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CONFIRMATION HEARING ON THE NOMINATION OF HON. SONIA SOTOMAYOR, TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

JULY 13–16, 2009

Serial No. J–111–34

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Lawyers' Committee for Civil Rights Under Law, Washington, DC, Report
Congressional Research Service, Anna C. Henning, Coordinator, Legislative Attorney and Kenneth R. Thomas, Coordinator, Legislative Attorney, June 19, 2009, report
Holmes, George, Executive Director & Chief Operating Officer, CORE-Congress of Racial Equality, New York, New York, July 17, 2009 duplicate letters to Senators Coburn, Cornyn, Durbin, Franken, Feingold, Feinstein, Graham, Grassley, Hatch, Kaufman, Klobuchar, Kohl, Kyl, Leahy, Sessions, Specter, Schumer and Whitehouse

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NOMINATION OF HON. SONIA SOTOMAYOR, TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

MONDAY, JULY 13, 2009

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 09:58 a.m., in room SH–216, Hart Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Kohl, Feinstein, Feingold, Schumer, Durbin, Cardin, Whitehouse, Klobuchar, Kaufman, Specter, Franken, Sessions, Hatch, Grassley, Kyl, Graham, Cornyn, and Coburn.

Chairman LEAHY. I will give everybody a chance to get in place here.

What we are going to do, we are going to have opening statements from members—and, of course, this is, as we all know, the confirmation hearing on the nomination of Judge Sonia Sotomayor to be a Justice of the United States Supreme Court.

Judge Sotomayor., welcome to the Senate Judiciary Committee. You have been before us twice before when President George H.W. Bush nominated you to be district judge and then, of course, when President Clinton nominated you as a court of appeals judge.

Before we begin the opening statements of the Senators, I know you have family members here, and I do not know if your microphone is on or not, but would you please introduce the members of your family?

Judge Sotomayor. If I introduced everybody that's family-like, we'd be here all morning, so I'm——

Chairman LEAHY. Okay. I will tell you what. You know what I am going to do?

Judge Sotomayor. Thank you, Mr. Chairman.

Chairman LEAHY. Because someday this will be in the archives, this transcript. Introduce whomever you like, and then we will hold the transcript open for you to add any other names you want.

[Laughter.]

Judge Sotomayor. Thank you, Mr. Chairman. I will limit myself to just my immediate family.

Sitting behind me is my brother, Juan Sotomayor. Next to him is my mom, Celina Sotomayor. Next to her is my favorite husband of my mom, Omar Lopez. Next to him is my niece, Kylie Sotomayor. And next to her is her mom and my sister-in-law, Tracy

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Sotomayor. Then there is Corey, Connor—Corey and Connor Sotomayor. I shouldn't have said—I should have said their last name first together. And the remainder of that row is filled with godchildren and dear friends. But this is my immediate family.

Chairman LEAHY. Well, thank you very much. I remember reading about the marshals being surprised at your swearing-in as a district court judge because they had never seen such a large crowd of friends and supporters arrive.

What we are going to do is each Senator will give a 10-minute opening statement. I would hope that all Senators would be able to be here today. If they are not, and if they want to give an opening statement, it will have to come out of their question time tomorrow.

Senator Schumer will give a shorter opening statement than the others because he is going to reserve some of his time as a later introduction.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM VERMONT, CHAIRMAN, COMMITTEE ON THE JUDICIARY

Chairman LEAHY. I would note for the record we are considering the nomination of Judge Sonia Sotomayor to be a Justice of the United States Supreme Court. Our Constitution is interesting in this regard. We have over 300 million Americans, but only 101 people get a chance to say who is going to be on the Supreme Court: first and foremost, of course, the President—in this case President Obama—who made the nomination; and then 100 Senators have to stand in place of all almost 320 million Americans in considering the appointment. The President has done his part. He has made a historic nomination. Now the Senate has to do its part on behalf of the Senate people—on behalf of the American people.

President Obama often quotes Dr. Martin Luther King, Jr.'s insight that "the arc of the moral universe is long, but it bends toward justice." Each generation of Americans has sought that arc toward justice. We have improved upon the foundation of our Constitution through the Bill of Rights, the Civil War amendments, the 19th Amendment's expansion of the right to vote to women, the Civil Rights Act of 1964 and Voting Rights Act of 1965, and the 26th Amendment's extension of the right to vote to young people. These actions have marked progress toward our more perfect union, and I believe this nomination can be another step along that path.

Judge Sotomayor.'s journey to this hearing room is a truly American story. She was raised by her mother, Celina, a nurse, in the South Bronx. Like her mother, Sonia Sotomayor worked hard. She graduated as the valedictorian of her class at Blessed Sacrament and at Cardinal Spellman High School in New York. She was a member of just the third class at Princeton University in which women were included. She continued to work hard, including reading classics that had been unavailable to her when she was younger and arranging tutoring to improve her writing. She graduated summa cum laude, Phi Beta Kappa; she was awarded the M. Taylor Senior Pyne Prize for scholastic excellence and service to the

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university. I would mention that is an honor that is given for outstanding merit.

After excelling at Princeton, she entered Yale Law School, where she was an active member of the law school community. Upon graduation, she had many options, but she chose to serve her community in the New York District Attorney's Office. And I might say parenthetically, every one of us who has had the privilege to be a prosecutor knows what kind of a job that is and how hard it is. There she prosecuted murders, robberies, assaults, and child pornography.

The first President Bush named her to the Federal bench in 1992, and she served as a trial judge for 6 years. President Clinton named her to the United States Court of Appeals for the Second Circuit where she has served for more than 10 years. She was confirmed each time by a bipartisan majority in the Senate.

Judge Sotomayor's qualifications are outstanding. She has more Federal court judicial experience than any nominee to the United States Supreme Court in nearly 100 years. She is the first nominee in well over a century to be nominated to three different Federal judgeships by three different Presidents. She is the first nominee in 50 years to be nominated to the Supreme Court after serving as both a Federal trial judge and a Federal appellate judge. She will be the only current Supreme Court Justice to have served as a trial judge. She was a prosecutor and a lawyer in private practice. She brings a wealth and diversity of experience to the Court. I hope all Americans are encouraged by Judge Sotomayor's achievements and by her nomination to the Nation's highest court. Hers is a success story in which all—all—Americans can take pride.

Those who break barriers often face the added burden of overcoming prejudice, and that has been true on the Supreme Court. Thurgood Marshall graduated first in his law school class. He was the lead counsel for the NAACP Legal Defense Fund. He sat on the United States Court of Appeals for the Second Circuit; he served as the Nation's top lawyer, the Solicitor General of the United States. He won a remarkable 29 out of 32 cases before the Supreme Court. But despite all of these qualifications and achievements, when he was before the Senate for his confirmation, he was asked questions designed to embarrass him, questions such as "Are you prejudiced against the white people of the South?" I hope that is a time of our past.

The confirmation of Justice Louis Brandeis, the first Jewish American to be nominated to the high Court, was a struggle rife with anti-Semitism and charges that he was a "radical." The commentary at the time included questions about "the Jewish mind" and how "its operations are complicated by altruism." Likewise, the first Catholic nominee had to overcome the argument that "as a Catholic he would be dominated by the pope."

We are in a different era, and I would trust that all members of this Committee here today will reject the efforts of partisans and outside pressure groups that have sought to create a caricature of Judge Sotomayor while belittling her record, her achievements, and her intelligence. Let no one demean—let no one demand—this extraordinary woman, her success, or her understanding of the constitutional duties she has faithfully performed for the last 17 years.

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And I hope all Senators will join together as we did when we considered President Reagan's nomination of Sandra Day O'Connor as the first woman to serve on the Supreme Court. There every Democrat and every Republican voted to confirm her.

This hearing is an opportunity for Americans to see and hear Judge Sotomayor for themselves and to consider her qualifications. It is the most transparent confirmation hearing ever held. Her decisions and confirmation materials have been posted online and made publicly available. The record is significantly more complete than that available when we considered President Bush's nominations of John Roberts and Samuel Alito just a few years ago. The judge's testimony will be carried live on several television stations and also live via webcast—something that I have set for the Judiciary Committee website.

My review of her judicial record leads me to conclude that she is a careful and restrained judge with a deep respect for judicial precedent and for the powers of the other branches of the Government, including the law-making role of Congress. That conclusion is supported by a number of independent studies that have been made of her record and shines through in a comprehensive review of her tough and fair record in criminal cases. She has a deep understanding of the real lives—the real lives—of Americans and the duty of law enforcement to help keep Americans safe and the responsibilities of all of us to respect the freedoms that define America.

Now, unfortunately, some have sought to twist her words and her record and to engage in partisan political attacks. Ideological pressure groups began attacking her even before the President made his selection. They then stepped up their attacks by threatening Republican Senators who do not oppose her. That is not the American way, and that should not be the Senate way.

In truth, we do not have to speculate about what kind of a Justice she will be because we have seen what kind of a judge she has been. She is a judge in which all Americans can have confidence. She has been a judge for all Americans, and she will be a Justice for all Americans.

Our ranking Republican Senator on this Committee reflected on the confirmation process recently, saying: "What I found was that charges come flying in from right and left that are unsupported and false. It's very, very difficult for a nominee to push back. So I think we have a high responsibility to base any criticisms that we have on a fair and honest statement of the facts and that nominees should not be subjected to distortions of their record." I agree with Senator Sessions. As we proceed, let no one distort the judge's record. Let us be fair to her and to the American people by not misrepresenting her views.

We are a country bound together by our magnificent Constitution. It guarantees the promise that our country will be a country based on the rule of law. In her service as a Federal judge, Sonia Sotomayor has kept faith with that promise. She understands that there is not one law for one race or another. There is not one law for one color or another. There is not one law for rich and a different one for poor. There is only one law. And, Judge, I remember so well when you sat in my office, and you said that "ultimately

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and completely" a judge has to follow the law, no matter what their upbringing has been. That is the kind of fair and impartial judging the American people expect. That is respect for the rule of law. And that is the kind of judge Judge Sotomayor has been. That is the kind of fair and impartial Justice she will be and that the American people deserve.

Judge Sotomayor. has been nominated to replace Justice Souter, whose retirement last month has left the Court with only eight Justices. Justice Souter served the Nation with distinction for nearly two decades on the Supreme Court with a commitment to justice, an admiration for the law, and an understanding of the impact of the Court's decisions on the daily lives of ordinary Americans. I believe that Judge Sotomayor will be in this same mold and will serve as a Justice in the manner of Sandra Day O'Connor, committed to the law and not to ideology.

In the weeks and months leading up to this hearing, I have heard the President and Senators from both sides of the aisle make reference to the engraving over the entrance of the Supreme Court. I look at that every time I go up there. It is carved in Vermont marble, and it says: "Equal Justice Under Law." Judge Sotomayor's nomination keeps faith with those words.

Senator SESSIONS.

STATEMENT OF JEFF SESSIONS, A U.S. SENATOR FROM ALABAMA, RANKING MEMBER, COMMITTEE ON THE JUDICIARY

Senator SESSIONS. Thank you, Mr. Chairman. Thank you for your leadership, and I believe you have set up some rules for the conducting of this hearing that are consistent with past hearings and I believe allow us to do our work together. And I have enjoyed working with you on this process.

Chairman LEAHY. Thank you.

Senator SESSIONS. I hope this will be viewed as the best hearing this Committee has ever had. Why not? We should seek that. So I join Chairman Leahy, Judge Sotomayor, in welcoming you here today.

It marks an important milestone in your life. I know your family is proud, and rightly so. And it is a pleasure to have them with us today.

I expect this hearing and resulting debate will be characterized by a respectful tone, a discussion of serious issues, a thoughtful dialogue, and maybe some disagreements. But we have worked hard to set that tone from the beginning.

I have been an active litigator in Federal courts. I have tried cases as a Federal prosecutor and as Attorney General of Alabama.

The Constitution and our great heritage of law I care deeply about. They are the foundation of our liberty and our prosperity, and this nomination hearing is critical for two important reasons.

First, Justices on the Supreme Court have great responsibility, hold enormous power, and have a lifetime appointment. Just five members can declare the meaning of our Constitution, bending or changing its meaning from what the people intended.

Second, this hearing is important because I believe our legal system is at a dangerous crossroads. Down one path is the traditional American system, so admired around the world, where judges im-

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partially apply the law to the facts without regard to personal views.

This is the compassionate system because it is the fair system. In the American legal system, courts do not make the law or set policy, because allowing unelected officials to make law would strike at the heart of our democracy.

Here, judges take an oath to administer justice impartially. That oath reads: "I . . . do solemnly swear that I will administer justice without respect to persons, and do equal right to the rich and the poor, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States. So help me God."

These principles give the traditional system its moral authority, which is why Americans respect and accept the rulings of courts—even when they disagree.

Indeed, our legal system is based on a firm belief in an ordered universe and objective truth. The trial is the process by which the impartial and wise judge guides us to truth.

Down the other path lies a Brave New World where words have no true meaning and judges are free to decide what facts they choose to see. In this world, a judge is free to push his or her own political or social agenda. I reject that view, and Americans reject that view.

We have seen Federal judges force their own political and social agenda on the Nation, dictating that the words "under God" be removed from the Pledge of Allegiance and barring students from even private—even silent prayer in schools.

Judges have dismissed the people's right to their property, saying the Government can take a person's home for the purpose of developing a private shopping center.

Judges have—contrary to longstanding rules of war—created a right for terrorists, captured on a foreign battlefield, to sue the United States Government in our own country.

Judges have cited foreign laws, world opinion, and a United Nations resolution to determine that a State death penalty law was unconstitutional.

I am afraid our system will only be further corrupted, I have to say, as a result of President Obama's views that, in tough cases, the critical ingredient for a judge is the "depth and breadth of one's empathy," as well as, his word, "their broader vision of what America should be."

Like the American people, I have watched this process for a number of years, and I fear that this "empathy standard" is another step down the road to a liberal activist, results-oriented, and relativistic world where laws lose their fixed meaning, unelected judges set policy, Americans are seen as members of separate groups rather than as simply Americans, and where the constitutional limits on Government power are ignored when politicians want to buy out private companies. So we have reached a fork in the road, I think, and there are stark differences.

I want to be clear:

I will not vote for—and no senator should vote for—an individual nominated by any President who is not fully committed to fairness and impartiality toward every person who appears before them.

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I will not vote for—and no Senator should vote for—an individual nominated by any President who believes it is acceptable for a judge to allow their personal background, gender, prejudices, or sympathies to sway their decision in favor of, or against, parties before the court. In my view, such a philosophy is disqualifying.

Such an approach to judging means that the umpire calling the game is not neutral, but instead feels empowered to favor one team over the other.

Call it empathy, call it prejudice, or call it sympathy, but whatever it is, it is not law. In truth, it is more akin to politics, and politics has no place in the courtroom.

Some will respond, "Judge Sotomayor would never say it's acceptable for a judge to display prejudice in a case." But I regret to say, Judge, that some of your statements that I will outline seem to say that clearly. Let's look at just a few examples.

We have seen the video of the Duke University panel where Judge Sotomayor says "It is [the] Court of Appeals where policy is made. And I know, and I know, that this is on tape, and I should never say that, and should not think that."

And during a speech 15 years ago, Judge Sotomayor said, "I willingly accept that we who judge must not deny the differences resulting from experience and heritage but attempt . . . continuously to judge when those opinions, sympathies, and prejudices are appropriate."

And in the same speech, she said, "my experiences will affect the facts I choose to see. . ."

Having tried a lot of cases, that particular phrase bothers me. I expect every judge to see all the facts.

So I think it is noteworthy that, when asked about Judge Sotomayor's now-famous statement that a "wise Latina" would come to a better conclusion than others, President Obama, White House Press Secretary Robert Gibbs, and Supreme Court Justice Ginsburg declined to defend the substance of those remarks. They each assumed that the nominee misspoke. But I do not think it—but the nominee did not misspeak. She is on record as making this statement at least five times over the course of a decade.

I am providing a copy of the full text of those speeches for the record.

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

Senator SESSIONS. Others will say that, despite these statements, we should look to the nominee's record, which they characterize as "moderate." People said the same of Justice Ginsburg, who is now considered to be one of the most members of the Supreme Court in history.

Some Senators ignored Justice Ginsburg's philosophy and focused on the nominee's judicial opinions. But that is not a good test because those cases were necessarily restrained by precedent and the threat of reversal from higher courts.

On the Supreme Court, those checks on judicial power will be removed, and the judge's philosophy will be allowed to reach full bloom.

But even as a lower court judge, our nominee has made some troubling rulings. I am concerned by *Ricci*, the *New Haven Firefighters* case—recently reversed by the Supreme Court—where she

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agreed with the City of New Haven's decision to change the promotion rules in the middle of the game. Incredibly, her opinion consisted of just one substantive paragraph of analysis.

Judge Sotomayor has said that she accepts that her opinions, sympathies, and prejudices will affect her rulings. Could it be that her time as a leader in the Puerto Rican Legal Defense and Education Fund, a fine organization, provides a clue to her decision against the firefighters?

While the nominee was Chair of that fund's Litigation Committee, the organization aggressively pursued racial quotas in city hiring and, in numerous cases, fought to overturn the results of promotion exams. It seems to me that in *Ricci*, Judge Sotomayor's empathy for one group of firefighters turned out to be prejudice against another.

That is, of course, the logical flaw in the "empathy standard." Empathy for one party is always prejudice against another.

Judge Sotomayor, we will inquire into how your philosophy, which allows subjectivity in the courtroom, affects your decision-making like, for example, in abortion, where an organization in which you were an active leader argued that the Constitution requires taxpayer money to fund abortions; and gun control, where you recently noted it is "settled law" that the Second Amendment does not prevent a city or State from barring gun ownership; private property, where you have ruled recently that the Government could take property from one pharmacy developer and give it to another; capital punishment, where you personally signed a statement opposing the reinstatement of the death penalty in New York because of the "inhuman[e] psychological burden" it places on the offender and the family.

So I hope the American people will follow these hearings closely. They should learn about the issues and listen to both sides of the argument, and at the end of the hearing ask: "If I must one day go to court, what kind of judge do I wish to hear my case?"

"Do I want a judge that allows his or her social, political, or religious views to change the outcome? Or do I want a judge that impartially applies the law to the facts and fairly rules on the merits, without bias or prejudice?"

It is our job to determine on which side of that fundamental divide the nominee stands.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Another housekeeping thing. We are going to try to keep these opening statements to 10 minutes. I will recognize Senators on the Democratic side based on seniority. I have told Senator Sessions I will——

Senator SESSIONS. Likewise.

Chairman LEAHY. That is what you want on your side. Then they will be recognized on your side by the same way. So the next Senator is Senator Kohl.

STATEMENT OF HON. HERB KOHL, A U.S. SENATOR FROM WISCONSIN

Senator KOHL. Thank you, Mr. Chairman.

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Judge Sotomayor, let me also extend my welcome to you and to your family. You are to be congratulated on your nomination.

Your nomination is a reflection of who we are as a country, and it represents an American success story that we all can be proud of. Your academic and professional accomplishments—as prosecutor, private practitioner, trial judge and appellate judge—are exemplary. And as a judge, you have brought a richness of experience to the bench and to the judiciary which has been an inspiration for so many.

Today, we begin a process through which the Senate engages in its constitutional role to "advise and consent" on your nomination. This week's hearing is the only opportunity we—and the American people—will have to learn about your judicial philosophy, your temperament, and your motivations before you put on the black robe and are heard from only in your opinions.

The President has asked us to entrust you with an immense amount of power—power which, by design, is free from political constraints, unchecked by the people, and unaccountable to Congress, except in the most extreme circumstances.

Our democracy, our rights, and everything we hold dear about America are built on the foundation of our Constitution. For more than 200 years, the Court has interpreted the meaning of the Constitution and, in so doing, guaranteed our most cherished rights: the right to equal education regardless of race; the right to an attorney and a fair trial for the accused; the right to personal privacy; the right to speak, vote, and worship without interference from the Government. Should you be confirmed, you and your colleagues will decide the future scope of our rights and the breadth of our freedoms. Your decisions will shape the fabric of American society for many years to come.

And that is why it is so important that over the course of the next few days, we gain a good understanding of what is in your heart and in your mind. We don't have a right to know in advance how you will rule on cases which will come before you. But we need—and we deserve—to know what you think about fundamental issues such as civil rights, privacy, property rights, the separation of church and state, and civil liberties, just to name a few.

Some believe that the confirmation process has become thoroughly scripted and that nominees are far too careful in cloaking their answers to important questions in generalities and with caveats about future cases. I recognize this concern, but I also hope that you recognize our need to have a frank discussion about these important issues.

And these are not just concepts for law books. They are issues Americans care about. As crime plagues our communities, we navigate the balance between individual rights and the duty of law enforcement to protect and maintain order. As families struggle to make ends meet in these difficult times, we question the permissible role for Government in helping get the economy back on track. As we continue to strive for equal rights in our schools and workplaces, we debate the tensions between admissions policies and hiring practices that acknowledge diversity, and those that attempt to be colorblind.

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These issues invite all Americans to struggle with the dilemmas of democracy and the great questions of our Constitution. If we discuss them with candor, I believe we will have a conversation that the American people will profit from.

When considering Supreme Court nominees over the years, I have judged each one with a test of judicial excellence.

First, judicial excellence means the competence, character, and temperament that we expect of a Supreme Court Justice. He or she must have a keen understanding of the law and the ability to explain it in ways that both the litigants and the American people will understand and respect, even if they disagree with the outcome.

Second, I look for a nominee to have the sense of values which form the core of our political and economic system. No one, including the President, has the right to require ideological purity from a member of the Supreme Court. But we do have a right to require that the nominee accept both the basic principles of the Constitution and its core values implanted in society.

Third, we want a nominee with a sense of compassion. This is a quality that I have considered with the last six Supreme Court Justices. Compassion does not mean bias or lack of impartiality. It is meant to remind us that the law is more than an intellectual game and more than a mental exercise.

As Justice Black said, "The courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered or because they are non-conforming victims of prejudice and public excitement."

A Supreme Court Justice must also be able to recognize that real people with real problems are affected by the decisions rendered by the Court. He or she must have a connection with and an understanding of the problems that people struggle with on a daily basis. For justice, after all, may be blind, but it should not be deaf.

As Justice Thomas told us at his confirmation hearing, it is important that a Justice "can walk in the shoes of the people who are affected by what the Court does." I believe this comment embodies what President Obama intended when he said he wanted a nominee with "an understanding of how the world works and how ordinary people live."

Some critics are concerned that your background will inappropriately impact your decision making. But it is impossible for any of us to remove ourselves from our life story with all the twists and turns that make us who we are.

As you have acknowledged, "My experiences in life unquestionably shape my attitudes." And I hope that we on this Committee can appreciate and relate to ourselves what you said next: ". . . but I am cognizant enough that mine is not the only experience." You will have an opportunity before this Committee to assure us that your life experiences will impact but not overwhelm your duty to follow the law and Constitution.

After your confirmation to the Court of Appeals in 1998, you said about the discussions at your confirmation hearing, "So long as people of good will are participating in the process and attempting to be balanced in their approach, then the system will remain healthy." I hope our process will include a healthy level of balanced

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and respectful debate, and I look forward to the opportunity to learn more about you and what sort of Justice you aspire to be.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, Senator.

Senator HATCH. Also a former Chairman of this Committee.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM UTAH

Senator HATCH. Well, thank you, Mr. Chairman. Judge, welcome to you and your good family. We are grateful to have all of you here.

Now, this is the 12th hearing for a Supreme Court nomination in which I have participated, and I am as struck today as I was the first time by the seriousness of our responsibility and its impact on America. I am confident that under this Committee's leadership, from both you, Mr. Chairman, and the distinguished Ranking Member, this hearing will be both respectful and substantive.

Judge Sotomayor comes to this Committee for the third time, having served in the first two levels of the Federal judiciary and now being nominated to the third. She has a compelling life story and a strong record of educational and professional achievement. Her nomination speaks to the opportunities that America today provides for men and women of different backgrounds and heritage.

The liberty we enjoy here in America makes these opportunities possible and requires our best efforts to protect that liberty. Our liberty rests on the foundation of a written Constitution that limits and separates government power, self-government by the people, and the rule of law. Those principles define the kind of judge our liberty requires. They define the role judges may play in our system of government.

I have described my basic approach to the judicial confirmation process in more detail elsewhere, so I ask unanimous consent that my article published this year in the Harvard Journal of Law and Public Policy, entitled "The Constitution Is the Playbook for Judicial Selection," be placed in the record, Mr. Chairman, if I can.

Chairman LEAHY. Without objection.

[The article appears as a submission for the record.]

Senator HATCH. My approach includes three elements:

First, the Senate owes some deference to the President's qualified nominees;

Second, a judicial nominee's qualifications include not only legal experience but, more importantly, judicial philosophy. By that I mean a nominee's understanding of the power and proper role of judges in our system of government;

Third, this standard must be applied to the nominee's entire record. I have also found guidance from what may seem to be as an unusual source. On June 8, 2005, then-Senator Barack Obama explained his opposition to the appeals court nomination of Janice Rogers Brown, an African American woman with a truly compelling life story, who then served as a justice on the California Supreme Court. Senator Obama made three arguments that I find relevant today.

First, he argued that the test of a qualified judicial nominee is whether she can set aside her personal views and, as he put it, "de-

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cide each case on the facts and the merits alone. That is what our Founders intended. Judicial decisions ultimately have to be based on evidence and on facts. They have to be based on precedent and on law."

Second, Senator Obama extensively reviewed Justice Brown's speeches off the court for clues about what he called her "overreaching judicial philosophy." There is even more reason to do so today. This is, after all, a nomination to the Supreme Court of the United States of America.

Judge Sotomayor, if confirmed, will help change the very precedents that today bind her as a circuit court of appeals judge. In other words, the judicial position to which she has been nominated is quite different than the judicial position she now occupies. This makes evidence outside of her appeals court decisions regarding her approach to judging more, not less, important. Judge Sotomayor has obviously thought, spoken, and written much on these issues, and I think we show respect to her by taking her entire record seriously.

Third, Senator Obama said that while a nominee's race, gender, and life story are important, they cannot distract from the fundamental focus on the kind of judge she will be. He said then, as I have said today, that we should all be grateful for the opportunity that our liberty affords for Americans of different backgrounds. We should applaud Judge Sotomayor's achievements and service to her community, her profession, and her country. Yet Senator Obama called it "offensive and cynical" to suggest that a nominee's race or gender can give her a pass for her substantive views. He proved it by voting twice to filibuster Janice Rogers Brown's nomination and then by voting against her confirmation.

I share his hope that we have arrived at a point in our country's history where individuals can be examined and even criticized for their views, no matter what their race or gender. If those standards were appropriate when Senator Obama opposed Republican nominees, they should be appropriate now that President Obama is choosing his own nominees.

But today President Obama says that personal empathy is an essential ingredient in judicial decisions. Today we are urged to ignore Judge Sotomayor's speeches altogether and focus only on her judicial decisions, which are extensive. I do not believe that we should do just that.

I wish that other current standards had been applied to past nominees. Democratic Senators, for example, offer as proof of Judge Sotomayor's moderation that she has agreed with her Republican-appointed Second Circuit colleagues 95 percent of the time. Joined by then—for which I congratulate her. Joined by then-Senator Obama, however, many of those same Democratic Senators voted against Justice Samuel Alito's confirmation, even though he had voted with his Democrat-appointed Third Circuit colleagues 99 percent of the time during a more longer appeals court career. And although Justice Alito also received the ABA's highest rating, Senator Obama joined 24 other Democrats on even voting to filibuster his nomination. And then he joined a total of 42 Democrats in voting against the confirmation of now-Justice Alito.

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In fact, Senator Obama never voted to confirm a Supreme Court Justice. He even voted against the man who administered the oath of Presidential office, Chief Justice John Roberts, another distinguished and well-qualified nominee.

Now, if a compelling life story, academic and professional excellence, and a top ABA rating make a convincing confirmation case, Miguel Estrada would be a U.S. circuit judge today. He is a brilliant, universally respected lawyer, one of the top Supreme Court practitioners in America. But he was fiercely opposed by groups and repeatedly filibustered by Democrat Senators, and ones who today say these same factors should count in Judge Sotomayor's favor.

Now, whether I vote for or against Judge Sotomayor, it will be by applying the principles that I have laid out, not by using such tactics and standards used against these nominees in the past. Judicial appointments have become increasingly contentious. Some of the things that have been said about Judge Sotomayor have been intemperate and unfair. There are now newspaper reports that left-wing groups supporting Judge Sotomayor—specifically, the extreme-left People for the American Way—are engaged in a smear campaign against the plaintiff in one of her more controversial cases, a man who will be testifying here later in the week. If that is true—and I hope it is not—it is beneath both contempt and the dignity that this process demands. But there must be a vigorous debate about the kind of judge America needs because nothing less than our liberty is at stake.

Must judges set aside or may judges consider their personal feelings in deciding cases? Is judicial impartiality a duty or an option? Does the fact that judicial decisions affect so many people's lives require judges to be objective and impartial? Or does it allow them to be subjective and sympathetic?

Judge Sotomayor's nomination raises these and other important issues, and I look forward to a respectful and energetic debate. The confirmation process in general, and this hearing in particular, must be both dignified and thorough. There are very different and strongly held views about the issues we will explore, in particular the role that judges should play in our system of government.

The task before us is to determine whether Judge Sonia Sotomayor is qualified by legal experience, and especially by judicial philosophy, to sit on the Supreme Court of the United States of America. Doing so requires examining her entire record, her speeches and articles, as well as her judicial decisions. We must at the same time be thankful for the opportunity represented by Judge Sotomayor's nomination and focus squarely on whether she will be the kind of judge required by the very liberty that makes that opportunity possible.

Judge, I am proud of you and I wish you well. This will be an interesting experience, and I expect you to be treated with dignity and respect throughout.

Thank you, Mr. Chairman.

Chairman LEAHY. I yield to the Chair of the Senate Intelligence Committee, Senator Feinstein.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM CALIFORNIA

Senator FEINSTEIN. Thank you very much, Mr. Chairman. Good morning, Judge Sotomayor. I want to congratulate you on your nomination, and I also want to start out with a couple of personal words.

Your nomination I view with a great sense of personal pride. You are indeed a very special woman. You have overcome adversity and disadvantage. You have grown in strength and determination, and you have achieved respect and admiration for what has been a brilliant legal and judicial career.

If confirmed, you will join the Supreme Court with more Federal judicial experience than any Justice in the past 100 years. And you bring with you 29½ years of varied legal experience to the Court. By this standard you are well qualified.

In your 11 years as a Federal appellate court judge, you have participated in 3,000 appeals and authored roughly 400 published opinions. In your 6 years on the Federal court, you were the trial judge in approximately 450 cases. For 4½ years, you prosecuted crimes as an assistant DA in New York City. And you spent 8 years litigating business cases at a New York law firm.

What is unique about this broad experience is that you have seen the law truly from all sides.

On the district court you saw firsthand the actual impact of the law on people before you in both civil and criminal cases.

You considered, wrote, and joined thousands of opinions clarifying the law and reviewing district court decisions in your time on the appellate court. Your 11 years there were a rigorous training ground for the Supreme Court.

It is very unique for a judge to have both levels of Federal court experience, and you will be the only one on the current Supreme Court with this background.

You were a prosecutor who tried murder, robbery, and child pornography cases. So you know firsthand the impact of crime on a major metropolis, and you have administered justice in the close and personal forum of a trial court.

You also possess a wealth of knowledge in the complicated arena of business law with its contract disputes, patent and copyright issues, and antitrust questions.

And as an associate and partner at a private law firm, you have tried complex civil cases in the areas of real estate, banking, and contracts law, as well as intellectual property law, which I am told was a specialty of yours. So you bring a deep and broad experience in the law to the Supreme Court.

In my nearly 17 years on this Committee, I have held certain qualities that a Supreme Court nominee must possess:

First, broad and relative experience. You satisfy that.

Second, a strong and deep knowledge of the law and the Constitution. You satisfy that.

Third, a firm commitment to follow the law. And you have in all of the statistics indicated that.

Next, a judicial temperament and integrity. And you have both of those.

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And, finally, mainstream legal reasoning. And there is everything in your record to indicate——

[Protestor outburst.]

Chairman LEAHY. The Senate will——

[Protestor outburst.]

Chairman LEAHY. The police will remove that man.

Let me make very clear: There will be no outbursts allowed in this Committee, either for or against the nominee, either for or against any position that Senator Sessions or I or any other Senator have. This is a hearing of the United States Senate, and we will have order and we will have decorum. There are people who want to have this hearing. In fairness to Judge Sotomayor, it will be done orderly, and I will direct the police to remove anybody who does any kind of an outburst, either for or against the nominee, either for or against any member of this Committee.

Senator SESSIONS. Thank you, Mr. Chairman, for your firm words. I support you 100 percent.

Chairman LEAHY. Thank you. And the record will show my comments outside of Senator Feinstein's comments, and I yield back to her.

Senator FEINSTEIN. Thank you, Mr. Chairman.

Bottom line, I believe your record indicates that you possess all of these qualities.

Over the past years of my service on this Committee, I have found it increasingly difficult to know from answers to questions we ask from this dais how a nominee will actually act as a Supreme Court Justice, because answers here are often indirect and increasingly couched in euphemistic phrases.

For example, nominees have often responded to our specific questions with phrases like "I have an open mind," or yes, that is precedent "entitled to respect," or "I have no quarrel with that."

Of course, these phrases obfuscate and prevent a clear understanding of where a nominee really stands.

For example, several past nominees have been asked about the *Casey* decision, where the Court held that the Government cannot restrict access to abortions that are medically necessary to preserve a woman's health.

Some nominees responded by assuring that *Roe* and *Casey* were precedents of the Court entitled to great respect. And in one of the hearings, through questioning by Senator Specter, this line of cases was acknowledged to have created a "super-precedent."

But once on the Court, the same nominees voted to overturn the key holding in *Casey*—that laws restricting a woman's medical care must contain an exception to protect her health.

Their decision did not comport with the answers they gave here, and it disregarded stare decisis and the precedents established in *Roe*, in *Ashcroft*, in *Casey*, in *Thornburgh*, in *Carhart I*, and in *Ayotte*.

So "super-precedent" went out the window, and women lost a fundamental constitutional protection that had existed for 36 years.

Also, it showed me that Supreme Court Justices are much more than umpires calling balls and strikes and that the word "activist" is often used only to describe opinions of one side.

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As a matter of fact, in just 2 years, these same nominees have either disregarded or overturned precedent in at least eight other cases: A case involving assignments to attain racial diversity in school assignments; a case overruling 70 years of precedent on the Second Amendment and Federal gun control law; a case which increased the burden of proof on older workers to prove age discrimination; a case overturning a 1911 decision to allow manufacturers to set minimum prices for their products; a case overruling two cases from the 1960s on time limits for filing criminal appeals; a case reversing precedent on the Sixth Amendment right to counsel; a case overturning a prior ruling on regulation of issue ads relating to political campaigns; and a case disregarding prior law and creating a new standard that limits when cities can replace civil service exams that they may believe have discriminated against a group of workers.

So I do not believe that Supreme Court Justices are merely umpires calling balls and strikes. Rather, I believe that they make the decisions of individuals who bring to the Court their own experiences and philosophies.

Judge Sotomayor, I believe you are a warm and intelligent woman. I believe you are well studied and experienced in the law with some 17 years of Federal court experience involving 3,000 appeals and 450 trial cases.

So I believe you, too, will bring your experiences and philosophies to this highest Court, and I believe that will do only one thing—and, that is, to strengthen this high institution of our great country.

Thank you Mr. Chairman.

Chairman LEAHY. Thank you, Senator Feinstein.

Senator Grassley.

STATEMENT OF HON. CHARLES GRASSLEY, A U.S. SENATOR FROM IOWA

Senator GRASSLEY. Judge Sotomayor, I notice how attentive you have been to everything we are saying. Thank you very much. Congratulations on your nomination to be Associate Justice and welcome to the Judiciary Committee, and a warm welcome to you and your family and friends. They are all very proud of you, and rightly so.

You have a distinguished legal and judicial record. No doubt it is one that we would expect of any individual nominated to the Supreme Court. You made your start from very humble beginnings. You overcame substantial obstacles and went on to excel at some of the Nation's top schools. You became an assistant district attorney and successful private practice attorney in New York City. You have been on the Federal bench as a district court and appellate court judge since 1992. These are all very impressive legal accomplishments which certainly qualify you to be on the Supreme Court.

However, an impressive legal record and superior intellect are not the only criteria that we on this Committee have to consider. To be truly qualified, the nominee must understand the proper role of a judge in society—that is, we want to be absolutely certain that the nominee will faithfully interpret the law and the Constitution

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without bias or prejudice. This is the most critical qualification of a Supreme Court Justice—the capacity to set aside one's own feelings so that he or she can blindly and dispassionately administer equal justice for all.

So the Senate has a constitutional responsibility of advise and consent, to confirm intelligent, experienced individuals anchored in the Constitution, not individuals who will pursue personal and political agendas from the bench.

Judge Sotomayor, you are nominated to the highest Court of the land which has the final say on the law. As such, it is even more important for the Senate to ascertain whether you can resist the temptations to mold the Constitution to your own personal beliefs and preferences. It is even more important for the Senate to ascertain whether you can dispense justice without bias or prejudice.

Supreme Court Justices sit on the highest Court in the land so that they are not as constrained, as you know, to follow precedent to the same extent as district and circuit judges. There is a proper role of a judge in our system of limited government and checks and balances. Our democratic system of government demands that judges not take on the role of policymakers. That is a role properly reserved to legislators, who can be voted out of office if people do not like what they legislate, unlike judges not being voted out of office.

The Supreme Court is meant to be a legal institution, not a political one. But some individuals and groups do not see it that way. They see the Supreme Court as ground zero for their political and social battles. They want Justices to implement their political and social agenda through the judicial process. That is not what our great American tradition envisioned. Those battles are appropriately fought in our branch of Government, the legislative branch.

So it is incredibly important that we get it right and confirm the right kind of person for the Supreme Court. Supreme Court nominees should respect the constitutional separation of power. They should understand that the touchstone of being a good judge is the exercise of judicial restraint. Good judges understand that their job is not to impose their own personal opinions of right and wrong. They know their job is to say what the law is rather than what they personally think that it ought to be.

Good judges understand that they must meticulously apply the law and the Constitution even if the results they reach are unpopular. Good judges know that the constitutional law constrains judges every bit as much as it constrains legislators, executives, and our whole citizenry. Good judges not only understand these fundamental principles; they live and breathe them.

President Obama said that he would nominate judges based on their ability to empathize in general and with certain groups in particular. This empathy standard is troubling to me. In fact, I am concerned that judging based on empathy is really just legislating from the bench.

The Constitution requires that judges be free from personal politics, feelings, and preferences. President Obama's empathy standard appears to encourage judges to make use of their personal poli-

tics, feelings, and preferences. This is contrary to what most of us understand to be the role of the judiciary.

President Obama clearly believes that you measure up to his empathy standard. That worries me. I have reviewed your record and have concerns about your judicial philosophy. For example, in one speech you doubted that a judge could ever be truly impartial. In another speech, you argued that it is a disservice both to law and society for judges to disregard personal views shaped by one's "differences as a woman or man of color."

In yet another speech, you proclaimed that the court of appeals is where policy is made. Your "wise Latina" comment starkly contradicts a statement by Justice O'Connor that a wise old man and a wise old woman would eventually reach the same conclusion in a case.

