yes.

TOM COTTON:  
If they commit rape, do you think it's fair to call him a rapist?

MYRNA PEREZ:  
Have they been convicted?

TOM COTTON:  
Yes, convicted.

MYRNA PEREZ:  
Yes.

TOM COTTON:  
So if they commit a felon, do you think it's fair to call them a felon?

MYRNA PEREZ:  
I think that that is a bit different because there's a temporal issue and I think that there's a raging policy debate on that.

TOM COTTON:  
Because in the past, you've said that you don't like to use that word. Like you said, I don't use words like felons to describe people. I mean, we don't describe people by a mistake that they made.

MYRNA PEREZ:  
I don't. I believe that every person is a child of God capable of being redeemed and I never look at anybody and see the worst thing that they've ever done.

TOM COTTON:  
If those convicted murderers or rapists get released from prison often under misguided policies, do you think it's still fair to call them a murderer or a rapist?

MYRNA PEREZ:  
Irrespective of what their label was, sir, I would be on record as an advocate of trying to advocate for their right to vote if the criminal justice system had deemed them to be fit to be living amongst us.

TOM COTTON:  
All right. Thanks for your testimony.

DICK DURBIN:  
Well, thank you very much, Ms. Perez, for appearing before the committee. You may receive some written questions, which we hope you will provide timely answers to.

MYRNA PEREZ:  
I will do so, sir. Thank you.

DICK DURBIN:  
Thank you very much. I'd like to let the staff prepare for the second panel, and I ask them to please step forward. I'm going to ask Senator Coons to take over while I go vote and return. So in --

CHRISTOPHER COONS:  
In terms of introductions and swearing-in.

DICK DURBIN:

First thing off the bat, you swear them in.

CHRISTOPHER COONS:  
Yup.

DICK DURBIN:  
And get their opening statements.

CHRISTOPHER COONS:  
Yeah.

DICK DURBIN:  
[Inaudible]

CHRISTOPHER COONS:  
You'll be back?

DICK DURBIN:  
I'll try to you. [Inaudible]

CHRISTOPHER COONS:  
Do you swear that the testimony you're about to give is the truth, the whole truth -- OK, and I don't need to. Please be seated if you would. I look forward to hearing from our -- I'm sorry, we're all just going to have to stand back up to take the oath. So please don't be seated. I look forward to hearing from our next five nominees.

Before making your opening statements, will the nominees please stand to be sworn in. Do you affirm that the testimony you are about to give before this committee will be the truth, the whole truth, and nothing, but the truth so help you God?

UNKNOWN:  
I do.

CHRISTOPHER COONS:  
Thank you. Please be seated. And Ms. Cobb, you may begin with your opening statement.

JIA COBB:  
Thank you so much, Senator Coons and all the senators here, to Chairman Durbin for that [Off-mic]. Thanks, that's much better. I'd also like to thank Representative Norton for recommending me and for President Biden for nominating me. I have been drawn to a career in the law for as long as I can remember.

My father is an attorney. I have such a great respect for the role of our courts in our democracy to interpret the laws. And I do want to take some time to introduce family members who I have here today. First, my parents, James and Anita Cobb, who drove up from Michigan to be here with me to support me as they always do. Now that I'm a parent, I understand the significant sacrifices that they made to ensure that me and my sister had an education and opportunity.

I would not be here, but for their support. My sister, Jenna Cobb, is also here who has been a best friend and an enduring source of support and encouragement. She is here with my brother-in-law, Keith Farrugia, who's just been a wonderful addition to our family. I want to thank all of my friends, colleagues for their support.

And then last but not least, my son, Ricky is here. He is missing slip-and-slide day at camp to support me here today. Everything that I do is to be an example for him. I'm so thankful that he has an opportunity to have a first-row seat to see how our great democracy works. I look forward to answering the questions today.

Thank you.

CHRISTOPHER COONS:

Thank you so much, Ms. Cobb, and my thanks to your family and to Ricky, in particular. This will be a riveting and hopefully painless session during which your mother will answer some important questions. Your Honor, Ms. Merriam, if you would please proceed with your opening statement.

SARAH MERRIAM:

Thank you, Senator Coons, and thank you to the committee for holding this hearing and, frankly, all of these hearings. I do want to thank President Biden for the great honor of this nomination, and I want to thank both Senators Blumenthal and Murphy for their support in this process and for their very kind introductions.

Four of my favorite people are here with us today, my mother and my stepfather, Michael; my best friend, Paul; and one of my closest friends for over 30 years now, Jenny. My father, Dwight; my little brothers, Jonathan and Alexander who are not so little anymore; and my baby sister, Lucy, could not be here in person, but I'm confident they're with us through the miracle of streaming video.

There are many others I want to acknowledge who have supported me both throughout this process and throughout my career. My extended family, scores of aunts and uncles and cousins all over the country, from Alaska to Oregon, to Colorado, to Virginia, to Massachusetts, and just about everywhere in between.

And I'm thinking especially of my Uncle Russ down in Florida today. I am blessed with an incredible court family in the district of Connecticut, which we believe to be the oldest operating federal court in the country. My phenomenal career clerk, Samantha; my term clerk, Anne; and my courtroom deputy, Andrew, make everything work.

And I especially want to acknowledge my fellow magistrate judges who serve our court and our country with such skill and dedication. And finally, my friends from every stage of my life, from New Haven, from New South, from the district, from Edgewood [Ph] School to law school who have become like family to me so much so that their kids call me auntie and I love them like my own.

So I appreciate the opportunity to speak to you today.

CHRISTOPHER COONS:

Thank you, Your Honor. Judge Pan?

FLORENCE PAN:

Thank you, Senator Coons. I want to thank Chairman Durbin and Ranking Member Grassley for the opportunity to appear at this hearing today. I want to thank President Biden for the tremendous honor of this nomination and Congresswoman Eleanor Holmes Norton for recommending me to the president. I also want to thank Chairman Durbin for his kind introduction today.

