Chairman SPECTER. Thank you very much, Commissioner Kirsanow.

Our next witness is Professor Samuel Issacharoff, Reiss Professor of Constitutional Law at New York University School of Law, an author of several books focusing on voting rights and civil procedure. He had taught at the Texas Law School. Bachelor's degree from Binghampton University in 1973 and law degree from Yale in 1983.

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

STATEMENT OF SAMUEL ISSACHAROFF, REISS PROFESSOR OF CONSTITUTIONAL LAW, NEW YORK UNIVERSITY, NEW YORK, NEW YORK

Mr. ISSACHAROFF. Thank you, Mr. Chairman, Senator Leahy, members of the Committee. I want to direct my remarks to the question of the reapportionment cases and the significance of the Court's role in overseeing the basic fairness and integrity of our political process.

I raise this issue because the reapportionment cases stand for something beyond simply the doctrine of one person/one vote. They also stand for the role that the Court has to play in making sure that the political process does not turn in on itself and does not close out those who are not able to effectively marshal their votes, their power, their support under the rules that govern the political process.

It is significant because no Justice of the Supreme Court over the past 35 years has hesitated to assume the responsibility so well articulated by the Supreme Court in the famous *Carolene Products* footnote. Justice Stone, in 1938, on behalf of the Court, recognized a special need for exacting judicial review in the case of laws, and these were his words, "that restrict those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." The reapportionment cases of the 1960s, the cases that appear to have so deeply concerned Judge Alito as a young man, were the realization of the *Carolene Products* insight.

In the 40 years that have passed since the reapportionment cases, the Supreme Court has bravely entered into the political thicket. Sometimes the Court's role is simply what appears to be routine, such as access to the ballot and the polling place, sometimes it is the truly extraordinary as with *Bush* v. *Gore*. The result of these interventions, although obviously not without controversy, is a political system that is more open and more participatory that at any time in our history.

It is difficult to imagine in this day and age any serious objection to the rights identified in these cases. In *Reynolds* v. *Sims*, for example, Chief Justice Warren wrote that "Full and effective participation by all citizens in State Government requires that each citizen have an equally effective voice in the election of members of his State legislature."

But it is also well to recall the facts presented in these cases. The willful failure to reapportion had transformed American legislative districts into grossly unrepresentative institutions in which voters of the growing cities and suburbs found themselves unable

to participate effectively in a political process controlled by rural minorities.

In Alabama, the site of *Reynolds* v. *Sims*, one county had 41 times as many representatives per person as another. That pattern was repeated across the country. In California, to pick just one, Los Angeles County had one State Senator, as did another county with one one-hundredth of its population.

While the basic principle of one person/one vote may now be so deeply embedded in our culture as to seemingly defy any controversy, its implementation was another matter, and I think that is what is significant about these cases. Those whose votes were discounted to the point of irrelevance were repeatedly frustrated by entrenched political power. The intervention of the Supreme Court was indispensable, indeed, it was the single most successful remedial effort by the Supreme Court in our history. It changed and made fundamentally more democratic the legislative process, and it made the legislative process one that was deserving of judicial deference.

When I teach these cases today to students, however, and even when I was a law student in the early 1980s, the idea of one person/one vote appears so elemental, so in keeping with the most rudimentary sense of democracy and legitimacy, that students cannot even fathom that a society, a democratic society could be organized on any other basis.

I do not know how a young college student in 1970 might have reacted, particularly when presented with the formidable writings of Alexander Bickel. Bickel captured well the tension between a commitment to popular sovereignty and the overriding commands of the Constitution, and it is well to remember that although we turn our attention here to the Court, it is obviously the Congress that is a significant and major institution expanding our democratic horizons, as with the Voting Rights Act of 1965.

Nonetheless, I would suggest that the fact that the reapportionment cases should appear on a job application in the 1980s is at least a curiosity. Perhaps it was through recounting of an intellectual path, but perhaps an indication of a continuing view that courts have no business in checking the abuses of political power. If it is the latter, it should be deeply troubling to this Committee and to the Senate, for the issue of the day is not the intellectual trajectory of a thoughtful college student, but the implications for the vital role the Supreme Court plays in our democratic life.

Critical issues in the organization of our democracy remain unsettled and are going to appear as they do before the Court. Our system of redistricting has run amuck, the competitive lifeblood drained by self-perpetuating insiders. This may prove to be the same sort of structural obstacle to democratic reform as had to be dislodged by reapportionment decisions of 40 years ago.

The answer may not be simple, but the role of the Court is absolutely critical. So too with campaign finance. So too with even the mechanics of our electoral system. In all of these areas there is reason to doubt that incumbent officials are able to fix the political process that elected them. As Justice Scalia has wisely cautioned, "the first instinct of political power is the retention of power." While not without controversy or difficulty, our collective experi-

ence over the past 40 years confirms that the Nation is much the better for the robust attention of the Court to the health of our democracy.

I would suggest to this Committee and to the Senate that before confirming any nominee to the Supreme Court, the Senate of the United States should be able to conclude with confidence that regardless how a nominee may vote on any given case, he or she will assume the full responsibility of protecting the integrity of our democratic processes.

Thank you, Mr. Chairman.

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

Chairman SPECTER. Thank you, Professor.

Our next witness is Mr. Carter Phillips, one of the premier appellate lawyers in the country. He has handled some 47 cases before the Supreme Court of the United States, some of those as Assistant to Former Solicitor General Rex Lee. He is a graduate of Northwestern School of Law, a clerk for Chief Justice Warren Burger, and rated as one of the 100 best lawyers in America by the National Law Journal.

At your hourly, Mr. Phillips, thank you for joining us, and how much does 5 minutes cost?

Mr. PHILLIPS. Well, I will not answer that question, but I will tell you that the law firm has taken a hit today.

[Laughter.]

STATEMENT OF CARTER G. PHILLIPS, MANAGING PARTNER, SIDLEY AUSTIN, LLP, WASHINGTON, D.C.

Mr. PHILLIPS. Thank you, Mr. Chairman and members of the Committee.

Oftentimes it strikes me that baseball metaphors tend to be used at these hearings, and it at least impresses me that perhaps a tennis metaphor is more appropriate at this point based on the testimony of Judge Alito in the last two and a half days and the extraordinary eloquent testimony of the Third Circuit judges in the last hour or so, it would strike me that we ought to be at the point of game, set and match, because it seems to me that there can be no serious question about either the qualifications on ability or ethics or any other standard that this Committee would want to use in reviewing the qualifications of Judge Alito to become a Supreme Court Justice.

You have my written testimony. I am not inclined to repeat it at this point. One thing I have learned as an appellate advocate is if you think you are ahead on points, you would do well to sit down and shut up. So all I am going to do is simply recount for you my own experiences with Judge Alito when we were in the Solicitor General's Office, not because I think they add all of that much, but I do think they debunk the notion that somehow Judge Alito has long been an ideologue of any sort.

The judge and I met when we both interviewed with Judge McCree, who was Jimmy Carter's, President Carter's Solicitor General. We were interviewing for a job as Assistants of the Solicitor General. We had applied for that position prior to the election. Neither of us knew which direction that election was going to come