These statements go directly to your views of how a judge should use his or her background and experience when deciding cases. Unfortunately, I fear they do not comport with what I and many others believe is the proper role of a judge or an appropriate judicial method.

The American legal system requires that judges check their biases, personal preferences, and politics at the door of the courthouse. Lady Justice stands before the Supreme Court with a blindfold, holding the scales of justice. Just like Lady Justice, judges and Justices must wear blindfolds when they interpret the Constitution and administer justice.

I will be asking you about your ability to wear that judicial blindfold. I will be asking you about your ability to decide cases in an impartial manner and in accordance with the law and the Constitution. I will be asking you about your judicial philosophy, whether you allow biases and personal preferences to dictate your judicial methods.

Finally—or ideally, the Supreme Court shouldn't be made up of men and women who are on the side of one special group or issue; rather, the Supreme Court should be made up of men and women who are on the side of the law and the Constitution.

I am looking to support a restrained jurist committed to the rule of law and the Constitution. I am not looking to support a creative jurist who will allow his or her background and personal preferences to decide cases.

The Senate needs to do its job and conduct a comprehensive and careful review of your record and qualifications. You are nominated to a lifetime position on the highest Court. The Senate has a tremendous responsibility to confirm an individual who has superior intellectual abilities, solid legal expertise, and an even judicial demeanor and temperament. Above all, we have a tremendous responsibility to confirm an individual who truly understands the proper role of a Justice.

So I will be asking questions about your judicial qualifications. However, like all of my colleagues, I am committed to giving you a fair and respectful hearing as is appropriate for Supreme Court nominees.

I congratulate you once again.

Chairman LEAHY. Thank you, Senator Grassley.

Senator Feingold, I would yield to you.

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STATEMENT OF HON. RUSSELL FEINGOLD, A U.S. SENATOR FROM WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman. I too want to welcome and congratulate the nominee, Judge Sotomayor. I greatly admire your accomplishments and your long record of public service. Let me also thank you in advance for the long week you're about to spend in this room.

The Supreme Court plays a unique and central role in the life of our nation. Those who sit as Justices have extraordinary power over some of the most important, and most intimate, aspects of the lives of American citizens.

It is therefore not surprising at all that the nomination and confirmation of a Supreme Court Justice is such a widely anticipated and widely covered event. The nine men and women who sit on the court have enormous responsibilities, and those of us tasked with voting on the confirmation of a nominee have a significant responsibility as well.

This is clearly one of the most consequential things that one does as a United States Senator and I'm honored and humbled to be given this role by the people of Wisconsin.

The ultimate responsibility of the Supreme Court is to safeguard the rule of law, which defines us as a nation and protects us all.

In the past eight years, the Supreme Court has played a crucial role in checking some of the previous administration's most egregious departures from the rule of law. Time after time in cases arising out of actions taken by the Administration after September 11, the court has said: "No. You have gone too far."

It said "no" to the Bush Administration's view that it could set up a law-free zone at Guantanamo Bay. It said "no" to the Administration's view that it could hold a citizen in the United States incommunicado indefinitely with no access to a lawyer.

It said "no" to the Administration's decision to create military commissions without congressional authorization, and it said no to the Administration and to Congress when they tried to strip the constitutional right to habeus corpus from prisoners held at Guantanamo.

These were courageous decisions, and in my opinion, they were correct decisions. They made plain, as Justice O'Connor wrote in the *Hamdi* decision in 2004: "A state of war is not a blank check for the President when it comes to the rights of the nation's citizens." These were all close decisions, some decided by a 5 to 4 vote.

That fact underscores the unparalleled power that each Supreme Court justice has. In my opinion, one of the most important qualities that a Supreme Court justice must have is courage. The courage to stand up to the President and Congress in order to protect the constitutional rights of the American people and preserve the rule of law.

I have touched on the crucial recent decisions of the court in the area of executive power, but we know, of course, that there are countless past Supreme Court decisions that have had a major impact on aspects of our national life.

The court rejected racial discrimination in education; it guaranteed the principle of "one person, one vote"; it made sure that even the poorest person accused of a crime in this country can be rep-

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resented by counsel; it made sure that newspapers can't be sued for libel by public figures for merely making a mistake.

It protected the privacy of telephone conversations from unjustified government eavesdropping; it protected an individual's right to possess afirearm for private use; and it even decided a presidential election.

It made these decisions by interpreting and applying open-ended language in our Constitution. Phrases like "equal protection of the laws," "due process of law," "freedom of the press," "unreasonable searches and seizures," and "the right to bear arms."

Senator Feinstein just suggested these momentous decisions were not simply the result of an umpire calling balls and strikes. Easy cases where the law is clear almost never make it to the Supreme Court. The great constitutional issues that the Supreme Court is called upon to decide require much more than the mechanical application of universally accepted legal principles. That is why Justices need great legal expertise, but they also need wisdom, they need judgment, they need to understand the impact of their decisions on the parties before them and the country around them, from New York City to small towns like Spooner, Wisconsin. And they need a deep appreciation of and dedication to equality, to liberty and to democracy.

That is why I suggest to everyone watching today that they be a little wary of a phrase that they are hearing at this hearing: "judicial activism." That term really seems to have lost all usefulness, particularly since so many rulings of the conservative majority on the Supreme Court can fairly be described as "activist" in their disregard for precedent and their willingness to ignore or override the intent of Congress.

At this point, perhaps we should all accept that the best definition of a "judicial activist" is a judge who decides a case in a way you don't like. Each of the decisions I mentioned earlier was undoubtedly criticized by someone at the time it was issued, and maybe even today, as being "judicial activism." Yet some of them are, as the judge well knows, among the most revered Supreme Court decisions in modern times.

Mr. Chairman, every Senator is entitled to ask whatever questions he or she wants at these hearings and to look at whatever factors he or she finds significant in evaluating this nominee.

I hope Judge Sotomayor will answer all questions as fully as possible. I'll have questions of my own on a range of issues. Certainly, with the two most recent Supreme Court nominations, Senators did ask tough questions and sought as much information from the nominees as we possibly could get. And I expect nothing less from my colleagues in these hearings. I am glad, however, that Judge Sotomayor will finally have an opportunity to answer some of the unsubstantiated charges that have been made against her.

One attack that I find particularly shocking is the suggestion that she will be biased against some litigants because of her racial and ethnic heritage. This charge is not based on anything in her judicial record because there is absolutely nothing in the hundreds of opinions she has written to support it. That long record, which is obviously the most relevant evidence we have to evaluate her, demonstrates a cautious and careful approach to judging. Instead,

a few lines from a 2001 speech, taken out of context, have prompted some to charge that she is a racist. I believe that no one who reads the whole Berkeley speech could honestly come to that conclusion. The speech is actually a remarkably thoughtful attempt to grapple with difficult issues not often discussed by judges: How does a judge's personal background and experiences affect her judging? And Judge Sotomayor concludes her speech by saying the following: "I am reminded each day that I render decisions that affect people concretely and that I owe them constant and complete vigilance in checking my assumptions, presumptions and perspectives and ensuring that to the extent that my limited abilities and capabilities permit me, that I reevaluate them and change as circumstances and cases before me require."

Mr. Chairman, these are the words of a thoughtful, humble, and self-aware judge striving to do her very best to administer impartial justice for all Americans, from New York City to Spooner, Wisconsin. It seems to me that is a quality we want in our judges.

Judge Sotomayor is living proof that this country is moving in the right direction on the issue of race, that doors of opportunity are finally starting to open to all of our citizens. And I think that nomination will inspire countless children to study harder and dream higher, and that is something we should all celebrate.

Let me again welcome and congratulate you. I look forward to further learning in these hearings whether you have the knowledge, the wisdom, the judgment, the integrity, and yes, the courage, to serve with distinction on our nation's highest court. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much. I will recognize Senator Kyl, the Deputy Republican Leader of the United States Senate.

Senator Kyl.

STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM ARIZONA

Senator KYL. Thank you, Mr. Chairman. I would hope that every American is proud that a Hispanic woman has been nominated to sit on the Supreme Court. In fulfilling our advise and consent role, of course, we must evaluate Judge Sotomayor's fitness to serve on the merits, not on the basis of her ethnicity.

With a background that creates a prima facie case for confirmation, the primary question I believe Judge Sotomayor must address in this hearing is her understanding of the role of an appellate judge. From what she has said, she appears to believe that her role is not constrained to objectively decide who wins based on the weight of the law, but rather who in her personal opinion, should win. The factors that will influence her decisions apparently include her gender and Latina heritage and foreign legal concepts that as she said, get her creative juices going.

What is the traditional basis for judging in America? For 220 years, presidents and the Senate have focused on appointing and confirming judges and justices who are committed to putting aside their biases and prejudices and applying law to fairly and impartially resolve disputes between parties.

This principle is universally recognized and shared by judges across the ideological spectrum. For instance, Judge Richard Paez

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of the Ninth Circuit with whom I disagree on a number of issues explained this in the same venue where, less than 24 hours earlier, Judge Sotomayor made her now-famous remarks about a wise Latina woman making better decisions than other judges.

Judge Paez described the instructions that he gave to jurors who were about to hear a case. "As jurors," he said, "recognize that you might have some bias, or prejudice. Recognize that it exists, and determine whether you can control it so that you can judge the case fairly. Because if you cannot—if you cannot set aside those prejudices, biases and passions, then you should not sit on the case."

And then Judge Paez said, "The same principle applies to judges. We take an oath of office. At the federal level, it is a very interesting oath. It says, in part, that you promise or swear to do justice to both the poor and the rich. The first time I heard this oath, I was startled by its significance," he said. "I have my oath hanging on the wall in the office to remind me of my obligations. And so, although I am a Latino judge and there is no question about that, I am viewed as a Latino judge. As I judge cases, I try to judge them fairly. I try to remain faithful to my oath."

What Judge Paez said has been the standard for 220 years. It correctly describes the fundamental and proper role for a judge.

Unfortunately, a very important person has decided it is time for change, time for a new kind of judge, one who will apply a different standard of judging, including employment of his or her empathy for one of the parties to the dispute.

That person is President Obama, and the question before us is whether his first nominee to the Supreme Court follows his new model of judging or the traditional model articulated by Judge Paez.

President Obama, in opposing the nomination of Chief Justice Roberts said that "while adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before a court, what matters on the Supreme Court is those 5 percent of cases that are truly difficult. In those 5 percent of hard cases, the constitutional text will not be directly on point. The language of the statute will not be perfectly clear. Legal process alone will not lead you to a rule of decision."

How does President Obama propose judges deal with these hard cases? Does he want them to use judicial precedent, canons of construction, and other accepted tools of interpretation that judges have used for centuries? No, President Obama says that "in those difficult cases, the critical ingredient is supplied by what is in the judge's heart."

Of course, every person should have empathy, and in certain situations, such as sentencing, it may not be wrong for judges to be empathetic. The problem arises when empathy and other biases or prejudices that are in the judge's heart become the critical ingredient to deciding cases. As Judge Paez explained, a judge's prejudices, biases, and passions should not be embraced, they must be set aside so that a judge can render an impartial decision as required by the judicial oath and as parties before the court expect.

I respectfully submit that President Obama is simply outside the mainstream in his statements about how judges should decide

cases. I practiced law for almost 20 years before every level of state and federal court, including the U.S. Supreme Court, and never once did I hear a lawyer argue that he had no legal basis to sustain his client's position, so that he had to ask the judge to go with his gut or his heart.

If judges routinely started ruling on the basis of their personal feelings, however well-intentioned, the entire legitimacy of the judicial system would be jeopardized.

The question for this committee is whether Judge Sotomayor agrees with President Obama's theory of judging or whether she will faithfully interpret the laws and Constitution and take seriously the oath of her prospective office.

Many of Judge Sotomayor's public statements suggest that she may, indeed, allow, and even embrace, decision-making based on her biases and prejudices.

The wise Latina woman quote, which I referred to earlier, suggests that Judge Sotomayor endorses the view that a judge should allow gender, ethnic and experience-based biases to guide her when rendering judicial opinions. This is in stark contrast to Judge Paez's view that these factors should be set aside.

In the same lecture, Judge Sotomayor posits that "there is no objective stance but only a series of perspectives. No neutrality, no escape from choice in judging" and claims that "the aspiration to impartiality is just that. It's an aspiration," she says, "because it denies the fact that we are by our experiences making different choices than others."

No neutrality, no impartiality in judging? Yet isn't that what the judicial oath explicitly requires?

Judge Sotomayor. clearly rejected the notion that judges should strive for an impartial brand of justice. She has already accepted that her gender and Latina heritage will affect the outcome of her cases.

This is a serious issue, and it's not the only indication that Judge Sotomayor has an expansive view of what a judge may appropriately consider.

In a speech to the Puerto Rican ACLU, Judge Sotomayor endorsed the idea that American judges should use good ideas found in foreign law so that America does not lose influence in the world.

The laws and practices of foreign nations are simply irrelevant to interpreting the will of the American people as expressed through our Constitution.

Additionally, the vast expanse of foreign judicial opinions and practices from which one might draw simply gives activist judges cover for promoting their personal preferences instead of the law.

You can, therefore, understand my concern when I hear Judge Sotomayor say that unless judges take it upon themselves to borrow ideas from foreign jurisdictions, America is "going to lose influence in the world." That's not a judge's concern.

Some people will suggest that we should not read too much into Judge Sotomayor's speeches and articles, that the focus should instead be on her judicial decisions. I agree that her judicial record is an important component of our evaluation, and I look forward to hearing why, for instance, the Supreme Court has reversed or

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vacated 80 percent of her opinions that have reached that body, by a total vote count of 52 to 19.

But we cannot simply brush aside her extrajudicial statements. Until now, Judge Sotomayor has been operating under the restraining influence of a higher authority, the Supreme Court. If confirmed, there will be no such restraint that would prevent her from, to paraphrase President Obama, deciding cases based on her heart-felt views.

Before we can faithfully discharge our duty to advise and consent, we must be confident that Judge Sotomayor is absolutely committed to setting aside her biases and impartially deciding cases based on the rule of law.

Chairman LEAHY. Somewhat differently than normal, Senator Schumer will be recognized for five minutes and will reserve his other five minutes for later on when he will be introducing Judge Sotomayor.

So Senator Schumer, you are recognized for five minutes.

STATEMENT OF HON. CHARLES SCHUMER, A U.S. SENATOR FROM NEW YORK

Senator SCHUMER. Thank you, Mr. Chairman and Ranking Member Sessions.

I want to welcome Judge Sotomayor. We in New York are so proud of you and to your whole family, who I know are exceptionally proud to be here today to support this historic nomination.

Now, our presence here today is about a nominee who is supremely well-qualified with experience on the District Court and the Appellate Court benches that is unmatched in recent history. It is about a nominee who, in 17 years of judging, has authored opinion after opinion that is smart, thoughtful, and judicially modest.

In short, Judge Sotomayor has stellar credentials. There's no question about that. Judge Sotomayor has twice before been nominated to the bench and gone through confirmation hearings with bipartisan support. The first time, she was nominated by a Republican President.

But most important, Judge Sotomayor's record bespeaks judicial modesty, something that our friends on the right have been clamoring for in a way that no recent nominee's has. It is the judicial record, more than speeches and statements, more than personal background, that most accurately measures how modest a judicial nominee will be.

There are several ways of measuring modesty in the judicial record. Judge Sotomayor more than measures up to each of them.

First, as we will hear in the next few days, Judge Sotomayor puts rule of law above everything else. Given her extensive and even-handed record, I am not sure how any member of this panel can sit here today and seriously suggest that she comes to the bench with a personal agenda. Unlike Justice Alito, she does not come to the bench with a record number of dissents.

Instead, her record shows that she is in the mainstream. She has agreed with Republican colleagues 95 percent of the time, she has ruled for the government in 83 percent of immigration cases against the immigration plaintiff, she has ruled for the government

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in 92 percent of criminal cases, she has denied race claims in 83 percent of cases and has split evenly on employment cases between employer and employee.

Second, and this is an important point because of her unique experience in the District Court. Judge Sotomayor delves thoroughly into the facts of each case. She trusts that an understanding of the facts will lead, ultimately, to justice.

I would ask my colleagues to do this: examine a sampling, a random sampling of her cases in a variety of areas. In case after case, she rolls up her sleeves, learns the facts, applies the law to the facts, and comes to a decision irrespective of her inclinations or her personal experience.

In a case involving a New York police officer who made white supremacist remarks, she upheld his right to make them. In a case brought by plaintiffs who claimed they had been bumped from a plane because of race, she dismissed their case because the law required it, and she upheld the First Amendment right of a prisoner to wear religious beads under his uniform.

In hot-button cases such as professional sports, she carefully adheres to the facts before her and upheld the NFL's ability to maintain certain player restrictions, but also ruled in favor of baseball players to end the Major League Baseball strike. Third, Judge Sotomayor has hewed carefully to the text of statutes, even when doing so results in rulings that go against so-called sympathetic litigants.

In dissenting from an award of damages to injured plaintiffs in a maritime accident, she wrote, "we start with the assumption that it is for Congress, not the federal courts, to articulate the appropriate standards to be applied as a matter of federal law."

Mr. Chairman, just short of four years ago, then-Judge Roberts sat where Judge Sotomayor is sitting. He told us that his jurisprudence would be characterized by modesty and humility. He illustrated this with a now well-known quote, "Judges are like umpires. Umpires don't make the rules. They apply them."

Chief Justice Roberts was, and is, a supremely intelligent man with impeccable credentials. But many can debate whether during his four years on the Supreme Court he actually called pitches as they come—or whether he tried to change the rules.

But any objective review of Judge Sotomayor's record on the Second Circuit leaves no doubt that she has simply called balls and strikes for 17 years, far more closely than Chief Justice Roberts has during his four years on the Supreme Court.

More important, if Judge Sotomayor continues to approach cases on the Supreme Court as she has for the last 17 years, she will be actually modest judicially. This is because she does not adhere to a philosophy that dictates results over the facts that are presented.

So, in conclusion, if the number one standard that conservatives use and apply is judicial modesty and humility, no activism on the Supreme Court, they should vote for Judge Sotomayor unanimously.

I look forward to the next few days of hearings, and to Judge Sotomayor's confirmation.

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Chairman LEAHY. Thank you very much. I am going to recognize Senator Graham and Senator Cardin and then we're going to take a short break.

Senator Graham.

STATEMENT OF HON. LINDSEY GRAHAM, A U.S. SENATOR FROM SOUTH CAROLINA

Senator GRAHAM. Well, thank you. I have learned something already. The Schumer conservative standard. We will see how that works.

No Republican would have chosen you, Judge. That is just the way it is. We would have picked Miguel Estrada. We would all have voted for him. I do not think anybody on that side would have voted for Judge Estrada, who is a Honduran immigrant who came to this country as a teenager, graduated from Columbia magna cum laude, Harvard 1986 magna cum laude and law review editor, a stellar background like yours. That is just the way it was.

He never had a chance to have this hearing. He was nominated by President Bush to the D.C. Circuit Court of Appeals which I think most people agree is probably the second highest court in the land, and he never had this day. So the Hispanic element of this hearing is important, but I don't want it to be lost that this is mostly about liberal and conservative politics more than it is anything else.

Having said that, there are some of my colleagues on the other side that voted for Judge Roberts and Alito, knowing they would not have chosen either one of those. I will remember that.

Now, unless you have a complete meltdown, you are going to get confirmed. I do not think you will, but the drama being created here is interesting. My Republican colleagues who voted against you I assure you could vote for a Hispanic nominee. They just feel unnerved by your speeches and by some of the things that you have said and some of your cases.

Now, having said that, I do not know what I am going to do yet, but I do believe that you as an advocate with a Puerto Rican defense legal fund that you took on some cases that I would have loved to have been on the other side, that your organization advocated taxpayer funded abortion and said in a brief that to deny a poor black woman Medicaid funding for an abortion was equivalent to the *Dred Scott* case. That is a pretty extreme thing to say, but I think it was heartfelt.

I would look at it the other way to take my taxpayer dollars and provide an abortion that I disagree with is pretty extreme. So there is two ways of looking at that.

You were a prosecutor but your organization argued for the repeal of the death penalty because it was unfairly applied and discriminatory against minorities. Your organization argued for quotas when it came to hiring.

I just want my colleagues to understand that there can be no more liberal group in my opinion than the Puerto Rican Defense Legal Fund when it came to advocacy. What I hope is that if we ever get a conservative President and he nominates someone who has an equal passion on the other side that we will not forget this

moment, that you could be the NRA General Counsel and still be a good lawyer.

My point is I'm not going to hold it against you or the organization for advocating a cause from which I disagree. That makes America a special place. I would have loved to have been on those cases on the other side. I hope that would not have disqualified me.

Now, when it comes to your speeches, that is the most troubling thing to me because that gives us an indication when you are able to get outside the courtroom without the robe and inside into how you think life works. This wise Latina comment has been talked about a lot, but I can just tell you one thing. If I had said anything remotely like that, my career would have been over. That's true of most people here. You need to understand that and I look forward to talking with you about that comment.

Does that mean that I think that you are racist? You have been called some pretty bad things. No. It just bothers me when somebody wearing a robe takes the robe off and says that their experience makes them better than someone else. I think your experience can add a lot to the core, but I don't think it makes you better than anyone else.

Now, when I look at your record, there is a lot of truth to what Senator Schumer said. I do not think you have taken the opportunity on the circuit to be a cause-driven judge. But what we are talking about here today is what will you do when it comes to making policy. I'm pretty well convinced I know what you are going to do. You are probably going to decide cases differently than I would.

So that brings me back to what am I supposed to do knowing that? I do not think anybody here worked harder for Senator McCain than I did, but we lost and President Obama won, and that ought to matter. It does to me.

Now, what standard do I apply? I can assure you that if I applied Senator Obama's standard to your nomination, I wouldn't vote for you. Because the standard that he articulated would make it impossible for anybody with my view of the law and society to vote for someone with your activism and background when it comes to judging.

He said something about the 5 percent of the cases that we are all driven by. He said something to the effect, in those difficult cases, the critical ingredient is applied by what is in the judge's heart. Well, I have no way of knowing what is in your heart anymore than you have knowing what is in my heart. So that to me is an absurd, dangerous standard.

Maybe something good could come out of these hearings. If we start applying that to nominees, it will ruin the judiciary. I have no idea what is in your heart anymore than you have an idea of what is in my heart. I think it takes us down a very dangerous road as a country when we start doing that.

Now, there was a time when someone like Scalia and Ginsburg got 95 plus votes. If you were confused about where Scalia was coming down, as a judge you should not be voting anymore than if you were a mystery about what Justice Ginsburg was going to do in these 5 percent of the cases. That is no mystery.

There is some aspect of you that I'm not sure about that gives me hope that you may not go down the Senator Feingold road

when it comes to the war on terror. We will talk about that later on.

But generally speaking, the President has nominated someone of good character, someone who has lived a very full and fruitful life who is passionate from day one from the time you got a chance to showcase who you are, you have stood out and you have stood up and you have been a strong advocate and you will speak your mind.

The one thing I am worried about is that if we keep doing what we are doing, we are going to deter people from speaking their mind. I do not want milk toast judges. I want you to be able to speak your mind, but you have got to understand when you gave these speeches as a sitting judge, that was disturbing to me.

I want lawyers who believe in something and are willing to fight for it. I do not want the young lawyers of this country feeling like there is certain clients they cannot represent because when they come before the Senate, it will be the end of their career.

So I do not know how I am going to vote, but my inclination is that elections matter. I am not going to be upset with any of my colleagues who find that you are a bridge too far, because in many ways what you have done in your legal career and the speeches you have made give me great insight as to where you will come out on these 5 percent of cases.

But President Obama won the election and I will respect that. But when he was here, he set in motion a standard I thought that was more about seeking the Presidency than being fair to the nominee.

When he said the critical ingredient is supplied by what is in the judge's heart, translated that means I am not going to vote against my base because I am running for President.

We have got a chance to start over. I hope we will take that chance and you will be asked hard questions and I think you expect that. My belief is that you will do well because whether or not I agree with you on the big themes of life is not important. The question for me is have you earned the right to be here.

If I give you this robe to put you on the Supreme Court, do I believe at the end of the day that you will do what you think is best, that you have courage and you will be fair. Come Thursday I think I will know more about that. Good luck.

Chairman LEAHY. Thank you. Just so we make sure we are all using the same facts, Mr. Estrada was nominated when Republicans were in charge of the Senate, he was not given a hearing by the Republicans.

He was given a hearing when the Democrats took back the majority and the Senate and then he was told at that time, there were a number of questions that were submitted to him by both Republicans and Democrats and before it could be set for a vote on the floor to answer those questions, he declined to, he may have been distracted by an offer of a very high paying law firm, but I do not know.

He was not given a hearing when the Republicans were in charge. He was given a hearing when the Democrats were in charge.

Senator SESSIONS. If I may, Mr. Chairman, since you brought it up.

Chairman LEAHY. I yield to Senator Sessions.

Senator SESSIONS. We had seven attempts to bring him up for a final vote and that was blocked. I think I spoke on his behalf more than any other Senator.

I do feel like that it was a clear decision on the part of the Democrats. The objection over release of documents of course were internal memorandum—legal memorandum that he had provided that the former Solicitor General said it was not appropriate for the Department of Justice to produce. Thank you.

Chairman LEAHY. He should have had that hearing when the Republicans were in charge is what you are saying.

Senator CARDIN. Once Senator Cardin is finished, we will take a 10-minute break.

STATEMENT OF HON. BENJAMIN CARDIN, A U.S. SENATOR FROM MARYLAND

Senator CARDIN. Judge Sotomayor, welcome to the United States Senate. I think you will find that each member of this Committee and each member of the United States Senate wants to do what is right for our country.

Now we may differ on some of our views, which will come out during this hearing, but I think we all share a respect for your public service. Thank you for your willingness to serve on the Supreme Court of the United States and I thank your family for the sacrifices they have made.

I am honored to represent the people of Maryland in the U.S. Senate and to serve on the Judiciary Committee, as we consider one of our most important responsibilities, whether we should recommend to the full Senate the confirmation of Judge Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States.

The next term of the Supreme Court that begins in October is likely to consider fundamental issues that will impact the lives of all Americans. In recent years, there have been many important decisions decided by the Supreme Court by a 5–4 vote. Each Justice can play a critical role in forming the needed consensus in our nation's highest court.

A new Justice could and very well may have a profound impact on the direction of the court.

Supreme Court decisions affect each and every person in our nation. I think of my own family's history. My grandfather came to America more than 100 years ago. I am convinced that they came to America not only for greater economic opportunities, but because of the ideals expressed in our Constitution, especially the First Amendment guaranteeing religious freedom.

My grandparents wanted their children to grow up in a country where they were able to practice their Jewish faith and fully participate in their community and government. My father, one of their sons, became a lawyer, state legislator, Circuit Court judge and President of his synagogue. And now his son serves in the U.S. Senate.

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While our Founding Fathers made freedom of religion a priority, equal protection for all races took longer to achieve. I attended Liberty School No. 64, a public elementary school in Baltimore City. It was part of a segregated public school system that under the law denied every student in Baltimore the opportunity to learn in a classroom that represented the diversity of our community.

I remember with great sadness how discrimination was not only condoned but, more often than not, actually encouraged against Blacks, Jews, Catholics, and other minorities in the community. There were neighborhoods that my parents warned me to avoid for fear of my safety because I was Jewish. The local movie theater denied admission to African Americans. Community swimming pools had signs that said, "No Jews, No Blacks Allowed." Even Baltimore's amusement parks and sports clubs were segregated by race. Then came *Brown* v. *Board of Education* and suddenly my universe and community were changed forever.

The decision itself moved our nation forward by correcting grievous wrongs that were built into the law. It also brought to the forefront of our nation's consciousness a great future jurist from Baltimore, Thurgood Marshall. Marshall had been denied admission to the University of Maryland Law School due to the color of his skin but went on to represent the plaintiffs in the 1954 landmark *Brown* v. *Board of Education*. And in 1967, it was Marshall, the grandson of a slave, who was appointed by President Lyndon Johnson as the first African American to serve on the Supreme Court.

The nine justices of the United States Supreme Court have the tremendous responsibility of safeguarding the framers' intent and the guiding values of our Constitution while ensuring the protections and rights found in that very Constitution are applied to and relevant to the issues of the day. At times, the Supreme Court has and should look beyond popular sentiment to preserve these basic principles and the rule of law. The next justice, who will fill Justice Souter's place on the court will be an important voice on these fundamental issues.

It is my belief that the Constitution and Bill of Rights were created to be living documents that stand together as the foundation for the rule of law in our nation. Our history reflects this. When the Constitution was written, African Americans were considered property and counted only as three-fifths of a person. Non-whites and women were not allowed to vote. Individuals were restricted by race as to whom they could marry. Laws passed by Congress and decisions by the Supreme Court undeniably moved our country forward, continuing the progression of Constitutional protections that have changed our Nation for the better.

Before the Court ruled in *Brown* v. *Board of Education* that separate was not equal, the law permitted our society to have separate facilities for black and white students. Before the Court ruled in *Loving* v. *Virginia*, a state could prohibit persons from marrying based on race. Before the Court ruled in *Roe* v. *Wade*, women had no constitutional implied right to privacy. These are difficult questions that have come before the Court and that the Framers could not have anticipated. New challenges will continue to arise but the basic framework of protections remains.

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I want to compliment President Obama in forwarding to the United States Senate a nominee, Judge Sonia Sotomayor, who is well qualified for our consideration. Her well-rounded background, including extensive experiences as a prosecutor, trial judge and appellate judge, will prove a valuable addition to our nation's court.

As a relatively new member of the Senate Judiciary Committee, as I prepared for this week, I considered a few key standards that apply to all judicial nominations. First, I believe nominees must have an appreciation for the Constitution and the protections it provides to each and every American. She or he must embrace a judicial philosophy that reflects mainstream American values, not narrow ideological interests.

They should have a strong passion to continue the Court's advancements in Civil Rights. There is a careful balance to be found here. Our next Justice should advance the protections in our Constitution, but not disregard important precedent that has made our society stronger by embracing our civil liberties.

I believe judicial nominees also must demonstrate a respect for the rights and responsibilities of each branch of government. These criteria allow me to evaluate a particular judge and whether she or he might place their personal philosophy ahead of the responsibility of the office.

As this Committee begins considering the nomination of Sonia Sotomayor, I want to quote Justice Thurgood Marshall, who said, "None of us got where we are solely by pulling ourselves up by our bootstraps." Judge Sotomayor is a perfect example of how family, hard work, supportive professors and mentors, and opportunity all can come together to create a real American success story.

She was born in New York, to a Puerto Rican family, and grew up in a public housing project in the South Bronx. Her mother was a nurse and her father was a factory worker with a third-grade education. She was taught early in life that education is the key to success, and her strong work ethic enabled her to excel in school and graduate valedictorian of her high school.

She attended Princeton University, graduating cum laude and Phi Beta Kappa, and she received the highest honors Princeton awards to an undergraduate. At Yale Law School, she was editor of the Law Review, where she was known to stand up for herself and not to be intimidated by anyone.

Nominated by both Democratic and Republican presidents, for 17 years she has been a distinguished jurist and now has more federal judicial experience than any Supreme Court nominee in the last hundred years.

This week's hearings are essential. With some understanding of the context of Judge Sotomayor's life and the role that she potentially is about to fill on the Supreme Court, I believe it is particularly important during these confirmation hearings to question Judge Sotomayor on the guiding principles she would use on reaching decisions.

For example, it is important for me to understand her interpretation of established precedent, on protecting individual Constitutional rights. I believe it would be wrong for Supreme Court Justices to turn their back on landmark Court precedents protecting individual Constitutional rights.

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It is likely that the Supreme Court will consider important protections in our Constitution for women, our environment and consumers, as well as voting rights, privacy, and the separation of church and state, among others, in coming years. The Supreme Court also has recently been active in imposing limits on executive power. It will continue to deal with the Constitutional rights in our criminal justice system, the rights of terror detainees and the rights of non-citizens.

All of these issues test our Nation's and the Supreme Court's commitment to our founding principles and fundamental values. For this reason, we need to know how our nominee might approach these issues and analyze these decisions.

Mr. Chairman, I look forward to hearing from Judge Sotomayor on these issues and I expect that she will share with this committee and the American people her judicial views and her thoughts on the protections in our Constitution.

Once again, Judge Sotomayor, I want to thank you for your public service and readiness to take on these great responsibilities for our nation. I also again want to thank your family for their clear support and sacrifice that has brought us to this hearing today.

Chairman LEAHY. Thank you, Senator Cardin. After discussion with Senator Sessions, we will take a 10-minute break and come back. We are trying to figure out a lunch hour time. You have been very, very patient, Judge.

One thing we will do in case the press wonders, there is a sign in front of you that has your name, which everybody knows here. It is angled in such a way that it is shining right in the eyes—no, don't you worry about it. The sign will be gone. That will not mean that that is not your place when you come back. Thank you. We stand recessed for 10 minutes.

[Recess 11:42 a.m. to 12:01 p.m.]

Chairman LEAHY. Judge, you may have a broken ankle, but you beat me back to the hearing room. I am looking, Senator Sessions. It will be Senator Cornyn next. Is that right?

Senator SESSIONS. Yes.

Chairman LEAHY. Senator Cornyn, and then Senator Whitehouse.

Senator Cornyn.

STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM TEXAS

Senator Cornyn. Thank you, Mr. Chairman.

Judge Sotomayor, you will recall Justice Jackson said of the Supreme Court, "We are not final because we are infallible. We are infallible only because we are final." Hence, the importance of these hearings and your nomination.

I want to join my colleagues in extending a warm welcome to you and your family and, of course, join my other colleagues who have noted your distinguished career. As I have said as often as I have been asked about your nomination in the weeks since it occurred, I said your nomination should make us all feel good as Americans that people of humble origin can work hard, through sacrifice and love and support of their families, achieve great things in America.

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That makes me feel very good about our country and about the opportunity it provides to each of us.

In the history of the United States, there have only been 110 people who served on the Supreme Court—110. It is amazing to think about that. This means that each and every Supreme Court nomination is a historic moment for our Nation. Each Supreme Court nomination is a time for national conversation and reflection on the role of the Supreme Court.

We have to ask ourselves, those of us who have the constitutional obligation to provide advice and consent, what is the proper direction of the Supreme Court in deciding how we should vote and conduct ourselves during the course of the hearing. And, of course, I think it is always useful to recall our history, that the Framers created a written Constitution to make sure our constitutional rights were fixed and certain; that the State conventions who represented we, the people, looked at that written Constitution and decided to ratify it. And the idea was, of course, that our rights should not be floating in the ether but, rather, be written down for all to see so we could all understand what those rights, in fact, are.

This framework gave judges a role that is both unique and very important. The role of judges was intended to be modest—that is, self-restrained and limited. Judges, of course, are not free to invent new rights as they see fit. Rather, they are supposed to enforce the Constitution's text and to leave the rest up to "we, the people," through the elected representatives of the people, such as the Congress.

It is my opinion that over time the Supreme Court has often veered off the course established by the Framers. First, the Supreme Court has invented new rights not clearly rooted in any constitutional text. For example, the Supreme Court has micro managed the death penalty, recognized in 35 States and by the Federal Government itself, and created new rights spun from whole cloth. It has announced constitutional rules governing everything from punitive damages to sexual activity. It has relied on international law that you have heard some discussion about that the people have never adopted.

The Supreme Court has even taken on the job of defining the rules of the game of golf. If you are curious, that is *PGA Tour* v. *Martin* from 2001.

Some people have talked about judicial activism. In one sense, I think people say activism is a good thing if it is enforcing the rights and the laws that have been passed by the legislative branch. On the other hand, as you know, inventing new rights, veering off this course of enforcing a written text and pulling ideas out of the ether are pretty far from enforcing the written Constitution that the Framers proposed and that the people enacted.

My opinion is that as the Supreme Court has invented new rights, it has often neglected others. This flip side is troubling to me, too. Many of the original important safeguards on Government power have been watered down or even ignored. Express constitutional limitations like the Takings Clause of the Fifth Amendment, designed to protect private property, and the Commerce Clause's limitations on federal power, as well as the Second Amendment right to keep and bear arms, I believe have been artificially lim-

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ited, almost like they have been written out of the Constitution over time. On occasion, judges just have not enforced them like I believe the American people expected them to do.

So what is the future like? Where should the Supreme Court go from here? I think there are two choices.

First, the Supreme Court could try to get us back on course. That is, the Court could demonstrate renewed respect for our original plan of Government and return us slowly but surely to a written Constitution and written laws rather than judge-made laws. The Supreme Court's recent Second Amendment decision in *D.C.* v. *Heller* I think is a good example of that.

Or the Court could, alternatively, veer off course once again and follow its own star. It could continue to depart from the written Constitution. It could further erode the established rights that we have in the text of the Constitution, and it could invent even more brand-new rights not rooted in the text and not agreed to by the American people.

Your Honor, I think the purpose of this hearing is to determine which path you would take us on, if confirmed to the United States Supreme Court. Would you vote to return to a written Constitution and laws written by the elected representatives of the people? Or would you take us further away from the written Constitution and laws legitimized by the consent of the governed?

To help the American people understand which of these paths you would take us down, we need to know more about your record. We need to know more about the legal reasoning behind some of your opinions on the Second Circuit. And we need to know more about some of your public statements related to your judicial philosophy.

In looking at your opinions on the Second Circuit, we recognize that lower-court judges are bound by the Supreme Court and by circuit precedent. To borrow a football analogy, a lower-court judge is like the quarterback who executes the plays, not the coach that calls them. That means many of your cases do not really tell us that much about your judicial philosophy or what it would be in action, if confirmed to the United States Supreme Court. But a few of your opinions do raise questions that I intend to ask you about, and they do suggest, I think, the kinds of plays you would call if you were promoted to the coaching staff.

These opinions raise the question: Would you steer the Court in a direction of limiting the rights that generations of Americans have regarded as fundamental? So Americans need to know whether you would limit, for example, the scope of the Second Amendment and whether we can count on you to uphold one of the fundamental liberties enshrined in the Bill of Rights.

They need to know, we need to know, whether you would limit the scope of the Fifth Amendment and whether you would expand the definition of "public use" by which Government can take private property from one person and give it to another. And we need to know whether you will uphold the plain language of the Equal Protection Clause of the 14th Amendment, promising that, "No State shall..deny to any person within its jurisdiction the equal protection of the laws."

Judge, some of your opinions suggest that you would limit some of these constitutional rights, and some of your public statements that have already been mentioned suggest that you would invent rights that do not exist in the Constitution.

For example, in a 2001 speech, you argue that there is no objectivity in law, but only what you called "a series of perspectives rooted in life experience of the judge."

In a 2006 speech, you said that judges can and even must change the law—even introducing what you called "radical change"—to meet the needs of an "evolving" society.

In a 2009 speech, you endorsed the use of foreign law in interpreting the American Constitution on the grounds that it gives judges "good ideas" that "get their creative juices flowing."

Judge Sotomayor, no one can accuse you of not having been candid about your views. Not every nominee is so open about their views. Yet many Americans are left to wonder whether these various—what these various statements mean and what you are trying to get at with these various remarks. Some wonder whether you are the kind of judge who will uphold the written Constitution or the kind of judge who will veer us off course—and toward new rights invented by judges rather than ratified by the people.

These are some my concerns, and I assure you that you will have every opportunity to address those and make clear which path you would take us down if you are confirmed to the Supreme Court.