I'm the daughter of immigrants from China. My parents, Wu-Ching and Felicia, came to the United States in 1961 to pursue graduate degrees in New York City. They chose to remain here because they recognized that this country offered the best opportunities for their children, my sister, Gloria, and me. Both of my parents became American citizens.

After naturalization ceremonies, each of them took an oath of allegiance before a United States district judge. When they took those oaths, they never imagined that one of their children might one day be nominated to assume a position of such trust and responsibility. I think it's fair to say that my presence before this committee is a fulfillment of the hopes and dreams that my parents held when they chose to make their lives here in the United States.

My parents can't be here today, but they're watching these proceedings from their home in Virginia with my sister, Gloria. I want to thank them for the sacrifices and the choices that they made, which allowed me to become the person that I am today. With me in the hearing room are my wonderful husband, Max Stier; our son, Zachary, who's 16 and probably will be asking all of the members of the committee for their autographs after this hearing.

Also, I'm pleased to have with me my brother-in-law, John Neuffer. My younger son, Noah, who is 15, can't be here today because he's in Sewanee, Tennessee at the Sewanee Summer Music Festival. I also want to acknowledge and thank other family members who are supporting me from afar, my cousins, Pearl Wang [Ph], Santos Shi [Ph], Stephanie Shi [Ph], and Debbie Wen [Ph] are watching from the great state of New Jersey, which is where I grew up. And my in-laws, Serena Stier and Steven Burton, are watching from the great state of Iowa.

Thank you, and I look forward to answering any questions from the committee.

CHRISTOPHER COONS:

Thank you, Your Honor. Judge Williams?

KAREN MCGLASHAN WILLIAMS:

Good morning. Thank you, Chairman Durbin, Ranking Member Grassley, and Senate -- I'm sorry, Senator Coons, for holding this hearing today and the honor of appearing before this body. Senator Booker, I believe our ancestors are indeed smiling down on us this morning. Senator Menendez, thank you for your ever so kind words.

I have many thanks -- many to thank for the journey that finds me here today. My village is strong, and the list is long, but I will be quick. My family here with me, Jim, my husband of 32 years. Thank you for all that you do and all that you have done. Our daughter, Danielle, who works in elementary education; our son, Justin, who works with Hope Scholars.

My mother, Millicent Tate, who transitioned from this life in 2004 was the strongest, most resilient woman I have ever known and the first person to tell me that I was enough. And she showed me and

prepared me for the grind. My dad, Norman Tate, who is here with me. The man brave enough to marry a divorced mother of four.

Thank you for lighting a new path for all of us. Ethan Carver White [Ph], also known as Uncle Jimmy, and his family. Uncle Jimmy, thank you for your service to this country and our family. My siblings, Michelle, Diane, Patrick, and Julian, their spouses, and my nieces and nephews. To the Lewis family and all those born McGlashan.

All of the cousins who started out on West Street in Jamaica came through Brooklyn and landed all over this country. To my in-laws, Jackie, Bonnie, Judy, Andre, Kathy, little Jimmy, my sis, Lisa, and her family. To the sisterhood, my sisterhood known as Alpha Kappa Alpha Sorority, Incorporated, for its service to all mankind and instilling that purpose in me. David Jasinowski [Ph] for allowing me the room to develop as an attorney.

Finally, the district of New Jersey, my federal family, my court family, my courthouse family, my chamber staff, Nicole, Tatiana [Ph], and Cara. Shout out to Camden. Shout out to the seven southernmost counties of New Jersey, especially Atlantic County where I put down my first legal roots. My village is strong, my list is long.

I appreciate the patience of this body for allowing me this time.

CHRISTOPHER COONS:

Thank you, Your Honor. And finally, Mr. Olsen?

MATT OLSEN:

Thank you. Thank you, Senator Coons, and members of the committee. I'm so honored to appear before you today as the nominee to be the assistant attorney general for national security. I am grateful to the president for his confidence in nominating me for this position. And I would also like to thank Senator Cardin and Senator Van Hollen for those very kind introductions.

I am joined here today by my family, my wife, Fern; my three children, Elizabeth, Nate, and Will. I would not be here without their love and support. I would also just like to take a moment to remember my parents, Myrna and Van. I was born in North Dakota. I moved here as a young kid because my dad got a job with a member of the House of Representatives from North Dakota.

We were going to move back to North Dakota in two years and we ended up staying here for my entire life. My mom was a school nurse. Public service is -- was the -- is the most noble calling in my family. Congress established the National Security Division after 9/11 and charged it with carrying out the Department of Justice's most important priority, and that is to protect the nation from terrorism and other threats to our national security by pursuing justice through law.

The threats we face today are diverse and complex, and the National Security Division plays a vital role in protecting the nation. I believe that our greatest strength in defending the nation comes from our career public servants. They are dedicated to securing our country with fidelity to our founding values.

And if confirmed, it will be my absolute honor to lead and support the extraordinary workforce of the National Security Division. We will confront domestic and international terrorism. We will counter

threats to our cyberinfrastructure. We will protect our nation from espionage and foreign adversaries. And we will work to foster trust of the work of the intelligence community.

I believe that my experience has prepared me to take on this critical responsibility. I began my career in the Department of Justice in the Civil Rights Division as a trial attorney. As an assistant United States attorney, as a federal prosecutor in Washington, D.C. for over a decade, I prosecuted crimes at the state and the federal level.

Those included murders, homicides, complex conspiracies, and public corruption cases. I learned to pursue justice based on the evidence and based on the law, and I learned to protect both the public safety and the rights of the accused and all Americans under our Constitution. The terrorist attacks on September 11 changed the course of my career, led me to shift my focus to national security.

I first worked at the FBI as special counsel to Director Mueller, helping to support the transformation of the FBI after 9/11. In 2006, I returned to Main Justice to help establish the new National Security Division. I was responsible for overseeing the department's intelligence work, including the implementation of Congress's landmark changes to the Foreign Intelligence Surveillance Act. I was the general counsel of the National Security Agency.