I thank you very much and congratulations once again.

Chairman LEAHY. Thank you very much, Senator Cornyn.

Senator Whitehouse.

STATEMENT OF HON. SHELDON WHITEHOUSE, A U.S. SENATOR FROM RHODE ISLAND

Senator WHITEHOUSE. Thank you, Mr. Chairman.

Judge Sotomayor, welcome. Welcome to you and to your family. Your nomination caps what has already been a remarkable legal career. And I join many, many Americans who are so proud to see you here today. It is a great country, isn't it? And you represent its greatest attributes.

Your record leaves no doubt that you have the intellectual ability to serve as a Justice. From meeting with you and from the outpouring of support I have experienced both personally and from organizations that have worked with you, your demeanor and your collegiality are well established. I appreciate your years as a prosecutor, working in the trenches of law enforcement. I am looking forward to learning more about the experience and judgment you are poised to bring to the Supreme Court.

In the last 2½ months and today, my Republican colleagues have talked a great deal about judicial modesty and restraint. Fair enough to a point, but that point comes when these words become slogans, not real critiques of your record. Indeed, these calls for restraint and modesty, and complaints about "activist" judges, are often codewords, seeking a particular kind of judge who will deliver a particular set of political outcomes.

It is fair to inquire into a nominee's judicial philosophy, and we will here have a serious and fair inquiry. But the pretense that Republican nominees embody modesty and restraint, or that Demo-

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cratic nominees must be activists, runs starkly counter to recent history.

I particularly reject the analogy of a judge to an "umpire" who merely calls "balls and strikes." If judging were that mechanical, we would not need nine Supreme Court Justices. The task of an appellate judge, particularly on a court of final appeal, is often to define the strike zone, within a matrix of constitutional principle, legislative intent, and statutory construction.

The umpire analogy is belied by Chief Justice Roberts, though he cast himself as an umpire during his confirmation hearings. Jeffrey Toobin, a well-respected legal commentator, has recently reported that—and this is a quote—"[i]n every major case since he became the Nation's 17th Chief Justice, Roberts has sided with the prosecution over the defendant, the state over the condemned, the executive branch over the legislative, and the corporate defendant over the individual plaintiff." Some umpire.

And is it a coincidence that this pattern, to continue Toobin's quote, "has served the interests, and reflected the values of the contemporary Republican party"? Some coincidence.

For all the talk of modesty and restraint, the right-wing Justices of the Court have a striking record of ignoring precedent, overturning congressional statutes, limiting constitutional protections, and discovering new constitutional rights: the infamous *Ledbetter* decision, for instance; the *Louisville* and *Seattle* integration cases; the first limitation on *Roe* v. *Wade* that outright disregards the woman's health and safety; and the D.C. *Heller* decision, discovering a constitutional right to own guns that the Court had not previously noticed in 220 years. Some balls and strikes.

Over and over, news reporting discusses "fundamental changes in the law" wrought by the Roberts Court's right-wing flank. The Roberts Court has not kept the promises of modesty or humility made when President Bush nominated Justices Roberts and Alito.

So, Judge Sotomayor, I would like to avoid codewords and look for a simple pledge from you during these hearings: that you will respect the role of Congress as representatives of the American people; that you will decide cases based on the law and the facts; that you will not prejudge any case, but listen to every party that comes before you; and that you will respect precedent and limit yourself to the issues that the Court must decide; in short, that you will use the broad discretion of a Supreme Court Justice wisely.

Let me emphasize that broad discretion. As Justice Stevens has said, "the work of Federal judges from the days of John Marshall to the present, like the work of the English common-law judges, sometimes requires the exercise of judgment—a faculty that inevitably calls into play notions of justice, fairness, and concern about the future impact of a decision."

Look at our history. America's common law inheritance is the accretion over generations of individual exercises of judgment. Our Constitution is a great document that John Marshall noted leaves "the minor ingredients" to judgment, to be deduced by our Justices from the document's great principles. The liberties in our Constitution have their boundaries defined, in the gray and overlapping areas, by informed judgment. None of this is "balls and strikes."

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It has been a truism since *Marbury* v. *Madison* that courts have the authority to "say what the law is," even to invalidate statutes enacted by the elected branches of government when they conflict with the Constitution. So the issue is not whether you have a wide field of discretion: you will. As Justice Cardozo reminds us, you are not free to act as "a knight-errant, roaming at will in pursuit of [your] own ideal of beauty or of goodness," yet, he concluded, "[w]ide enough in all conscience is the field of discretion that remains."

The question for this hearing is: Will you bring good judgment to that wide field? Will you understand, and care, how your decisions affect the lives of Americans? Will you use your broad discretion to advance the promises of liberty and justice made by the Constitution?

I believe that your diverse life experience, your broad professional background, your expertise as a judge at each level of the system, will bring you that judgement. As Oliver Wendell Holmes famously said, the life of the law has not been logic, it has been experience.

If your wide experience brings life to a sense of the difficult circumstances faced by the less powerful among us: the woman shunted around the bank from voicemail to voicemail as she tries to avoid foreclosure for her family; the family struggling to get by in the neighborhood where the police only come with raid jackets on; the couple up late at the kitchen table after the kids are in bed sweating out how to make ends meet that month; the man who believes a little differently, or looks a little different, or thinks things should be different; if you have empathy for those people in this job, you are doing nothing wrong.

The Founding Fathers set up the American judiciary as a check on the excesses of the elected branches and as a refuge when those branches are corrupted or consumed by passing passions. Courts were designed to be our guardians against what Hamilton in the Federalist Papers called "those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people . . . and which . . . have a tendency . . . to occasion serious oppressions of the minor party in the community." In present circumstances, those oppressions tend to fall on the poor and voiceless. But as Hamilton noted, "[c]onsiderate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts: as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer to-day."

The courtroom can be the only sanctuary for the little guy when the forces of society are arrayed against him, when proper opinion and elected officialdom will lend him no ear. This is a correct, fitting, and intended function of the judiciary in our constitutional structure, and the empathy President Obama saw in you has a constitutionally proper place in that structure. If everyone on the Court always voted for the prosecution against the defendant, for the corporation against the plaintiffs, and for the government against the condemned, a vital spark of American democracy would be extinguished. A courtroom is supposed to be a place where the status quo can be disrupted, even upended, when the Constitution

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or laws may require; where the comfortable can sometimes be afflicted and the afflicted find some comfort, all under the stern shelter of the law. It is worth remembering that judges of the United States have shown great courage over the years, courage verging on heroism, in providing that sanctuary of careful attention, what James Bryce called "the cool dry atmosphere of judicial determination," amidst the inflamed passions or invested powers of the day.

Judge Sotomayor, I believe your broad and balanced background and empathy prepare you well for this constitutional and proper judicial role. And I join my colleagues in welcoming you to the Committee and looking forward to your testimony.

Chairman LEAHY. Thank you.

Senator Coburn.

STATEMENT OF HON. TOM COBURN, A U.S. SENATOR FROM OKLAHOMA

Senator COBURN. Thank you.

Judge, welcome. It is truly an honor to have you before us. It says something remarkable about our country that you are here, and I assure you during your time before this Committee you will be treated with the utmost respect and kindness. It will not distinguish, however, that we will be thorough as we probe the areas where we have concerns.

There is no question that you have a stellar résumé, and if résumés and judicial history were all that we went by, we wouldn't need to have this hearing. But, in fact, other things add into that.

Equally important to us providing consent on this nomination is our determination that you have a judicial philosophy that reflects what our Founders intended. There is great division about what that means. I also wanted to note that I thought this was your hearing, not Judge Roberts' hearing, and that the partial-birth abortion ban was a law passed by the United States Congress and was upheld by the Supreme Court. So I have a different point of view on that.

As I expressed to you in our meeting, I think our Nation is at a critical point. I think we are starting to see cracks, and the reason I say that is because I think the glue that binds our Nation together is not our political philosophies. We have very different political philosophies. The thing that binds us together is an innate trust that you can have fair and impartial judgment in this country, that we better than any other nation, when we have been wrong, have corrected the wrongs of our founding; but we have instilled the confidence that, in fact, when you come before it, there is blind justice. And that, in fact, allows us the ability to overlook other areas where we are not so good because it instills in us the confidence of an opportunity to have a fair hearing and a just outcome.

I am concerned, as many of my colleagues, with some of your statements, and I do not know if the statements were made to be provocative or if they are truly heart-felt in what you have said. But I know that some of those concerns will guide my questioning when we come to the questioning period. And you were very straightforward with me in our meeting, and my hope is that you will be there as well.

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I am deeply concerned by your assertion that the law is uncertain—that goes completely against what I just said about the rule of law being the glue that binds us together—and your praise for an unpredictable system of justice. I think we want it to be predictable. We want it to be predictable in its fairness and the fact in how cases are viewed. And it shouldn't matter which judge you get. It should matter what the law is and the facts are.

I am worried that our Constitution may be seen to be malleable and evolving when I, as someone who comes from the heartland, seems to grasp and hold and the people that I represent from the State of Oklahoma seem to grasp and hold that there is a foundational document and there are statutes and occasionally treaties that should be the rule rather than our opinions.

Other statements such as the court of appeals is where policy is made, that is surprising to me. And as I look at our Founders, the Court is to be a check, not a policymaker. Your assertion that ethnicity and gender will make someone a better judge, although I understand the feelings and emotions behind that, I am not sure that could be factually correct. Maybe a better judge than some, but not a better judge than others.

The other statement, there is no objective stance but only a series of perspectives, no neutrality, no escape from choice in judging—what that implies, the fact that it is subjective implies that it is not objective. And if we disregard objective consideration of facts, then all rulings are subjective, and we lose the glue that binds us together as a Nation.

Even more important is your questioning of whether the application of impartiality in judging, including transcending personal sympathies and prejudices, is possible in most cases or is even desirable is extremely troubling to me.

You have taken the oath already twice and, if confirmed, will take it again. And I want to repeat it again. It has been said once this morning. Here is the oath: "I do solemnly swear or affirm that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and will faithfully and impartially discharge and perform all the duties incumbent upon me under the Constitution and the laws of the United States, so help me God."

It does not reference foreign law anywhere. It does not reference whether or not we lose influence in the international community. We lost influence when we became a country in the international community to several countries. But the fact is that did not impede us from establishing this great republic.

I think this oath succinctly captures the role of a judge, and I am concerned about some of your statements in regard to that. Your judicial philosophy might be—and I am not saying it is—inconsistent with the impartial, neutral arbiter that the oath describes.

With regard to your judicial philosophy, the burden of proof rests on you, but in this case, that burden has been exaggerated by some of your statements and also by some of President Obama's stated intent to nominate someone who is not impartial but instead favors certain groups of people.

During the campaign, he promised to nominate someone who has got the heart and the empathy to recognize what it is like to be

a young teenage mom. The implication is that our judges today do not have that. Do you realize how astounding that is? The empathy to understand what it is like to be poor, to be African American or gay or disabled or old. Most of our judges understand what it is like to be old.

[Laughter.]

Senator COBURN. Senator Obama referred his "empathy standard" when he voted against Chief Justice Roberts. He stated, "The tough cases can only be determined on the basis of one's deepest values, one's core concerns, one's broader perspective on how the world works, and the depth and breadth of one's empathy."

I believe that standard is antithetical to the proper role of a judge. The American people expect their judges to treat all litigants equally, not to favor and not to enter the courtroom already prejudiced against one of the parties. That is why Lady Justice is always depicted blind and why Aristotle defined law as "reason free from passion."

Do we expect a judge to merely call balls and strikes? Maybe so, maybe not. But we certainly do not expect them to sympathize with one party over the other, and that is where empathy comes from.

Judge Sotomayor, you must prove to the Senate that you will adhere to the proper role of a judge and only base your opinions on the Constitution, statutes, and, when appropriate, treaties. That is your oath. That is what the Constitution demands of you. You must demonstrate that you will strictly interpret the Constitution and our laws and will not be swayed by your personal biases or your political preferences—which you are entitled to.

As Alexander Hamilton stated in Federalist Paper No. 78, "The interpretation of the law is the proper and peculiar province of the courts. The Constitution, however, must be regarded by the judges as fundamental law." He further stated it was indispensable in the courts of justice that judges have "an inflexible and uniform adherence to the rights of the Constitution." A nominee who does not adhere to these standards necessarily rejects the role of a judge as dictated by the Constitution and should not be confirmed.

I look forward to a respectful and rigorous interchange with you during my time to question you. I have several questions that I hope you will be able to answer. I will try not to put you in a case where you have to answer a future opinion. I understand your desire in that regard, and I respect it.

I thank you for being here, and I applaud your accomplishments. May God bless you.

Chairman LEAHY. Thank you, Senator.

We have been joined by the Deputy Majority Leader, Senator Durbin, and just so everyone can plan, especially you, Judge, we will hear from Senator Durbin. We will then recess until 2 o'clock, and we will come back at 2 o'clock, at which point Senator Klobuchar will be recognized.

Senator Durbin.

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM ILLINOIS

Senator DURBIN. Thank you very much, Mr. Chairman.

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Judge Sotomayor, welcome to you and your family. These nomination hearings can be long and painful, but after surviving a broken ankle and individual meetings with 89 different U.S. Senators in the past few weeks, you are certainly battle-tested.

At the nomination hearing for Judge Ruth Bader Ginsburg in 1993, my friend Senator Paul Simon of Illinois asked the following question: "You face a much harsher judge . . . than this Committee and that is the judgment of history. And that judgment is likely to revolve around the question: Did she restrict freedom or did she expand it?"

I asked this question with respect to the nominations of Chief Justice Roberts and, Justice Alito, and I think it is an important question of any court nominee, particularly to the Supreme Court.

The nine men and women on the Supreme Court serve lifetime appointments, and they resolve many of our most significant issues. It is the Supreme Court that defines our personal right to privacy and decides the restrictions to be placed on the most personal aspects of our lives.

The Court decides the rights of the victims of discrimination, immigrants, consumers. The nine Justices decide whether Congress has the authority to pass laws to protect our civil rights and our environment. They decide what checks will exist on the executive branch in war and in peace.

Because these issues are so important, we need Justices with intelligence, knowledge of the law, the proper judicial temperament, and a commitment to impartial justice. More than that, we need our Supreme Court Justices to have an understanding of the real world and the impact their decisions will have on everyday people. We need Justices whose wisdom——

[Protestor outburst.]

Chairman LEAHY. The officer will remove the person. The officer will remove the person. As I have said before, and both Senator Sessions and I have said, you are guests of the Senate while you are here. Everybody is a guest of the Senate. Judge Sotomayor deserves the respect of being heard. The Senators deserve the respect of being heard. No outburst will be allowed that might interrupt the ability of the Senators or of the judge or, I might say, of our guests who are sitting here patiently listening to everything that is being said.

I thank the Capitol Police for responding as quickly and as rapidly and as professionally as they always do. I apologize to Senator Durbin for the interruption, and I yield back to him.

Senator SESSIONS. Thank you, Mr. Chairman.

Senator DURBIN. Thank you, Mr. Chairman.

More than that, we need our Supreme Court Justices to have an understanding of the real world and the impact their decisions have on everyday people. We need Justices whose wisdom comes from life, not just from law books.

Sadly, this important quality seems to be in short supply. The current Supreme Court has issued many decisions that I think represent a triumph of ideology over common sense. When Chief Justice Roberts came before this Committee in 2005, he famously said a Supreme Court Justice is like an umpire calling balls and strikes.

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We have observed, unfortunately, that it is a little hard to see home plate from right field.

If being a Supreme Court Justice were as easy as calling balls and strikes, we wouldn't see many 5–4 decisions in the Court. But in the last year alone, 23 of the Supreme Court's 74 decisions were decided by a 5–4 vote.

The recent decision of *Ledbetter* v. *Goodyear Tire and Rubber* is a classic example of the Supreme Court putting activism over common sense. The question in that case was simply, fundamental: Should women be paid the same as men for the same work? Lilly Ledbetter was a manager at a Goodyear Tire plant in Alabama, worked there for 19 years, did not learn until she was about to retire that her male colleagues in the same job were paid more. She brought a discrimination lawsuit. The jury awarded her a verdict.

The Supreme Court in a 5–4 decision reversed it and threw out the verdict. The basis for it? They said Lilly Ledbetter filed her discrimination complaint too late. They said her complaint should have been filed within 180 days of the first discriminatory paycheck.

That decision defied common sense in the realities of a workplace where few employees know what their fellow employees are being paid. It contradicted decades of past precedent.

In the case *Safford Unified School District* v. *Redding*, a 13-year-old girl was strip-searched at her school because of a false rumor that she was hiding ibuprofen pills. At the oral argument in April several of the Supreme Court Justices asked questions about the case that, unfortunately, revealed a stunning lack of empathy about the eighth-grade victim. One of the Justices even suggested that being strip-searched was no different than changing clothes for gym class. Although Justice Ruth Bader Ginsburg helped her eight male colleagues understand why the strip-search of a 13-year-old girl was humiliating enough to violate her constitutional rights, a majority of the Justices ruled that the school officials were immune from liability.

In a 5–4 case in 2007, *Gonzales* v. *Carhart*, the Supreme Court again overturned past precedent and ruled for the first time it was permissible to place restrictions on abortion that do not include an exception regarding a woman's health.

Judge Sotomayor, you have overcome many obstacles in your life that have given you an understanding of the daily realities and struggles faced by everyday people. You grew up in a housing complex in the Bronx. You overcame a diagnosis of juvenile diabetes at age 8 and the death of your father at age 9. Your mother worked two jobs so she could afford to send you and your brothers to Catholic schools, and you earned scholarships to Princeton and Yale. I know how proud you are of your mom and your family.

Your first job out of law school was as assistant district attorney where you prosecuted violent crime. You went on to work in a law firm representing corporations, which gave you another valuable perspective. In 17 years as a Federal judge, you have demonstrated an ability to see both sides of the issues. You earned a reputation as being restrained and moderate and neutral.

Of the 110 individuals who have served as Supreme Court Justices throughout our Nation's history, 106 have been white males.

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Until Thurgood Marshall's appointment to the Supreme Court a generation ago, every Justice throughout our Nation's history had been a white male. President Obama's nomination of you to serve as the first Hispanic and the third woman on the Supreme Court is historic. The President knows and we know that to be the first you have to meet a higher standard. Before you can serve on this Court, the American people, through their elected Senators, will be asked to judge you. We owe it to you and the Constitution to be a fair jury.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much, and, Judge, thank you. Enjoy your lunch. We will look forward to coming back. And when you come back, we will hear from Senator Klobuchar, Senator Kaufman, Senator Specter, Senator Franken, and I welcome Senator Franken to the Committee. And we will then have an introduction of you, and what everybody has really been waiting to hear, we will hear from you. So thank you very, very much, Judge.

[Whereupon, at 12:38 p.m., the Committee recessed, to reconvene at 2:00 p.m., this same day.]

Chairman LEAHY. Thank you. If we could get back order in the room.

It's good to have you back here. As I recall, we left at Senator Klobuchar. You're next, and I will yield to Senator Klobuchar.

STATEMENT OF HON. AMY KLOBUCHAR, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator KLOBUCHAR. Thank you very much, Mr. Chair.

Welcome back, Judge. It's a pleasure to see you again. I enjoyed our conversation. And what I most remembered about that, is that you confessed to me that you once brought a winter parka to Minnesota in June.

[Laughter].

Senator KLOBUCHAR. And I promise I will not hold that against you during this week.

I know you have many friends and family here, but it was really an honor for me to meet your mom. When President Obama first announced your nomination, I loved the story about how your mom saved all of her money to buy you and your brother the first set of encyclopedias in the neighborhood, and it reminded me of when my own parents brought us Encyclopedia Brittannicas. It always held this hallowed place in the hallway, and for me they were a window on the world and a gateway to knowledge, which they clearly were to you as well.

From the time you were nine years old, your mom raised you and your brother on her own. She struggled to buy those encyclopedias on her nurse's salary, but she did it because she believed deeply in the value of education. You went on to be the valedictorian of your high school class and to be tops in your class in college, and go to law school.

After that, and this is an experience that we have in common, you became a local prosecutor. Most of my questions during this hearing will be about opinions you've authored and work that you've done in the criminal area. I believe having judges with real-world front-line experience as prosecutors is a good thing.

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When I think about the inspiring journey of your life I'm reminded of other Supreme Court Justices who came from, in your own words, "modest and challenging circumstances". There is Justice O'Connor, who lived the first years of her life in a ranch in Arizona with no running water and no electricity. By sheer necessity, she learned how to mend fences, ride horses, brand cattle, shoot a rifle, and even drive a truck, all before she was 13 years old.

I also think about Justice Thurgood Marshall, who was the great-grandson of a slave. His mother was a teacher, while his father worked as a Pullman car waiter before becoming a steward at an all-white country club. Justice Marshall waited tables to put himself through law school and his mom actually pawned her wedding and engagement rings to get the down payment to send him to Howard University Law School here in Washington.

And then there's Justice Blackman, who grew up in a St. Paul working-class neighborhood in my home State of Minnesota. He was able to attend Harvard College only because at the last minute the Harvard Club of Minnesota got him a scholarship, and then he went on to Harvard where he worked as a tutor and a janitor. Through four years of college and three years of law school, his family was never able to scrape up enough money to bring him back to Minnesota for Christmas.

Each of these very different Justices grew up in challenging circumstances. No one can doubt that for each of these Justices, their life experiences shaped their work and they did—that they did on the Supreme Court. This should be unremarkable and, in fact, it's completely appropriate.

After all, our own Committee members demonstrate the value that comes from members who have different backgrounds and perspectives. For instance, at the same time my accomplished colleague Senator Whitehouse, son of a renowned diplomat, was growing up in Saigon during the Vietnam War, I was working as a car hop at the A&W Rootbeer stand in suburban Minnesota.

And while Senator Hatch is a famed gospel music songwriter, Senator Leahy is such a devoted fan of the Grateful Dead that he once had trouble taking a call from the President of the United States because the Chairman was on stage with the Grateful Dead.

[Laughter].

Senator KLOBUCHAR. We have been tremendously blessed on this Committee with the gift of having members with different backgrounds and different experiences, just as different experiences are a gift for any court in this land.

So when one of my colleagues questioned whether you, Judge, would be a Justice for all of us or just for some of us, I couldn't help but remember something that Hubert Humphrey once said. He said, "America is all the richer for the many different and distinctive strands of which it is woven."

Along those lines, Judge, you are only the third woman in history to come before this Committee as a Supreme Court nominee, and as you can see there are currently only two women on this Committee, Senator Feinstein and myself. So I think it's worth remembering that when Justice O'Connor graduated from law school, the only offer she got from law firms were for legal secretary positions. Justice O'Connor, who graduated third in her class from Stanford

Law School, saw her accomplishments reduced to one question: can she type?

Justice Ginsberg faced similar obstacles. When she entered Harvard Law School, she was one of only nine women in a class of more than 500. One professor actually demanded that she justify why she deserved a seat that could have gone to a man. Later, she was passed over for a prestigious clerkship, despite impressive credentials.

Nevertheless, both of them persevered, and they certainly prevailed. Their undeniable merits triumphed over those who sought to deny them opportunity. The women who came before you to be considered by this Committee helped blaze a trail, and although your record stands on your own, you also stand on their shoulders, another woman with an opportunity to be a Justice for all of us.

As Justice Ginsburg's recent comments regarding the strip search of a 13-year-old girl indicate, as well as her dissent in the *Lilly Ledbetter* Equal Pay case, being a Justice for all of us may mean bringing some real-world practical experience into the courthouse.

As we consider your nomination, we know that you are more than a sum of your professional experiences. Still, you bring one of the most wide-ranging legal résumés to this position: local prosecutor, civil litigator, trial judge, and appellate judge. Straight out of law school, you went to work as a prosecutor in the Manhattan D.A.'s office and you ended up staying there for five years.

When you're a prosecutor, the law ceases to be an abstract subject. It's not just a dusty book in the basement. It's real and it has an impact on real people's lives, whether it's victims and their families, defendants and their families, or the neighborhood where you live.

It also has a big impact on the individual prosecutor. You never forget the big and difficult cases. I know in your case, one of those is the serial burglar-turned-murderer, the *Tarzan* murder case. In my case, it was a little girl named Taisha Edwards, an 11-year-old girl shot by stray gang fire as she sat at her kitchen table doing her homework.

As a prosecutor, you don't just have to know the law, you also have to know people. So, Judge, I'm interested in talking to you more about what you've learned from that job and how that job shaped your legal career and your approach to judging.

I'm also interested in learning more about your views on criminal law issues. I want to explore your views on the Fourth Amendment, the confrontation clause, and sentencing law and policy. I'd like to know, in criminal cases as well as in civil cases, how you would balance the text of statutes and the Constitution and the practical things you see out there in the world.

It seems to me in cases like *Falso*, *Santa*, and *Howard* that you have a keen understanding of the real-world implications of your decisions. I often get concerned that those pragmatic experiences are missing in judicial decision-making, especially when I look at the recent Supreme Court case in which the majority broadly interpreted the confrontation clause to include crime lab workers. I agree with the four dissenting Justices that the ruling has vast po-

tential to disrupt criminal procedures that already give ample protections against the misuse of scientific evidence.

Your old boss, Manhattan District Attorney Robert Morgenthau, called you a fearless and effective prosecutor. This is how he put it once in an interview: "We want people with good judgment because a lot of the job of a prosecutor is making decisions. I also want to see some signs of humility in anybody that I hire. We're giving young lawyers a lot of power and we want to make sure that they're going to use that power with good sense and without arrogance."

These are among the very qualities I'm looking for in a Supreme Court Justice. I, too, am looking for a person with good judgment, someone with intellectual curiosity and independence, but who also understands that her judicial decisions affect real people.

With that, I think, comes the second essential quality: humility. I'm looking for a Justice who appreciates the awesome responsibility that she will be given, if confirmed, a Justice who understands the gravity of the office and who respects the very different roles that the Constitution provides for each of the three branches of government.

Finally, a good prosecutor knows that her job is to enforce the law without fear or favor; likewise, a Supreme Court Justice must interpret the law without fear or favor. And I believe your background and experiences, including your understanding of front-line law enforcement, will help you to always remember that the cases you hear involve real people with real problems who are looking for real remedies.

With excellent justice and excellent judgment, and a sense of humility, I believe you can be a Justice for all of us.

Thank you very much.

Chairman LEAHY. Thank you, Senator Klobuchar.

Next, Senator Kaufman.

STATEMENT OF HON. EDWARD E. KAUFMAN, A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator KAUFMAN. Thank you, Mr. Chairman.

Welcome, Judge Sotomayor, and welcome to your family and friends. Congratulations on your nomination, and congratulations to your parents, who did such a good job on raising you to get to where you are today.

We are beginning—now beginning the end of an extraordinarily important process, to confirm a Supreme Court Justice of the United States. Short of voting to go to war, the Senate's constitutional obligation to advise and consent on Supreme Court nominees is probably our most important responsibility.

Supreme Court Justices serve for life, and once the Senate confirms a nominee she is likely to be affecting the law and American lives much longer than many of the Senators who are here to confirm her. The advise-and-consent process for the nomination began after Justice Souter announced his intent to resign and President Obama consulted with members of both parties before making his selection.

It has continued since then with the help from extensive public debate among analysts and commentators, scholars and activists,

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both in the traditional press and in the blogosphere. This public vetting process, while not always accurate or temperate, is extremely valuable both to the Senate and to the public.

One of the truly great benefits of a free society is our ability to delve deeply into an extensive public record. We have seen a wide-ranging discussion of the issues in which anyone—literally anyone—can help dissect and debate even the most minute legal issue and personal expressions of opinion.

In another less public part of the process, Judge, you had the wonderful experience of meeting with 90 Senators, over 90 percent—almost 90 percent of the Senate. These meetings are also extremely useful. I know I learned a great deal from my meeting and I'm confident my colleagues did as well.

For me, the critical criteria for judging a Supreme Court nominee are the following: a first-rate intellect; significant experience; unquestioned integrity; absolute commitment to the rule of law; unwavering dedication to being fair and open-minded; the ability to appreciate the impact of court decisions on the lives of ordinary people.

Based on what we've learned so far, you are truly an impressive nominee. I'm confident this hearing will give this Committee, and the rest of the Senate, the information we need to complete our constitutional duty. As Senators, I believe we each owe you a decision based on your record and your answers to our questions. That decision should not turn on empty code words like "judicial activist", or on charges of guilt by association, or on any litmus test. Instead, we should focus on your record and your responses and determine whether you have the qualities that will enable you to well serve all Americans and the rule of law on our Nation's highest court.

As my colleagues have already noted, your rise from humble beginnings to extraordinary academic and legal achievement is an inspiration to us all. I note that you would bring more Federal judicial experience to the Supreme Court than any Justice in over 100 years. You also have incredibly valuable practice experience not only as a prosecutor, but also a commercial litigator.

In terms of your judicial record, you appear to have been careful, thoughtful, and open-minded. In fact, what strikes me most about your record is that it seems to reveal no biases. You appear to take each case as it comes, without predilection, giving full consideration to the arguments of both sides before reaching a decision.

When Justice Souter announced his retirement in May, I suggested the court would benefit from a broader range of experience among its members. My concern at the time wasn't the relative lack of women, or racial, or ethnic minorities on our court, although that deficit is glaring. I was pointing to the fact that most of the current Justices, whether they be black or white, women or men, share roughly the same life experiences. I am heartened by what you bring to the court based on your upbringing, your story of achievement in the face of adversity, your professional experience as a prosecutor and commercial litigator, and yes, the prospect of your being the first Latina to sit on the high court.

Though the Supreme Court is not a representative body, we should hold as an ideal that it broadly reflect the citizens it serves.

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Diversity shares many goals. Outside the courtroom, it better equips our institutions to understand more of the viewpoints and backgrounds that comprise our pluralistic society. Moreover, a growing body of social research suggests that groups with diverse experience and backgrounds come to the right outcome more often than do non-diverse groups which may be just as talented. I believe a diverse court will function better as well.

Another concern I have about the current Supreme Court is its handling of business cases. Too often it seems they disregard settled law and congressional policy choices. Based on my education, my experience and my inclination, I am not anti-business, but whether it is preempting State consumer protection laws, striking down punitive damage awards, restricting access to the courts, or overturning 96 years of pro-consumer antitrust law, today's court gives me the impression that in business cases the working majority is outcome-oriented and therefore too one-sided.

Given our current economic crisis and the failures of regulation and enforcement that led to that crisis, that bias is particularly troubling. Congress can, and will, enact a dramatically improved regulatory system. The President can, and will, make sure that relevant enforcement agencies are populated with smart, motivated, and effective agents.

But a Supreme Court, resistant to Federal Government involvement in the regulation of markets, could undermine those efforts. A judge or a court has to call the game the same way for all sides. Fundamental fairness requires that, in the courtroom, everyone comes to the plate with the same count of no balls and no strikes.

One of the aspirations of the American judicial system is that it is a place where the powerless have a chance for justice on a level playing field with the powerful. We need Justices on the Supreme Court who not only understand that aspiration, but also are committed to making it a reality.

Because of the importance of businesses cases before the Supreme Court, I plan to spend some time asking you about your experience as a commercial litigator, your handling of business cases as a trial judge and on the Court of Appeals, and your approach to business cases generally. From what I've seen of your record, you seem to recall these cases right down the middle without any bias or agenda. That is very important to me.

Very soon, those of us up here will be done talking and you will have the chance to testify and answer our questions. I look forward to your testimony. Thank you.

Chairman LEAHY. Thank you. Thank you very much, Mr. Kaufman.

Another former Chairman of this Committee, Senator Specter. I yield to you.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you, Mr. Chairman.

I join my colleagues, Judge Sotomayor, in welcoming you and your family here. I compliment the President for nominating an Hispanic woman. I think it was wrong for America to wait until 1967 to have an African-American, Justice Thurgood Marshall, on

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the court, waited too long, until 1981, to have the first woman, Justice Sandra Day O'Connor. I think, as a diverse Nation, diversity is very, very important.

You bring excellent credentials academically, professionally, your service on the court. The Constitution requires the process for this Committee, and then the full Senate, to consider in detail your qualifications under our consent function. Most of the questions which will be asked of you in the course of these hearings will involve decided cases. I intend to ask about decided cases, but also about cases that the Supreme Court decided not to decide and on the rejection of cases for decision. It's a big problem.

The court, I would suggest, has time for more cases. Chief Justice Roberts noted in his confirmation hearing that the decision in more cases would be very helpful. If you contrast the docket of the Supreme Court in 1886 with currently, in 1886 there were 1,396 on the docket, 451 were decided. A century later, there were only 161 signed opinions; in 2007, there were only 67 signed opinions.

I start on the cases which are not decided, although I could start in many, many areas. I could start with the Circuit splits, where one Court of Appeals in one section of the country goes one way, another Court of Appeals goes the other way. The rest of the courts don't know which way the precedents are, and the Supreme Court decides not to decide.

But take the case of the Terrorist Surveillance Program, which was President Bush's secret warrantless wire taps, and contrast it with congressional authority exercised under Article I on the Foreign Intelligence Surveillance Act, providing the exclusive way to have wire taps, perhaps the sharpest conflict in the history of this great country on the Article I powers of Congress and the Article II powers of the President as Commander-in-Chief.

The Federal District Court in Detroit said that the Terrorist Surveillance Program was unconstitutional. The Sixth Circuit decided 2:1 that the plaintiffs did not have standing. I thought the dissenting opinion was much stronger than the majority opinion. Standing, as we all know, is a very flexible doctrine, and candidly, at least as I see it, used frequently by the court to avoid deciding a case.

Then the Supreme Court of the United States denied certiorari and decided not to hear the case, didn't even decide whether the lack of standing was a justifiable basis. This has led to great confusion in the law. And it's as current as this morning's newspapers reporting about other secret programs which apparently the President had in operation. Had the Supreme Court of the United States taken up the Terrorist Surveillance Program, the court could have ruled on whether it was appropriate for the President not to notify the Chairman of the Judiciary Committee about the program.

We have a law which says all members of the Intelligence Committees are to be notified. Well, the President didn't follow that law. Did he have the right to do so under Article II powers? Well, we don't know. Or within the last two weeks, the Supreme Court denied hearing a case involving claims by families of victims of 9/11 against Saudi Arabia and Saudi Arabia commissions, and for princes in Saudi Arabia.

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The Congress decided what sovereign immunity was in legislation in 1976 and had exclusions for torts, but the Supreme Court denied an opportunity for those families who had suffered grievously from having their day in court. One of the questions, when my opportunity arises, will be to ask you what would be the standards that you would employ in deciding what cases the Supreme Court would hear.

There is currently a major matter at issue on the Voting Rights Act, and the conflict has been present for many years, between the authority of Congress to decide what is the factual basis for legislation, a standard which Justice Harlan decided in the Wirtz case was a rational basis. The Supreme Court, more recently, has adopted a standard of congruently—congruence and proportionality, a standard which Justice Scalia has said is a "flabby test" which invites judicial lawmaking.

You'll hear a lot about—in this hearing about a judge's responsibility to interpret the law and the statutes and not to make laws. And during the confirmation hearing of Chief Justice Roberts, he said in pretty plain terms that the court ought to allow the Congress to decide what the factual basis is, and for the court to do otherwise is to engage in judicial legislation.

The Voting Rights case was decided on narrow grounds, but it certainly looks, if you read the record, that the court is about ready to upset the Voting Rights case just like it did in *Alabama* v. *Garrett* on the Americans With Disabilities Act, notwithstanding a vast record establishing the basis.

So I would like to know what your standard will be, if confirmed, a rational basis which had been the traditional standard, or congruence and proportionality? If you tell me congruence and proportionality, then I'll ask you what it means because it slips and slides around so much that it's impossible to tell what a constitutional standard is. We Senators would like to know what the standards are so we know what to do when we undertake legislation.

Your decision on the District—on the Circuit Court, in a case captioned *Entergy Corporation* v. *Riverkeeper*, Inc. involving the Environmental Protection Agency and the Clean Water Act, has a special prominence now that we are debating climate control and global warming. In the Second Circuit opinion, you were in the majority, deciding that it was the "best technology".

The Supreme Court reversed, 5:4, saying that it turned on a "cost-benefit analysis". It, I think, is worthy of exploration, although what you answer, obviously, is a matter of your discretion as to whether, on a 5:4 decision—it's hard to say who's really right, the 5 or the 4, as a matter of interpreting the Constitution or the statute.

Having a different view, I'd be interested to know if you'd care to respond, when the time comes, as to whether you'd be with what had been the minority, and perhaps a voice as strong as yours in the conference room would produce a different result. It could have a real impact on what we're legislating now on cap and trade.

With the few seconds I have left, I'd like to preview some questions on televising the court. I don't know why there's so much interest here today. I haven't counted this many cameras since Justice Alito was sitting where you're sitting. You've had experience in

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the District Court with television. You're replacing Justice Souter, who said that if TV cameras were to come to court they'd have to roll over his dead body. If you're confirmed, they won't have to roll over his dead body.

[Laughter].

Senator SPECTER. But the court decides all the cutting-edge questions of the day. The Senate is televised, the House is televised. A lot of people are fascinated by this hearing. I'd like to see the court televised; you can guess that.

Thank you very much, Judge Sotomayor.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, Senator Specter.

I understand, the next statement will be by Senator Franken, and then we'll call forward the two people who are going to introduce you, and you, then, Judge, have a chance to say something.

Senator Franken has been waiting patiently all day, and I appreciate having you here. Please go ahead.

STATEMENT OF HON. AL FRANKEN, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Senator FRANKEN. Thank you, Mr. Chairman. It's an incredible honor to be here, less than week into my term as a United States Senator. My first major responsibility is here at this historic confirmation hearing.

I am truly humbled to join the Judiciary Committee, which has played, and will continue to play, such an important role in overseeing our Nation's system of justice. Chairman Leahy, for several years now, I have admired your strength and integrity in leading this Committee. I am grateful for your warm welcome and the consideration that you've given me, sir, and I am honored to serve alongside of you.

Ranking Member Sessions, I want you to know that I plan to follow the example of my good friend and predecessor, Paul Wellstone, who was willing and ready to partner with his colleagues across the aisle to do the work of the American people. I look forward to working over the years with you and my other Republican colleagues in the Senate to improve the lives of all Americans.

To all the members of this Committee, I know that I have a lot to learn from each of you. Like so many private citizens, I have watched at least part of each and every Supreme Court confirmation hearing since they've been televised. And I would note that this is the first confirmation hearing that Senator Kennedy has not attended since 1965.

[Interruption from the audience.]

Chairman LEAHY. The Senate will suspend. Officers, please remove whoever is causing the disturbance.

Again, as Senator Sessions and I have said, this is a meeting of the United States Senate. We'll show respect to everybody who is here.

[Interruption from the audience.]

Chairman LEAHY. We'll show respect to everybody here, and certainly to Judge Sotomayor, to the Senators on both sides of the aisle, and we will have order in this room.

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Senator SESSIONS. Thank you, Senator Leahy.

Chairman LEAHY. Thank you.

Senator Franken, please continue.

Senator FRANKEN. Thank you, Mr. Chairman.

What I was saying was, this is the first hearing since 1965 that Senator Kennedy has not been present, and I know he's off the Committee now, but we do miss his presence. These televised hearings over the years have taught Americans a lot about our Constitution and the role that the courts play in upholding and defending it. I look forward to listening to all of your questions and the issues that you and your constituents care about.

To Judge Sotomayor, welcome. Over the next few days I expect to learn from you as well. As has been said, you're the most experienced nominee to the Supreme Court in 100 years. After meeting you in my office last week, I know that you're not just an outstanding jurist, but an exceptional individual. And as others have said, your story is inspirational and one which all Americans should take great pride in, and I welcome your family as well.

As most of you know, this is my fifth day in office. That may mean I'm the most junior Senator, but it also means that I am the Senator who most recently took the oath of office. Last Tuesday, I swore to support and defend the Constitution of the United States and to bear true faith and allegiance to it. I take this oath very seriously as we consider your nomination, Judge Sotomayor.

I may not be a lawyer, but neither are the overwhelming majority of Americans. Yet all of us, regardless of our backgrounds and professions, have a huge stake in who sits on the Supreme Court, and we are profoundly affected by its decisions.

I hope to use my time over the next few days to raise issues that concern the people of Minnesota, and the people of this Nation. This hearing will helps folks sitting in living rooms and offices in Winona, Duluth, and the Twin Cities to get a better idea of what the court is, what it does, and what it's supposed to do, and most importantly, how it affects the everyday lives of all Americans.

Justice Souter, whom you will replace if you are confirmed, once said, "The first lesson, simple as it is, is that whatever court we're in, whatever we're doing, at the end of our task some human being is going to be affected, some human life is going to be changed by what we do, and so we had better use every power of our minds and our hearts and our beings to get those rulings right." I believe Justice Souter had it right.

In the past months, I have spent a lot of time thinking about the court's impact on the lives of Americans, and reading and consulting with some of Minnesota's top legal minds. And I believe that the rights of Americans as citizens and voters are facing challenges on two separate fronts.

First, I believe that the position of the Congress, with respect to the courts and the executive, is in jeopardy. Even before I aspired to represent the people of Minnesota in the United States Senate, I believed that the framers made Congress the first branch of government for a reason. It answers most directly to the people and has the legitimacy to speak for the people in crafting laws to be carried out by the executive branch.

I am wary of judicial activism and I believe in judicial restraint. Except under the most exceptional circumstances, the judicial branch is designed to show deep deference to the Congress and not make policy by itself. Yet, looking at recent decisions on voting rights, campaign finance reform, and a number of other topics, it appears that appropriate deference may not have been shown in the past few years and there are ominous signs that judicial activism is on the rise in these areas.

I agree with Senator Feingold and with Senator Whitehouse. We hear a lot about judicial activism when politicians are running for office and when they talk about what kind of judge they want on the Supreme Court, but it seems that their definition of an activist judge is one who votes differently than they would like. For example, during the Rehnquist court, Justice Clarence Thomas voted to overturn Federal laws more than Justice Stevens and Justice Breyer combined.

Second, I am concerned that Americans are facing new barriers to defending their individual rights. The Supreme Court is the last court in the land where an individual is promised a level playing field and can seek to right a wrong: it is the last place an employee can go if he or she is discriminated against because of age, or gender, or color; it is the last place a small business owner can go to ensure free and fair competition in the market; it is the last place an investor can go to try to recover losses from security fraud; it is the last place a person can go to protect the free flow of information on the Internet; it is the last place a citizen can go to protect his or her vote; it is the last place where a woman can go to protect her reproductive health and rights.

Yet, from what I see on each of those fronts, for each of those rights, the past decade has made it a little bit harder for American citizens to defend themselves. As I said before, Judge, I'm here to learn from you. I want to learn what you think is the proper relationship between Congress and the courts, between Congress and the executive, I want to learn how you go about weighing the rights of the individual, the small consumer or business owner and more powerful interests, and I want to hear your views on judicial restraint and activism in the context of important issues like voting rights, open access to the Internet, and campaign finance reform. We're going to have a lot more time together, so I'm just going to start listening.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very, very much, Senator Franken.

What we're going to do, we're going to move a couple of chairs. Just stay there, please, Judge. We're going to have two people who will speak, each for five minutes, to introduce you. I will then administer the oath of the Committee to you.

[Laughter].

Chairman LEAHY. How about that? I'll administer the oath before the Committee and then we will hear your testimony.

So, going as we do by seniority, Senator Schumer, you are recognized for five minutes, and then Senator Gillibrand, you are recognized for five minutes.

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK, PRESENTING SONIA SOTOMAYOR, NOMINEE TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Senator SCHUMER. Thank you, Mr. Chairman.

Today is a great national opportunity. It's an opportunity to recognize that the nomination of one of the most qualified candidates to the Supreme Court in American history could not have happened anywhere else in the world.

Judge Sotomayor's story is a great American story and, I might add, a great New York story as well. Consider this: in no other country in the world could a woman from a minority group who grew up in a working-class family have received an education at the best institutions, and having thrived there, gone on to be a judge, and now a nominee to the highest court in the land.

This is because we don't have a caste system in this country, or even a class system. Two hundred fifty years ago, we threw away the centuries-old framework of gentry and nobility. We started fresh, with no ranks and no titles. Less than four score and seven years later, a farmer and self-taught lawyer from Illinois became, perhaps, our greatest President. And so the American story goes, and Judge Sonia Sotomayor from the Bronx, daughter of a single-parent practical nurse, has written her own chapter in it.

Judge Sotomayor embodies what we all strive for as American citizens. Her life and her career are not about race, or class, or gender, although, as for all of us, these are important parts of who she is. Her story is about how race and class, at the end of the day, are not supposed to predetermine anything in America. What matters is hard work and education, and those things will pay off no matter who you are or where you have come from. It's exactly what each of us wants for ourselves and for our children, and this shared vision is why this moment is historic for all Americans.

Judge Sotomayor was born to parents who moved to New York from Puerto Rico during World War II. Her father was a factory worker with a third grade education; he died when she was nine. Her mother worked and raised Sotomayor and her brother, Juan, now a doctor practicing in Syracuse, on her own.

Sonia Sotomayor graduated first in her high school class at Cardinal Spellman High School in 1971. She has returned to Cardinal Spellman to speak there and to encourage future alumni to work hard, get an education, and pursue their dreams the same way she did. When Sonia Sotomayor was growing up, the Nancy Drew stories inspired her sense of adventure, developed her sense of justice, and showed her that women could, and should, be outspoken and bold. Now in 2009, there are many more role models for a young Cardinal Spellman student to choose from, with Judge Sotomayor foremost among them.

Judge Sotomayor went on to employ her enormous talents at Princeton, where she graduated summa cum laude, and received the Pyne Prize, the highest honor bestowed on a Princeton student. This is an award that is given not just to the smartest student in the class, but to the most exceptionally smart student who has also given the most to her community. She graduated from Yale Law School, where she was a Law Review editor.

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And because we have such an extensive judicial record before us, I believe that these hearings will matter less than for the several previous nominees, or at the least that these hearings will bear out what is obvious about her, that she is modest and humble in her approach to judging.

As we become even more familiar with her incisive mind and balanced views, I am certain that this hearing will prove to all what is already clear to many. This is a moment in which all Americans can take great pride, not just New Yorkers, not just Puerto Ricans, not just Hispanics, not just women, but all Americans who believe in opportunity and who want for themselves and their children a fair reading of the laws by a judge who understands that while we are a Nation of individuals, we are all governed by one law.

Mr. Chairman, people felt at the founding of America that we were "God's noble experiment." Judge Sotomayor's personal story shows that today, more than 200 years later, we are still God's noble experiment.

Thank you.

Chairman LEAHY. Thank you, Senator Schumer.

Now, Senator Gillibrand, the other Senator from New York. Please go ahead, Senator Gillibrand.

STATEMENT OF HON. KIRSTEN E. GILLIBRAND, A U.S. SENATOR FROM THE STATE OF NEW YORK, PRESENTING SONIA SOTOMAYOR, NOMINEE TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Senator GILLIBRAND. Thank you, Chairman Leahy, Ranking Member Sessions, and the other distinguished members of the Judiciary Committee, for the privilege to speak on behalf of Judge Sonia Sotomayor.

President Obama has chosen one of the country's outstanding legal minds with his nomination of Sonia Sotomayor to the United States Supreme Court. As a New Yorker, I take great pride in Judge Sotomayor's nomination, along with the rest of my State and our delegation, including Senator Schumer and my colleagues from the House, Congresswoman Nydia Velázquez, who was the first person to introduce me to Judge Sotomayor and her record, and Congressman José Serrano.

As a woman, I take great pride in this historic nomination. In the words of Justice Sandra Day O'Connor, "It took a very long time, about 171 years, to get the first woman on the Supreme Court," and I thought that we'd very likely always have two, and eventually more. I'm very thankful for President Obama in his recognition of the importance of women's voices on the Nation's highest court.

Sonia Sotomayor's life and career are a study in excellence, commitment to learning, a dedication to the law, and the constant pursuit of the highest ideals of our country and Constitution. Her story is also the quintessential American and New York story: born to a Puerto Rican family, growing up in public housing in the South Bronx, and raised with a love of country and a deep appreciation for hard work.

Judge Sotomayor demonstrated a devotion to learning, graduating summa cum laude from Princeton, and serving as an editor

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on the Yale Law Journal before pursuing her career in the law. The breadth and depth of Judge Sotomayor's experience make her uniquely qualified for the Supreme Court.

Judge Sotomayor's keen understanding of case law and the importance of precedent is derived from working in nearly every aspect of our legal system: as a prosecutor, as a corporate litigator, as a trial judge, and as an appellate judge.

As prosecutor, Judge Sotomayor fought the worst of society's ills, prosecuting a litany of crimes from murder, to child pornography, to drug trafficking. The Manhattan D.A., Bob Morgenthau, described her as "fearless" and "an effective prosecutor" and "an able champion of the law".

Judge Sotomayor's years as a corporate litigator exposed her to all facets of commercial law, including real estate, employment, banking, contracts, and agency law. Judge Sotomayor was appointed to the U.S. District Court for the Southern District of New York by President George Herbert Walker Bush, presiding over roughly 450 cases and earning a reputation as a tough, fair-minded, and thoughtful jurist. She would replace Justice Souter as the only member on the Supreme Court with trial experience.

At the appellate level, Judge Sotomayor has participated in over 3,000 panel decisions, offering roughly 400 published opinions, with only 7 being brought up to the Supreme Court, which reversed only 3 of those decisions, two of which were closely divided. With confirmation, Judge Sotomayor brings more Federal judicial experience to the Supreme Court than any Justice in 100 years, and more judicial experience than any Justice confirmed in the court in 70 years.

As a testament to Judge Sotomayor, many independent national, legal, and law enforcement groups have already endorsed her nomination, including among them the ABA, voting unanimously and giving her the highest rating of "Well Qualified", complimenting not only her formidable intellect, but her mature legal mind and her record of deciding cases based on the precise facts and legal issues before her, also faithful in following the law as it exists, and that she has a healthy respect for the limited role of judges and the balance of powers for the executive and legislative branches. The President of the Fraternal Order of Police also stated, "She's a model jurist: tough, fair-minded, and mindful of the constitutional protections afforded to all U.S. citizens."

A nominee's experience as a legal advocate for civil rights certainly must not be seen as a disqualifying criteria for confirmation, but instead as the hallmark of an individual's commitment to our founding principles of equality, justice, and freedom. Like Ruth Bader Ginsburg's participation in the ACLU Women's Rights Project or Thurgood Marshall's participation on behalf of the NAACP Legal Defense and Education Fund, Judge Sotomayor's leadership role in the Puerto Rican Legal Defense Fund demonstrates her commitment to the Constitution, constitutional rights and core values of equality as being an inalienable right, an inalienable American right, and should not be ascribed based on gender or color.

Judge Sotomayor's entire breadth of experience uniquely informs her ability to discern facts as she applies the law and follows prece-

dent. Judge Sotomayor's commitment to the Constitution is unyielding. As she described her judicial philosophy, saying, "I don't believe we should bend the Constitution under any circumstance. It says what it says; we should do honor to it." Judge Sotomayor's record on the Second Circuit demonstrates the paramount importance of this conviction.

The importance of Sonia Sotomayor's professional and personal story cannot be understated. Many of our most esteemed justices have noted the importance of their own diverse backgrounds and life experiences in being an effective Justice. Like Judge Sotomayor, they also understand that their gender or ethnicity is not a determining factor in their judicial rulings, but another asset which they bring to the court, much like education, training, and previous legal work.

Justice Anthony Scalia said, "I am the product of the melting pot in New York, grew up with people of all religious and ethnic backgrounds. I have absolutely no racial prejudices, and I think I am probably at least as antagonistic as the average American, and probably much more so, towards racial discrimination."

Justice Clarence Thomas said, "My journey has been one that required me to at some point touch on virtually every aspect, every level of our country, from people who couldn't read and write to people who were extremely literate and—"

Chairman LEAHY. Senator? Senator, we're going to have to put your full statement in the record so that Judge Sotomayor can be heard.

Senator GILLIBRAND. May I conclude my remarks?

Chairman LEAHY. If it can be done in the next few seconds, Senator.

Senator GILLIBRAND. One minute?

Chairman LEAHY. Well, how about——

Senator GILLIBRAND. Twenty seconds.

I strongly support Judge Sotomayor's nomination and firmly believe her to be one of the finest jurists in American history.

Chairman LEAHY. Thank you.

Judge, now we will administer the oath. I'll let the two Senators step back if they'd like. Please raise your right hand.

Do you swear 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?

Judge Sotomayor. I do.

Chairman LEAHY. Thank you. Please be seated.

And I thank my two colleagues from New York for the introduction. I appreciate it because I know both have known you for some time. Judge, you've also introduced a number of members of your family. Now the floor is yours.

STATEMENT OF HON. SONIA SOTOMAYOR, NOMINATED TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Judge Sotomayor. Thank you, Mr. Chairman.

I also want to thank Senators Schumer and Gillibrand for their kind introductions.

In recent weeks, I have had the privilege and pleasure of meeting 89 Senators, including all of the members of this Committee. Each of you has been gracious to me, and I have so much enjoyed meeting you. Our meetings have given me an illuminating tour of the 50 States and invaluable insights into the American people.

There are countless family members and friends who have done so much over the years to make this day possible. I am deeply appreciative for their love and support. I want to make one special note of thanks to my mother. I am here, as many of you have noted, because of her aspirations and sacrifices for both my brother Juan and me.

I am very grateful to the President, and humbled to be here today as a nominee to the United States Supreme Court.

The progression of my life has been uniquely American. My parents left Puerto Rico during World War II. I grew up in modest circumstances in a Bronx housing project. My father, a factory worker with a third grade education, passed away when I was nine years old. On her own, my mother raised my brother and me. She taught us that the key to success in America is a good education and she set the example, studying alongside my brother and me at our kitchen table so that she could become a registered nurse.

We worked hard. I poured myself into my studies at Cardinal Spellman High School, earning scholarships to Princeton University and then Yale Law School, while my brother went on to medical school.

Our achievements are due to the values that we learned as children and they have continued to guide my life's endeavors. I try to pass on this legacy by serving as a mentor and friend to my many godchildren and to students of all backgrounds.

Over the past three decades, I have seen our judicial system from a number of different perspectives: as a big-city prosecutor, as a corporate litigator, as a trial judge, and as an appellate judge. My first job after law school was as an Assistant District Attorney in New York. There, I saw children exploited and abused. I felt the pain and suffering of families torn apart by the needless death of loved ones. I saw and learned the tough job law enforcement has in protecting the public.

In my next legal job, I focused on commercial, instead of criminal, matters. I litigated issues on behalf of national and international businesses and advised them on matters ranging from contracts to trademarks.

My career as an advocate ended and my career as a judge began when I was appointed by President George H.W. Bush to the United States District Court for the Southern District of New York. As a trial judge, I did decide over 450 cases and presided over dozens of trials, with perhaps my most famous case being the major league baseball strike in 1995.

After six extraordinary years on the District Court, I was appointed by President Clinton to the United States Court of Appeals for the Second Circuit. On that court I have enjoyed the benefit of sharing ideas and perspectives with wonderful colleagues as we have worked together to resolve the issues before us. I have now served as an appellate judge for over a decade, deciding a wide range of constitutional, statutory, and other legal questions.

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Throughout my 17 years on the bench, I have witnessed the human consequences of my decisions. Those decisions have not been made to serve the interests of any one litigant, but always to serve the larger interests of impartial justice.

In the past month, many Senators have asked me about my judicial philosophy. Simple: fidelity to the law. The task of a judge is not to make law, it is to apply the law. And it is clear, I believe, that my record in two courts reflects my rigorous commitment to interpreting the Constitution according to its terms, interpreting statutes according to their terms and Congress' intent, and hewing faithfully to precedents established by the Supreme Court and by my Circuit Court.

In each case I have heard, I have applied the law to the facts at hand. The process of judging is enhanced when the arguments and concerns of the parties to the litigation are understood and acknowledged. That is why I generally structure my opinions by setting out what the law requires and then explaining why a contrary position, sympathetic or not, is accepted or rejected.

That is how I seek to strengthen both the rule of law and faith in the impartiality of our judicial system. My personal and professional experiences help me to listen and understand, with the law always commanding the result in every case.

Since President Obama announced my nomination in May, I have received letters from people all over this country. Many tell a unique story of hope in spite of struggles. Each letter has deeply touched me. Each reflects a dream, a belief in the dream that led my parents to come to New York all those years ago. It is our Constitution that makes that dream possible and I now seek the honor of upholding the Constitution as a Justice on the Supreme Court.

Senators, I look forward, in the next few days, to answering your questions, to having the American people learn more about me, and to being part of a process that reflects the greatness of our Constitution and of our Nation.

Thank you all.

Chairman LEAHY. Thank you, Judge.

I thank all Senators for their opening statements this morning. I thank Senator Schumer and Senator Gillibrand for their introduction of you, but especially, Judge Sotomayor, I thank you for your statement. I look at the faces of your family; they appreciate it. We all do.

We will stand in recess until 9:30 tomorrow morning.

Thank you very, very much.

[Whereupon, at 3:04 p.m., the Committee was adjourned, to reconvene at 9:30 a.m., Tuesday, July 14, 2009.]

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CONTINUATION OF THE NOMINATION OF HON. SONIA SOTOMAYOR, TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

TUESDAY, JULY 14, 2009

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 9:29 a.m., in room SH–216, Hart Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Kohl, Feinstein, Feingold, Schumer, Durbin, Cardin, Whitehouse, Klobuchar, Kaufman, Specter, Franken, Sessions, Hatch, Grassley, Kyl, Graham, Cornyn, and Coburn.

Chairman LEAHY. Good morning, everybody.

Just so we can understand what is going on, I am not sure whether we have votes or not today. If we do have votes, to the extent that we can keep the hearing going during votes and have different Senators leave between them, we will. If we can't, then I will recess for those votes.

With the way the traffic was today, I think some people are still having trouble getting in here. I have talked with Senator Sessions about this, and what we are going to do is have 30-minute rounds. We will go back and forth between sides, and Senators will be recognized based on seniority if they are there. If not, then we will go to the next person.

And with that, as I said yesterday when we concluded, the American people finally have heard from Judge Sotomayor, and I appreciate your opening statement yesterday. You have had weeks of silence. You have followed the traditional way of nominees. I think you have visited more Senators than any nominee I know of for just about any position, but we get used to the tradition of the press is outside, questions are asked, you give a nice wave, and keep going. But finally you are able to speak, and I think your statement yesterday went a long way to answering the critics and the naysayers. And so we are going to start with the questions here.

I would hope that everybody will keep their questions pertaining to you and to your background as a judge. You are going to be the first Supreme Court nominee in more than 50 years who served as a Federal trial court judge, the first in 50 years to have served as

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both a Federal trial court judge and a Federal appellate court judge.

Let me ask you the obvious one. What are the qualities that a judge should possess? You have had time on both the trial court and the appellate court. What qualities should a judge have, and how has that experience you have had, how does that shape your approach to being on the bench?

STATEMENT OF HON. SONIA SOTOMAYOR, TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Judge SOTOMAYOR. Senator Leahy, yesterday many of the Senators emphasized their—the values they thought were important for judging, and central to many of their comments was the fact that a judge had to come to the process understanding the importance and respect the Constitution must receive in the judging process and an understanding that that respect is guided by and should be guided by a full appreciation of the limited jurisdiction of the Court in our system of Government, but understanding its importance as well. That is the central part of judging.

What my experience on the trial court and the appellate court have reinforced for me is that the process of judging is a process of keeping an open mind. It's the process of not coming to a decision with a prejudgment ever of an outcome, and that reaching a conclusion has to start with understanding what the parties are arguing, but examining in all situations carefully the facts as they prove them or not prove them, the record as they create it, and then making a decision that is limited to what the law says on the facts before the judge.

Chairman LEAHY. Let us go into some of the particulars. One of the things that I found appealing in your record is that you were a prosecutor, as many of us—both the Ranking Member and I had the privilege—and you worked on the front lines as assistant district attorney in the Manhattan DA's office. Your former boss, District Attorney Robert Morgenthau, the dean of the American prosecutors, said one of the most important cases you worked on was the prosecution of the man known as "the Tarzan burglar." He terrorized people in Harlem. He would swing on ropes into their apartments and rob them and steal and actually killed three people.

Your co-counsel, Hugh Mo, described how you threw yourself into every aspect of the investigation and the prosecution of the case. You helped to secure a conviction, a sentence of 62 years to life for the murders. Your co-counsel described you as "a skilled legal practitioner who not only ruthlessly pursued justice for victims of violent crimes, but understood the root causes of crime and how to curb it."

Did that experience shape your views in any way, as a lawyer and also as a judge? This case was getting into about as nitty-gritty as you could into the whole area of criminal law.

Judge SOTOMAYOR. I became a lawyer in the prosecutor's office. To this day, I owe who I have become as—who I became as a lawyer and who I have become as judge to Mr. Morgenthau. He gave

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me a privilege and honor in working in his office that has shaped my life.

When I say I became a lawyer in his office, it's because in law school, law schools teach you in hypotheticals. They set forth facts for you. They give you a little bit of teaching on how those facts are developed, but not a whole lot. And then they ask you to opine about legal theory and apply legal theory to the facts before you.

Well, when you work in a prosecutor's office, you understand that the law is not legal theory. It's facts. It's what witnesses say and don't say. It's how you develop your position in the record. And then it's taking those facts and making arguments based on the law as it exists. That's what I took with me as a trial judge. It's what I take with me as an appellate judge. It is respect that each case gets decided case by case, applying the law as it exists to the facts before you.

You asked me a second question about the *Tarzan murderer* case, and that case brought to life for me, in a way that perhaps no other case had fully done before, the tragic consequences of needless death. In that case, Mr. Maddicks was dubbed "the Tarzan murderer" by the press because he used acrobatic feats to gain entry into apartments. In one case, he took a rope, placed it on a pipe on top of a roof, put a paint can at the other end, and threw it into a window in a building below, and broke the window. He then swung himself into the apartment and on the other side shot a person he found. He did that repeatedly, and as a result, he destroyed families.

I saw a family that had been intact with a mother living with three of her children, some grandchildren. They all worked at various jobs. Some were going to school. They stood as they watched one of their—the mother stood as she watched one of her children be struck by a bullet that Mr. Maddicks fired and killed him because the bullet struck the middle of his head. That family was destroyed. They scattered to the four winds, and only one brother remained in New York who could testify.

That case taught me that prosecutors, as all participants in the justice system, must be sensitive to the price that crime imposes on our entire society.

At the same time, as a prosecutor in that case, I had to consider how to ensure that the presentation of that case would be fully understood by jurors, and to do that it was important for us as prosecutors to be able to present those number of incidences that Mr. Maddicks had engaged in, in one trial so the full extent of his conduct could be determined by a jury.

There had never been a case quite like that where an individual who used different acrobatic feats to gain entry into an apartment was tried with all of his crimes in one indictment. I researched very carefully the law and found a theory in New York law, called the "Molineaux theory" then, that basically said if you can show a pattern that established a person's identity or assisted in establishing a person's identity—I'm simplifying the argument, by the way—then you can try different cases together. This was not a conspiracy under law because Mr. Maddicks acted alone, so I had to find a different theory to bring all his acts together.

Well, I presented that to the trial judge. It was a different application of the law. But what I did was draw on the principles of the Molineaux theory, and arguing those principles to the judge, the judge permitted that joint trial of all of Mr. Maddicks' activities.

In the end, carefully developing the facts in the case, making my record—our record, I should say—Mr. Mo's and my record complete, we convinced the judge that our theory was supported by law. That harkens back to my earlier answer, which is that's what being a trial judge teaches you.

Chairman LEAHY. So you see it from both ends, having obviously a novel theory as a prosecutor—a theory that is now well established in the law—but was novel at that time, and as a trial judge, you have seen novel theories brought in by prosecutors or by defense, and you have to make your decisions based on those theories. The fairly easy answer to that is you do see it from both ends, do you not?

Judge SOTOMAYOR. Well, it's important to remember that as a judge, I don't make law, and so the task for me as a judge is not to accept or not accept new theories. It's to decide whether the law as it exists has principles that apply to new situations.

Chairman LEAHY. Well, let's go into that, because obviously the *Tarzan* case was a unique case, and as I said, Mr. Morgenthau singled that out as an example of the kind of lawyer you are. And I find compelling your story about being in the apartment. I have stood in homes at 3 o'clock in the morning as they are carrying the body out from a murder. I can understand how you are feeling.

But in applying the law and applying the facts, you told me once that ultimately and completely the law is what controls, and I was struck by that when you did. And so there has been a great deal of talk about the *Ricci* case, *Ricci* v. *DeStefano*, and you and two other judges were reversed in this appeal involving firefighters in New Haven. The plaintiffs were challenging the city's decision to voluntarily discard the result of a paper-and-pencil test to measure leadership abilities.

Now, the legal issue that was presented to you in that case was not a new one—not in your circuit. In fact, there was a unanimous, decades-old Supreme Court decision as well. In addition, in 1991, Congress acted to reinforce that understanding of the law. I might note that every Republican member of this Committee still serving in the Senate supported that statement of the law. So you had a binding precedent. You and two other judges came to a unanimous decision. Your decision deferred to the district court's ruling allowing the city's voluntary determination that it could not justify using that paper-and-pencil test under our civil rights laws, you say it was settled judicial precedent. A majority of the Second Circuit later voted not to revisit the panel's unanimous decision; therefore, they upheld your decision.

So you had Supreme Court precedent. You had your circuit precedent. You were upheld within the circuit. Subsequently, it went to the Supreme Court, and five, a bare majority of five Justices reversed the decision, reversed their precedent, and many have said that they created a new interpretation of the law.

Ironically, if you had done something other than followed the precedent, some would be now attacking you as being an activist.

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You followed the precedent, so now they attack you as being biased and racist. It is kind of a unique thing. You are damned if you do and damned if you don't.

How do you react to the Supreme Court's decision in the New Haven firefighters case?

Judge SOTOMAYOR. You are correct, Senator, that the panel, made up of myself and two other judges, in the Second Circuit decided that case on the basis of a very thorough, 78-page decision by the district court and on the basis of established precedent.

The issue was not what we would do or not do, because we were following precedent, and you—we're now on the circuit court—are obligated on a panel to follow established circuit precedent.

The issue in *Ricci* was what the city did or could do when it was presented with a challenge to one of its tests that—for promotion. This was not a quota case. This was not an affirmative action case. This was a challenge to a test that everybody agreed had a very wide difference between the pass rate of a variety of different groups.

The city was faced with the possibility, recognized in law, that the employees who were disparately impacted—that's the terminology used in the law, and that is a part of the civil rights amendment that you were talking about in 1991—that those employees who could show a disparate impact, a disproportionate pass rate, that they could bring a suit, and that then the employer had to defend the test that it gave.

The city here, after a number of days of hearings and a variety of different witnesses, decided that it wouldn't certify the test, and it wouldn't certify it in an attempt to determine whether they could develop a test that was of equal value in measuring qualifications, but which didn't have a disparate impact.

And so the question before the panel was: Was the decision of the city based on race or based on its understanding of what the law required it to do? Given Second Circuit precedent, *Bushey* v. *New York State Civil Services Commission*, the panel concluded that the city's decision in that particular situation was lawful under established law.

The Supreme Court, in looking and reviewing that case, applied a new standard. In fact, it announced that it was applying a standard from a different area of law, and explaining to employers and the courts below how to look at this question in the future.

Chairman LEAHY. But when you were deciding it, you had precedent from the Supreme Court and from your circuit that basically determined the outcome you had to come up with. Is that correct?

Judge SOTOMAYOR. Absolutely.

Chairman LEAHY. And if today, now that the Supreme Court has changed their decision, without you having to relitigate the case, it would lay open, obviously, a different result. Certainly the circuit would be bound by the new decision. Even though it is only a 5–4 decision, a circuit would be bound by the new decision of the Supreme Court. Is that correct?

Judge SOTOMAYOR. Absolutely, sir.

Chairman LEAHY. Thank you.

Judge SOTOMAYOR. That is now the statement of the Supreme Court of how employers and the Court should examine this issue.

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Chairman LEAHY. During the course of this nomination, there have been some unfortunate comments, including outrageous charges of racism, made about you on radio and television. One person referred to you as being "the equivalent of the head of the Ku Klux Klan." Another leader in the other party referred to you as being "a bigot." And to the credit of the Senators, the Republican Senators as well as Democratic Senators, they have not repeated those charges.

But you have not been able to respond to any of these things. You have had to be quiet. Your critics have taken a line out of your speeches and twisted it, in my view, to mean something you never intended.

You said that you "would hope that a wise Latina woman with the richness of her experiences would reach wise decisions." I remember other Justices, the most recent one Justice Alito, talking about the experience of the immigrants in his family and how that would influence his thinking and help him reach decisions.

And you also said in your speech that you "love America and value its lessons and great things could be achieved if one works hard for it." And then you said, "Judges must transcend their personal sympathies and prejudices and aspire to achieve a greater degree of fairness and integrity based on the reason of law." And I will just throw one more quote in there—what you told me—that ultimately and completely, the law is what controls.

So tell us. You have heard all of these charges and countercharges, the wise Latina and on and on. Here is your chance. You tell us what is going on here, Judge.

Judge SOTOMAYOR. Thank you for giving me an opportunity to explain my remarks. No words I have ever spoken or written have received so much attention.

[Laughter.]

Judge SOTOMAYOR. I gave a variant of my speech to a variety of different groups, most often to groups of women lawyers or to groups most particularly of young Latino lawyers and students. As my speech made clear in one of the quotes that you referenced, I was trying to inspire them to believe that their life experiences would enrich the legal system, because different life experiences and backgrounds always do. I don't think that there is a quarrel with that in our society. I was also trying to inspire them to believe that they could become anything they wanted to become, just as I had.

The context of the words that I spoke have created a misunderstanding, and I want—a misunderstanding, and to give everyone assurances, I want to state up front unequivocally and without doubt, I do not believe that any ethnic, racial, or gender group has an advantage in sound judging. I do believe that every person has an equal opportunity to be a good and wise judge regardless of their background or life experiences.

The words that I used, I used agreeing with the sentiment that Justice Sandra Day O'Connor was attempting to convey. I understood that sentiment to be what I just spoke about, which is that both men and women were equally capable of being wise and fair judges.

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That has to be what she meant, because judges disagree about legal outcomes all of the time—or I shouldn't say "all of the time." At least in close cases they do. Justices on the Supreme Court come to different conclusions. It can't mean that one of them is unwise—despite the fact that some people think that.

So her literal words couldn't have meant what they said. She had to have meant that she was talking about the equal value of the capacity to be fair and impartial.

Chairman LEAHY. And isn't that what you, having been on the bench for 17 years, set as your goal, to be fair and show integrity based on the law?

Judge SOTOMAYOR. I believe my 17-year record on the two courts would show that in every case that I render, I first decide what the law requires under the facts before me, and that what I do is explained to litigants why the law requires a result. And whether their position is sympathetic or not, I explain why the result is commanded by law.

Chairman LEAHY. And doesn't your oath of office actually require you to do that?

Judge SOTOMAYOR. That is the fundamental job of a judge.

Chairman LEAHY. Let me talk to you about another decision, *District of Columbia* v. *Heller*. In that case, the Supreme Court held that the Second Amendment guarantees to Americans the right to keep and bear arms and that it is an individual right. I have owned firearms since my early teen years. I suspect a large number of Vermonters do. I enjoy target shooting on a very regular basis at our home in Vermont, so I watched that decision rather carefully and found it interesting.

Is it safe to say that you accept the Supreme Court's decision as establishing that the Second Amendment right is an individual right? Is that correct?

Judge SOTOMAYOR. Yes, sir.

Chairman LEAHY. Thank you. And in the Second Circuit's decision in *Maloney* v. *Cuomo*, you, in fact, recognize the Supreme Court decided in *Heller* that the personal right to bear arms is guaranteed by the Second Amendment of the Constitution against Federal law restriction. Is that correct?

Judge SOTOMAYOR. It is.

Chairman LEAHY. And you accepted and applied the *Heller* decision when you decided *Maloney*?

Judge SOTOMAYOR. Completely, sir. I accepted and applied established Supreme Court precedent that the Supreme Court in its own opinion in *Heller* acknowledged answered a different question.

Chairman LEAHY. Well, in fact, let me refer to that, because Justice Scalia's opinion in the *Heller* case expressly left unresolved and expressly reserved as a separate question whether the Second Amendment guarantee applies to the States and laws adopted by the States. Earlier this year, you were on a Second Circuit panel in a case posing that specific question, analyzing a New York State law restriction on so-called chukka sticks, a martial arts device.

Now, the unanimous decision of your court cited Supreme Court precedent as binding on your decision, and the longstanding Supreme Court cases have held that the Second Amendment applies only to the Federal Government and not to the States. And I notice

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that the panel of the Seventh Circuit, including Judge Posner, one of the best-known, very conservative judges, cited the same Supreme Court authority and agreed with the Second Circuit decision.

We all know that not every constitutional right has been applied to the States by the Supreme Court. I know that one of my very first cases as a prosecutor was the question whether the Fifth Amendment guaranteed a grand jury indictment has been made applicable to the States. The Supreme Court has not held that applicable to the States.

The Seventh Amendment right to a jury trial and the Eighth Amendment prohibition against excessive fines also have not been made applicable to the States.

I understand that petitions seeking to have the Supreme Court apply the Second Amendment to the States are pending. So obviously I am not going to ask you, if that case appears before the Supreme Court and you are there, how you are going to rule. But would you have an open mind on the Supreme Court in evaluating the legal proposition whether the Second Amendment right should be considered a fundamental right and, thus, applicable to the States?

Judge SOTOMAYOR. Like you, I understand how important the right to bear arms is to many, many Americans. In fact, one of my godchildren is a member of the NRA, and I have friends who hunt. I understand the individual right fully that the Supreme Court recognized in *Heller*.

As you pointed out, Senator, in the *Heller* decision the Supreme Court was addressing a very narrow issue, which was whether an individual right under the Second Amendment applied to limit the Federal Government's rights to regulate the possession of firearms. The Court expressly, Justice Scalia in a footnote, identified that there was Supreme Court precedent that has said that that right is not incorporated against the States. What that term of "incorporation" means in the law is that that right doesn't apply to the States in its regulation of its relationship with its citizen.

In Supreme Court parlance, the right is not fundamental. It's a legal term. It's not talking about the importance of the right in a legal term. It's talking about is that right incorporated against the States.

When *Maloney* came before the Second Circuit, as you indicated, myself and two other judges read what the Supreme Court said, saw that it had not explicitly rejected its precedent on application to the States, and followed that precedent, because it's the job of the Supreme Court to change it.

Chairman LEAHY. Well——

Judge SOTOMAYOR. You asked me—I'm sorry, Senator. I didn't mean to cut you off.

Chairman LEAHY. No, no. Go ahead.

Judge SOTOMAYOR. You asked me whether I have an open mind on that question. Absolutely. My decision in *Maloney* and on any case of this type would be to follow the precedent of the Supreme Court when it speaks directly on an issue, and I would not prejudge any question that came before me if I was a Justice on the Supreme Court.

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Chairman LEAHY. Let me just ask—and I just asked Senator Sessions if he minded. I want to ask one more question, and it goes to the area of prosecution. You have heard appeals in over 800 criminal cases. You affirmed 98 percent of the convictions for violent crimes, including terrorism cases; 99 percent of the time at least one Republican-appointed judges of the panel agreed with you. Let me just ask you about one, *United States* v. *Giordano*.

That was a conviction against the mayor of Waterbury, Connecticut. The victims in that case were the young daughter and niece of a prostitute, young children who, as young as 9 and 11, were forced to engage in sexual acts with the defendant. The mayor was convicted under a law passed by Congress prohibiting the use of any facility or means of interstate commerce to transmit contact information about a person under 16 for the purpose of illegal sexual activity.

You spoke for the unanimous panel of the Second Circuit, which included Judge Jacobs and Judge Hall. You upheld that conviction against the constitutional challenge that the Federal criminal statute in question exceeded Congress' power under the Commerce Clause. I mention that only because I appreciate your deference to the constitutional congressional authority to prohibit illegal conduct.

Did you have any difficulty in reaching the conclusion you did in the *Giordano* case?

Judge SOTOMAYOR. No, sir.

Chairman LEAHY. Thank you. I am glad you reached it.

And I appreciate Senator Sessions' forbearance.

Senator SESSIONS. It is good to have you back, Judge, and your family and friends and supporters, and I hope we will have a good day today. I look forward to a dialog with you.

I have got to say that I liked your statement on the fidelity of the law yesterday and some of your comments this morning. And I also have to say had you been saying that with clarity over the last decade or 15 years, we would have a lot fewer problems today, because you have evidenced, I think it is quite clear, a philosophy of the law that suggests that a judge's background and experiences can and should—even should and naturally will impact their decision, which I think goes against the American ideal and oath that a judge takes to be fair to every party, and every day when they put on that robe, that is a symbol that they are to put aside their personal biases and prejudices.

So I would like to ask you a few things about it. I would just note that it is not just one sentence, as my Chairman suggested, that causes us difficulty. It is a body of thought over a period of years that causes us difficulty. And I would suggest that the quotation he gave was not exactly right of the "wise Latina" comment that you made. You have said, I think, six different times, "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion . . ." So that is a matter that I think we will talk about as we go forward.

Let me recall that yesterday you said, "It's simple: fidelity to the law. The task of a judge is not to make law. It's to apply law." I heartily agree with that.

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However, you previously have said, "The court of appeals is where policy is made." And you said on another occasion, "The law that lawyers practice and judges declare is not a definitive, capital 'L' law that many would like to think exists." So I guess I am asking today what do you really believe on those subjects: that there is no real law—that judges do not make law, or that there is no real law and the court of appeals is where policy is made? Discuss that with us, please.

Judge SOTOMAYOR. I believe my record of 17 years demonstrates fully that I do believe that law—that judges must apply the law and not make the law. Whether I've agreed with a party or not, found them sympathetic or not, in every case I have decided I have done what the law requires.

With respect to judges' making policy, I assume, Senator, that you were referred to a remark that I made in a Duke law student dialog. That remark in context made very clear that I wasn't talking about the policy reflected in the law that Congress makes. That's the job of Congress to decide what the policy should be for society.

In that conversation with the students, I was focusing on what district court judges do and what circuit court judges do, and I noted that district court judges find the facts and they apply the facts to the individual case. And when they do that, their holding, their finding doesn't bind anybody else.

Appellate judges, however, establish precedent. They decide what the law says in a particular situation. That precedent has policy ramifications because it binds not just the litigants in that case; it binds all litigants in similar cases, in cases that may be influenced by that precedent.