And from 2011 to 2014. I served as the director of the National Counterterrorism Center, which Congress established to unify and coordinate our counterterrorism efforts. At every stage of my career, I've been guided by the values of the Department of Justice, devotion to the Constitution, to the search for the truth, and to the pursuit of equal justice under the law.

If I am confirmed, I will follow the facts and I will follow the law, and I will work relentlessly to advance the security of the nation. I look forward to answering your questions. Thank you.

CHRISTOPHER COONS:

Thank you. Thank you to all of our five witnesses at this panel for your opening statements. We're now going to proceed to our five-minute rounds of questioning. As you all know, the Senate is currently in the middle of a vote series. Thus, senators will come in and out, and I presume that the chairman will return, and I will go for a second vote.

But let me begin if I could. Mr. Olsen, from your opening statement, it's clear you're no stranger to the critical work of the National Security Division. I'd be interested in having you just elaborate a little bit on the time you spent working there previously, and can you explain the critical role that office plays in supporting our national security?

And then just elaborate a little bit more on your service working for the U.S. attorney's office in the Bush administration and how that experience prepared you for your service in the subsequent Obama administration?

MATT OLSEN:

Yes, absolutely. And thank you, Senator. I -- you know, I was there at the very beginning of the National Security Division. It was established by Congress because of a recognition that the Department of Justice's various elements that worked on national security, whether that's the Foreign Intelligence Surveillance Act or counterterrorism or counter-espionage, were not sufficiently unified.

The decision was made to create the first new division in several decades, the National Security Division, which like a number of other parts of the government were reformed in response to the attacks of 9/11. In my judgment, the division's been an unqualified success, bringing together intelligence professionals and attorneys who work on applications to the FISA court, along with the prosecutors who handle and oversee counterterrorism cases and counter-espionage cases, and really been part of the broader national security reformation following the attacks of 9/11. But I should add that it's also continued to evolve since I left a decade ago.

I left in 2009, and it has changed to evolve to meet the threats we face today, whether those threats are from cyber actors, from those that would seek to steal our intellectual property. It has continued to grow and evolve as the threats that we face have grown and evolved. And again, to continue to represent the intelligence community very effectively.

CHRISTOPHER COONS:

Thank you, Mr. Olsen. I think based on your broad and deep service and experience, we're lucky to have you nominated to continue your public service in this room. Ms. Williams, if I might -- Judge Williams, forgive me. You've served as a magistrate judge, I think, for a dozen years. How has that role and experience prepared you for an Article III judgeship and what aspects of that new role for which you've been nominated are you most excited about if confirmed?

KAREN MCGLASHAN WILLIAMS:

So, thank you, Senator. For the past 12 years, I have served the district of New Jersey as a magistrate judge and I am lucky to be in the district of New Jersey, which has delegated quite a bit of authority to magistrate judges in our district. And so, most of my work is managing cases and preparing them for disposition by the Article III judges.

And so, how my work as a magistrate judge has prepared me is to understand the process of judging and justice, and to ensure that everyone who appears before me as a magistrate judge or if confirmed as a district court judge, is privy to a fair, impartial process.

CHRISTOPHER COONS:

Thank you, Your Honor. Judge Pan, during your tenure as a magistrate judge, if I understand correctly, you've presided over more than 650 trials. That is an astonishing body of work. You've spent your entire career in public service. President Obama noted your unwavering commitment to justice and integrity upon your initial nomination.

I just would be interested in how your experience as a magistrate judge and your long public service dedication will inform your service in the federal judiciary as an Article III judge should you be confirmed?

FLORENCE PAN:

Thank you, Senator Coons, for that question. For the last 12 years, I've served as a judge on the District of Columbia Superior Court, the local court of general jurisdiction in the District of Columbia. And I've served in the criminal division, the civil division, and the family court. Before that, I was an assistant United States attorney for 10 years, and so I have devoted the last 22 years to serving the citizens and residents of the District of Columbia.

CHRISTOPHER COONS:

It didn't seem that long at the time when you say it, it seems like a long time, doesn't it?

FLORENCE PAN:

Yes. Well, it's been an honor and a privilege, and I would be honored to continue my service to this same community in this new capacity as an Article III judge to consider issues of constitutional and federal importance and to continue my service in that regard.

CHRISTOPHER COONS:

Thank you very much. My five minutes are up. Senator Cotton.

TOM COTTON:

Thank you, Mr. Acting Chairman. Congratulations to you all. Mr. Olsen, I remember when you used to come brief Congress as the director of NCTC and I always found you to be a sober, reasonable, national security professional. Like I say when Joe Biden nominated you in this position that was one of his better choices.

But then I started looking at what you've been up to for the last four years and now I have questions about which medals and -- we're getting. 2017, you wrote an op-ed entitled The Electoral College is a National Security Threat. I want to repeat that. The Electoral College is a National Security Threat.

Do you believe that -- still believe that -- the Electoral College is a national security threat?

MATT OLSEN:

Well, Senator, let me begin by thanking you for your initial comments about my time as the National Counterterrorism Center director. And I spent my -- better part of my career as a government public servant, protecting the country. I've left the government in 2014 and -- as the private sector. I wanted to stay -- remain engaged on the issues that I thought were important.

And as a private citizen, of course, I expressed some views including that article you're referring to in a way that I wouldn't and haven't expressed as a public or government servant. That view, yes, there are aspects and context if I may explain. There are aspects of the way in which the electoral college allowed or could allow nefarious cyber actors to pinpoint their efforts to influence an election.

There are ways in which the Electoral College makes us more vulnerable to nefarious, particularly nation-state cyber actors to influence elections. And I -- that was what I was seeking to highlight.

TOM COTTON:

That's -- I'm sorry, our time --

MATT OLSEN:

No, of course.