I think if my speech is heard outside of the minute and a half that YouTube presents and its full context examined, it is very clear that I was talking about the policy ramifications of precedent and never talking about appellate judges or courts making the policy that Congress makes.

Senator SESSIONS. Judge, I would just say I don't think it is that clear. I looked at that tape several times, and I think a person could reasonably believe it meant more than that. But yesterday you spoke about your approach to rendering opinions and said, "I seek to strengthen both the rule of law and faith in the impartiality of the justice system," and I would agree. But you had previously said this: "I am willing to accept that we who judge must not deny differences resulting from experiences and heritage, but attempt, as the Supreme Court suggests, continuously to judge when those opinions, sympathies, and prejudices are appropriate."

So, first, I would like to know, Do you think there is any circumstance in which a judge should allow their prejudices to impact their decision making?

Judge SOTOMAYOR. Never their prejudices. I was talking about the very important goal of the justice system is to ensure that the personal biases and prejudices of a judge do not influence the outcome of a case. What I was talking about was the obligation of judges to examine what they're feeling as they're adjudicating a case and to ensure that that's not influencing the outcome.

Life experiences have to influence you. We're not robots to listen to evidence and don't have feelings. We have to recognize those feelings and put them aside. That's what my speech was saying. That's our job.

Senator SESSIONS. But the statement was, "I willingly accept that we who judge must not deny the differences resulting from experience and heritage, but continuously to judge when those opinions, sympathies, and prejudices are appropriate." That is exactly opposite of what you are saying, is it not?

Judge SOTOMAYOR. I don't believe so, Senator, because all I was saying is because we have feelings and different experiences, we can be led to believe that our experiences are appropriate. We have to be open-minded to accept that they may not be and that we have to judge always that we're not letting those things determine the outcome. But there are situations in which some experiences are important in the process of judging because the law asks us to use those experiences.

Senator SESSIONS. Well, I understand that. But let me just follow up. You say in your statement that you want to do what you can to increase the faith in the impartiality of our system. But isn't it true this statement suggests that you accept that there may be sympathies, prejudices, and opinions that legitimately influence a judge's decision? And how can that further faith in the impartiality of the system?

Judge SOTOMAYOR. I think the system is strengthened when judges don't assume they're impartial but when judges test themselves to identify when their emotions are driving a result or their experiences are driving a result and the law is not.

Senator SESSIONS. I agree with that. I know one judge that says that if he has a feeling about a case, he tells his law clerks to, "Watch me. I do not want my biases, sympathies, or prejudices to influence this decision, which I have taken an oath to make sure is impartial."

I just am very concerned that what you are saying today is quite inconsistent with your statement that you willingly accept that your sympathies, opinions, and prejudices may influence your decision making.

Judge SOTOMAYOR. Well, as I have tried to explain, what I try to do is to ensure that they're not. If I ignore them and believe that I'm acting without them, without looking at them and testing that I'm not, then I could, unconsciously or otherwise, be led to be doing the exact thing I don't want to do, which is to let something but the law command the result.

Senator SESSIONS. Well, yesterday you also said that your decisions have always been made to serve the larger interest of impartial justice. A good aspiration, I agree. But in the past, you have repeatedly said this: "I wonder whether achieving the goal of impartiality is possible at all in even most cases, and I wonder whether by ignoring our differences as women, men, or people of color we do a disservice to both the law and society."

Aren't you saying there that you expect your background and heritage to influence your decision making?

Judge SOTOMAYOR. What I was speaking about in that speech was—harkened back to what we were just talking about a few min-

utes ago, which is life experiences do influence us, in good ways. That's why we seek the enrichment of our legal system from life experiences. That can affect what we see or how we feel, but that's not what drives a result.

The impartiality is an understanding that the law is what commands the result. And so to the extent that we are asking the question—because most of my speech was an academic discussion—about what should we be thinking about, what should we be considering in this process, and accepting that life experiences could make a difference, but I wasn't encouraging the belief or attempting to encourage the belief that I thought that that should drive the result.

Senator SESSIONS. Judge, I think it is consistent in the comments I have quoted to you and your previous statements that you do believe that your background will affect the result in cases, and that is troubling me. So that is not impartiality. Don't you think that is not consistent with your statement that you believe your role as a judge is to serve the larger interest of impartial justice?

Judge SOTOMAYOR. No, sir. As I've indicated, my record shows that at no point or time have I ever permitted my personal views or sympathies to influence an outcome of a case. In every case where I have identified a sympathy, I have articulated it and explained to the litigant why the law requires a different result——

Senator SESSIONS. Well, Judge——

Judge SOTOMAYOR. I do not permit my sympathies, personal views, or prejudices to influence the outcome of my cases.

Senator SESSIONS. Well, you said something similar to that yesterday, that "in each case I have applied the law to the facts at hand." But you have repeatedly made this statement: "I accept the proposition"—"I accept the proposition that a difference there will be by the presence of women and people of color on the bench and that my experiences affect the facts I choose to see as a judge."

First, that is troubling to me as a lawyer. When I present evidence, I expect the judge to hear and see all the evidence that gets presented. How is it appropriate for a judge ever to say that they will choose to see some facts and not others?

Judge SOTOMAYOR. It's not a question of choosing to see some facts or another, Senator. I didn't intend to suggest that, and in the wider context, what I believe I was—the point that I was making was that our life experiences do permit us to see some facts and understand them more easily than others. But in the end, you are absolutely right; that's why we have appellate judges that are more than one judge, because each of us from our life experiences will more easily see different perspectives argued by parties. But judges do consider all of the arguments of litigants. I have. Most of my opinions, if not all of them, explain to parties why the law requires what it does.

Senator SESSIONS. Well, do you stand by your statement that "My experiences affect the facts I choose to see"?

Judge SOTOMAYOR. No, sir. I don't stand by the understanding of that statement that I will ignore other facts or other experiences because I haven't had them. I do believe that life experiences are important to the process of judging; they help you to understand

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and listen; but that the law requires a result, and it will command you to the facts that are relevant to the disposition of the case.

Senator SESSIONS. Well, I would just note you made that statement in individual speeches about seven times over a number-of-years' span, and it is concerning to me. So I would just say to you I believe in Judge Cedarbaum's formulation, and she said—and you disagreed, and this was really the context of your speech, and you used her statement as sort of a beginning of your discussion. And you said she believes that a judge, no matter what their gender or background, should strive to reach the same conclusion, and she believes that is possible. You then argued that you do not think it is possible in all, maybe even most cases. You deal with the famous quote of Justice O'Connor in which she says, "A wise old man should reach the same decision as a wise old woman." And you push back from that. You say you do not think that is necessarily accurate, and you doubt the ability to be objective in your analysis.

So how can you reconcile your speeches, which repeatedly assert that impartiality is a mere aspiration which may not be possible in all or even most cases with your oath that you have taken twice, which requires impartiality?

Judge SOTOMAYOR. My friend Judge Cedarbaum is here this afternoon, and we are good friends, and I believe that we both approach judging in the same way, which is looking at the facts of each individual case and applying the law to those facts.

I also, as I explained, was using a rhetorical flourish that fell flat. I knew that Justice O'Connor couldn't have meant that if judges reached different conclusions, legal conclusions, that one of them wasn't wise. That couldn't have been her meaning because reasonable judges disagree on legal conclusions in some cases.

So I was trying to play on her words. My play was—fell flat. It was bad, because it left an impression that I believed that life experiences commanded a result in a case. But that's clearly not what I do as a judge. It's clearly not what I intended. In the context of my broader speech, which was attempting to inspire young Hispanic, Latino students and lawyers to believe that their life experiences added value to the process.

Senator SESSIONS. Well, I can see that perhaps as a lay person's approach to it, but as a judge who has taken this oath, I am very troubled that you would repeatedly over a decade or more make statements that consistently—any fair reading of these speeches consistently argues that this ideal and commitment—I believe every judge is committed, must be, to put aside their personal experiences and biases and make sure that that person before them gets a fair day in court.

Judge, so philosophy can't impact your judging. I think it is much more likely to reach full flower if you sit on the Supreme Court than it will on a lower court where you are subject to review by your colleagues on the higher Court. So with regard to how you approach law and your personal experiences, let's look at the New Haven firefighters case, the *Ricci* case.

In that case, the city of New Haven told firefighters that they would take an exam, set for the process for it, that would determine who would be eligible for promotion. The city spent a good deal of time and money on the exam to make it a fair test of a per-

son's ability to serve as a supervisory fireman, which, in fact, has the awesome responsibility at times to send their firemen into a dangerous building that is on fire. And they had a panel that did oral exams—it was not all written—consisting of one Hispanic and one African American and one white. And according to the Supreme Court—this is what the Supreme Court held: The New Haven officials were careful to ensure broad racial participation in the design of the test and its administration. The process was open and fair. There was no genuine dispute that the examinations were job related and consistent with business purposes, business necessity. But after the city saw the results of the exam, it threw out those results because "not enough of one group did well enough on the test."

The Supreme Court then found that the city, and I quote, "rejected the test results solely because the higher scoring candidates were white. After the tests were completed, the raw racial results became the predominant rationale for the city's refusal to certify the results."

So you have stated that your background affects the facts that you choose to see. Was the fact that the New Haven firefighters had been subject to discrimination one of the facts you chose not to see in this case?

Judge SOTOMAYOR. No, sir. The panel was composed of me and two other judges. In a very similar case, the Seventh Circuit, in an opinion authored by Judge Easterbrook—I'm sorry. I misspoke. It wasn't Judge Easterbrook. It was Judge Posner—saw the case in an identical way. And neither judge—I have confused some statements that Senator Leahy made with this case, and I apologize.

In a very similar case, the Sixth Circuit approached a very similar issue in the same way. So a variety of different judges on the appellate court were looking at the case in light of established Supreme Court and Second Circuit precedent and determined that the city, facing potential liability under Title VII, could choose not to certify the test if it believed an equally good test could be made with a different impact on affected groups.

The Supreme Court, as it is its prerogative in looking at a challenge, established a new consideration or a different standard for the city to apply, and that is, was there substantial evidence that they would be held liable under the law?

That was a new consideration. Our panel didn't look at that issue that way because it wasn't argued to us in the case before us and because the case before us was based on existing precedent. So it is a different test——

Senator SESSIONS. Judge, there was apparently unease within your panel. I was really disappointed—and I think a lot of people have been—that the opinion was so short, it was per curiam, it did not discuss the serious legal issues that the case raised. And I believe that is a legitimate criticism of what you did. But it appears, according to Stuart Taylor, the respected legal writer for the National Journal, that—Stuart Taylor concluded that it appears that Judge Cabranes was concerned about the outcome of the case, was not aware of it because it was a per curiam unpublished opinion, but it began to raise the question of whether rehearing should be granted.

You say you are bound by the superior authority, but the fact is when the question of rehearing that Second Circuit authority that you say covered the case—some say it didn't cover so clearly—but that was up for debate. And the circuit voted, and you voted not to reconsider the prior case. You voted to stay with the decision of the circuit and, in fact, your vote was the key vote. Had you voted with Judge Cabranes, himself of Puerto Rican ancestry, had you voted with him, you could have changed that case. So, in truth, you weren't bound by that case had you seen it a different way. You must have agreed with it and agreed with the opinion and stayed with it until it was reversed by the Court.

Let me just mention this: In 1997——

Chairman LEAHY. Was that a question or——

Senator SESSIONS. Well, that was a response to some of what you said, Mr. Chairman, because you misrepresented factually the posture of the case. In 19——

Chairman LEAHY. Well, I obviously will disagree with that, but we will have a chance to vote on this issue.

Senator SESSIONS. In 1997, when you came before the Senate and I was a new Senator, I asked you this: "In a suit challenging a Government racial preference, quota, or set-aside, will you follow the Supreme Court decision in *Adarand* and subject racial preferences to the strictest judicial scrutiny?"

In other words, I asked you would you follow the Supreme Court's binding decision in *Adarand* v. *Pena*? In *Adarand*, the Supreme Court held that all governmental discrimination, including affirmative action programs, that discriminated by race of an applicant must face strict scrutiny in the courts. In other words, this is not a light thing to do. When one race is favored over another, you must have a really good reason for it, or it is not acceptable.

After *Adarand*, the Government agencies must prove there is a compelling state interest in support of any decision to treat people differently by race.

This is what you answer: "In my view, the *Adarand* Court correctly determined that the same level of scrutiny, strict scrutiny, applies for the purpose of evaluating the constitutionality of all government classifications, whether at the State or Federal level, based on race." So that was your answer, and it deals with the government being the city of New Haven.

You made a commitment to this Committee to follow *Adarand*. In view of this commitment, you gave me 12 years ago, why are the words "Adarand," "equal protection," and "strict scrutiny" completely missing from any of your panel's discussion of this decision?

Judge SOTOMAYOR. Because those cases were not what was at issue in this decision, and, in fact, those cases were not what decided the Supreme Court's decision. The Supreme Court parties were not arguing the level of scrutiny that would apply with respect to intentional discrimination. The issue is a different one before our court and the Supreme Court, which is, What is a city to do when there is proof that its test disparately impacts a particular group?

And the Supreme Court decided, not on the basis of strict scrutiny, that what it did here was wrong, what the city did here was wrong, but on the basis that the city's choice was not based on a

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substantial basis in evidence to believe it would be held liable under the law.

Those are two different standards, two different questions that a case would present.

Senator SESSIONS. This case was recognized pretty soon as a big case. I noticed what perhaps kicked off Judge Cabranes' concern was a lawyer saying it was the most important discrimination case that the circuit had seen in 20 years. They were shocked. They got a, basically, one paragraph decision, per curiam, unsigned, back on that case.

Judge Cabranes apparently raised this issue within the circuit, asked for a rehearing. Your vote made the difference in not having a rehearing en banc. And he said, "Municipal employers could reject the results"—and talking about the results of your test, the impact of your decision. "Municipal employers could reject the results of an employment examination whenever those results failed to yield a desirable outcome, i.e., failed to satisfy a racial quota."

So that was Judge Cabranes' analysis of the impact of your decision. And he thought it was very important. He wanted to review this case. He thought it deserved a full and complete analysis and opinion. He wanted the whole circuit to be involved in it. And to the extent that some prior precedent in the circuit was different, the circuit could have reversed that precedent had they chose to do so.

Don't you think—tell us how it came to be that this important case was dealt with in such a cursory manner?

Judge SOTOMAYOR. The panel decision was based on a 78-page District Court opinion. The opinion referenced it. In its per curiam, the Court incorporated it directly, but it was referenced by the circuit. And it relied on that very thoughtful, thorough opinion by the District Court. And that opinion discussed Second Circuit precedent in its fullest—to its fullest extent.

Justice Cabranes had one view of the case; the panel had another. The majority of the vote—it wasn't just my vote—the majority of the Court, not just my vote, denied the petition for rehearing.

The court left to the Supreme Court the question of how an employer should address what no one disputed, was prima facie evidence that its test disparately impacted on a group. That was undisputed by everyone, but the case law did permit employees that had been disparately impacted to bring a suit.

The question was, for the city, was it racially discriminating when it didn't accept those tests or was it attempting to comply with the law.

Senator SESSIONS. Well, Your Honor, I think it is not fair to say that a majority—I guess it is fair to say a majority voted against rehearing, but it was 6 to 6, unusual that one of the judges had to challenge a panel decision. And your vote made the majority not to rehear it.

Ricci did deal with some important questions, some of the questions that we have got to talk about as a nation. We have to work our way through. I know there is concern on both sides of this issue, and we should do it carefully and correctly.

But do you think that Frank Ricci and the other firefighters, whose claims you dismissed, felt that their arguments and concerns

were appropriately understood and acknowledged by such a short opinion from the Court?

Judge SOTOMAYOR. We were very sympathetic and expressed our sympathy to the firefighters who challenged the city's decision, Mr. Ricci and the others. We understood the efforts that they had made in taking the test; we said as much.

They did have before them a 78-page thorough opinion by the District Court. They obviously disagreed with the law as it stood under Second Circuit precedent. That's why they were pursuing their claims and did pursue them further.

In the end, the body that had the discretion and power to decide how these tough issues should be decided, that along the precedent that had been recognized by our circuit court and another at least, the Sixth Circuit, but along what the Court thought would be the right test or standard to apply. And that's what the Supreme Court did. It answered that important question because it had the power to do that. Not the power, but the ability to do that because it was faced with the arguments that suggested that. The panel was dealing with precedent and arguments that relied on our precedent.

Senator SESSIONS. Thank you, Judge, and I appreciate this opportunity. I would just say, though, had the per curiam opinion stood without a rehearing requested by one of the judges in the whole circuit and kicked off the discussion, it is very, very unlikely that we would have heard about this case or the Supreme Court would have taken it up.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Obviously, we can talk about your speeches, but, ultimately, will it determine how you act as a judge and how you make decisions? And I will put into the record the American Bar Association, which has unanimously given you the highest rating.

I put into the record the New York City Bar, which said you are extremely well credentialed to sit on the Supreme Court. I will put that in there.

I will put in the Congressional Research Service report analyzing your cases and found that you consistently deal with the law and with stare decisis, upholding past judicial precedents.

I will put in that the nonpartisan Brennan Center found you solidly in the mainstream. And then in another analysis of more than 800 of your cases, which found you called a traditional consensus judge on criminal justice issues.

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

Chairman LEAHY. I thought I would put those in. It is one thing to talk about speeches you might give. I am more interested about cases you might decide.

Senator Kohl.

Senator KOHL. Thank you very much, Mr. Chairman, and good morning, Judge Sotomayor.

Judge SOTOMAYOR. Good morning.

Senator KOHL. Just spent a great deal of time on the New Haven case, so I would like to see if we can put it into some perspective.

Isn't it true that *Ricci* was a very close case? Isn't it true that 11 of the 22 judges that reviewed the case did agree with you, and

that it was only reversed by the Supreme Court by a one vote 5 to 4 margin?

Do you agree, Judge, that it was a close case and that reasonable minds could have seen it in one way or another and not be seen as prejudiced or unable to make a clear decision?

Judge SOTOMAYOR. To the extent that reasonable minds can differ on any case, that's true as to what the legal conclusion should be in a case. But the panel, at least as the case was presented—was relying on the reasonable views that Second Circuit precedent had established.

And so, to the extent that one, as a judge, adheres to precedents, because it is that which dies and gives stability to the law, then those reasonable minds, who decided the precedent and the judges who apply it, are coming to the legal conclusion they think the facts and laws require.

Senator KOHL. All right.

Judge, we have heard several of our colleagues, now, particularly on the other side, criticize you because they believe some things that you have said in speeches show that you will not be able to put your personal views aside. But I believe rather than pulling lines out of speeches, oftentimes out of context, there are better ways to examine your record as a judge.

In fact, when I ask now Justice Alito what sort of a justice he was going to make, he said, "If you want to know what sort of justice I would make, look at what sort of judge I've been."

So you have served now as a Federal judge for the past 17 years, the last 11 as an appellate court judge. We examined the record. I believe it is plain that you are a careful jurist, respectful of precedent, and author of dozens of moderate and carefully reasoned decisions.

The best evidence I believe is the infrequency with which you have been reversed. You have authored over 230 majority opinions in your 11 years on the Second Circuit Court of Appeals. But in only three out of those 230 plus cases have your decisions been reversed by the Supreme Court, a very, very low reversal rate of 2 percent.

Doesn't this very low reversal rate indicate that you do have, in fact, an ability to be faithful to the law and put your personal opinions and background aside when deciding cases, as you have in your experience as a Federal judge?

Judge SOTOMAYOR. I believe what my record shows is that I follow the law, and that my small reversal rate, vis-a-vis the vast body of cases that I have examined—because you've mentioned only the opinions I've authored. But I've been a participant in thousands more that have not been either reviewed by the Supreme Court or reversed.

Senator KOHL. Well, I agree with what you are saying. And I would like to suggest that this constant criticism of you in terms of your inability to be an impartial judge is totally refuted by the record that you have compiled as a Federal judge up to this point.

We have heard much recently about Chief Justice Roberts' view that judges are like umpires simply calling balls and strikes. So finally, would you like to take the opportunity to give us your view about this sort of an analogy?

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Judge SOTOMAYOR. Few judges could claim they love baseball more than I do, for obvious reasons. But analogies are always imperfect, and I prefer to describe what judges do, like umpires, is to be impartial and bring an open mind to every case before them. And by an open mind, I mean a judge who looks at the facts of each case, listens and understands the arguments of the parties, and applies the law as the law commands.

It's a refrain I keep repeating because that is my philosophy of judging, applying the law to the facts at hand. And that's my description of judging.

Senator KOHL. Thank you.

Judge, which current one or two Supreme Court justices do you most identify with and which ones might we expect you to be agreeing with most of the time in the event that you are confirmed?

Judge SOTOMAYOR. Senator, to suggest that I admire one of the sitting Supreme Court justices would suggest that I think of myself as a clone of one of the justices. I don't. Each one of them brings integrity, their sense of respect for the law, and their sense of their best efforts and hard work to come to the decisions they think the law requires.

Going further than that would put me in the position of suggesting that by picking one justice, I was disagreeing or criticizing another, and I don't wish to do that. I wish to describe just myself.

I'm a judge who believes that the facts drive the law and the conclusion that the law will apply to that case. And when I say drives the law, I mean determines how the law will apply in that individual case.

If you would ask me—instead, if you permit me to tell you a justice from the past that I admire for applying that approach to the law, it would be Justice Cardozo.

Now, Justice Cardozo didn't spend a whole lot of time on the Supreme Court; he had an untimely passing. But he had been a judge on the New York Court of Appeals for a very long time. And during his short tenure on the bench, one of the factors that he was so well known for was his great respect for precedent, and his great respect for respect and deference to the legislative branch, and to the other branches of government and their powers under the Constitution.

In those regards, I do admire those parts of Justice Cardozo, which he was most famous for, and think that that is how I approach the law, as a case-by-case application of law to facts.

Senator KOHL. Thank you. Appreciate that.

Judge Sotomayor, many of us are impressed with you in your nomination and we hold you in great regard. But I believe we have a right to know what we are getting before we give you a lifetime appointment to the highest court in the land.

In past confirmation hearings, we have seen nominees who tell us one thing during our private meetings and in the confirmation hearings, and then go to the Court and become a justice that is quite different from the way they portrayed themselves at the hearing.

So I would like to ask you questions about a few issues that have generated much discussion. First, affirmative action.

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Judge, I would like to discuss the issue of affirmative action. We can all agree that it is good for our society when employers, schools and government institutions encourage diversity. On the other hand, the consideration of ethnicity or gender should not trump qualifications or turn into a rigid quota system.

Without asking you how you would rule in any particular case, what do you think of affirmative action?

Do you believe that affirmative action is a necessary part of our society to date?

Do you agree with Justice O'Connor that she expects in 25 years the use of racial preferences will no longer be necessary to promote diversity?

Do you believe affirmative action is more justified in education than in employment or do you think it makes no difference?

Judge SOTOMAYOR. The question of whether affirmative action is necessary in our society or not and what form it should take is always first a legislative determination in terms of legislative or government employer determination in terms of what issue it is addressing and what remedy it is looking to structure.

The Constitution promotes and requires the equal protection of law of all citizens in its Fourteenth Amendment. To ensure that protection, there are situations in which race in some form must be considered. The courts have recognized that. Equality requires effort, and so there are some situations in which some form of race has been recognized by the Court.

It is firmly my hope, as it was expressed by Justice O'Connor in her decision involving the University of Michigan Law School admissions criteria, that in 25 years, race in our society won't be needed to be considered in any situation. That's the hope, and we've taken such great strides in our society to achieve that hope.

But there are situations in which there are compelling state interests. And the admissions case that Justice O'Connor was looking at, the Court recognized that in the education field. And the state is applying a solution that is very narrowly tailored. And there the Court determined that the law school's use of race as only one factor among many others, with no presumption of admission whatsoever, was appropriate under the circumstances.

In another case, companion case, the Court determined that a more fixed use of race that didn't consider the individual was inappropriate, and it struck down the undergraduate admissions policy.

That is what the Court has said about the educational use of race in a narrow way.

The question, as I indicated, of whether that should apply in other contexts has not been looked at by the Supreme Court directly. The holdings of that case have not been applied or discussed in another case. That would have to await another state action that would come before the Court, where the state would articulate its reasons for doing what it did, and the Court would consider if those actions were constitutional or not.

Senator KOHL. Thank you.

Judge, *Bush* v. *Gore*. Many critics saw the *Bush* v. *Gore* decision as an example of the judiciary improperly injecting itself into a political dispute.

In your opinion, should the Supreme Court even have decided to get involved in *Bush* v. *Gore*?

Judge SOTOMAYOR. That case took the attention of the nation, and there's been so much discussion about what the Court did or didn't do.

I look at the case, and my reaction as a sitting judge is not to criticize it or to challenge it, even if I were disposed that way, because I don't take a position on that; that the Court took and made the decision it did.

The question for me as I look at that sui generis situation—it's only happened once in the lifetime of our country—is that some good came from that discussion. There's been and was enormous electoral process changes in many states as a result of the flaws that were reflected in the process that went on.

That is a tribute to the greatness of our American system, which is whether you agree or disagree with a Supreme Court decision, that all of the branches become involved in the conversation of how to improve things. And as I indicated, both Congress, who devoted a very significant amount of money to electoral reform in its legislation—and states have looked to address what happened there.

Senator KOHL. Judge, in a 5:4 decision in 2005, the Supreme Court ruled in *Kelo* v. *City of New London*, that it was constitutional for local government to seize private property for private, economic development.

Many people, including myself, were alarmed about the consequences of this landmark ruling because, in the words of dissenting Justice O'Connor, under the logic of the *Kelo* case, "Nothing is to prevent the state from replacing any Motel 6 with a Ritz Carlton, any home with a shopping mall, or any farm with a factory."

This decision was a major shift in the law. It said that private development was a permissible "public use," according to the Fifth Amendment, as long as it provided economic growth for the community.

What is your opinion of the *Kelo* decision, Judge Sotomayor? What is an appropriate "public use" for condemning private property?

Judge SOTOMAYOR. *Kelo* is now a precedent of the Court. I must follow it. I am bound by a Supreme Court decision as a Second Circuit judge. As a Supreme Court judge, I must give it the deference that the doctrine of the stare decisis would suggest.

The question of the reach of *Kelo* has to be examined in the context of each situation. And the Court did in *Kelo* note that there was a role for the courts to play in ensuring that takings by a state did, in fact, intend to serve the public—a public purpose and public use.

I understand the concern that many citizens have expressed about whether *Kelo* did or did not honor the importance of property rights, but the question in *Kelo* was a complicated one about what constituted public use. And there the Court held that a taking to develop an economically blighted area was appropriate.

Senator KOHL. Yes. That is what they decided in *Kelo*. I asked you your opinion, and apparently you feel that you are not in a po-

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sition to offer an opinion because it is precedent, and now you are required to follow precedent as an appellate court judge.

But I asked you if you would express your opinion, assuming that you became a Supreme Court justice, and assuming that you might have a chance someday to review the scope of that decision.

Judge SOTOMAYOR. I don't prejudge issues.

Senator KOHL. All right.

Judge SOTOMAYOR. That is actually—I come to every case with an open mind.

Senator KOHL. All right.

Judge SOTOMAYOR. Every case is a new for me.

Senator KOHL. That is good. All right. Let's leave that.

As you know, Judge, the landmark case of *Griswold* v. *Connecticut* guarantees that there is a fundamental constitutional right to privacy as it applies to contraception.

Do you agree with that? In your opinion, is that settled law?

Judge SOTOMAYOR. That is the precedent of the Court, so it is settled law.

Senator KOHL. Is there a general constitutional right to privacy, and where is the right to privacy, in your opinion, found in the Constitution?

Judge SOTOMAYOR. There is a right of privacy. The Court has founded in various places in the Constitution, has recognized rights under those various provisions of the Constitution. It's founded in the Fourth Amendment's right and prohibition against unreasonable search and seizures.

Most commonly, it's considered—I shouldn't say most commonly because search and seizure cases are quite frequent before the Court. But it's also found in the Fourteenth Amendment of the Constitution when it is considered in the context of the liberty interest protected by the due process clause of the Constitution.

Senator KOHL. All right.

Judge, the Court's ruling about the right to privacy in Griswold laid the foundation for *Roe* v. *Wade*. In your opinion, is *Roe* settled law?

Judge SOTOMAYOR. The Court's decision in *Planned Parenthood* v. *Casey* reaffirmed the core holding of *Roe*. That is the precedent of the Court and settled in terms of the holding of the Court.

Senator KOHL. Do you agree with Justices Souter, O'Connor and Kennedy in their opinion in *Casey*, which reaffirmed the core holding in *Roe*?

Judge SOTOMAYOR. As I said, *Casey* reaffirmed the holding in *Roe*. That is the Supreme Court's settled interpretation of what the core holding is and its reaffirmance of it.

Senator KOHL. All right. Let's talk a little bit about cameras in the court.

You sit on a court of appeals, which does allow cameras in the court. And from all indications, your experience with it has not been negative. In fact, I understand it has been somewhat positive.

So how would you feel about allowing cameras in the Supreme Court, where the country would have a chance to view discussions and arguments about the most important issues that the Supreme Court decides with respect to our Constitution, our rights and our future?

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Judge SOTOMAYOR. I have had positive experiences with cameras. When I have been asked to join experiments using cameras in the courtroom, I have participated. I have volunteered.

Perhaps it would be useful if I explained to you my approach to collegiality on a court.

[Laughter.]

Judge SOTOMAYOR. It is my practice when I enter a new enterprise, whether it's on a court or in my private practice or when I was a prosecutor, to experience what those courts were doing, or those individuals doing that job were doing, understand and listen to the arguments of my colleagues about why certain practices were necessary or helpful, or why certain practices shouldn't be done, or new procedures tried, and then spend my time trying to convince them.

But I wouldn't try to come in with prejudgments, so that they thought that I was unwilling to engage in a conversation with them, or unwilling to listen to their views. I go in and I try to share my experiences, to share my thoughts, and to be collegial and come to a conclusion together.

And I can assure you that if this august body gives me the privilege of becoming a justice of the Supreme Court, that I will follow that practice with respect to the tall issues of procedures on the Court, including the question of cameras in the courtroom.

Senator KOHL. No. I appreciate the fact that if you cannot convince them, it will not happen. But how do you feel——

[Laughter.]

Senator KOHL [continuing]. How do you feel about permitting cameras in the Supreme Court, recognizing that you cannot decree it by fiat?

Judge SOTOMAYOR. You know, I'm pretty good——

Senator KOHL. Do you think it is a good idea?

Judge SOTOMAYOR [continuing]. I'm a pretty good litigator. I was a really good litigator. And I know that when I work hard at trying to convince my colleagues of something after listening to them, they'll often try it for a while. I mean, we'll have to talk together. We'll have to figure out that issue together.

Senator KOHL. All right.

Judge SOTOMAYOR. I would be, again, if I was fortunate enough to be confirmed, a new voice in the discussion, and new voices often see things, and talk about them, and consider taking new approaches.

Senator KOHL. All right.

Judge, all of us in public office, other than Federal judges, have specific fixed terms, and we must periodically run for reelection if you want to remain in office. Even most state court judges have fixed terms of office. The Federal Judiciary, as you know, is very different. You have no term of office; instead, you serve for life.

So I would like to ask you, would you support term limits for Supreme Court justices, for example, 15, 20 or 25 years? Would this help ensure that justices do not become victims of a cloistered, ivory tower existence, and that you will be able to stay in touch with the problems of ordinary Americans?

Term limits for Supreme Court justices?

Judge SOTOMAYOR. All questions of policy are within the providence of Congress first. And so, that particular question would have to be considered by Congress first. But it would have to consider it in light of the Constitution and then of statutes that govern these issues. And so, that first step and decision would be Congress'.

I can only note that there was a purpose to the structure of our Constitution, and it was a view by the Founding Fathers that they wanted justices who would not be subject to political whim or to the emotions of a moment. And they felt that by giving them certain protections, that that would ensure their objectivity and their impartiality over time.

I do know, having served with many of my colleagues who have been members of the court, sometimes for decades, I had one colleague who was still an active member of the court in his nineties. And at close to 90, he was learning the Internet and encouraging my colleagues of a much younger age to participate in learning the Internet.

So I don't think that it's service or the length of time. I think there's wisdom that comes to judges from their experience that helps them in the process over time. I think in the end, it is a question of, one, of what the structure are of our government is best served by. And as I said, the policy question will be considered first by Congress and the processes set forth by the Constitution. But I do think there is a value in the services of judges for long periods of time.

Senator KOHL. All right, Judge. Finally, I would like to turn to antitrust law. Antitrust law is not some mysterious legal theory, as you know, that only lawyers can understand. Antitrust is just an old-fashioned word for fair competition, Judge, and it is a law we use to protect consumers and competitors alike from unfair and illegal trade practices.

A prominent antitrust lawyer named Carl Hittinger was quoted in an AP story recently as saying that, "Judge Sotomayor has surprisingly broke the pro-business record in the area of antitrust. In nearly every case in which she was one of the three judges considering a dispute, the court ruled against the plaintiff bringing an antitrust complaint."

I would like you to respond to that and to one other thing I would like to raise.

In 2007, *Leegin* case, in a 5–4 decision. Supreme Court overturned a 97-year-old precedent and held that vertical price fixing no longer automatically violated antitrust law. In effect, this means that a manufacturer is now free to set minimum prices at retail for its products, and thereby, prohibit discounting of its products.

What do you think of this decision? Do you think it was appropriate for the Supreme Court, by judicial fiat, to overturn a nearly century-old decision, on the meaning of this Sherman Act, that businesses and consumers had come to rely on and which had been never altered by Congress?

Those two things, antitrust.

Judge SOTOMAYOR. I cannot speak, Senator, to whether Leegins was right or wrong; it's now the established law of the Court. That case in large measure centered around the justices, different views

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of the effects of stare decisis on a question which none of them seemed to dispute, that there were a basis to question the economic assumptions of the Court in this field of law.

Leegins is the Court's holding, its teachings and holding. And I will have to apply in new cases, so I can't say more than what I know about it and what I thought the Court was doing there.

With respect to my record, I can't speak for why someone else would view my record as suggesting a pro or anti approach to any series of cases. All of the business cases, as with all of the cases, my structure of approaching is the same; what is the law requiring?

I would note that I have cases that have upheld antitrust complaints and upheld those cases going forward. I did it in my Visa/MasterCard antitrust decision, and that was also a major decision in this field.

All I can say is that with business and the interest of any party before me, I will consider and apply the law as it is written by Congress and informed by precedent.

Senator KOHL. Thank you very much, Judge Sotomayor, and thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Judge Sotomayor, this is probably an appropriate place to take a short break, and we will. And then we will come back. At some point, we will break for both the Republicans and the Democrats to be in caucus lunch, but also gives you a chance to have lunch.

So we will take a 10-minute, flexible 10-minute, break. And I thank you for your patience here, Judge Sotomayor, and we will be back.

[Whereupon, at 11:08 a.m., the hearing was recessed.]

After Recess [11:27 a.m.]

Chairman LEAHY. There has been some question during the break from the press about what our schedule will be, and I fully understand that they have to work out their own schedules. What I would suggest—Senator Kohl asked questions. We will go to—next is Senator Hatch, a former chairman of this committee. Following Senator Hatch, we will go to Senator Feinstein. And that will bring us to roughly 12:30.

Because of the caucuses, we will break at 12:30, but then resume right at 2, which will mean—I have talked to Republicans and Democrats. It means everybody that wants to come back will leave their caucus a few minutes early. But I think everybody will understand that.

Senator Hatch is a former chairman of this committee and a friend of many years. I recognize Senator Hatch.

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

Welcome, again, and to your lovely family. We are grateful to have you all here.

Now, let me ask you a question about settled law. If a holding in the Supreme Court means that it is settled, you believe that *Gonzalez* v. *Carhart*, upholding the partial birth abortion ban, is settled law.

Judge SOTOMAYOR. All precedents of the Supreme Court I consider settled law subject to the deference with doctrine of stare decisis would counsel.

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Senator HATCH. Now, I want to begin here today by looking at your cases in an area that is very important to many of us, and that is the Second Amendment, the right to keep and bear arms, and your conclusion that the right is not fundamental.

Now, in the 2004 case entitled *United States* v. *Sanchez-Villar*, you handled the Second Amendment issue in a short footnote. You cited the Second Circuit's decision in *United States* v. *Toner* for the proposition of the right to possess a gun is not a fundamental right.

Toner in turn relied on the Supreme Court's decision in *United States* v. *Miller*. Last year, in the *District of Columbia* v. *Heller*, the Supreme Court examined *Miller* and concluded that, "The case did not even purport to be a thorough examination of the Second Amendment," and that *Miller* provided "no explanation of the content of the right."

You are familiar with that.

Judge SOTOMAYOR. I am, sir.

Senator HATCH. Okay. So let me ask you, doesn't the Supreme Court's treatment of *Miller* at least cast doubts on whether relying on *Miller*, as the Second Circuit has done for this proposition, is proper?

Judge SOTOMAYOR. The issue——

Senator HATCH. Remember, I am saying at least cast doubts.

Judge SOTOMAYOR [continuing]. Well, that is what I believe Justice Scalia implied in his footnote 23, but he acknowledged that the issue of whether the right, as understood in Supreme Court jurisprudence, was fundamental. It's not that I considered it unfundamental, but that the Supreme Court didn't consider it fundamental so as to be incorporated against the states.

Senator HATCH. Well, it did not decide that point.

Judge SOTOMAYOR. Well, it not only didn't decide it, but I understood Justice Scalia to be recognizing that the Court's precedent had held it was not—his opinion with respect to the application of the Second Amendment to government regulation was a different inquiry, and a different inquiry as to the meaning of U.S. Miller with respect to that issue.

Senator HATCH. Well, if *Heller* had already been decided, would you have addressed that issue differently than *Heller* or would you take the position that the doctrine of incorporation is inapplicable with regard to state issues?

Judge SOTOMAYOR. That's the very question that the Supreme Court is more than likely to be considering. There are three cases addressing this issue, at least I should say three cases addressing this issue in the circuit courts. And so, it's not a question that I can address. As I said, bring an open mind to every case.

Senator HATCH. I accept that.

In *Sanchez-Villar*, you identified the premise that a right to possess a gun is not fundamental, and the conclusion that New York's ban on gun possession was permissible under the Second Amendment, but it is not a word actually connecting the premise to the conclusion.

Without any analysis at all, that footnote that you wrote leaves the impression that unless the right to bear arms is considered fundamental, any gun restriction is necessarily permissible under the Second Amendment.

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Is that what you believe?

Judge SOTOMAYOR. No, sir, because that's not—I'm not taking an opinion on that issue because it's an open question. Sanchez is——

Senator HATCH. So you admit it is an open question.

Judge SOTOMAYOR. Well, I admit that Justice—I admit—I—the courts have been addressing that question. The Supreme Court in the opinion authored by Justice Scalia suggested that it was a question that the Court should consider. I am just attempting to explain that *U.S.* v. *Sanchez* was using fundamental in its legal sense, that whether or not it had been incorporated against the states.

With respect to that question, moreover, even if it's not incorporated against the states, the question would be would the states have a rational basis for the regulation it has in place. And I am—I believe that the question there was whether or not a prohibition against felons possessing firearms was at question, if my memory serves me correctly. If it doesn't—but even Justice Scalia in the majority opinion in *Heller* recognized that that was a rational basis regulation for a state under all circumstances, whether or not there was a Second Amendment right.

Senator HATCH. Well, in the *District of Columbia* v. *Heller*, the Supreme Court observed that, "It has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a preexisting right." And the Court also observed this, "By the time of the founding, the right to have arms had become fundamental for English subjects."

Now, the Court also described the right to bear arms is a natural right.

Do you recall that from that decision?

Judge SOTOMAYOR. I do remember that discussion.

Senator HATCH. All right.

In what way does the Court's observation that the Second Amendment codified the preexisting, fundamental right to bear arms affect your conclusion that the Second Amendment does not protect a fundamental right?

Judge SOTOMAYOR. My conclusion in the *Maloney* case or in the *U.S. Sanchez-Villar* was based on precedence and the holding of precedence that the Second Circuit did not apply to the states.

Senator HATCH. Well, what is—excuse me. I am sorry. I did not mean to interrupt you.

What is your understanding of the test or standard the Supreme Court has used to determine whether a right should be considered fundamental? I am not asking a hypothetical here. I am only asking about what the Supreme Court has said in the past on this question.

I recall, for instance, the Court emphasizing that a right must be deeply rooted in our Nation's history and tradition, that it is necessary to an Anglo-American regime of ordered liberty or that it is an enduring American tradition.

I think I have cited that pretty accurately on what the Court has held with regard to what is a fundamental right. Now, those are different formulations from the Supreme Court's decisions, but I think the common thread there is obvious.

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Now, is that your understanding of how the Supreme Court has evaluated whether a right should be deemed fundamental?

Judge SOTOMAYOR. The Supreme Court's decision with respect to the Second Circuit incorporation—Second Amendment incorporation doctrine is reliant on old precedent of the Court.

Senator HATCH. Right.

Judge SOTOMAYOR. And I don't mean to use that as precedent that doesn't bind when I call it old. I'm talking about precedent that was passed in the 19th century.

Since that time, there is no question that different cases addressing different amendments of the Constitution have applied a different framework. And whether that framework and the language you quoted are precise or not, I haven't examined that framework in a while to know if that language is precise or not. I'm not suggesting it's not, Senator. I just can't affirm——

Senator HATCH. Sure.

Judge SOTOMAYOR [continuing]. That description.

My point is, however, that once there's Supreme Court precedent directly on point and Second Circuit precedent directly on point on a question, which there is on this incorporation doctrine and how it uses the word fundamental, then my panel, which was unanimous on this point—there were two other judges and at least one other—or one other panel on the Seventh Circuit by Justice—by Justice—by Judge Easterbrook, has agreed that once you have settled precedent in an area, on a precise question, then the Supreme Court has to look at that.

And under the deference one gives to stare decisis and the factors one considers in deciding whether that older precedent should be changed or not, that's what the Supreme Court will do.

Senator HATCH. All right. As I noted, the Supreme Court put the Second Amendment in the same category as the First and the Fourth Amendments as preexisting rights that the Constitution merely codified.

Now, do you believe that the First Amendment rights, such as the right to freely exercise religion, the freedom of speech, or the freedom of the press, are fundamental rights?

Judge SOTOMAYOR. Those rights have been incorporated against the states. The states must comply with them. So to the extent that the Court has held that, then they are—they have been deemed fundamental as that term is understood legally.

Senator HATCH. What about the Fourth Amendment about unreasonable searches and seizures?

Judge SOTOMAYOR. As well.

Senator HATCH. Same?

Judge SOTOMAYOR. But with respect to the holding as it relates to that particular amendment.

Senator HATCH. I understand.

Let me turn to your decision in *Maloney* v. *Cuomo*. And this is the first post-*Heller* decision about the Second Amendment to reach any Federal court, or Federal appeals court. I think I should be more specific.

In this case, you held that the Second Amendment applies only to the Federal Government and not to the states. And this was

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after *Heller*. And am I right that your authority for that proposition was the Supreme Court's 1886 decision in *Presser* v. *Illinois*?

Judge SOTOMAYOR. That plus some Second Circuit precedent that had held that it had not—that the amendment had not been——

Senator HATCH. But *Plesser* was definitely one of the cases you relied on.

Judge SOTOMAYOR. It was.

Senator HATCH. All right. In that case—or I should say, that case involved the Fourteenth Amendment's privileges and immunities clause.

Now, is that correct? Are you aware of that?

Judge SOTOMAYOR. It may have. I haven't read it recently enough to remember exactly.

Senator HATCH. You can take my word on it.

Judge SOTOMAYOR. Okay. I'll accept——

Senator HATCH. Thank you.

Last year's decision in *Heller* involved the District of Columbia, so it did not decide the issue of whether the Second Amendment applies to the states or is incorporated. But the Court did say that its 19th century cases about applying the Bill of Rights to the states "did not engage the sort of Fourteenth Amendment inquiry required by our later cases."

Now, here is my question.

Am I right that those later cases to which the Court referred involved the Fourteenth Amendment's due process clause rather than its privileges and immunities clause?

Judge SOTOMAYOR. As I said, I haven't examined those cases recently enough to be able to answer your question, Senator. But what I can say is that regardless of what those pieces address or didn't address, the Second Circuit had very directly addressed the question of whether the Second—whether it viewed the Second Amendment as applying against the states.

To that extent, if that precedent got the Supreme Court's teachings wrong, it still would bind my court.

Senator HATCH. I understand that.

Judge SOTOMAYOR. And to the extent that——

Senator HATCH. I am talking about something beyond that. I am talking about what should be done here.

Isn't the *Presser* case that you relied on in *Maloney*—to say that the Second Amendment does not apply to the states, one of those 19th century cases where they have used the privileges and immunities clause, not the Fourteenth Amendment due process clause, to incorporate—see, the late cases have all used the Fourteenth Amendment, as far as I can recall.

Judge SOTOMAYOR. As I said, Senator, I just haven't looked at those cases to analyze it. I know what *Heller* said about them. In *Maloney*, we were addressing a very, very narrow question.

Senator HATCH. Right.

Judge SOTOMAYOR. And in the end, the issue of whether that precedent should be followed or not is a question the Supreme Court's going to address if it accepts certiorari in one of the three cases in which courts have looked at this question, the Court of Appeals has.

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Senator HATCH. The reason I am going over this is I believe you applied the wrong line of cases in *Maloney*, because you were applying cases that used the privileges and immunities clause and not cases that used the Fourteenth Amendment due process clause.

Let me just clarify your decision in *Maloney*. As I read it, you held that the Second Amendment does not apply to the state or local governments. You also held that since the right to bear arms is not fundamental, all that is required to justify a weapons restriction is some reasonably conceivable state of facts that could provide a rational basis for it.

Now, am I right that this is a very permissive standard that would be easily met, the rational basis standard?

Judge SOTOMAYOR. Well, all standards of the Court are attempting to ensure that government action has a basis.

Senator HATCH. Right.

Judge SOTOMAYOR. In some situations, the Court looks at the action and applies a stricter scrutiny to the government's action. In others, if it's not a fundamental right in the way the law defines that, but it hasn't been incorporated against the states, then standard of review is of rational basis.

Senator HATCH. And my point is, it is a permissive standard that can be easily met; isn't that correct?

Judge SOTOMAYOR. Well, the government can remedy a social problem that it is identifying or difficulty—it's identifying in conduct, not in the most narrowly tailored way. But one that reasonably seeks to achieve that result, in the end, it can't be arbitrary and capricious. That's a word that is not in the definition.

Senator HATCH. Maybe I can use the words "more easily met"? How is that?

Judge SOTOMAYOR. As I said, the rational basis does look more broadly than strict scrutiny may——

Senator HATCH. That is my point. That is my point.

As a result of this very permissive legal standard, and it is permissive, doesn't your decision in *Maloney* mean that virtually any state or local weapons ban would be permissible?

Judge SOTOMAYOR. Sir, in *Maloney* we were talking about nunchuck sticks.

Senator HATCH. I understand.

Judge SOTOMAYOR. Those are martial art sticks.

Senator HATCH. Two sticks bound together by rawhide or some sort of a——

Judge SOTOMAYOR. Exactly. And when the sticks are swung, which is what you do with them, if there's anybody near you, you're going to be seriously injured because that swinging mechanism can break arms, it can bust someone's skull——

Senator HATCH. Sure.

Judge SOTOMAYOR [continuing]. It can cause not only serious but fatal damage.

So to the extent that a state government would choose to address this issue of the danger of that instrument by prohibiting its possession in the way New York did, the question before our court, because the Second Amendment has not been incorporated against the state, was did the state have a rational basis for prohibiting the possession of this kind of instrument.

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So it's a very narrow question. Every kind of regulation would come to a court with a particular statute, which judicial—legislative findings as to why a remedy is needed. And that statute would then be subject to rational basis review.

Senator HATCH. Well, the point that I am really making is, is that the decision was based upon a 19th century case that relied on the privileges and immunities clause, which is not the clause that we use to invoke the doctrine of incorporation today. And that is just an important consideration for you as you see these cases in the future.

But let me just change the subject. In the *Ricci* case—and I am very concerned about that because of a variety of reasons—the Court split 5 to 4 on whether to grant summary judgment to the firefighters. And it was a summary judgment, meaning it didn't have to be distributed to the other judges on the Court.

The other reason that Judge Cabranes raised the issue is that he read it in the newspaper, and then said I want to see that case. Then he got it, and he realized, my gosh, this is a case of first impression.

So the Court split 5 to 4 on whether to grant summary judgment to the firefighters. Now, even the four dissenters said that the firefighters deserved their day in court to find more facts. But all nine justices disagreed with your handling of that particular case.

Now, thus, your decision in—I mean, even though it was a 5 to 4 decision, all nine of them disagreed with your handling. All right. But, as you know, your decision in *Ricci* v. *DeStefano* has become very controversial. People all over the country are tired of courts imposing their will against one group or another without justification.

Now, the primary response or defense so far seems to be that you have no choice because you were bound by clear and longstanding precedent. Most say you were bound by Second Circuit precedent; some say it was Supreme Court precedent.

So I need to ask you about this. To be clear, this case involved not only disparate impact discrimination, but both disparate treatment and disparate impact. That is what made it a case of first impression. The city says that they had to engage in disparate treatment or they would have been sued for disparate impact. So it was how these two concepts of discrimination, disparate treatment and disparate impact, relate in the same case?

The fact of the issue of whether you were bound by clear, longstanding precedent, as I recall your opinion in this case, whether it was the summary order or the per curiam opinion, did not cite any Supreme Court or Second Circuit Court precedent at all.

Is that right?

Judge SOTOMAYOR. I believe they cited the *Bushey* case.

Senator HATCH. All right. The only case citation in your opinion was to the District Court opinion, because you were simply adopting what the District Court had said rather than doing your own analysis of the issues. And I think that is right, but you can correct me if I am wrong. I would be happy to be corrected.

But didn't the District Court say that this was actually a very unusual case? This is how the District Court put it. "This case presents the opposite scenario of the usual challenge to an employ-

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ment or promotional examination as plaintiffs attack not the use of allegedly racially discriminatory exam results, but defendants' reason for their refusal to use those results."

Now, this seems complicated I know, but you know more about it than probably anybody here in this room.

The District Court cited three Second Circuit precedents, but did not two of them, the *Kirkland* and the *Bushey* cases—didn't they deal with race norming of test scores, which did not occur in this case?

Judge SOTOMAYOR. They dealt with when employees could prove a disparate impact of a case, and it would be——

Senator HATCH. But based upon race norming.

Judge SOTOMAYOR [continuing]. But the principles underlying when employees could bring a case are the same when they establish a *prima facie* case, which is can an employee be sued—employer be sued by employees who can prove a disparate impact. And the basic principles of those cases were the same regardless of what form the practice at issue took.

Senator HATCH. All right. Well, the third case, the *Hayden* case, didn't it present a challenge to the design of the employment test rather than the results of the test?

Judge SOTOMAYOR. I'm sorry. Say this again.

Senator HATCH. The *Hayden* case, didn't it actually present a challenge to the design of the case rather than the results of the—design of the employment test rather than the results of the test?

Judge SOTOMAYOR. Again, regardless of what the challenge is about, what test is at issue, the core holding of that precedent was that if an employee could show a disparate impact from a particular practice or test or activity by an employer, then that employee had a *prima facie* case of liability under Title VII.

So the question is, was the city subject to potential liability because the employees, the city of New Haven, because the employees could bring a suit under established law challenging that the city of New Haven had violated Title VII. So that was the question.

Senator HATCH. All right, as one of the reasons why. It is a very important case.

When the Second Circuit considered whether to review the decision en banc, didn't you join an opinion admitting that the case presents "difficult issues?"

Judge SOTOMAYOR. Well, the District Court noted that it was a different scenario, but it evaluated its decision—it evaluated the case in a 78-page decision, and gave a full explanation, one which the panel agreed with my adopting the opinion of the District Court.

Those questions, as I indicated, are always whether, given the risk the city was facing, the fact that it could face a lawsuit and its conclusion that perhaps a better test could be devised that would not have a disparate impact, whether it was liable for discrimination—disparate—not disparate—different treatment under the law.

The Supreme Court came back and said, new standard. As I understood the dissenters in that case, what they were saying is, to the majority, if you're going to apply a new standard, then give the Second Circuit a chance to look at the record and apply that stand-

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ard. It wasn't disagreeing that the circuit wasn't applying the law as it was understood at the time. The dissenters, as I read what they were doing, were saying, send it back to the circuit and let them look at this in the first instance.

Senator HATCH. Well, as I understand it, Judge Cabranes basically did not know the decision was done until he read it in the newspaper and then asked to look at it. His opinion, joined by five other judges, supporting en banc review, opens with these words, "This appeal raises important questions of first impression in our circuit, and, indeed, in the Nation, regarding the implication of the Fourteenth Amendment and Title VII's prohibition on discriminatory employment practices."

Was he wrong?

Judge SOTOMAYOR. That was his view. He expressed it in his opinion on his vote. I can't speak for him. I know that the panel——

Senator HATCH. I am just asking you to speak for you.

Look, when the Supreme Court reversed you, Justice Kennedy wrote, "This action presents two provisions of Title VII to be interpreted and reconciled with few, if any, precedents in the Courts of Appeals discussing the issue."

He was referring to the lack of precedent anywhere in the country, not just the Second Circuit.

Was he wrong?

Judge SOTOMAYOR. He was talking about whether—I understood him to be talking about not whether the precedent that existed would have determined the outcome as the panel did, but whether the Court should be looking at these two provisions in a different way to establish a choice—a different choice in considerations by the city.

As I indicated, that argument about what new standard or new approach to the questions that the city should consider before it denies certification of a test, yes, had not been addressed by other courts. But the ability of a city, when presented with a *prima facie* case, to determine whether or not it would attempt to reach a nondisparate impact have been recognized by the courts.

Senator HATCH. Even the District Court felt that this was an unusual case. And if there was little or no Second Circuit precedent directly on point for a case like this—one of the questions I had is why did your panel not just do your own analysis and your own opinion?

Judge Cabranes pointed out that the per curiam approach that simply adopts the District Court's reasoning is reserved for cases that involve only "straightforward questions that do not require explanation."

As I asked you about a minute ago, you yourself joined an opinion regarding rehearing, saying the case raised difficult questions.

Now, the issue I am raising is why did you not analyze the issues yourself and apply what law existed to the difficult and perhaps unprecedented cases or issues in the case? And whether you got it right or wrong—and the Supreme Court did find that you got it wrong because they reversed—I just can't understand the claim that you were just sticking to binding, clear, longstanding precedent when all of that was part of the total decision and all nine

justices found it to be a flaw that you did not give serious, adequate consideration to what really turned out to be a case at first impression.

It is easy always to look at these things in retrospect, and you are under a lot of pressure here. But I just wanted to cover that case because I think it is important that that case be covered. And I think it is also important for you to know how I feel about these type of cases, and I think many here in the U.S. Senate. These are important cases. These are cases where people are discriminated against.

Let me just make one last point here. You have nothing to do with this, I know. But there is a rumor that people for the American Way, that this organization has been smearing Frank Ricci, who is only one of 20 plaintiffs in this case, because he may be willing to be a witness in these proceedings.

I hope that is not true, and I know you have nothing to do with it. So don't think I am trying to make a point against you. I am not. I am making a point that that is the type of stuff that does not belong in Supreme Court nomination hearings, and I know you would agree with me on that.

Judge SOTOMAYOR. Absolutely, Senator. I would never, ever endorse, approve or tolerate, if I had any control over individuals, that kind of conduct.

Senator HATCH. I believe that, and I want you to know I have appreciated this little time we have had together.

Judge SOTOMAYOR. Thank you, Senator.

Senator FEINSTEIN. Thank you very much, Mr. Chairman. I'm puzzled why Mr. Estrada keeps coming up.

Mr. Estrada had no judicial experience. The nominee before us has considerable judicial experience. Mr. Estrada wouldn't answer questions presented to him. This nominee I think has been very straightforward. She has not used catchy phrases, she has answered the questions directly the best she could, and to me that gets points.

I must say that if there is a test for judicial temperament, you pass it with an A++. I want you to know that because I wanted to respond and my adrenaline was moving along and you have just sat there very quietly and responded to questions that in their very nature are quite provocative. So I want to congratulate you about that.

Now, it was just said that all nine Justices disagreed with you in the *Ricci* case. But I want to point out that Justice Ginsburg and three other Justices stated in the dissent that the Second Circuit decision should have been affirmed. Is that correct?

Judge SOTOMAYOR. Yes.

Senator FEINSTEIN. Thank you very much. Also a Senator made a comment about the Second Circuit not being bound in the *Ricci* case that I wanted to follow up on because I think what he said was not correct.

You made the point that the unanimous *Ricci* panel was bound by Second Circuit precedent, as we have said. The Senator said that you easily could have overruled that precedent by voting for the case to be heard en banc.

First, my understanding is that a majority of the Second Circuit voted not to rehear the case. Is that correct?

Judge SOTOMAYOR. That's correct.

Senator FEINSTEIN. Second, it took a significant change in disparate impact law to change the result of the Second Circuit reached in this case. The Supreme Court itself in *Ricci* recognized that it was creating a new standard. Is my understanding correct?

Judge SOTOMAYOR. Yes, Senator.

Senator FEINSTEIN. You see? So what is happening here, ladies and gentlemen and members, is that this very reserved and very factual and very considered nominee is being characterized as being an activist when she is anything but.

I have a problem with this because some of it is getting across out there, calls begin to come into my office. Wow, she's an activist. In my view because you have agreed with your Republican colleagues on constitutional issues some 98 percent of the time, I don't see how you can possibly be construed to be an activist.

By your comments here, and as I walked in the room earlier, somebody asked you how you see your role and you said, 'to apply the law as it exists with the cases behind it.' That's a direct quote. It's a very clear statement. It does not say oh, I think it's a good idea or it does not say any other cliche. It states a definitive statement.

Later you said, 'Precedent is that which gives stability to the law.' I think that's a very important statement.

What we are talking about here is following precedent. So let me ask you in a difficult area of the law a question.

The Supreme Court has decided on more than seven occasions that the law cannot put a woman's health at risk. It said it in *Rowe* in '73, in *Danforth* in '76, in *Planned Parenthood* in '83, in *Thornburg* in '86, in *Casey* in '92, in *Carhart* in 2000 and in *Ayotte* in 2006.

With both Justices Roberts and Alito on the court, however, this rule seems to have changed because in 2007 in *Carhart 2*, the court essentially removed this basic constitutional right from women.

Now here is my question. When there are multiple precedents and a question arises, are all the previous decisions discarded or should the court reexamine all the cases on point?

Judge SOTOMAYOR. It is somewhat difficult to answer that question because before the court in any one case is a particular factual situation. So how the court's precedent applies to that unique factual situation because often what comes before the court is something that's different than its prior decision. Not always, but often.

In the *Carhart* case, the court looked to its precedence, and as I understood that case, it was deciding a different question which was whether there were other means, safer means and equally effective means for a woman to exercise her right, the procedure at issue in the case.

That was, I don't believe, a rejection of its prior precedence. Its prior precedence are still the precedence of the court. The health and welfare of a woman must be a compelling consideration.

Senator FEINSTEIN. So you believe that the health of the woman still exists?

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Judge SOTOMAYOR. You mentioned many cases. It has been a part of the court's jurisprudence and a part of its precedence. Those precedents must be given deference in any situation that arises before the court.

Senator FEINSTEIN. Thank you very much. I appreciate that.

I'd also like to ask you your thoughts on how a precedent should be reviewed. In a rare rebuke of his colleagues, Justice Scalia has sharply criticized Chief Justice Roberts and Justice Alito for effectively overruling the court's precedence without acknowledging that they were doing so.

Scalia wrote in the *Hein* case, 'Overruling prior precedent is a serious undertaking and I understand the impulse to take a minimalist approach. But laying just claim to be honoring Stare Decisis requires more than beating a prior precedent to a pulp and then sending it out to the lower courts weakened, denigrated, more incomprehensible than ever and yet somehow technically alive.'

In Wisconsin, *Right to Life* v. *FEC*, he said that Chief Justice Roberts' opinion, 'Effectively overruled a 2003 decision without saying so,' and said this kind of quote follow judicial restraint was really 'judicial obfuscation.'

Here is the question. When the court decides to overrule a previous decision, is it important that it do so outright and in a way that is clear to everyone?

Judge SOTOMAYOR. The Doctrine of Starry Decisis which means stand by a decision, stand by a prior decision, has a basic premise. That basic premise is that there is a value in society to predictability, consistency, fairness, evenhandedness in the law.

This society has an important expectation that judges won't change the law based on personal whim or not. But they will be guided by a humility they should show and the thinking of prior judges who have considered weighty questions and determined as best as they could given the tools that they had at the time to establish precedent.

There are circumstances under which a court should reexamine precedent and perhaps change its direction or perhaps reject it. But that should be done very, very cautiously and I keep emphasizing the verys because the presumption is in favor of deference to precedent.

The question then becomes what are the factors you use to change it, and then courts have looked at a variety of different factors, applying each in a balance in determining where that balance falls at a particular moment.

It is important to recognize, however, that the development of the law is step by step, case by case. There are some situations in which there is a principled way to distinguish precedent from application to a new situation.

No, I do not believe a judge should act in an unprincipled way, but I recognize that both the Doctrine of Starry Decisis starts from a presumption that deference should be given to precedence and that the development of the law is case by case. It is always a very fine balance.

Senator FEINSTEIN. Thank you very much. I appreciate that.

I wanted to ask a question on Executive Power and national security. We have seen the executive branch push the boundaries of

power claiming sweeping authority, to disregard acts of Congress. That's one way to collect communications of Americans without warrants and to detain people indefinitely without due process.

Now, the President and literally hundreds of signing statements affixed to a signature on a bill indicated part of a bill that he would in essence disregard. He didn't veto the bill, he signed the bill and said but there are sections that I—in so many words, will disregard.

Most egregiously in 2005 when Congress passed a bipartisan bill banning torture, President Bush signed it. But he also issued a signing statement saying he would only enforce the law, 'Consistent with the Constitutional authority of the President to supervise the unitary executive branch consistent with the Constitutional limitations on the judicial power.'

In other words, although he signed the bill, it was widely interpreted that he was asserting the right not to follow it.

Does the Constitution authorize the President to not follow parts of laws duly passed by the Congress that he is willing to sign that he believes are an unconstitutional infringement on executive authority.

Judge SOTOMAYOR. That's a very broad question.

Senator FEINSTEIN. It is one that we are grappling with, though.

Judge SOTOMAYOR. And that is why I have to be very cautious in answering it.

Senator FEINSTEIN. That's fine.

Judge SOTOMAYOR. Because not only is Congress grappling with this issue, but so are courts by claims being raised by many litigants who are asserting whether they are right or wrong would need to be addressed in each individual case that the President in taking some activity against the individual has exceeded Congress' authorizations or his powers.

The best I can do in answering your question because there is so many pending cases addressing this issue in such a different variety of ways is to say that the best expression of how to address this in a particular situation was made by Justice Jackson in his concurrence in the Youngstown seizure cases. That involved President Truman's seizure of seal factories.

There, Justice Jackson has sort of set off the framework and articulation that no one has thought of a better way to make it.

He says that you always have to look at an assertion by the president that he or she is acting within executive power in the context of what Congress has done or not done. He always starts with first you look at whether Congress has expressly or implicitly addressed or authorized the president to act in a certain way.

If the President has, then he is acting at his highest statute of power.

If the President is acting in prohibition of an express or implied act of Congress, then he is working at his lowest edge. If he is acting where Congress hasn't spoken, then we are in what Justice Jackson called the Zone of Twilight.

The issue in any particular case is always starting with what Congress says or has not said and then looking at what the Constitution has, what it says about the powers of the President minus Congress' powers in that area.

You can't speak more specifically than that in response to your statement that we are part of your question, other than to say the President can't act in violation of the Constitution. No one is above the law.

But what that is in a particular situation has to be looked at in the factual scenario before the court.

Senator FEINSTEIN. Thank you very much. This is really very relevant to what we do and we have often discussed this *Jackson* case or the steel case. But we just recently passed a Foreign Intelligence Surveillance Act and one of the amendments, because I did the amendment, was to strengthen the exclusivity clause of the law which has been in the bill since the beginning but that there are no exceptions from which the President can leave the four corners of this bill. So it will remain to be seen how that works out over time.

But I can certainly say to you that it's a most important consideration as we've looked at these matters of national security.

So let me ask you this. You joined a second circuit opinion last year that held that the executives should not forbid companies that received national security letters to tell the public about those letters.

The panel's opinion in the case said, 'The national security context in which NSL are authorized imposes on courts a significant obligation to defer to the judgments of executive branch officials.' But also that under no circumstance should the judiciary become the hand maiden of the executive. That's *Doe* v. *Mukasey*.

Given that the executive branch has responsibility of protecting the national security, how should courts balance the executive branch's expertise in national security matters with the judicial branches constitutional duty to enforce the Constitution and prevent abuse of power.

Judge SOTOMAYOR. I can talk about what we did in *Doe* as reflective of the approach that we used in that case. It is difficult to talk about an absolute approach in any case.

Senator FEINSTEIN. I understand.

Judge SOTOMAYOR. Because each case presets its own actions by parties in its own set of competing considerations often.

In Doe, the District Court had invalidated the Congressional statute all together, reasoning that the statute violated the Constitution in a number of different ways and that those violations did not authorize Congress to act in the manner it did.

As the panel said that decision recognizing that deference to the executive is important in national security questions. In deference to Congress because the District Court was validating an Act of Congress. We had, as an appellate court, to be very cautious about what we were doing in this area and to balance and keep consistent with constitutional requirements the actions that were being taken.

Giving back due deference, we upheld most of the statute. What we did was address two provisions of the statute that didn't pass in our judgment, constitutional muster.

One of them was that the law as Supreme Court precedence had commanded required that if the government was going to stop an individual from speaking in this particular context, that the gov-

ernment had to come to court immediately to get court approval of that step.

The statute instead required the individual who was restricted to come and challenge the restriction. We said no, government is acting. You have a right to speak. If you have a right to speak, you should know what the grounds for that right are and you should be told or brought to court to be given an opportunity to have that restriction lifted.

The other was a question of who wore the burden of supporting that restriction and the statute held that it was the individual who was being burdened who had to prove that there wasn't a reason for it.

The government agreed with our court that that burden violated Supreme Court precedent and the premises of freedom of speech and agreed that the burden should not be that way and we read the statute to explain what the proper burden was.

There is in all of these cases a balance and deference that is needed to be given to the executive and to Congress in certain situations. But we are a court that protects the Constitution and the rights of individuals under it and we must ensure and act with caution whenever reviewing a claim before us.

Senator FEINSTEIN. Thank you very much. One question on the Commerce clause in the Constitution.

That clause as you well know is used to pass laws in a variety of contexts, from protecting schools from guns to highway safety to laws on violent crime, child pornography, laws to prevent discrimination and to protect the environment, to name just a few examples.

When I questioned now Chief Justice Roberts, I talked about how for 60 years the court did not strike down a single Federal law for exceeding Congressional power under the Commerce clause.

In the last decade, however, the court has changed its interpretation of the Commerce clause and struck down more than three dozen case.

My question to the Chief Justice and now to you is do you agree with the direction the Supreme Court has moved in more narrowly interpreting Congressional authority to enact laws under the Commerce clause? General, not relating to any one case.

Judge SOTOMAYOR. No, I know. But the question assumes a prejudgment by me of what is an appropriate approach or not in a new case that may come before me as a Second Circuit judge or again if I'm fortunate enough to be a Justice on the Supreme Court. So it is not a case I can answer in a broad statement.

I can say that the court in reviewing congressional acts as it relates to an exercise of powers under the Commerce clause has looked at a wide variety of factors and considered that in different areas.

But there is a framework that those cases have addressed, and that framework would have to be considered with respect to each case that comes before the court.

Now, I know that you mentioned a number of different cases and if you have one in particular that concerns you, perhaps I could talk about what the framework is that the court established in those cases.

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Senator FEINSTEIN. I will give you one very quickly. Restricting the distance that somebody could bring a gun close to a school.

Judge SOTOMAYOR. The Gun Free Zone School Act which the court struck down with *Lopez*.

Senator FEINSTEIN. Right, *Lopez*.

Judge SOTOMAYOR. In that case and in some of its subsequent cases, the court was examining as I mentioned a wide variety of factors. They included whether the activity that the government was attempting to regulate was economic or non-economic, whether it was an area in which states traditionally regulated, whether the statute at issue had an interstate commerce provision as an element of the crime and then considered whether there was a substantial effect on commerce.

It looked at the congressional findings on that last element, the court did, and determined that there weren't enough in the factors that it was looking at to find that that particular statute was within Congress' powers.

That is the basic approach it has used to other statutes it has looked at. I would note that its most recent case in this area, the *Raich* case. The court did uphold a crime that was non-economic in the sense of that it involved just the possession of marijuana.

There it looked at the broader statute in which that provision was passed and the intent of Congress to regulate a market in illegal drugs.

So the broad principles established in those cases have been the court's precedent. Its most recent holding suggests that another factor purports to look at and each situation will provide a unique factual setting that the court will apply those principles to.

Senator FEINSTEIN. One last question on that point. One of the main concerns is that this interpretation which is much more restrictive now could impact important environmental laws, whether it be the Endangered Species Act, the Clean Air Act, the Clean Water Act or anything that we might even do with cap and trade.

Judge SOTOMAYOR. In fact there are cases pending before the courts raising those arguments. So those are issues that the courts are addressing. I can't speak much more further than that because of the restrictions on me.

Senator FEINSTEIN. I understand. It is just that Congress has to have the ability to legislate. In those general areas it is the Commerce clause that enables that legislation.

Now as you pointed out, you did revise the *Lopez* case and make specific findings and perhaps with more care toward the actual findings that bring about the legislative conclusion that we might be able to continue to legislate in these areas, but my hope is that you would go to the court with the sensitivity that this body has to be able to legislate in those areas. They involve all of the states and they are very important questions involving people's well being, control of the environment, the air, the water, et cetera.

Judge SOTOMAYOR. I do believe that in all of the cases the court has addressed this issue that it pays particular attention to congressional findings.

I know that individuals may disagree with what the court has done in individual cases, but it has never disavowed the impor-

tance of deference to legislative findings with respect to legislation that it is passing within its powers under the Constitution.

Senator FEINSTEIN. Thank you. I wish you best of luck. Thank you very much.

Senator SESSIONS. Mr. Chairman, I want to correct one thing. I said I had a letter earlier from Miguel Estrada. That was not correct. It wasn't a letter.

Chairman LEAHY. If we could have a copy of whatever you put in the record. I did send Mr. Estrada a note last night about my earlier statement.

Senator SESSIONS. Well, we both made an error talking about it.

Chairman LEAHY. We should remember that Mr. Estrada is not the nominee here, just as with all the statements made about President Obama's philosophy, his confirmation hearing was last November, not now. It is just you, Judge Sotomayor, and have a good lunch and we will come back. Who is next? Senator Grassley will be recognized when we come back in and we will start right at 2:00.

[Whereupon, at 12:32 p.m., the hearing was recessed.]

After Recess [2 p.m.]

Chairman LEAHY. Judge, I once, on a television interview, said if I could do anything I wanted to do in life, I said, well, if I ever have to work for a living I want to be a photographer, because I do. At which point, 2 minutes after the interview, the phone rings. My mom was still alive. She called. She said, don't you ever say that. They'll think you don't work!

[Laughter.]

Chairman LEAHY. Actually, I don't. I just recognize Senators here. You're doing all the work, and I appreciate how well you're doing it.

I turn, next, to Senator Grassley, and then after Senator Grassley, to Senator Feingold.

Senator Grassley.

Senator GRASSLEY. Yes. Welcome once again, Judge. I hope you had a good break. I appreciate very much the opportunity to ask you some questions.

I'd like to start off my round with some questions about your understanding of individual property rights and how they're protected by the Constitution. And let me say, as I observe property rights around the world, there's a big difference between developed nations and developing nations, and respect for private property has a great deal to do with the advancement of societies.

So I believe all Americans care about this right. They want to protect their homes and anything they own from unlawful taking by government. But this is also a right that is important for agricultural interests. As you know, besides being a Senator, I come from an agricultural State in Iowa and am a farmer as well. I'm sure that ordinary Americans, besides the economic interests that might be involved, are all very well concerned about where you stand on property rights.

So some of these issues have been discussed, but I want to go into a little more depth on *Kelo*, as an example. Could you explain what your understanding is of the state of the Fifth Amendment's Taking Clause jurisprudence after the Supreme Court decision in

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Kelo? Senator Brownback said this, aptly, when Chief Justice Roberts was before this committee: "Isn't it now the case that it is much easier for one man's home to become another man's castle?" Your general understanding of the Taking Clause.

Judge SOTOMAYOR. Good afternoon, Senator Grassley. And it's wonderful to see you again.

Senator GRASSLEY. Thank you.

Judge SOTOMAYOR. I share your view of the importance of property rights under the Constitution. As you know, I was a commercial litigator that represented national and international companies, and it wasn't even the case that it was a difference between developed and under-developed countries. Many of my clients who were from developed countries chose to, in part, to invest in the United States because of the respect that our Constitution pays to property rights in its various positions, in its various amendments.

With respect to the *Kelo* question, the issue in *Kelo*, as I understand it, is whether or not a State who had determined that there was a public purpose to the takings under the Takings Clause of the Constitution that requires the payment of just compensation when something is—is condemned for use by the government, whether the Takings Clause permitted the State, once it's made a proper determination of public purpose and use according to the law, whether the State could then have a private developer do that public act, in essence. Could they contract with a private developer to effect the public purpose? And so the holding, as I understood it in *Kelo*, was a question addressed to that issue.

With respect to the importance of property rights and the process that the State must use, I just point out to you that in another case involving that issue that came before me in a particular series of cases that I had involving a village in New York, that I—I ruled in favor of the property rights—the property owner's rights to challenge the process that the State had followed in his case and to hold that the State had not given him adequate notice of their intent to use the property—well, not adequate notice not to use the property, but to be more precise, that they hadn't given him an adequate opportunity to express his objection to the public taking in that case.

Senator GRASSLEY. Could I zero in on two words in the *Kelo* case? The Constitution uses the word "use", "public use", whereas the *Kelo* case talked about taking private property for public purpose. In your opinion, is public use and public purpose the same thing?

Judge SOTOMAYOR. Well, as I understood the Supreme Court's decision in *Kelo*, it was looking at the court's precedents over time and determining that its precedents had suggested that the two informed each other, that public purpose in terms of developing an area that would have a public improvement and use, that the two would inform each other.

Senator GRASSLEY. Do you believe that the Supreme Court overstepped their constitutional authorities when they went beyond the words of the Constitution, in other words, to the word "purpose", and thus expanded the ability of government to take an individual's private property? Because I think everybody believes that *Kelo* was an expansion of previous precedent there.

Judge SOTOMAYOR. I know that there are many litigants who have expressed that view, and in fact there's been many State legislators that have passed State legislation not permitting State governments to take in the situation that the Supreme Court approved of in *Kelo*.

The question of whether the Supreme Court overstepped the Constitution, as I've indicated, the court—at least my understanding of the majority's opinion—believed and explained why it thought not. I have to accept, because it is precedent, that as precedent and so I can't comment further than to say that I understand the questions and I understand what State legislatures have done——

Senator GRASSLEY. Okay.

Judge SOTOMAYOR. And would have to await another situation, or the court would, to apply the holding in that case.

Senator GRASSLEY. Then I think that answers my next question, but it was going to be to ask you whether you think that *Kelo* improperly undermines the constitutionally protected private property rights. I presume you're saying that you believe that's what the court said and it doesn't undermine property rights?

Judge SOTOMAYOR. I can only talk about what the—the court said in the context of that particular case and to explain that it is the court's holding, and so it's entitled to stare decisis effect and deference.

Senator GRASSLEY. Okay. Okay.

Judge SOTOMAYOR. But the extent of that has to await the next step, the next cases.

Senator GRASSLEY. Okay. Well, then maybe it would be fair for me to ask you, what is your understanding of the constitutional limitations then on government entity—any government entity taking land for a public purpose?

Judge SOTOMAYOR. Well, that was the subject of much discussion in the *Kelo* case among the Justices, and with certain Justices in the dissent, hypothesizing that the limits were difficult to see, the majority taking the position that there were limits. As I've indicated to you, opining on a hypothetical is very, very difficult for a judge to do.

Senator GRASSLEY. Okay.

Judge SOTOMAYOR. And as a potential—as a potential Justice on the Supreme Court, but more importantly as a Second Circuit Judge still sitting, I can't engage in a question that involves hypotheses.

Senator GRASSLEY. Let me ask you a couple obvious, then. Does the—does the Constitution allow for takings without any compensation?

Judge SOTOMAYOR. Well, it—the Constitution provides that when the government takes it has to pay compensation. As you know, the question of what constitutes an actual taking is a very complex one because there is a difference between taking a home and regulation that may or may not constitute a taking. So I'm not at all trying to not answer your question, Senator.

Senator GRASSLEY. Okay. Well, then let me ask you another question that maybe you can answer. Would you strike down a takings that provided no compensation at all?

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Judge SOTOMAYOR. Well, as I explained, if the taking violates the Constitution, I would be required to—to strike it down.

Senator GRASSLEY. Okay. Let me move on to the *Didden case* v. *Village of Port Chester*. It raised serious concerns about whether you understand the protection provided by the Constitution for individual property rights. In this case, Mr. Didden alleged that his local village government violated his Fifth Amendment rights when it took his property to build a national-chain drugstore. At a meeting with a government agency, another developer, Mr. Didden was told that he could give the developer $800,000 or a 50 percent interest in his pharmacy project, and if Mr. Didden did not accept either condition, the government would simply take his property.

Two days after Mr. Didden refused to comply with these demands, the government began proceeding to take his land. The District Court denied Mr. Didden his day in court, and your panel affirmed that decision in a five-paragraph opinion.

Why did you deny Mr. Didden his day in court? How can these facts—in essence, allegations of extortion—at least not warrant the opportunity to call witnesses to see if Mr. Didden was telling an accurate story?

Judge SOTOMAYOR. The *Didden* case presented a narrow issue that the court below——

[Interruption by the audience.]

Chairman LEAHY. Officer, remove that man immediately. We will stand in order. We will stand in order. Officers will remove that man.

[Laughter.]