TOM COTTON:

Our time is very limited here. So, you still think that Electoral College is a national security threat?

MATT OLSEN:

I stand by the content of the -- of the article that I wrote, yes.

TOM COTTON:

Should the Department of Justice ever bring a lawsuit to try to force states to, say, adopt the national popular vote or compact?

MATT OLSEN:

Senator, I'm not familiar with any statutory provisions or proposals on those lines.

TOM COTTON:

Last year, in the middle of riots that cost billions of dollars of damage and had murders spiking at rates not seen in our generation, you described the situation as mostly peaceful protests. Do you think the rioting we saw last year was mostly peaceful protests?

MATT OLSEN:

I think that -- I'm not sure exactly the comment you're referring to, but I --

TOM COTTON:

You signed a public letter last June saying that.

MATT OLSEN:

Yeah. I will say this, Senator. If I'm confirmed and have the opportunity to lead the National Security Division, the threat that we face from the types of violence that we've seen from the past several years, particularly any type of domestic terrorism, I would be responsible for enforcing our laws -- enforcing those laws regardless of ideology and enforcing them fairly and impartially.

And that would be my pledge.

TOM COTTON:

You once wrote that ISIS supports Donald Trump. Do you think that ISIS supported Donald Trump?

MATT OLSEN:

I appreciate, again, Senator, the article you're referring to. Again, I -- as a private citizen, I tried to stay engaged on the national security issues that I had worked on, and I will answer your question directly. The article I wrote was based on statements that I had seen and was very concerned about from a propaganda standpoint.

In 2016, when I wrote that article, ISIS had risen and was using its propaganda machine to influence people in the United States and they were using the language, the words of then-candidate Donald Trump to advance their propaganda machine. And so, I was referring to their exact words in making that statement.

And I stand by the article, I was concerned about the ways in which ISIS was using that -- those comments to recruit and mobilize people in the United States.

TOM COTTON:

If it's true that ISIS supported Donald Trump, do you think Abu Bakr al-Baghdadi thinks he made a bad bet?

MATT OLSEN:

I'm very supportive of the nature in which we prosecuted the -- and way the Trump administration took the fight to ISIS over the past several years.

TOM COTTON:

OK. So, Mr. Olsen, I'll say again. I had a lot of respect for the medals, and we saw as the NCTC director, but I feel like something has changed here just in the last four years. To review what we've covered today, you've said ISIS supports Donald Trump, you referred to writing last summer's mostly peaceful protests, you've said the Electoral College is a national security threat.

It's one thing to leave government comment on public affairs, even be partisan to give money to candidates of your choice and to campaign for them. But I feel like something about Donald Trump's presence in the last four years sends you a little bit around the bend. So, it makes me wonder which Matt Olsen, we're going to be getting at the Department of Justice.

My time's expired.

CHRISTOPHER COONS:

Thank you, Senator Cotton. Senator Blumenthal.

RICHARD BLUMENTHAL:

Thanks, Mr. Chairman. You know, I want to put in the record, first of all, a letter from more than 20 former prosecutors in Connecticut, including three of my successors, maybe more as U.S. Attorney. Deirdre Daley, Chris Droney, and Stan Twardy, all of them among the most distinguished lawyers but also former prosecutors in Connecticut, a rather extraordinary letter attesting to the integrity and intellect of Judge Merriam.

If there's no objection, I ask that it be put in the record, Mr. Chair.

CHRISTOPHER COONS:

Without objection.

RICHARD BLUMENTHAL:

Thank you. The reason I focus on this letter is -- Judge because your career has been on the other side of the courtroom from them. And all of the members of this panel who have been in the trenches of litigation, particularly in the criminal area, know how heated and contentious it can sometimes be. So, to have this kind of extraordinary vote of confidence in your integrity and credibility, I think says far more than I could about the qualifications that you bring to this position.

And there are a lot of things going on today here in the capital. President's going to visit, we have potentially an infrastructure agreement, but for all of us in Connecticut, your appearance here is one of the more consequential events of the day and of this year because you will serve on the bench for decades, God willing.

You may well hear cases of students who are now in law school and every one of you who will serve on the bench are the voice and face of justice to everyday Americans. Most litigants simply don't have the wherewithal or the time or resources to appeal to the 2nd Circuit Court of Appeals. And for them, the decisions in the district court are justice in America.

So, this position is so profoundly important to our nation and to have someone who as has been stated by those lawyers I mentioned has "brought an even-handed and accessible approach to the federal bench" and "applied the law fairly and properly without regard to personal preference" is an extraordinary gift to the people of Connecticut and our country.

Maybe, if you don't mind, could you tell me a little bit about how your experience as a federal defender has informed your work as a magistrate judge in the approach that you'll take on the United States district court bench?

SARAH MERRIAM:

Thank you, Senator, for those very kind words. Connecticut has the great benefit of being a fairly small federal court and it is collegial, and people know each other, and they respect each other. And I felt that as a defender, I felt that as a law clerk, I felt it in private practice, and I feel it now as a magistrate judge.

And in the 18 months in which I was appointed as a magistrate judge, two others were appointed in close succession: one a career prosecutor and one a career civil litigator. And over the past four and a half years, almost five years, the three of us have worked as magistrate judges together, asked for each other's advice, shared our ideas for how to better the system, and to better the experience of people that come in front of us. Because as magistrate judges, we are the first person a litigant usually sees.

And likewise, for a public defender, you're the first person a defendant turns to when they're caught up in a system that can be very scary. But at the end of the day, I think my experience there helped me to see all sides of the system and to understand that when people come to court, it's because something has gone terribly wrong, and we need to help them get through that crisis with respect.

RICHARD BLUMENTHAL:

Thank you. Mr. Olsen, you and I spoke about the 9/11 families when we had an opportunity to talk privately. And I emphasized to you my concern about the government, in effect, withholding evidence and information that they need to pursue their case against the government of Saudi Arabia. And I think the failure to provide that evidence and information is absolutely unconscionable from what I know.