Chairman LEAHY. Again, both Senator Sessions and I have said, as all previous Chairs and Ranking Members of this have said, this is a hearing of the U.S. Senate. The judge deserves respect. Senators asking questions deserve respect. I will order the removal of anyone who disrupts it, whether they are supportive of the nominee or opposed to the nominee, whether they are supportive of a position I take, or opposed to it. We will have the respect that should be accorded to both the nominee and to the U.S. Senate.

Senator SESSIONS. Thank you, Mr. Chairman. I think you've handled this well throughout, and I support you 100 percent.

Chairman LEAHY. Thank you.

Senator Grassley, we did stop the clock there so it did not take from your time.

Senator GRASSLEY. Thank you. People always say I have the ability to turn people on.

[Laughter.]

Senator GRASSLEY. Maybe you could start over again with your—with your sentence, please.

Judge SOTOMAYOR. Yes.

Chairman LEAHY. Now, where were we?

Judge SOTOMAYOR. I hope I remember where we were.

[Laughter.]

Senator GRASSLEY. Okay.

Judge SOTOMAYOR. Senator, the right of property owners to have their day in court is a very important one, but there is a corollary to the right to have your day in court, which is that you have to bring it to court in a timely manner.

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Senator GRASSLEY. Okay.

Judge SOTOMAYOR. Because people who are relying on your assertion of rights should know when you're going to make them. And so there's a doctrine called the Statute of Limitations that says if a party knows, or has reason to know, of their injury, then that party has to come in to court and raise their arguments within that statute that sets the limits of the action.

Senator GRASSLEY. I——

Judge SOTOMAYOR. In the *Didden* case—oh, I'm sorry.

Senator GRASSLEY. No. No, no, no.

Judge SOTOMAYOR. No, no, no.

Senator GRASSLEY. Please, I interrupted you. I shouldn't have interrupted you.

Judge SOTOMAYOR. No. I—I——

Senator GRASSLEY. Please go——

Judge SOTOMAYOR. In the *Didden* case——

Senator GRASSLEY. Yeah.

Judge SOTOMAYOR [continuing]. The question was whether Mr. Didden knew that the State was intending to take his property, and for what it, the State, claimed was a public use and that it had plans to have a private developer take his—they take his property and the private developer develop the land.

So there was a full hearing by the village on this question of whether there was a public use of the land. Mr. Didden didn't claim in the action before the courts that he didn't have notice of that hearing, he did not raise a challenge in that hearing to the public taking, and he didn't raise a challenge to the State's intent to have a private developer develop the land.

Now, in that case the developer was developing not just Mr. Didden's property, it was one piece of property in a larger development project and that larger development project had been based on the village's conclusions, from its very lengthy hearings in accordance with New York law, that the area was blighted and that the area needed economic development.

So, too, that issue became the issue before the court in the sense of, had Mr. Didden, knowing that he could be injured by the State's finding of public use and the State's decision to let a private developer develop this land, did he bring his lawsuit in a timely manner?

Senator GRASSLEY. Well——

Judge SOTOMAYOR. And the court below, and our court, ruled on that basis, that he hadn't because he had reason to know about the injury that could occasion—that could come to him.

Senator GRASSLEY. Well, since Mr. Didden's claim was based on conduct of the developer, how could he ever have filed a successful claim under the standard that you just mentioned?

Judge SOTOMAYOR. Mr. Didden alleged in his complaint that the private developer had extorted him. Extortion, under the law, is defined as "an unlawful demand for money". On this one piece of property within a larger development that the private developer was actively engaged in doing what he had contracted with the State to do, to revive the economic base by making investments in it, the private developer knew that Mr. Didden has his claims.

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The private developer had his agreement with the State, and so he was doing, in—at least this was the private developer's argument—what he was entitled to do, which is to say, we disagree. I'm claiming that I have a right under contract, you're claiming that you have a right under the Takings Clause. Let's settle this. I am going to lose X amount of money, so you pay me back for me not to do what I'm entitled to do under the law.

That, however, was—those were the claims of the parties in the action. In the end, the decision of the court was, if you believe that the takings of your property were not proper under the public use, under the Takings Clause, and you knew that the State had entered a contract with this private developer, then you had knowledge that you could be injured and you should have come to court earlier.

Senator GRASSLEY. Why was the situation in *Didden* not the kind of prohibited pretextual taking articulated in *Kelo*? How was this not some sort of form of extortion? And if there wasn't a pretext in the *Didden* case where the developer says "give me the money personally or we'll take your land", then what is a pretext?

Judge SOTOMAYOR. Well, as I—as I have described the case——

Senator GRASSLEY. Yes, I understand.

Judge SOTOMAYOR. The question comes up in the context of, what did Mr. Didden know? Did he have enough to know he could be injured? Was there no public use to which the property would apply, and what rights did the private developer have with the State? And so the extortion question came up in a legal context surrounding the relative rights of the parties. So as I said, extortion is a term, a legal term, which is someone demanding money with no lawful claim to it. I'm simplifying this because there's different definitions of extortion that apply to different situations.

Senator GRASSLEY. Sure.

Judge SOTOMAYOR. But in the context of this case, that's the simplest description of the case, I believe.

Senator GRASSLEY. The Second Circuit panel in *Didden* took over a year to issue its ruling, suggesting that you understood the novelty and importance of this case. Yet your opinion dealt with Mr. Didden's Fifth Amendment claim in just one paragraph. Did you believe that this was an ordinary takings case?

Judge SOTOMAYOR. Well, cases present claims by parties, and to the extent that Mr. Didden was raising claims that sounded in the issues the court was looking at in *Kelo*, certainly if *Kelo* had not come out and the court had to—for whatever reason, determined that somehow the *Kelo* decision affected the Statute of Limitations question, it may have had to reach the question.

But courts do often wait for Supreme Courts to act on cases that are pending in order to see if some form of its analysis changes or not, or inform whether a different look should be given to the case. But on the bottom-line issue, *Kelo* didn't change, in the judgment of the panel, the Statute of Limitations question.

Senator GRASSLEY. Okay. Regardless of the Statute of Limitations, I am curious why you didn't elaborate on your *Kelo* analysis, and why wasn't this opinion published?

Judge SOTOMAYOR. Well, *Kelo* didn't control the outcome, the Statute of Limitations did, so there was no basis to go into an

elaborate discussion of *Kelo*. The discussion of *Kelo*, really, was to say that we had understood the public taking issue that Mr. Didden had spent a lot of time in his argument about, but the ruling was based on the narrow Statute of Limitations ground so the *Kelo* discussion didn't need to be longer because it wasn't the holding of the case. The holding of the case was the Statute of Limitations.

Senator GRASSLEY. Okay. This—on another case, the Supreme Court reversed you 6:3 just 3 months ago in *Entergy Corporation* v. *Riverkeeper*. You had held that the Environmental Protection Agency, which is the agency with expertise, could not use a cost-benefit analysis in adopting regulations from the construction of water structures that had an impact on fish. Rather, you interpreted the Clean Water Act to hold that EPA had to require upgrades to technology that achieved the greatest reduction in adverse environmental impact, even when the cost of those upgrades were disproportionate to benefit.

Following long-established precedent, the Supreme Court held that the EPA was reasonable in applying a cost-benefit analysis when adopting regulations under the Clean Water Act. In reversing, the Supreme Court questioned your proper application of subtle law that agency regulations should be upheld so long as they're reasonable.

Under Chevron, agency interpretation of statutes are entitled to deference so long as they are reasonable, in other words, if they aren't capricious and arbitrary. Do you find it unreasonable that the EPA was willing to allow money to be spent in a cost-effective manner by not requiring billions of additional dollars to be spent to save a minimal number of additional fish?

Judge SOTOMAYOR. To be able to answer your question I would need to explain a little bit more about the background.

The Supreme Court has now ruled in that case that the conclusion of the Second Circuit would not be upheld on this narrow question, but the question the Second Circuit was looking at is, what did Congress intend or mean when, in the statute at issue, it said that the agency had to use the "best technology available to minimize an adverse environmental impact". Those were the statute's words. In looking at that, the Circuit applied general statutory construction principles, which is, in our judgment, what was the ordinary meaning of that? And——

Senator GRASSLEY. Are you saying you're not bound by Chevron, then?

Judge SOTOMAYOR. Oh, no. Absolutely not.

Senator GRASSLEY. Okay. Okay. Go ahead.

Judge SOTOMAYOR. Chevron speaks to agency action or interpretation, but ultimately the task of a court is to give deference to what Congress wants. That's the very purpose of Congress' legislation. And so what the court was trying to do there was to see if the agency's interpretation, in light of the words of the statute and how Congress has used cost-benefit analysis in other statutes in this area, and determine what Congress intended. And so we looked at the language and it said just what it said, "best technology available to minimize adverse environmental impact".

We looked at how Congress used cost-benefit in similar statutes and similar provisions—or I shouldn't say similar, in other provisions. We noted that under the statutes at issue when Congress wanted the agency to use cost-benefit analysis, it said so. In this provision, Congress was silent but the language, in the panel's judgment, was the language.

And so in trying to discern what Congress' intent was, we came to the conclusion not that cost had no role in the agency's evaluation, but that Congress had specified a more limited role that cost-benefit. We described it as cost-effectiveness. And, in fact, we voted to—voted past our decision, asked and sent the case back to describe to us exactly what the agency had done, and why. Had it used cost-benefit? Had it used cost-effectiveness? But cost was always going to be a part of what the agency could consider. The issue was more, in what approach did Congress' words intend? And so agency deference is important, but Congress is the one who writes the statutes so you have to start as a court with, what did Congress intend?

Senator GRASSLEY. It seems to me like you're saying, in ignoring the expertise of the statute, that the agency was being arbitrary and capricious in——

Judge SOTOMAYOR. Not—not at all, sir. We were trying to look at the statute as a whole and determine what Congress meant by words that appeared to say that "best technology available had to minimize environmental effect".

Senator GRASSLEY. Okay.

Judge SOTOMAYOR. As I said, that does have—and as our opinion said—considerations of cost. But given that Congress didn't use the cost-benefit—give the agency cost-benefit approval in the terms of this particular provision while it had in others, we determined that the agency and precedent interpreting provisions limited the use of cost-benefit analysis.

Senator GRASSLEY. In another 2004 administrative law case dealing with environmental issues, *NRDC* v. *Abraham*, you voted to strike down a Bush administration regulation and reinstate a Clinton administration environmental rule that had never even become final. In this case it appears you also fairly narrowly interpreted Chevron deference when striking down EPA adoptions of reasonable regulations.

If you are elevated to the Supreme Court, do you intend to replace an agency's policy decisions with your own personal policy opinions as it appears you did in both—in the *Abraham* case?

Judge SOTOMAYOR. No, sir. In that case we were talking about, and deciding, an issue of whether the agency had followed its own procedures in changing policy. We weren't substituting our judgment for that of the agency, we were looking at the agency's own regulations as to the procedure that it had to follow in order to change an approach by the agency. So, that was a completely different question. With respect to deference to administrative bodies, in case after case where Chevron deference required deference, I have voted in favor of upholding administrative—executive and administrative decisions.

Senator GRASSLEY. Okay. This will probably have to be my last question.

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Since 2005, you have been presiding judge on the panel of an appeal filed by eight States and environmental groups, arguing that greenhouse gases are a public nuisance that warrant a court-imposed injunction to reduce emissions. Your panel, in *Connecticut* v. *American Electric Power*, has sat on that case for 45 months, or nearly three times the average of the Second Circuit. Why, after 4 years, have you failed to issue a decision in this case?

Judge SOTOMAYOR. The American Bar Association rule on Code of Conduct does not permit me to talk about a pending case. I can talk to you about one of the delays for a substantial period of time in that decision, and it was that the Supreme Court was considering a case, the *Massachusetts* case, that had some relevancy, or at least had relevancy to the extent that the panel asked the parties to brief further the applicability of that case to that decision.

Senator GRASSLEY. Okay. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, Senator Grassley.

Senator Feingold.

Senator FEINGOLD. Judge, let me first say I don't mind telling you how much I'm enjoying listening to you, both your manner and your obvious tremendous knowledge and understanding of the law. In fact, I am enjoying it so much that I hope when you go into these deliberations about cameras in the courtroom, that you consider the possibility that I, and other Americans, would like the opportunity to observe your skills for many years to come in the comfort of our family rooms and living rooms. I think it's a——

[Laughter.]

Judge SOTOMAYOR. You were a very good lawyer, weren't you, Senator?

[Laughter.]

Senator FEINGOLD. But I'm not going to ask you about that one now; others have covered it. Let me get into a topic that I discussed at length with the two most recent Supreme Court nominees, Chief Justice Roberts and Justice Alito, and that's the issue of executive power.

In 2003, you spoke at a law school class about some of the legal issues that have arisen since 9/11. You started your remarks with a moving description of how Americans stood together in the days after those horrific events, and how people from small Midwestern towns and people from New York City found "their common threads as Americans," you said.

As you said in that speech, while it's hard to imagine that something positive could ever result from such a tragedy, there was a sense in those early days of coming together as one community that we would all help each other get through this. It was something that none of us had ever experienced before, and something I've often discussed as well.

But what I have also said is that, in the weeks and months that followed, I was gravely disappointed that the events of that awful day, the events that had brought us so close together as one nation, were sometimes used, Judge, to justify policies that departed so far from what America stands for.

So I'm going to ask you some questions that I asked now-Chief Justice Roberts at his hearing. Did that day, 9/11, change your

view of the importance of individual rights and civil liberties and how they can be protected?

Judge SOTOMAYOR. September 11th was a horrific tragedy, for all of the victims of that tragedy and for the nation. I was in New York. My home is very close to the World Trade Center. I spent days not being able to drive a car into my neighborhood because my neighborhood was used as a staging area for emergency trucks.

The issue of the country's safety and the consequences of that great tragedy are the subject of continuing discussion among not just Senators, but the whole nation. In the end, the Constitution, by its terms, protects certain individual rights. That protection is often fact-specific. Many of its terms are very broad: so what's an unreasonable search and seizure? What are other questions are fact-specific.

But in answer to your specific question, did it change my view of the Constitution, no, sir. The Constitution is a timeless document. It was intended to guide us through decades, generation after generation, to everything that would develop in our country. It has protected us as a nation, it has inspired our survival. That doesn't change.

Senator FEINGOLD. I appreciate that answer, Judge.

Are there any elements of the government's response to September 11th that you think, maybe 50 or 60 years from now, we as a nation will look back on with some regret?

Judge SOTOMAYOR. I'm a historian by undergraduate training. I also love history books. It's amazing how difficult it is to make judgments about one's current positions. That's because history permits us to look back and to examine the actual consequences that have arisen, and then judgments are made. As a Judge today, all I can do, because I'm not part of the legislative branch—it's the legislative branch who has the responsibility to make laws consistent with that branch's view of constitutional requirements in its powers. It's up to the President to take his actions, and then it's up to the court to just examine each situation as it arises.

Senator FEINGOLD. I can understand some hesitance on this. But the truth is that courts are already dealing with these very issues. The Supreme Court itself has now struck down a number of post-9/11 policies, and you yourself sat on a panel that struck down one aspect of the National Security Letter statutes that were expanded by the PATRIOT Act.

So I'd like to hear your thoughts a bit on whether you see any common themes or important lessons in the court's decisions in *Rasul*, *Hamdi*, *Hamdan*, and *Boumediene*. What is your general understanding of that line of cases?

Judge SOTOMAYOR. That the court is doing its task as judges. It's looking, in each of those cases, at what the actions are of either the military, and what Congress has done or not done, and applied constitutional review to those actions.

Senator FEINGOLD. And is it fair to say, given that line of cases, that we can say that, at least as regards the Supreme Court, it believes mistakes were made with regard to post-9/11 policies? Because in each of those cases there was an overturning of a decision made either by the Congress or the executive.

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Judge SOTOMAYOR. I smiled only because that's not the way that judges look at that issue. We don't decide whether mistakes were made, we look at whether action was consistent with constitutional limitations or statutory limitations.

Senator FEINGOLD. And in each of those cases there was a problem with either a constitutional violation or a problem with a congressional action, right?

Judge SOTOMAYOR. Yes.

Senator FEINGOLD. That's fine.

As I'm sure you are aware, many of us on the Committee discussed at length with the prior Supreme Court nominees the framework for evaluating the scope of executive power in the national security context. You already discussed this at some length with Senator Feinstein, including Justice Jackson's test in the *Youngstown* case.

And I and others on the Committee are deeply concerned about the very broad assertion of executive power that has been made in recent years—an interpretation that has been used to authorize the violation of clear statutory prohibitions—from the Foreign Intelligence Surveillance Act, to the anti-torture statute.

You discussed with Senator Feinstein the third category, the lowest ebb category in the *Youngstown* framework, and that's where, as Justice Jackson said, the President's power is at its lowest ebb because Congress has, as you well explained it, specifically prohibited some action.

I take the point of careful scholars who argue that, hypothetically speaking, Congress could conceivably pass a law that is plainly unconstitutional. For example, if Congress passed a law that said that somebody other than the President would be the Commander-in-Chief of a particular armed conflict and not subject to Presidential direction, presumably that would be out of bounds.

But setting aside such abstract hypotheticals, as far as I'm aware—and I'm pretty sure this is accurate—the Supreme Court has never relied on the *Youngstown* framework to conclude that the President may violate a clear statutory prohibition. In fact, in *Youngstown* itself, the court rejected President Truman's plan to seize the steel mills.

Now, is that your understanding of the Supreme Court precedent in this area?

Judge SOTOMAYOR. I haven't had cases—or a sufficient a number of cases—in this area to say that I can remember every Supreme Court decision on a question related to this topic. As you know, in the *Youngstown* case, the court held that the President had not acted within his powers in seizing the steel mills in the particular situation existing before him at the time.

But the question or the framework doesn't change, which is, each situation would have to be looked at individually because you can't determine ahead of time with hypotheticals what a potential constitutional conclusion will be. As I may have said to an earlier question, academic discussion is just that. It's presenting the extremes of every issue and attempting to debate about, on that extreme of the legal question, how should the judge rule?

Senator FEINGOLD. I'll concede that point, Judge. I mean, given your tremendous knowledge of the law and your preparation, I'm

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pretty sure you would have run into any example of where this had happened. And I just want to note that I am unaware of—and if anybody is aware of an example of where something was justified under the President's power under the lowest ebb, I'd love to know about it. But I think that's not a question of a hypothetical, that's a factual question about what the history of the case law is.

Judge SOTOMAYOR. I can only accept your assumption. As I said, I—I have not had sufficient cases to—to—to have looked at what I know in light of that particular question that you're posing.

Senator FEINGOLD. All right.

In August 2002, the Office of Legal Counsel at the Department of Justice issued two memoranda considering the legal limits on interrogation of terrorism detainees. One of these contained a detailed legal analysis of the criminal law prohibiting torture. It concluded, among other things, that enforcement of the anti-torture statute would be an unconstitutional infringement on the President's Commander-in-Chief authority.

Judge, that memo did not once cite to the *Youngstown* case or to Justice Jackson's opinion in *Youngstown*. We just learned on Friday, in a new Inspector General report, that a November 2001 OLC memo providing the legal basis for the so-called Terrorist Surveillance Program also did not cite *Youngstown*.

Now, I don't think you would have to be familiar with those memos to answer my question. Does it strike you as odd that a complex legal analysis of the anti-torture statute, or the FISA Act, that considers whether the President could violate those statutes would not even mention the *Youngstown* case?

Judge SOTOMAYOR. I have never been an advisor to a President. That's not a function I have served, so I don't want to comment on what was done or not done by those advisors in that case. And it's likely that some question—and I know some are pending before the court in one existing case, so I can't comment. All I can—on whether that's surprising or not. I can only tell you that I would be surprised if a court didn't consider the *Youngstown* framework in a decision involving this question because it is—that case's framework is how these issues are generally approached.

Senator FEINGOLD. Good. I appreciate that answer.

Let me go to a topic that Senator Leahy and Senator Hatch discussed with you at some length: the Second Amendment.

I have long believed that the Second Amendment grants citizens an individual right to own firearms. Frankly, I was elated when the court ruled in *Heller* last year, and unified what I think had been a mistake all along and recognized it as an individual right.

The question of whether Second Amendment rights are incorporated in the Fourteenth Amendment's guarantee of due process of law, and therefore applicable to the states, as you pointed out, was not decided in *Heller*. A Supreme Court decision in 1886 specifically held that the Second Amendment applies only to the federal government.

So in my view, it is unremarkable that, as a Circuit Court judge in the *Maloney* case, you would follow applicable Supreme Court precedent that directly controlled the case rather than apply your own guess of where the court may be headed after *Heller*. In other

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words, I think that's would be an unfair criticism of a case, and I think you needed to rule that way, given the state of the law.

But let me move on from that, because many of my constituents would like to know more about how you would make such a decision as a member of the highest court, so I want to follow up on that. First of all, am I right that if you're confirmed and the court grants cert in the *Maloney* case, you would have to recuse yourself from its consideration?

Judge SOTOMAYOR. Yes, sir. My own judgment is that it would seem odd, indeed, if any Justice would sit in review of a decision that they authored. I would think that the Judicial Code of Ethics that govern recusals would suggest and command that that would be inappropriate.

Senator FEINGOLD. Fair enough.

What about if one of the other pending appeals comes to the court, such as the Seventh Circuit decision in *NRA* v. *Chicago*, which took the same position as your decision in *Maloney*? Would you have to recuse yourself from that one as well?

Judge SOTOMAYOR. There are many cases in which a Justice, I understand, has decided cases as a Circuit Court judge that are not the subject of review that raise issues that the Supreme Court looks at later. What I would do in this situation, I would look at the practices of the Justices to determine whether or not I—that would counsel to—to recuse myself. I would just note that many legal issues, once they come before the court, present a different series of questions than the one one addresses as a Circuit Court.

Senator FEINGOLD. Well, let's assume you were able to sit on one of these cases or a future case that deals with this issue of incorporating the right to bear arms as applied to the states.

How would you assess whether the Second Amendment, or any other amendment that has not yet been incorporated through the Fourteenth Amendment, should be made applicable to the States? What's the test that the Supreme Court should apply?

Judge SOTOMAYOR. That's always the issue that litigants are arguing in litigation. So to the extent that the Supreme Court has not addressed this question yet, and there's a strong likelihood it may in the future, I can't say to you that I've prejudged the case and decided this is exactly how I'm going to approach it in that case.

Senator FEINGOLD. But what would be the general test for incorporation?

Judge SOTOMAYOR. Well——

Senator FEINGOLD. I mean, what is the general principle?

Judge SOTOMAYOR. One must remember that the Supreme Court's analysis in its prior precedent predated its principles of—or the development of cases discussing the incorporation doctrine. Those are newer cases, and so the framework established in those cases may well inform.

Senator FEINGOLD. Okay.

Judge SOTOMAYOR. As I said, I—I am hesitant of prejudging and saying they will or won't, because that will be what the parties are going to be arguing in the litigation.

Senator FEINGOLD. Well, it——

Judge SOTOMAYOR. But it is—I'm sorry.

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Senator FEINGOLD. No, no. Go ahead.

Judge SOTOMAYOR. No. I was just suggesting that I do recognize that the court's more recent jurisprudence in incorporation with respect to other amendments has taken—has been more recent, and those cases, as well as stare decisis and a lot of other things, will inform the court's decision on how it looks at a new challenge to a State regulation.

Senator FEINGOLD. And, of course, it is true that despite that trend that you just described, the Supreme Court has not incorporated several constitutional amendments as against the states, but most of those are covered by constitutional provisions and state constitutions, and the Supreme Court decisions that refuse to—incorporate the federal constitutional protections like the case involving the Second Amendment, a 19th century case, date back nearly a century.

So after *Heller*, doesn't it seem almost inevitable that when the Supreme Court again considers whether the Second Amendment applies to the states, it will find the individual right to bear arms to be fundamental, which is a word that we've been talking about today? After all, Justice Scalia's opinion said this: "By the time of the founding, the right to have arms—bear arms had become fundamental for English subjects."

Blackstone, whose works we have said constituted the preeminent authority on English law for the founding generation, cited the arms provision in the Bill of Rights as one of the fundamental rights of Englishmen. "It was," he said, "the natural right of resistance and self-preservation and the right of having and using arms for self-preservation and defense."

Judge SOTOMAYOR. As I said earlier, you are a very eloquent advocate. But a decision on what the Supreme Court will do and what's inevitable will come up before the Justices in great likelihood in the future, and I feel that I'm threading the line——

Senator FEINGOLD. Okay.

Judge SOTOMAYOR [continuing]. Of answering a question about what the court will do in a case that may likely come before it in the future.

Senator FEINGOLD. Let me try it in a more—less lofty way then.

[Laughter.]

Senator FEINGOLD. You talked about nunchucks before.

Judge SOTOMAYOR. Okay.

[Laughter.]

Senator FEINGOLD. That's an easier kind of case. But what *Heller* was about, was that there was a law here in DC that said you couldn't have a handgun if you wanted to have it in your house to protect yourself. It is now protected under the Constitution that the citizens of the District of Columbia can have a handgun.

Now, what happens if we don't incorporate this right and the people of the State of Wisconsin—let's say we didn't have a constitutional provision in Wisconsin. We didn't have one until the 1980s, when I and other State Senators proposed that we have a right to bear arms provision. But isn't there a danger here that if you don't have this incorporated against the States, that we'd have this result where the citizens of DC have a constitutional right to have a handgun, but the people of Wisconsin might not have that

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right? Doesn't that make it almost inevitable that you would have to apply this to the states?

Judge SOTOMAYOR. It's a question the court will have to consider.

Senator FEINGOLD. I appreciate your patience.

Judge SOTOMAYOR. And it's meaning——

[Laughter.]

Judge SOTOMAYOR. Senator, the Supreme Court did hold that there is, in the Second Amendment, an individual right to bear arms, and that is its holding and that is the court's decision. I fully accept that. In whatever new cases come before me that don't involve incorporation as a Second Circuit judge, I would have to consider those—those issues in the context of a particular State regulation of firearms or other instruments.

Senator FEINGOLD. I accept that answer.

I'm going to move on to another area, what I'd like to call "secret law", that is, the development of controlling legal authority that has direct effects on the rights of Americans but that is done entirely in secret. There are two strong examples of that. First, the FISA court often issues rulings containing substantive interpretation of the Foreign Intelligence Surveillance Act, or FISA, that with very few exceptions have been kept from the public, and until a recent change in the law, many of them were not available to the full Congress either, meaning that members had been called upon to vote on statutory changes without knowing how the court had interpreted the existing statute. Second, the Office of Legal Counsel at the Justice Department issues legal opinions that are binding on the executive branch, but are also often kept from the public and Congress.

Now, I understand that these legal documents may sometimes contain classified operational details that would need to be redacted, but I'm concerned that the meaning of a law like FISA, which directly affects the privacy rights of Americans, could develop entirely in secret. I think it flies in the face of our traditional notion of an open and transparent American legal system.

Does this concern you at all? Can you say a little bit about the importance of the law itself being public?

Judge SOTOMAYOR. Well, the question for a judge as a judge would look at it, is to examine, first, what policy choices the Congress is making in its legislation. It is important to remember that some of the issues that you are addressing were part of congressional legislation as to how FISA would operate. And as you just said, there's been amendments subsequent to that, and so a court would start with what Congress has—what Congress has done and whether the acts of the other branch of government is consistent with that or not.

The issue of whether, and how, a particular document would affect national security or affect questions of that nature would have to be looked at in—with respect to an individual case. And as I understand it, there are review processes in the FISA procedure. I'm not a member of that court, so I am not intimately familiar with those procedures, but I know that this is part of the review process there, in part.

And so when you ask concern, there is always some attention paid to the issue of—of the public reviewing or looking at the ac-

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tions that a court is taking, but that also is tempered with the fact that there are situations in which complete openness can't be had, for a variety of different reasons.

So courts—I did as a District Court judge and I have as a Circuit Court judge—looked at situations in which judges have to have determined whether juries should be empaneled anonymously, and in those situations we do consider the need for public actions, but we also consider that there may be, in some individual situations, potential threats to the safety of jurors that require an anonymous jury.

I am attempting to speak about this as—it's always a question of balance——

Senator FEINGOLD. What most concerns——

Judge SOTOMAYOR [continuing]. And you have to look at, first, what Congress says about that.

Senator FEINGOLD. The concerns you just raised, don't they have to do more with the facts that shouldn't be revealed than the legal basis? It's sort of hard for me to imagine a threat to national security by revealing properly redacted documents as simply referred to the legal basis for something. Isn't there a distinction between those two things?

Judge SOTOMAYOR. I can't—it's difficult to speak from the abstract, in large measure, because as I explained, I've never been a part of the FISA court and so I've never had the experience of reviewing what those documents are and whether they, in fact, can be redacted or not without creating risk to national security. One has to think about what the—what explanations the government has. There's so many issues a court would have to look at.

Senator FEINGOLD. Let me go to something completely different. There's been a lot of talk about this concept of empathy. In the context of your nomination, a judge's ability to feel empathy does not mean the judge should rule one way or another, as you well explained. But I agree with President Obama that it's a good thing for our country for judges to understand the real-world implications of their decisions and the effects on regular Americans, and to seek to understand both sides of an issue.

Judge, your background is remarkable. As you explained yesterday, your parents came to New York from Puerto Rico during World War II, and after your father died your mother raised you on her own in a housing project in the South Bronx. You are a lifelong New Yorker and a Yankee fan, as I understand it. But many Americans don't live in big cities. Many of my constituents live in rural areas and small towns—and they root for the Brewers and the Packers. Some might think that you don't have a lot in common with them.

What can you tell me about your ability as a judge to empathize with them—to understand the everyday challenges of rural and small-town Americans and how Supreme Court decisions might affect their lives?

Judge SOTOMAYOR. Yes, I live in New York City and it is a little different than other parts of the country, but I spend a lot of time in other parts of the country. I've visited a lot of States. I've stayed with people who do all types of work. I've lived on—not lived, I've visited and vacationed on farms. I've lived and vacationed in moun-

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taintops. I've lived and vacationed in all sorts—not lived. I'm using the wrong word. I've visited all sorts of places.

In fact, one of my habits is, when I travel somewhere new, I try to find a friend I know to stay with them.

And it's often not because I can't afford a hotel—usually the people who are inviting me would be willing to pay—but it's because I do think it's important to know more than what I live and to try to stay connected to people and to different experiences.

I don't think that one needs to live an experience without appreciating it, listening to it, watching it, reading about it, all of those things, experiencing it for a period of time, help judges in appreciating the concerns of other experiences that they don't personally have. And as I said, I try very, very hard to ensure that, in my life, I introduce as much experience with other people's lives as I can.

Senator FEINGOLD. I realize I'm jumping back and forth to these issues, but the last one I want to bring up has to do with wartime Supreme Court decisions like *Korematsu* that we look back at with some bewilderment. I'm referring, of course, *Korematsu* v. *United States*, the decision in which the Supreme Court upheld the government policy to round up and detain more than 100,000 Japanese-Americans during World War II.

It seems inconceivable that the U.S. Government would have decided to put huge numbers of citizens in detention centers based on their race, and yet the Supreme Court allowed that to happen. I asked Chief Justice Roberts about this, and I'll ask you as well: Do you believe that *Korematsu* was wrongly decided?

Judge SOTOMAYOR. It was, sir.

Senator FEINGOLD. Does a judge have a duty to resist the kind of war-time fears that people understandably felt during World War II, which likely played a role in the 1944 *Korematsu* decision?

Judge SOTOMAYOR. A judge should never rule from fear. A judge should rule from law and the Constitution. It is inconceivable to me today that a decision permitting the detention/arrest of an individual solely on the basis of their race would be considered appropriate by our government.

Senator FEINGOLD. Now, some of the great justices in the history of our country were involved in that decision. How does a judge resist those kind of fears?

Judge SOTOMAYOR. One hopes, by having the wisdom of a Harlan in *Plessy*, by having the wisdom to understand, always, no matter what the situation, that our Constitution has held us in good stead for over 200 years and that our survival depends on upholding it.

Senator FEINGOLD. Thank you, Judge.

Chairman LEAHY. Thank you. Thank you very much, Senator Feingold.

Senator KYL. Thank you, Mr. Chairman.

Could I return briefly to a series of questions that Senator Feingold asked at the very beginning relating to the *Maloney* decision relating to the Second Amendment?

Judge SOTOMAYOR. Sure. Good afternoon, by the way.

Senator KYL. I am sorry?

Judge SOTOMAYOR. Good afternoon, by the way.

Senator KYL. Yes, good afternoon. You had indicated, of course, if that case were to come before the Court, under the recusal statute you would recuse yourself from participating in the decision.

Judge SOTOMAYOR. In that case, yes.

Senator KYL. Yes, and you are aware that—or maybe you are not, but there are two other decisions both dealing with the same issue of incorporation, one in the Ninth Circuit and one in the Seventh Circuit. The Seventh Circuit decided the case similarly to your circuit. The Ninth Circuit has decided it differently, although that case is on rehearing.

If the Court should take all three—let's assume the Ninth Circuit stays with its decision so you do have the conflict among the circuits, and the Court were to take all three decisions at the same time, I take it the recusal issue would be the same. You would recuse yourself in that situation.

Judge SOTOMAYOR. I haven't actually been responding to that question, and I think you're right proposing it. I clearly understand that recusing myself from Maloney would be appropriate. The impact of the joint hearing by the Court would suggest that I would have to apply the same principle, but as I indicated, issues of recusal are left to the discretion of Justices because their participation in cases is so important. It is something that I would discuss with my colleagues and follow their practices with respect to a question like this.

Senator KYL. Sure. I appreciate that, and I agree with your reading of the law; 28 U.S.C. Section 455 provides, among other things, and I quote, "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." And that, of course, raises the judge's desire to consult with others and ensure that impartiality is not questioned by participating in a decision.

I would think—and I would want your responses. I would think that there would be no difference if the *Maloney* case is decided on its own or if it is decided as one of two or three other cases all considered by the Court at the same time.

Judge SOTOMAYOR. As I said, that is an issue that is different than the question that was posed earlier——

Senator KYL. Would you not be willing to make an unequivocal commitment on that at this time?

Judge SOTOMAYOR. It's impossible to say I will recuse myself on any case involving *Maloney*. How the other cert. is granted and whether joint argument is presented or not, I would have to await to see what happened.

Senator KYL. Let me ask you this: Suppose that the other two cases are considered by the Court, your circuit is not involved; or that the Court takes either the Seventh or Ninth Circuit and decides the question of incorporation of the Second Amendment. I gather that in subsequent decisions you would consider yourself bound by that precedent or that you would consider that to be the decision of the Court on the incorporation question.

Judge SOTOMAYOR. Absolutely. The decision of the Court in *Heller* is—its holding has recognized an individual right to bear arms as applied to the Federal Government.

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Senator KYL. If as a result—I mean, that was the matter before your circuit, and if as a result of the fact that the Court decided one of the other or both of the other two circuit cases and resolved that issue so that the same matter would have been before the Court, would it not also make sense for you to indicate to this Committee now that should that same matter come before the Court and you are on the Court, that you would necessarily recuse yourself from its consideration?

Judge SOTOMAYOR. I didn't quite follow the start of your question, Senator. I want to answer precisely.

Senator KYL. Sure.

Judge SOTOMAYOR. But I'm not quite sure——

Senator KYL. You agreed with me that if the Court considered either the Seventh or Ninth Circuit or both decisions and decided the issue if incorporation of the Second Amendment to make it applicable to the States, you would consider that binding precedent of the Court. That, of course, was the issue in *Maloney*. As a result, since it is the same matter that you resolved in *Maloney*, wouldn't you have to, in order to comply with the statute, recuse yourself if either or both or all three of those cases came to the Court?

Judge SOTOMAYOR. Senator, as I indicated, clearly the statute would reach *Maloney*. How I would respond to the Court taking certiorari in what case and whether it held—it took certiorari in one or all three is a question that I would have to await to see what the Court decides to do and what issues it addresses in its grant of certiorari.

There is also the point that whatever comes before the Court will be on the basis of a particular State statute, which might involve other questions. It's hard to speak about recusal in the abstract because there's so many different questions that one has to look at.

Senator KYL. And I do appreciate that, and I appreciate that you should not commit yourself to a particular decision in a case. If the issue is the same, however, it is simply the question of incorporation, that is a very specific question of law. It does not depend upon the facts. I mean, it did not matter that in your case you were dealing with a very dangerous arm but not a firearm, for example. You still considered the question of incorporation.

Well, let me just try to help you along here. Both Justice Roberts and Justice Alito made firm commitments to this Committee. Let me tell you what Justice Roberts said. He said that he would recuse him, and I am quoting now, "from matters in which he participated while a judge on the court of appeals matters." And since you did acknowledge that the incorporation decision was the issue in your Second Circuit case, and the question that I asked was whether if that is the issue from the Ninth and Seventh Circuits, you would consider yourself bound by that. It would seem to me that you should be willing to make the same kind of commitment that Justice Roberts and Justice Alito did.

Judge SOTOMAYOR. I didn't understand their commitment to be broader than what I have just said, which is that they would certainly recuse themselves from any matter. I understood it to mean any case that they had been involved in as a circuit judge. If their practice was to recuse themselves more broadly, then obviously I would take counsel from what they did. But I believe, if my mem-

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ory is serving me correctly—and it may not be, but I think so—that Justice Alito as a Supreme Court Justice has heard issues that were similar to ones that he considered as a circuit court judge.

So as I have indicated, I will take counsel from whatever the practices of the Justices are with the broader question of what——

Senator KYL. I appreciate that. "Issues which are similar" is different, though, from "an issue which is the same." And I would just suggest that there would be an appearance of impropriety. If you have already decided the issue of incorporation one way, that is the same issue that comes before the Court, and then you, in effect, review your own decision, that to me would be a matter of inappropriate—and perhaps you would recuse yourself. I understand your answer.

Let me ask you about what the President said and I talked about in my opening statement, whether you agree with him. He used two different analogies. He talked once about the 25 miles, the first 25 miles of a 26-mile marathon, and then he also said in 95 percent of the cases, the law will give you the answer, and the last 5 percent, legal process will not lead you to the rule of decision; the critical ingredient in those cases is supplied by what is in the judge's heart.

Do you agree with him that the law only takes you the first 25 miles of the marathon and that that last mile has to be decided what's in the judge's heart?

Judge SOTOMAYOR. No, sir. That's—I don't—wouldn't approach the issue of judging in the way the President does. He has to explain what he meant by judging. I can only explain what I think judges should do, which is judges can't rely on what's in their heart. They don't determine the law. Congress makes the laws. The job of a judge is to apply the law. And so it's not the heart that compels conclusions in cases. It's the law. The judge applies the law to the facts before that judge.

Senator KYL. I appreciate that. And has it been your experience that every case, no matter how tenuous it has been, and every lawyer, no matter how good their quality of advocacy, that in every case every lawyer has had a legal argument of some quality to make, some precedent that he cited. It might not be the Supreme Court. It might not be the court of appeals. It might be a trial court somewhere. It might not even be a court precedent. It may be a law review article or something. But have you ever been in a situation where a lawyer said, "I don't have any legal argument to make, Judge. Please go with your heart on this, or your gut"?

Judge SOTOMAYOR. Well, I've actually had lawyers say something very similar to that.

[Laughter.]

Judge SOTOMAYOR. I have had lawyers where questions have been raised about the legal basis of their argument. I had one lawyer throw up his hands and say, "But it's just not right."

"But it's just not right" is not what judges consider. What judges consider is what the law says.

Senator KYL. You have always been able to find a legal basis for every decision that you have rendered as a judge.