I have purposely rejected opportunities to look at the classified information because I want to talk as publicly as I can about what I do know without any threat or hint that I'm violating the rules of classification. But I think the American people deserve an explanation as to why our government is, in effect, withholding or concealing evidence that would aid the 9/11 families in pursuing justice against the government of Saudi Arabia, which may well have aided and abetted the attackers on 9/11 and caused the deaths of their loved one.

And I have written, along with my colleagues Senators Gillibrand and Menendez, to the Attorney General Merrick Garland and Director Ray as recently as two weeks ago. Over the past couple of years, I've sent several letters with different groups of colleagues on and off this committee concerning the department's and the FBI's invocation of the state secrets privilege.

Still without any explanation. I asked Director Ray about this issue in 2019 and I've asked Attorney General Garland and Helaine Greenfeld about it earlier this year. The administration, so far, has provided no explanation or the evidence that the 9/11 families are seeking. We are approaching the 20th anniversary of that insidious, unspeakable act of horror, an attack on our nation and the American people deserve to know 20 years later why that information still needs to be withheld.

You and I talked about it, I know you're not in the job right now, but I would like a commitment from you that you will review this matter and you'll consider whether the privilege has been properly invoked and provide an explanation to the American people.

MATT OLSEN:

Senator, thank you and thank you for the opportunity to discuss this issue with you. As I mentioned, I am in this work of national security because of 9/11 and you have my commitment that if confirmed, I will work with the attorney general to review this matter closely.

RICHARD BLUMENTHAL:

Thank you. And by the way, on the Electoral College, I agree with you. Thank you.

CHRISTOPHER COONS:

Senator Grassley.

CHUCK GRASSLEY:

Ms. Cobb, as a law student in 2004, you wrote an article on federal statutes and regulations. You argued that social history should be used in statutory interpretation, a position that led you to criticize the dissent by Justice Thomas. In criticizing Justice Thomas, you wrote about "the utility of looking at the social and legislative histories in tandem to garner a complete understanding of both the purpose and the meaning of the legislation." Do you think that the words in a statute can change meaning based on social events?

JIA COBB:

No, Senator. And if I could just put that in context, I believe you're referring to an article I wrote when I was maybe 23 or 24 years old. I had never had a client before, never been in court. My role as a judge is obviously different than my academic pursuits when I was in my 20s. I believe that you start with the text.

I've never used the --

CHUCK GRASSLEY:

I think you've answered my question.

JIA COBB:

Thank you.

CHUCK GRASSLEY:

You bet. And I thank you for upfront saying no. Second, do you agree with Justice Kavanaugh that courts should phase out the statutory term "alien" in favor of "noncitizen" because of perceived social history of those terms?

JIA COBB:

I don't have a position on that, Senator. I've not considered that.

CHUCK GRASSLEY:

In January of this year, you were a panelist for the Metropolitan Washington Employment Lawyers Association. You spoke at a webinar entitled "Litigating Race Discrimination in Employment in the BLM Era." My understanding -- that's the end of the quote. My understanding is that you talked about both racial discrimination and sexual harassment.

Will you please explain for us how litigation is impacted or changed by the Black Lives Matter era? In other words, I wouldn't think that that movement would change anything from what it would be previous to that, but I'll wait for your opinion.

JIA COBB:

Senator, yes. I didn't choose that title and I don't know that it actually captured what was discussed at that informal luncheon discussion. I think a better title if I were to change -- choosing it would be "Litigating Cases or Current Considerations for Litigating Cases." I think that there is a lot more discussion about race and whether you want to attribute that to the Black Lives Matter Movement or anything else.

I think people are more in tuned to it and there are certain considerations as litigators. For example, one thing that came up that I recall from that informal discussion was just talking about voir dire. You have jurors that have, you know, exposure to what they're seeing on the news and may have opinions that litigants need to flesh out to make sure that we're getting fair and impartial jurors.

So, I think a better title would be "Current Considerations for Litigating Race Discrimination and Sexual Harassment Cases.

CHUCK GRASSLEY:

Mr. Olsen, as head of the National Security Division, you will supervise the counterterrorism section. I'm deeply concerned given recent events that the current administration does not take an even-handed approach to domestic terrorism. For example, we know that the FBI is currently investigating 500 domestic terrorism cases of primarily anarchist extremists that were open during the 2020 riots.

These cases constitute 25 percent of the FBI's current domestic terrorism investigations, yet they're not mentioned in the administration's domestic terrorism strategy. Two questions, will you commit to pursuing left-wing domestic terrorism cases in addition to right-wing ones?

MATT OLSEN:

Thank you, Senator Grassley, absolutely. I will pursue all acts of violence, all acts of domestic terrorism regardless of ideology. That's the commitment that I make, that's the commitment the attorney general has made.

CHUCK GRASSLEY:

Specifically, how do you plan to ensure that your division is prosecuting leftwing domestic terrorism cases at the same rate and pace as rightwing cases?

MATT OLSEN:

Senator, I was a prosecutor here in Washington D.C. for 10 years. I worked as a career public servant on national security matters for another decade. My entire career has been based on following the facts and following the law, applying the law to those facts. If I'm confirmed in the national security division,

that's exactly what I will do. I will follow the facts, investigate every case that falls within my purview without regard to ideology.

CHUCK GRASSLEY:

My last question is to Judge Merriam. At your investiture, Judge Alvin Thompson said, "I believe that in both her professional life and her personal life, she lives out the ideals of justice and fairness expressed by John Rawls in a publication A Theory of Justice. What does A Theory of Justice means to you?

SARAH MERRIAM:

Thank you, Senator Grassley. I'm afraid I have not read it and I'm not familiar with what Judge Thompson was referring to.

CHUCK GRASSLEY:

As a magistrate judge, how does the concept of justice's fairness affect your job, if at all?

SARAH MERRIAM:

Every day, Senator. Every day, it is my job to make sure that every party that comes in front of me is treated completely fairly.

CHUCK GRASSLEY:

Do you think an effort to achieve justice from Rawls' -- well, I guess you can't comment on that, so I won't ask that question.

SARAH MERRIAM:

Thank you, Senator.

DICK DURBIN:

I'll get you a copy of that book, Senator. This is a transition period. We're going live, as they say, except a couple of senators are still in a remote virtual situation. We're going to see if they're tuned in from --

AMY KLOBUCHAR:

Thank you.

DICK DURBIN:

State of Minnesota, Senator Klobuchar.

AMY KLOBUCHAR:

Thank you. I am -- I'm not in an undisclosed position here. I am in the Capitol, but thank you very much, Chairman Durbin, and thank you to our panel of witnesses, and I should say, nominees. I want to welcome you, Judge Pan, especially back to the Senate with another opportunity to be considered. I know you got out of the committee by voice vote last time back in 2016 and then sadly wasn't considered by the full Senate.

But in the years since you appeared before the committee, you have continued to serve as a judge on the D.C. Superior Court. Could you talk a little bit about the last question from Senator Grassley? How do you ensure that those who appear before you believe that the court can reach a fair and just decision?

I think it's very important right now for judges to think about this because of the last four years, we had some politicization from the White House of the judiciary. And to me, that all citizens feel that judges are -- can be fair in their decision-making process is really important.

FLORENCE PAN:

Thank you, Senator Klobuchar. As a judge on the D.C. Superior Court for the past 12 years, I've tried every day to make sure that every litigant, every party, every witness, everyone that comes into my courtroom receives fair treatment, open-minded decision-making, and prompt decision-making from the court.

I think that that's what they're entitled to in -- from our system of justice and I'm deeply committed to ensuring that everyone who enters my courtroom receives the highest quality of justice and fair treatment. And we've received training from my court to make sure that this happens, and I try to do it every day.

Thank you.

AMY KLOBUCHAR:

Well, thank you. And at a time where we've seen this horrific violence against the Asian-American community, it's critical that our institutions reflect the diversity of our country. And if confirmed, you would actually be, I was surprised by this, the first Asian-American woman to serve on the district court for the District of Columbia.

Can you take a moment to tell us what that would mean to you personally, to your family, and to the community?

FLORENCE PAN:

Thank you, Senator Klobuchar. I think diversity on the bench is important because it contributes and promotes confidence in our judiciary for the community to see that the judiciary actually reflects the membership of the community as well. I also think it performs an important role-model function for members of the bar who are people of color and -- or from groups that are not traditionally or haven't been nominated to the bench in large numbers, and so I think that that is important.

I'm deeply honored to be honored -- to be nominated by the president. I was the first Asian Pacific American judge in the District of Columbia, and it would be a tremendous honor to become the first female Asian Pacific American judge on the United States District Court and its jurisdiction.

AMY KLOBUCHAR:

Very good. Thank you very much. Mr. Olsen, I enjoyed our discussion and I want to welcome you as an honorary Minnesotan since you were born in Fargo but spent summers in our great state in Detroit Lakes. You spent more than two decades in government service and national security, in numerous leadership roles under both President Bush and Obama.

How was your experience in national security from across government and having served presidents of both parties prepared you for your role? And then if you could just comment a little bit about what we talked about the other day, cybersecurity and elections. So, thank you.

MATT OLSEN:

Thank you very much for that, Senator Klobuchar. Just -- I came upon -- and working in national security during a time when the Bush administration was in office. And in fact, some of the most consequential work I did, in my own view, on national security took place during the Bush administration. The transformation of the FBI, the passage of the landmark changes to the Foreign Intelligence Surveillance Act, these were priorities of the Bush administration.

I stayed on as a career national security official into the Obama administration. And I think one of the enduring lessons of that experience was that national security really transcends political or partisan considerations. And that's true not just in my own experience, it is absolutely true of the people that I worked with, whether they were in the intelligence community or at the Justice Department.

That people who worked on national security cared about protecting the country, they were not influenced, and they refused to be influenced by political or partisan concerns. That would be the way I would proceed if I'm fortunate enough to be confirmed is to continue to lead the National Security Division according to that ideal of nonpartisan, apolitical commitment to national security.

And that's what I learned from that experience. On the second part of your question, Senator, you know, cybersecurity has been an issue for a number of years, but it has really taken prominence in the past several years as a national security threat. And I would be committed to continuing the great work that the National Security Division has done in prosecuting cybercriminals, people who are engaged in nefarious cyber activity that threatens our national security, particularly our critical infrastructure.

There are nation-states, particularly the Chinese or the -- or China that is involved in stealing our intellectual property, carrying out espionage through cyber, and the National Security Division plays a critical role in countering that activity. And that's something, I think, that's going to continue to be a priority going forward and I look forward to, if confirmed, being able to work on that further.

AMY KLOBUCHAR:

Thank you. Thank you to all the nominees.

DICK DURBIN:

Thank you, Senator Klobuchar. Is Senator Ossoff with us?

JON OSSOFF:

Yes, I am. Thank you, Mr. Chairman.

DICK DURBIN:

Take it away.

JON OSSOFF:

Thank you and congratulations to these nominees on your nominations. Mr. Olsen, my first question is for you, please. Despite serious problems documented in the FISA application process by the Department of Justice inspector general, among others, the Foreign Intelligence Surveillance Court approved electronic collection activity in response to all 459 of the final-filed government applications requesting such authority in 2020. Given the deficiencies that have been identified by DOJ's inspector general in the FISA application process, are you open to and will you work with this committee to develop possible legislative fixes to ensure the integrity of the process?

MATT OLSEN:

Yes, Senator. The answer -- direct answer to your question is yes, I look forward to working with this committee in continuing to improve the Foreign Intelligence Surveillance Act and its implementation. If I may just say, it is a landmark law, it has provided as a tool, indispensable intelligence to our -- to protect our country.

At the same time, I was very concerned by the findings of the inspector general in its recent report on the deficiency in the way that the law has been implemented. And I am absolutely committed it would be, in fact, a priority if I'm confirmed to continue to work to address those deficiencies and to improve the process because the trust of the American people depends on their confidence in the way that law is implemented.

JON OSSOFF:

And you acknowledged that the remedy to those documented flaws may include legislative fixes and you're willing to engage in good faith with this committee to consider such fixes?

MATT OLSEN:

Yes, of course. Working with the rest of the Justice Department and the intelligence community, with this committee, and Congress to implement those changes. I've done that in the past, and I would do so again.

JON OSSOFF:

Thank you, Mr. Olsen. And in your position, you will have responsibility for reviewing all applications for surveillance under FISA. Is that correct?

MATT OLSEN:

Yes.

JON OSSOFF:

Based on the department's disclosed FISA statistics for 2020, you personally would need to review and fact-check at least a 125-page document every day in order to personally render such oversight. Can you please describe the process that you anticipate you would implement by which you would assess the accuracy of facts stated in applications to the Foreign Intelligence Surveillance Court?

MATT OLSEN:

Yes, of course. And so, the -- Senator, the National Security Division includes, when I was last there, approximately 100 attorneys who are responsible for appearing before the FISA court, representing the government before the FISA court with -- and working with the intelligence community, particularly the FBI, to review those applications.

Ultimately, they go to a senior official, whether the attorney general, the deputy attorney general, or if I'm confirmed, me, in the role as assistant attorney general for final signature. The crucial point here, of course, is that the process needs to be sufficiently robust so that facts are checked and documents are reviewed by agents at the FBI, for example, who submit these applications, by lawyers at the FBI, by lawyers at the Department of Justice, by the individuals who support the judges.

So, there's a multilayered process to check the facts and to ascertain the lawfulness of any application, that it meets the standards, in particular, probable cause standard before it's approved by the FISA court

judge. Again, I was very concerned by the IG's finding of 17 significant problems in a number of applications that the inspector general reviewed, and I know that there are a number of steps already underway by the FBI and DOJ to address those concerns, and I would make it a priority to ensure that those are implemented.

JON OSSOFF:

Thank you. And Mr. Olsen, you will take personal responsibility for ensuring that all applications to the FISC are factual and accurate.

MATT OLSEN:

Yes, Senator. That is part of this job is to be personally responsible, in my view, for the FISA court process and to represent the government in a way to ensure that FISA court applications are complete and accurate.

JON OSSOFF:

Thank you. Section 702 permits the government to obtain the content of communications between Americans and foreign surveillance targets. This, sometimes referred to as "incidental collection" of American communications, can sweep Americans into surveillance without warrants from courts other than the Foreign Intelligence Surveillance Court and some would argue this deprives them of Fourth Amendment protections.

What are your views on the scope of this "incidental collection" and whether or not it does pose a threat to the privacy of American citizens?

MATT OLSEN:

Senator, in my view, Section 702, first of all, has proven to be extraordinarily successful in collecting critical intelligence that's focused on non-U.S. persons, non-U.S. citizens who are outside the United States and has been upheld numerous times by courts that have reviewed the way in which Section 702 operates with judicial and Congressional oversight.

The concern that you raised is an important one, that is the privacy concerns or interests that are implicated when a U.S. person is -- their communications are captured in the course of targeting a non-U.S. person overseas. And the key here is that there are procedures in place to destroy that information if it does not involve foreign intelligence or evidence of a criminal act.

I would say that there have been a number of cases where that, as we've referred to "incidental collection," has led to important foreign intelligence also being collected. For example, if a target outside the United States is communicating with a coconspirator inside the United States, the government has identified that coconspirator inside the United States and then being able to follow up appropriately under the Fourth Amendment to continue that collection.

So, the law I think strikes the right balance. That said, we need to be careful and sensitive to the privacy interests that are certainly implicated by the way it operates.

JON OSSOFF:

Thank you, Mr. Olsen. I have additional questions on this subject for the record. And if indeed you are confirmed, look forward to working with you. Thanks for your testimony. I yield, Mr. Chairman.

DICK DURBIN:

Thanks, Senator Ossoff. I think I'll be the last to wrap up and I just have a question for the aspiring judges, and it relates to my own experience here serving in Congress. It's about 30 years ago when we declared a war on drugs. And the reason that we acted as we did have a lot to do with the advent of crack cocaine.

The arrival of this new narcotic was scary. It was very cheap, very addictive, and very destructive to many people. And during the course of our debate on this issue, I was in the House at the time, there were incidents that occurred that gave us a sense of immediacy, all the discovery of this drug and such.

There was a case that didn't involve crack cocaine but had a great deal of publicity involving a Maryland basketball player, Len Bias. And as a consequence, we did something dramatic. We created the sentencing guidelines for crack cocaine at 100 times the level of powder cocaine. One hundred times. The idea was that if we came down that hard, that fast, that dramatically, that it would really break the back of crack cocaine in terms of its infiltration into America.

We were completely wrong. Completely. The number of addicts increased, the price of the drug on the street went down instead of up, and we started filling our prisons, primarily with African American defendants. Dramatic increases in our federal prison population to levels we've never seen before. In some of the sentencing that went on as a result of it, we looked back on and say how could we have done that.

A man named Alton Sims [Ph] in the Chicagoland area, three nonviolent crack cocaine sales, life in prison. Life in prison. And many others just like it. They went way beyond any deterrent effect and really reflected our desperation to bring this under control. Many judges commented as they were forced by our mandatory minimum sentences and other guidelines.

They didn't feel justice was being served in their courts when they imposed these sentences. I know several of those judges personally who talked to me at the time. Since then, I've tried to correct my mistake and we have passed two reforms of the sentencing law. Senator Grassley was my partner in the most significant one, the first step back, unfair sentencing before that.

I'd like to ask the four of you who are aspiring to these district court judgeships what lesson we should have learned from this experience. Judge Pan?

FLORENCE PAN:

Thank you for the question, Senator. I think that you raised a question of deep significance that affects many people. And the lesson that I've learned from what you've just said is that the legislature can learn from mistakes and seek to correct them through the legislative process, and I think that's a very positive thing for the legislature to undertake.

Of course, as a judge, this is not the kind of thing that we can address as a policy matter, but I think sentencing considerations before judges are done on a case-by-case individual basis and we are required to look at the facts of each case. But from a judge's perspective, I think that making the sentencing guidelines, not -- no longer mandatory nor voluntary is another thing that's been helpful in this regard.

DICK DURBIN:

But there are sentencing enhancements that are suggested by the government in many cases. Does that come into play? That's a discretionary decision by the judge.

FLORENCE PAN:

Yes. And of course, as a judge, performing the function of sentencing, which is so important because the liberty of another person is at stake, a judge must consider all the relevant factors, including the request of the government, and weigh all of that under the totality of the circumstances.

DICK DURBIN:

Judge Williams?

KAREN MCGLASHAN WILLIAMS:

Senator, my understanding of how as a judge, if confirmed as a district court judge to deal with it, is informed by my handling of some misdemeanor cases squarely not on point with addressing the crack cocaine issue. As I agree with Judge Pan, that's an issue for the legislature. What we have learned, what we learn and know as judges is that we have guidelines to follow.

3553 A allows judges to interact with a very, very seasoned and skilled probation office that helps inform and supply us with the information necessary for us to work through those guidelines on individual cases. So, I've done that in misdemeanor cases for individuals charged with crimes. And should I be confirmed, I look forward to working with our many talented probation officers as I work through the Sentencing Act in the role of sentencing as a district court judge.

DICK DURBIN:

Judge Merriam.

SARAH MERRIAM:

Thank you, Senator. When I was in the federal defender's office, I was there when the initial changes in the crack powder disparity went into effect and I was heavily involved in the process of organizing the district, which meant everyone, that was the prosecutors and the probation office and the judges, and the Marshals Service, and the defense bar to make those changes applicable to what -- to the clients where it was appropriate as quickly and efficiently as possible to try to do the justice on the ground that the legislature had seen fit to put in place.

And those changes have certainly made a real difference over the years. But at the end of the day, we're bound now, other than by the mandatory minimums, by 3553 A, which is as Judge Williams referenced, very broadly encompassing the kinds of factors and the kinds of considerations a judge can take into account.

And that discretion is an awesome one and an important one and allows judges, I think, to work within the law to try to do justice.

DICK DURBIN:

Ms. Cobb.

JIA COBB:

Thank you. It's hard to improve upon the responses that have been given, but I think what struck me most about what you said is the fact that this body was paying attention to what was happening in the

courts, and I think that's extraordinarily important when laws are passed, particularly that provide criminal penalties, whether they be mandatory minimums or otherwise, to pay attention to kind of what the effect is on the ground once those laws are implemented.

And I know that the sentencing commission does some work in compiling statistics, but I really think it's important to, you know, to continue to pay attention to what's happening after these laws are passed.

DICK DURBIN:

Let me just add one other thing that has changed the conversation. Twenty years ago or 15 years ago, if you would have said, oh, did you hear about that person who overdosed on drugs last night, the most common answer would be, no, I didn't. Was it an African American? Inner city? A man between 20 and 35? You would have been right in most cases.

Not anymore. When we talk about drug overdoses now, it could have been that cheerleader at the all-white high school in the suburbs. And drug addiction has now reached every corner of America and we're starting to look at it and knew it is no longer just say no, we realize it is a medical problem, a disease.

We haven't responded with adequate resources to deal with addiction. I hope we will in the future. But the conversation on drugs has changed in America because the victims have changed pretty dramatically. That is going to be part of the reality that I hope you soon will be dealing with in your new positions.

I thank you for your cooperation at this hearing. It's been an important one. You may receive some written questions in the near term. Is there anything else I need to do formally?

UNKNOWN:

Yeah. Just read the letters [Inaudible]

DICK DURBIN:

He wants me to read it, make sure you understand this. Questions for the record will be due to the nominees by 5 p.m. on Wednesday, July 21. The record will remain open until that time to submit letters and similar materials. And with that, the hearing is adjourned. Thank you all very much.

List of Panel Members and Witnesses

PANEL MEMBERS:

SEN. RICHARD J. DURBIN (D-ILL.), CHAIRMAN

SEN. PATRICK J. LEAHY (D-VT.)

SEN. DIANNE FEINSTEIN (D-CALIF.)

SEN. SHELDON WHITEHOUSE (D-R.I.)

SEN. AMY KLOBUCHAR (D-MINN.)

SEN. CHRIS COONS (D-DEL.)

SEN. RICHARD BLUMENTHAL (D-CONN.)

SEN. MAZIE K. HIRONO (D-HAWAII)

SEN. CORY BOOKER (D-N.J.)

SEN. ALEX PADILLA (D-CALIF.)

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SEN. CHARLES E. GRASSLEY (R-IOWA), RANKING MEMBER

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SEN. TOM COTTON (R-ARK.)

SEN. JOHN KENNEDY (R-LA.)

SEN. THOM TILLIS (R-N.C.)

SEN. MARSHA BLACKBURN (R-TENN.)

WITNESSES:

UNITED STATES CIRCUIT JUDGE FOR THE SECOND CIRCUIT NOMINEE MYRNA PeREZ

UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF COLUMBIA NOMINEE FLORENCE Y. PAN

UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF CONNECTICUT NOMINEE SARAH A.L. MERRIAM

UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF COLUMBIA NOMINEE JIA M. COBB

UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF NEW JERSEY NOMINEE KAREN MCGLASHAN.  
WILLIAMS

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