Judge SOTOMAYOR. Well, to the extent that every legal decision has—this is what I do in approaching legal questions, is I look at

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the law that's being cited. I look at how precedent informs it. I try to determine what those principles are of precedent to apply to the facts in the case before me and then do that.

And so one—that is a process. You use——

Senator KYL. Right, and all I am asking—this is not a trick question.

Judge SOTOMAYOR. No. I wasn't——

Senator KYL. I can't imagine that the answer would be otherwise than, yes, you have always found some legal basis for ruling one way or the other, some precedent, some reading of a statute, the Constitution, or whatever it might be. You haven't ever had to throw up your arms and say, "I can't find any legal basis for this opinion, so I am going to base it on some other factor."

Judge SOTOMAYOR. When you say, use the words "some legal basis," it suggests that a judge is coming to the process by saying I think the result should be here——

Senator KYL. No, no. I——

Judge SOTOMAYOR.—and so I'm going to use something to get there.

Senator KYL. No. I am not trying to infer that any of your decisions have been incorrect or that you have used an inappropriate basis. I am simply confirming what you first said in response to my question about the President; that in every case the judge is able to find a basis in law for deciding the case. Sometimes there are not cases directly on point. That is true. Sometimes it may not be a case from your circuit. Sometimes it may be somewhat tenuous, and you may have to rely upon authority like scholarly opinions in law reviews or whatever.

But my question was really very simple to you: Have you always been able to have a legal basis for the decisions that you have rendered and not have to rely upon some extra-legal concept such as empathy or some other concept other than a legal interpretation or precedent?

Judge SOTOMAYOR. Exactly, sir. We apply law to facts. We don't apply feelings to facts.

Senator KYL. Right. Now—thank you for that.

Let me go back to the beginning. I raise this issue about the President's interpretation because he clearly is going to seek nominees to this Court and other courts that he is comfortable with, and that would imply who have some commonality with his view of the law and judging. It is a concept that I also disagree with, but in this respect, it is—the speeches that you have given and some of the writings that you have engaged in have raised questions because they appear to fit into what the President has described as this group of cases in which the legal process or the law simply doesn't give you the answer. And it is in that context that people have read these speeches and have concluded that you believe that gender and ethnicity are an appropriate way for judges to make decisions in cases. That is my characterization.

I want to go back through the—I have read your speeches, and I have read all of them several times. The one I happened to mark up here is the Seton Hall speech, but it was virtually identical to the one at Berkeley. You said this morning that the point of those speeches was to inspire young people, and I think there is some in

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your speeches that certainly is inspiring. In fact, it is more than that. I commend you on several of the things that you talked about, including your own background, as a way of inspiring young people. Whether they are minority or not, and regardless of their gender, you said some very inspirational things to them. And I take it that, therefore, in some sense your speech was inspirational to them.

But in reading these speeches, it is inescapable that your purpose was to discuss a different issue, that it was to discuss—in fact, let me put it in your words. You said, "I intend to talk to you about my Latina identity, where it came from, and the influence I perceive gender, race, and national origin representation will have on the development of the law."

And then after some preliminary and sometimes inspirational comments, you got back to the theme and said, "The focus of my speech tonight, however, is not about the struggle to get us where we are and where we need to go, but instead to discuss what it will mean to have more women and people of color on the bench."

You said, "No one can or should ignore asking and pondering what it will mean or not mean in the development of the law."

You cited some people who had a different point of view than yours, and then you came back to it and said, "Because I accept the proposition that, as Professor Resnick explains, to judge is an exercise of power; and because, as Professor Martha Minow of Harvard Law School explains, there is no objective stance but only a series of perspectives. No neutrality, no escape from choice in judging," you said. "I further accept that our experiences as women and people of color will in some way affect our decisions."

Now, you are deep into the argument here. You have agreed with Resnick that there is no objective stance, only a series of perspectives, no neutrality—which, just as an aside, it seems to me is relativism run amok. But then you say, "What Professor Minow's quote means to me is not all women or people of color or all in some circumstances or me in any particular case or circumstance, but enough women and people of color in enough cases will make a difference in the process of judging." You are talking here about different outcomes in cases. And you go on to substantiate your case by, first of all, citing a Minnesota case in which three women judges ruled differently than two male judges in a father's visitation case. You cited two excellent studies which tended to demonstrate differences between women and men in making decisions in cases. You said, "As recognized by legal scholars, whatever the cause is, not one woman or person of color in any one position, but as a group, we will have an effect on the development of law and on judging."

So you develop the theme. You substantiated it with some evidence to substantiate your point of view. Up to that point, you had simply made the case, I think, that judging could certainly reach—or judges could certainly reach different results and make a difference in judging depending upon their gender or ethnicity. You hadn't rendered a judgment about whether they would be better judgments or not.

But then you did. You quoted Justice O'Connor to say that a wise old woman and a wise old man would reach the same decision. And

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then you said, "I am also not sure I agree with that statement." And that is when you made the statement that is now relatively famous: "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion."

So here you are reaching a judgment that not only will it make a difference but that it should make a difference. And you went on—and this is the last thing that I will quote here. You said, "In short, I"—well, I think this is important. You note that some of the old white guys made some pretty good decisions eventually—Oliver Wendell Holmes, Cardozo, and others—and you acknowledged that they made a big difference in discrimination cases. But it took a long time, to understand takes time and effort, something not all people are willing to give, and so on. And then you concluded this: "In short, I accept the proposition that difference will be made by the presence of women and people of color on the bench and that my experiences will affect the facts that I choose to see." You said, "I don't know exactly what the difference will be in my judging, but I accept that there will be some based on gender and my Latina heritage."

As you said in your response to Senator Sessions, you said that you weren't encouraging that, and you talked about how we need to set that aside. But you didn't in your speech say that this is not good, we need to set this aside. Instead, you seemed to be celebrating it. The clear inference is it is a good thing that this is happening.

So that is why some of us are concerned, first with the President's elucidation of his point of view here about judging, and then these speeches, several of them, including speeches that were included in law review articles that you edited that all say the same thing, and that would certainly lead one to a conclusion that, A, you understand it will make a difference and, B, not only are you not saying anything negative about that, but you seem to embrace that difference in concluding that you will make better decisions.

That is the basis of concern that a lot of people have. Please take the time you need to respond to my question.

Judge SOTOMAYOR. Thank you. I have a record for 17 years. Decision after decision, decision after decision, it is very clear that I don't base my judgments on my personal experiences or my feelings or my biases. All of my decisions show my respect for the rule of law, the fact that, regardless about if I identify a feeling about a case, which was part of what that speech did talk about, there are situations where one has reactions to speeches, to activities.

It's not surprising that in some cases the loss of a victim is very tragic. A judge deals with those situations, and acknowledging that there is a hardship to someone doesn't mean that the law commands the result. I have any number of cases where I have acknowledged a particular difficulty to a party or disapproval of a party's action and said, no, but the law requires this. So my views, I think, are demonstrated by what I do as a judge.

I am grateful that you took notice that much of my speech, if not all of it, was intended to inspire, and my whole message to those students—and that is the very end of what I said to them—was, "I hope I see you in the courtroom someday." I don't know if I said

it in that speech, but I often end my speeches with saying, "And I hope someday you're sitting on the bench with me."

And so the intent of the speech, its structure, was to inspire them to believe, as I do, as I think everyone does, that life experiences enrich the legal system. I used the words "process of judging," that experience that you look for in choosing a judge, whether it is the ABA rule that says the judge has to be a lawyer for X number of years, or it's the experience that your Committee looks for in terms of what's the background of the judge. Have they undertaken serious consideration of constitutional questions?

All of those experiences are valued because our system is enriched by a variety of experiences. And I don't think that anybody quarrels with the fact that diversity on the bench is good for America. It's good for America because we are the land of opportunity, and to the extent that we are pursuing and showing that all groups can be lawyers and judges, that's just reflecting the values of our society.

Senator KYL. And if I could just interrupt you right now, to me that is the key. It is good because it shows these young people that you are talking to that, with a little hard work, it doesn't matter where you came from; you can make it. And that is why you hope to see them on the bench. I totally appreciate that.

The question, though, is whether you leave them with the impression that it's good to make different decisions because of their ethnicity or gender, and it strikes me that you could have easily said in here, "Now, of course, Blind Lady Justice doesn't permit us to base decisions in cases on our ethnicity or gender. We should strive very hard to set those aside when we can." I found only one rather oblique reference in your speech that could be read to say that you warned against that. All of the other statements seem to embrace it, or certainly to recognize it and almost seem as if you are powerless to do anything about it. "I accept that this will happen," you said.

So while I appreciate what you are saying, it still doesn't answer to me the question of whether you think that these—that ethnicity or gender should be making a difference.

Judge SOTOMAYOR. There are two different, I believe, issues to address and to look at because various statements are being looked at and being tied together. But the speech, as it is structured, didn't intend to do that and didn't do that. Much of the speech about what differences there will be in judging was in the context of my saying or addressing an academic question, all the studies that you reference I cited in my speech, which is that studies, they were suggesting that there could be a difference. They were raising reasons why I was inviting the students to think about that question. Most of the quotes that you had and reference say that.

We have to ask this question: Does it make a difference? And if it does, how? And the study about differences in outcomes was in that context. There was a case in which three women judges went one way and two men went the other, but I didn't suggest that that was driven by their gender. You can't make that judgment until you see what the law actually said. And I wasn't talking about what law they were interpreting in that case. I was just talking about the academic question that one should ask.

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Senator KYL. If I could just interrupt, I think you just contradicted your speech, because you said in the line before that, "Enough women and people of color in enough cases will make a difference in the process of judging." Next comment: "The Minnesota Supreme Court has given us an example of that."

So you did cite that as an example of gender making a difference in judging.

Now, look, I am not—I do not want to be misunderstood here as disagreeing with a general look into the question of whether people's gender, ethnicity, or background in some way affects their judging. I suspect you can make a very good case that that is true in some cases. You cite a case here for that proposition. Neither you nor I probably know whether for sure that was the reason, but one could infer it from the decision that was rendered. And then you cite two other studies.

I am not questioning whether the studies are not valuable. In fact, I would agree with you that it is important for us to be able to know these things so that we are on guard to set aside prejudices that we may not even know that we have, because when you do judge a case—let me just go back in time.

I tried a lot of cases, and it always depended on the luck of the draw what judge you got. Ninety-nine times out of a hundred, it didn't matter. So what? We got Judge Jones. Fine. We got Judge Smith. Fine. It didn't matter because you knew they would all apply the law.

In the Federal district court in Arizona, there was one judge you didn't want to get. All of the lawyers knew that, because they knew he had predilections that were really difficult for him to set aside. It is a reality. And I suspect you have seen that on some courts, too.

So it is a good thing to examine whether or not those biases and prejudices exist in order to be on guard and to set them aside. The fault I have with your speech is that you not only do not let these students know that you need to set it aside. You don't say that that is what you need this information for. But you almost celebrate it. You say if there are enough of us, we will make a difference—inferring that it is a good thing if we begin deciding cases differently.

Let me just ask you one last question here. Have you ever seen a case where, to use your example, the wise Latina made a better decision than non-Latina judges?

Judge SOTOMAYOR. No. What I've seen——

Senator KYL. I mean, I know you like all of your decisions, but——

[Laughter.]

Chairman LEAHY. Let her answer the——

Senator KYL. I was just saying that I know that she appreciates her own decisions, and I don't mean to denigrate her decisions, Mr. Chairman.

Judge SOTOMAYOR. I was using a rhetorical riff that harkened back to Justice O'Connor, because her literal words and mine have a meaning that neither of us, if you were looking at it, in their exact words make any sense. Justice O'Connor was a part of a Court in which she greatly respected her colleagues, and yet those wise men—I am not going to use the other word—and wise women

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did reach different conclusions in deciding cases. I never understood her to be attempting to say that that meant those people who disagreed with her were unwise or unfair judges.

As you noted, my speech was intending to inspire the students to understand the richness that their backgrounds could bring to the judicial process in the same way that everybody else's background does the same. I think that's what Justice Alito was referring to when he was asked questions by this Committee, and he said, "You know, when I decide a case, I think about my Italian ancestors and their experiences coming to this country." I don't think anybody thought that he was saying that that commanded the result in the case. These were students and lawyers who I don't think would have been misled either by Justice O'Connor's statement or mine in thinking that we actually intended to say that we could really make wiser and fairer decisions. I think what they could think and would think is that I was talking about the value that life experiences have, in the words I used, in the process of judging. And that is the context in which I understood the speech to be doing.

The words I chose, taking the rhetorical flourish, it was a bad idea. I do understand that there are some who have read this differently, and I understand why they might have concern. But I have repeated more than once, and I will repeat throughout, if you look at my history on the bench, you will know that I do not believe that any ethnic, gender, or race group has an advantage in sound judging. You noted that my speech actually said that. And I also believe that every person, regardless of their background and life experiences, can be good and wise judges.

Chairman LEAHY. In fact——

Senator KYL. Excuse me, if I may, just for the record. I don't think it was your speech that said that, but that is what you said in response to Senator Sessions' question this morning.

Chairman LEAHY. When we get references made to Justice Alito, that was on January 11, 2006. When he said, "When I get a"—this is Justice Alito speaking. "When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender, and I do take that into account."

We will take a 10-minute break.

[Whereupon, at 3:37 p.m., the committee was recessed.]

After Recess [3:52 p.m.]

The CHAIRMAN. First off, Judge, I compliment your family. You cannot see them sitting behind you, because they have all been sitting there very attentively, and I have to think that after a while, they would probably rather just be home with you. But I do appreciate it.

So we are going to go to Senator Schumer, who did such a good job introducing you yesterday. Senator Schumer?

Senator SCHUMER. Thank you, Mr. Chairman. And thank all of my colleagues. First, I am going to follow-up on some of the line of questioning of Senators Sessions and Kyl, but I would like to, first, thank my Republican colleagues. I think the questioning has been strong, but respectful.

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I would also like to compliment you, Judge. I think you have made a great impression on America today. The American people have seen today what we have seen when you have met with us one-on-one. You are very smart and knowledgeable, but down to earth. You are a strong person, but also a very nice person. And you have covered the questions thoughtfully and modestly.

So now I am going to go on to that line of questions. We have heard you asked about snippets of statements that have been used to criticize you and challenge your impartiality, but we have heard precious little about the body and totality of your 17-year record on the bench, which everybody knows is the best way to evaluate a nominee.

In fact, no colleague has pointed to a single case in which you said the court should change existing law, in which you have attempted to change existing law, explicitly or otherwise, and I had never seen such a case anywhere in your long and extensive record.

So if a questioner is focusing on a few statements or "those few words" and does not refer at all to the large body of cases where you have carefully applied the law, regardless of sympathies, I do not think that is balanced or down the middle.

By focusing on these few statements rather than your extensive record, I think some of my colleagues are attempting to try and suggest that you might put your experiences and empathies ahead of the rule of law. But the record shows otherwise and that is what I now want to explore.

Now, from everything I have read in your judicial record and everything I have heard you say, you put rule of law first. But I want to clear it up for the record, so I want to talk to you a little bit about what having empathy means and then I want to turn to your record on the bench, which I believe is the best way to get a sense of what your record will be on the bench in the future.

Now, I believe that empathy is the opposite of indifference, the opposite of, say, having ice water in your veins rather than the opposite of neutrality, and I think that is the mistake, in concept, that some have used.

But let us start with the basics. Will you commit to us today that you will give every litigant before the court a fair shake and that you will not let your personal sympathies toward any litigant overrule what the law requires?

Judge SOTOMAYOR. That commitment I can make and have made for 17 years.

Senator SCHUMER. Okay. Well, good. Let us turn to that record. I think your record shows extremely clearly that even when you might have sympathy for the litigants in front of you, as a judge, your fidelity is first and foremost to the rule of law, because as you know, in the courtroom of a judge who ruled based on empathy, not law, one would expect that the most sympathetic plaintiffs would always win.

But that is clearly not the case in your courtroom. I am going to take a few cases here and go over them with you. For example, in In re: Air Crash Off Long Island, which is sort of a tragic, but interesting name for a case, you heard the case of families of the 213 victims of a tragic TWA crash, which we all know about in New York.

The relatives of the victims sued manufacturers of the airplane, which spontaneously combusted in midair, in order to get some modicum of relief, though, of course, nothing a court could do would make up for the loss of the loved ones.

Did you have sympathy for those families?

Judge SOTOMAYOR. All of America did. That was a loss of life that was traumatizing for New York State, because it happened off the shores of Long Island. And I know, Senator, that you were heavily involved in ministering to the families during that case.

Senator SCHUMER. I was, right.

Judge SOTOMAYOR. Everyone had sympathy for their loss. It was absolutely tragic.

Senator SCHUMER. Many of them were poor families, many of them from your borough in the Bronx. I met with them. But, ultimately, you ruled against them, did you not?

Judge SOTOMAYOR. I didn't author the majority opinion in that case. I dissented from the majority's conclusion, but my dissent suggested that the court should have followed what I viewed as existing law and reject their claims or at least a portion of their claim.

Senator SCHUMER. Right. Your dissent said that, "The appropriate remedial scheme for deaths occurring off the United States coast is clearly a legislative policy choice which should not be made by the courts." Is that correct?

Judge SOTOMAYOR. Yes, sir.

Senator SCHUMER. That is exactly, I think, the point that my colleague from Arizona and others were making about how a judge should rule. How did you feel ruling against individuals who had clearly suffered a profound personal loss and tragedy and were looking to the courts and to you for a sense of justice?

Judge SOTOMAYOR. One, in a tragic, tragic, horrible situation like that, can't feel anything but personal sense of regret, but those personal senses can't command a result in a case. As a judge, I serve the greater interest and that greater interest is what the rule of law supplies.

As I mentioned in that case, it was fortuitous that there was a remedy and that remedy, as I noted in my case, was Congress and, in fact, very shortly after the second circuit's opinion, Congress amended the law, giving the victims the remedies that they had sought before the court. And my dissent was just pointing out that despite the great tragedy, that the rule of law commanded a different result.

Senator SCHUMER. And it was probably very hard, but you had to do it. Here is another case, *Washington* v. *County of Rockland*, Rockland is a county, a suburb of New York, which was a case involving black corrections officers who claimed that they were retaliated against after filing discrimination claims. Remember that case?

Judge SOTOMAYOR. I do.

Senator SCHUMER. Did you have sympathy for the officers filing that case?

Judge SOTOMAYOR. Well, to the extent that anyone believes that they had been discriminated on the basis of race, that not only violates the law, but one would have—I wouldn't use the word "sym-

pathy," but one would have a sense that this claim is of some importance and one that the court should very seriously consider.

Senator SCHUMER. Right, because I am sure, like Judge Alito said and others, you had suffered discrimination in your life, as well. So you could understand how they might feel, whether they were right or wrong in the outcome, in filing.

Judge SOTOMAYOR. I've been more fortunate than most. The discrimination that I have felt has not been as life-altering as it has for others. But I certainly do understand it, because it is a part of life that I'm familiar with and have seen others suffer so much with, as I have in my situation.

Senator SCHUMER. Now, let me ask you, again, how did you feel ruling against law enforcement officers, the kind of people you have told us repeatedly you have spent your career working with, DA's office and elsewhere, and for whom you have tremendous respect?

Judge SOTOMAYOR. As with all cases where I might have a feeling of some identification with because of background of because of experiences, one feels a sense of understanding what they have experienced. But in that case, as in the TWA case, the ruling that I endorsed against them was required by law.

Senator SCHUMER. Here is another one. It was called *Boykin* v. *Keycorp*. It was a case in which an African-American woman filed suit after being denied a home equity loan, even after her loan application was conditionally approved based on her credit report.

She claimed that she was denied the opportunity to own a home because of her race, her sex, and the fact that her prospective home was in a minority-concentrated neighborhood. She did not even have a lawyer or anyone else to interpret the procedural rules for her. She filed the suit on her own.

Did you have sympathy for the woman seeking a home loan from the bank?

Judge SOTOMAYOR. Clearly, everyone has sympathy for an individual who wants to own their own home. That's the typical dream and aspiration, I think, of most Americans. And if someone is denied that chance for a reason that they believe is improper, one would recognize and understand their feeling.

Senator SCHUMER. Right. In fact, you ruled that her claim was not timely. Rather than overlooking the procedural problems with the case, you held fast to the complicated rules that keep our system working efficiently, even if it meant that claims of discrimination could not be heard. We never got to whether she was actually discriminated against, because she did not file in a timely manner.

Is my summation there accurate? Do you want to elaborate?

Judge SOTOMAYOR. Yes, in terms of the part of the claim that we held was barred by the statute of limitation. In a response to the earlier question—to an earlier question, I indicated that the law requires some finality and that's why Congress passes or a state legislature passes statutes of limitations that require people to bring their claims within certain timeframes. Those are statutes and they must be followed if a situation—if they apply to a particular situation.

Senator SCHUMER. Finally, let us look at a case that cuts the other way, with a pretty repugnant litigant. This is the case called

Pappas v. *Giuliani*, and you considered claims of a police employee who was fired for distributing terribly bigoted and racist materials.

First, what did you think of the speech in question that this officer was distributing?

Judge SOTOMAYOR. Nobody, including the police officer, was claiming that the speech wasn't offensive, racist and insulting. There was a question about what his purpose was in sending the letter. But my opinion dissent in that case pointed out that offensiveness and racism of the letter, but I issued a dissent from the majority's affirmance of his dismissal from the police department because of those letters.

Senator SCHUMER. Right. As I understand it, you wrote that the actual literature that the police officer was distributing was "patently offensive, hateful and insulting." But you also noted that, and this is your words in a dissent, where the majority was on the other side, "Three decades of jurisprudence and the centrality of First Amendment freedom in our lives," that is your quote, the employee's right to speech had to be respected.

Judge SOTOMAYOR. In the situation of that case, that was the decision that I took, because that's what I believe the law commanded.

Senator SCHUMER. Even though, obviously, you would not have much sympathy or empathy for this officer or his actions. Is that correct?

Judge SOTOMAYOR. I don't think anyone has sympathy for what was undisputedly a racist statement, but the First Amendment commands that we respect people's rights to engage in hateful speech.

Senator SCHUMER. Right. Now, I am just going to go to a group of cases here rather than one individual case. We could do this all day long, where sympathy, empathy would be on one side, but you found rule of law on the other side and you sided with rule of law.

So, again, to me, analyzing a speech and taking words maybe out of context does not come close to analyzing the cases as to what kind of judge you will be, and that is what I am trying to do here.

Now, this one, my office conducted an analysis of your record in immigration cases, as well as the record of your colleagues. In conducting this analysis, I came across a case entitled *Chen* v. *Board of Immigration Appeals*, where your colleague said something very interesting. This was Judge Jon Newman. He is a very respected judge on your circuit.

He said something very interesting when discussing asylum cases. Specifically, he said the following, this is Judge Newman, "We know of no way to apply precise calipers to all asylum cases so that any particular finding would be viewed by any three of the 23 judges of this court as either sustainable or not sustainable. Panels will have to do what judges always do in similar circumstances—apply their best judgment, guided by the statutory standard governing review in the holdings of our precedents to the administrative decision and the record assembled to support it."

In effect, what Judge Newman is saying is these cases would entertain more subjectivity, let us say, because as he said, you could decide many of them as sustainable or not sustainable.

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So given the subjectivity that exists in the asylum cases, it is clear that if you had wanted to be "an activist judge," you could certainly have found ways to rule in favor of sympathetic asylum-seekers, even when the rule of law might have been more murky and not have dictated an exact result.

Yet, in the nearly 850 cases you have decided in the second circuit, you ruled in favor of the government, that is, against the petitioner seeking asylum, immigrant seeking asylum, 83 percent of the time. That happens to be the exact statistical median rate for your court. It is not one way or the other.

This means that with regard to immigration, you were neither more liberal nor more conservative than your colleagues. You simply did what Judge Newman said. You applied your best judgment to the record at hand.

Now, can you discuss your approach to immigration cases, explain to this panel and the American people the flexibility that judges have in this context, and your use of this flexibility in a very moderate manner?

Judge SOTOMAYOR. Reasonable judges look at the same set of facts and may disagree on what those facts should result in. It harkens back to the question of wise men and wise women being judges. Reasonable people disagree. That was my understanding of Judge Newman's comment in the quotation you made.

In immigration cases, we have a different level of review, because it's not the judge making the decision whether to grant or not grant asylum. It's an administrative body.

And I know that I will—I'm being a little inexact, but I think using old terminology is better than using new terminology. And by that, I mean the agency that most people know as the Bureau of Immigration has a new name now, but that is more descriptive than its new name.

Senator SCHUMER. Some people think the new name is descriptive, but that is okay.

Judge SOTOMAYOR. In immigration cases, an asylum-seeker has an opportunity to present his or her case before an immigration judge. They then can appeal to the Bureau of Immigration and argue that there was some procedural default below or that the immigration judge or the bureau itself has committed some error or law.

They then are entitled by law to appeal directly to the second circuit. In those cases, because they are administrative decisions, we are required, under the Chevron Doctrine and other tests in administrative law, to give deference to those decisions.

But like with all processes, there are occasions when processes are not followed and an appellate court has to ensure that the rights of the asylum-seeker have been—whatever those rights may be—have been given. There are other situations in which an administrative body hasn't adequately explained its reasoning. There are other situations where administrative bodies have actually applied erroneous law.

No institution is perfect. And so that accounts for why, given the deference—and I'm assuming you're statistic is right, Senator, because I don't add up the numbers. Okay? But I do know that in immigration cases, the vast majority of the Bureau of Investigation

cases are—the petitions for review are denied. So that means that——

Senator SCHUMER. Right. The only point I am making here, if some are seeking to suggest that your empathy or sympathy overrules rule of law, this is a pretty good body of law to look at. A, it is a lot of cases, 850; B, one would think—I am not going to ask you to state it, but you will have sympathy for immigrants and immigration; and, third, there is some degree of flexibility here, as Judge Newman said, just because of the way the law is.

Yet, you were exactly in the middle of the second circuit. If empathy were governing you, I do not think you would have ended up in that position, but I will let everybody judge whether that is true. But the bottom line here, in the *Air Crash* case, in Washington, in Boykin, in this whole mass of asylum cases, you probably had sympathy for many of the litigants, if not all of them, ruled against them.

The cases we just discussed are just a sampling of your lengthy record, but they do an effective job of illustrating the fact that in your courtroom, rule of law always triumphs.

Would you agree? That seems to me, looking at your record, you know it much better than I do, that rule of law triumphing probably best characterizes your record in your 17 years as a judge.

Judge SOTOMAYOR. I firmly believe in the fidelity to the law. In every case I approach, I start from that working proposition and apply the law to the facts before it.

Senator SCHUMER. Has there ever been a case in which you ruled in favor of a litigant simply because you were sympathetic to their plight, even if rule of law might not have led you in that direction?

Judge SOTOMAYOR. Never.

Senator SCHUMER. Thank you. Let us go on here a little bit to foreign law, which is an issue that has also been discussed. Your critics have tried to imply that you will improperly consider foreign law and sources in cases before you.

You gave a speech in April that has been selectively quoted, discussing whether it is permissible to use foreign law or international law to decide cases. You stated clearly that, "American analytic principles do not permit us," that is your quote, to do so.

Just so the record is 100 percent clear, what do you believe is the appropriate role of any foreign law in the U.S. courts?

Judge SOTOMAYOR. American law does not permit the use of foreign law or international law to interpret the Constitution. That's a given, and my speech explained that, as you noted, explicitly.

There is no debate on that question. There is no issue about that question. The question is a different one, because there are situations in which American law tells you to look at international or foreign law, and my speech was talking to the audience about that.

In fact, I pointed out that there are some situations in which courts are commanded by American law to look at what others are doing. So, for example, if the U.S. is a party to a treaty and there's a question of what the treaty means, then courts routinely look at how other courts of parties who are signatories are interpreting that.

There are some U.S. laws that say you have to look at foreign law to determine the issue. So, for example, if two parties have

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signed a contract in another country that's going to be done in that other country, then American law would say you may have to look at that foreign law to determine the contract issue.

The question of use of foreign law then is different than considering the idea that it may, on an academic level, provide. Judges—and I'm not using my words. I'm using Justice Ginsberg's words. You build up your story of knowledge as a person, as a judge, as a human being with everything you read. For judges, that includes law review articles and there are some judges who have opined negatively about that. You use decisions from other courts. You build up your story of knowledge.

It is important, in the speech I gave, I noted and agreed with Justices Scalia and Thomas that one has to think about this issue very carefully, because there are so many differences in foreign law from American law. But that was the setting of my speech and the discussion that my speech was addressing.

Senator SCHUMER. And you have never relied on a foreign court to interpret U.S. law nor would you.

Judge SOTOMAYOR. In fact, I know that in my 17 years on the bench, other than applying it in treaty interpretation or conflicts of law situations, that I have not cited to foreign law.

Senator SCHUMER. Right, and it is important. American judges consider many non-binding sources when reaching a determination. For instance, consider Justice Scalia's well known regard for dictionary definitions in determining the meaning of words or phrases or statutes being interpreted by a court.

In one case, *MCI* v. *AT&T*, that is a pretty famous case, Justice Scalia cited not one, but five different dictionaries to establish the meaning of the word "modify" in a statute.

Would you agree that dictionaries are not binding on American judges?

Judge SOTOMAYOR. They are a tool to help you in some situations to interpret what is meant by the words that Congress or a legislature uses.

Senator SCHUMER. Right. So it was not improper for Justice Scalia to consider dictionary definitions, but they are not binding, same as citing of foreign law, as long as you do not make it binding on the case.

Judge SOTOMAYOR. Yes. Well, foreign law, except in the situation——

Senator SCHUMER. Of treaties.

Judge SOTOMAYOR.—which we spoke about and even then is not binding. It's American principles of construction that are binding.

Senator SCHUMER. Right. Okay. Good. Now, we will go to a little easier topic, since we are close to the end here. That is a topic that you like and I like and, that is, we have heard a lot of discussions about baseball in metaphorical terms, judges as umpires. We had a lot of that yesterday, a little of that today.

But I want to talk about baseball a little more concretely. First, am I correct you share my love for America's past-time?

Judge SOTOMAYOR. It's often said that I grew up in the shadow of Yankee Stadium. To be more accurate, I grew up sitting next to my dad, while he was alive, watching baseball and it's one of my fondest memories of him.

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Senator SCHUMER. So given that you lived near Yankee Stadium and you are from the Bronx, I was going to ask you, are you a Mets or a Yankee fan, but I guess you have answered that. Right?

Chairman LEAHY. Be careful. You want to keep the Chairman on your side.

[Laughter.]

Senator SCHUMER. No, no. As much as Judge Scalia might want to be nominated, I do not think she would adopt the Red Sox as her team as you have, Mr. Chairman. Judge Sotomayor, I am sorry. What did I say? I do not know who Judge Scalia roots for, but I know who Judge Sotomayor roots for.

Judge SOTOMAYOR. I know many residents of Washington, D.C. have asked me to look at the Senators for——

Senator SCHUMER. Anyway, I do want to ask you just about the 1995 players strike case, which comes up, but it is an interesting case for everybody. You will not have to worry about talking about it, because I do not think the *Mets* v. *Yankees* will come up or the *Red Sox* v. *the Yankees* will come up before the court, although the Yankees could use all the help they can get right now.

But could you tell us a little bit about the case and why you listed it in your questionnaire that you filled out as one of your 10 most important cases?

And that will be my last question, Mr. Chairman.

Judge SOTOMAYOR. That was and people often forget how important some legal challenges seem before judges decide the case. Before the case was decided, all of the academics and all of newspapers and others talking about the case were talking about the novel theory that the baseball owners had developed in challenging the collective bargaining rights of players and owner.

In that case, as with all the cases that I approach, I look at what the law is, what precedent says about it, and I try to discern it a new factual challenge how the principles apply, and that's the process I used in that case.

And it became too clear to me, after looking at that case, that that process led to affirming the decision of the National Labor Relationships Board, that it could and should issue an injunction on the grounds that it claimed.

So that, too, was a case where there's a new argument, a new claim, but where the application of the law came from taking the principles of the law and applying it to that new claim.

Chairman LEAHY. Thank you very much, Senator Schumer.

Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman.

Chairman LEAHY. And then we will go to Senator Durbin.

Senator GRAHAM. Okay. Thank you, Judge. I know it's been a long day, and we'll try to keep it moving here. I think you're one Senator after me away from taking a break.

My problem, quite frankly, is that, as Senator Schumer indicated, the cases that you've been involved in, to me, are left of center, but not anything that jumps out at—at me, but the speeches really do. I mean, the speech you gave to the ACLU about foreign law—we'll talk about that probably in the next round—was pretty disturbing. And I keep talking about these speeches because what I'm trying—and I listen to you today, and I think I'm listening to

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Judge Roberts. I mean, I'm, you know, listening to a strict constructionist here.

So we've got to reconcile in our minds here to put the puzzle together to go that last line, is that you've got Judge Sotomayor, who has come a long way and done a lot of things that every American should be proud of. You've got a judge who has been on a Circuit Court for a dozen years. Some of the things trouble me, generally speaking, left of center, but within the mainstream, and you have these speeches that just blow me away. Don't become a speech writer if this law thing doesn't work out, because these speeches really throw a wrinkle into everything. And that's what we're trying to figure out: who are we getting here? You know, who are we getting, as a Nation?

Now, legal realism. Are you familiar with that term?

Judge SOTOMAYOR. I am.

Senator GRAHAM. What does it mean, for someone who may be watching the hearing?

Judge SOTOMAYOR. To me it means that you are guided in reaching decisions in law by the realism of the situation, of the—the—it's less—it looks at the law through the——

Senator GRAHAM. It's kind of touchy-feely stuff.

[Laughter.]

Judge SOTOMAYOR. It's not quite words that I would use, because there are many academics and judges who have talked about being legal realists. I don't apply that label to myself at all. I—as I said, I look at law and—and precedent and discern its principles and apply it to the situation before me.

Senator GRAHAM. So you would not be a disciple of the legal realism school?

Judge SOTOMAYOR. No.

Senator GRAHAM. Okay. All right.

Would you be considered a strict constructionist, in your own mind?

Judge SOTOMAYOR. I don't use labels to describe what I do. There's been much discussion today about what various labels mean and don't mean.

Senator GRAHAM. Uh-huh.

Judge SOTOMAYOR. Each person uses those labels and gives it their own sense of what——

Senator GRAHAM. When Judge Rehnquist says he was a strict constructionist, did you know what he was talking about?

Judge SOTOMAYOR. I think I understood what he was referencing.

Senator GRAHAM. Uh-huh.

Judge SOTOMAYOR. But his use——

Senator GRAHAM. Uh-huh.

Judge SOTOMAYOR.—is not how I go about looking at——

Senator GRAHAM. What does "strict constructionism" mean to you?

Judge SOTOMAYOR. Well, it means that you look at the Constitution as it's written, or statutes as is—as they are written and you apply them exactly by the words.

Senator GRAHAM. Right. Would you be an originalist?

Judge SOTOMAYOR. Again, I don't use labels.

Senator GRAHAM. Okay.

Judge SOTOMAYOR. And—because——

Senator GRAHAM. What is an originalist?

Judge SOTOMAYOR. In my understanding, an originalist is someone who looks at what the founding fathers intended and what the situation confronting them was, and you use that to determine every situation presented—not every, but most situations presented by the Constitution.

Senator GRAHAM. Do you believe the Constitution is a living, breathing, evolving document?

Judge SOTOMAYOR. The Constitution is a document that is immutable to the sense that it's lasted 200 years. The Constitution has not changed, except by amendment. It is a process—an amendment process that is set forth in the document. It doesn't live, other than to be timeless by the expression of what it says. What changes, is society. What changes, is what facts a judge may get presented.

Senator GRAHAM. What's the—what's the best way for society to change, generally speaking?

Judge SOTOMAYOR. Well——

Senator GRAHAM. What's the—what's the most legitimate way for society to change?

Judge SOTOMAYOR. I don't know if I can use the word "change". Society changes because there's been new developments in technology, medicine, in—in society growing.

Senator GRAHAM. Do you think judges——

Judge SOTOMAYOR. There's——

Senator GRAHAM. Do you think judges have changed society by some of the landmark decisions in the last 40 years?

Judge SOTOMAYOR. Well, in the last few years?

Senator GRAHAM. Forty years.

Judge SOTOMAYOR. I'm sorry. You said the——

Senator GRAHAM. Forty. I'm sorry. Forty, 4–0. Do you think *Roe* v. *Wade* changed American society?

Judge SOTOMAYOR. *Roe* v. *Wade* looked at the Constitution and decided that the Constitution, as applied to a claimed right, applied.

Senator GRAHAM. Is there anything in the Constitution that says a State legislator or the Congress cannot regulate abortion or the definition of life in the first trimester?

Judge SOTOMAYOR. The holding of the court as——

Senator GRAHAM. I'm asking, the Constitution. Does the Constitution, as written, prohibit a legislative body at the State or Federal level from defining life or regulating the rights of the unborn, or protecting the rights of the unborn in the first trimester?

Judge SOTOMAYOR. The Constitution, in the Fourteenth Amendment, has a——

Senator GRAHAM. I'm talking about, is there anything in the document written about abortion?

Judge SOTOMAYOR. There—the word "abortion" is not used in the Constitution, but the Constitution does have a broad provision concerning a liberty provision under the due process——

Senator GRAHAM. And that gets us to the speeches. That broad provision of the Constitution that has taken us from no written prohibition protecting the unborn, no written statement that you can't voluntarily pray in school, and on, and on, and on, and on.

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And that's what drives us here, quite frankly. That's my concern. And when we talk about balls and strikes, maybe that's not the right way to talk about it.

But a lot of us feel that the best way to change society is to go to the ballot box, elect someone, and if they're not doing it right, get rid of them through the electoral process. And a lot of us are concerned, from the left and the right, that unelected judges are very quick to change society in a way that's disturbing. Can you understand how people may feel that way?

Judge SOTOMAYOR. Certainly, sir.

Senator GRAHAM. Okay.

Now, let's talk about you. I like you, by the way, for whatever that matters. Since I may vote for you, that ought to matter to you. One thing that stood out about your record is that when you look at the almanac of the Federal judiciary, lawyers anonymously rate judges in terms of temperament.

And here's what they said about you: "she's a terror on the bench"; "she's temperamental, excitable"; "she seems angry"; "she's overly aggressive, not very judicial"; "she does not have a very good temperament"; "she abuses lawyers"; "she really lacks judicial temperament"; "she believes in an out-of-control—she behaves in an out-of-control manner"; "she makes inappropriate outbursts"; "she is nasty to lawyers"; "she will attack lawyers for making an argument she does not like"; "she can be a bit of a bully".

When you look at the evaluation of the judges on the Second Circuit, you stand out like a sore thumb in terms of your temperament. What is your answer to these criticisms?

Judge SOTOMAYOR. I do ask tough questions at oral argument.

Senator GRAHAM. Are you the only one that asks tough questions in oral argument?

Judge SOTOMAYOR. No. No, not at all. I can only explain what I'm doing, which is, when I ask lawyers tough questions, it's to give them an opportunity to explain their positions on both sides and to persuade me that they're right. I do know that in the Second Circuit, because we only give litigants 10 minutes of oral argument each, that the processes in the Second Circuit are different than in most other circuits across the country, and that some lawyers do find that our court—which is not just me, but our court generally—is described as a "hot bench". It's a term of art lawyers use. It means that they're peppered with questions. Lots of lawyers who are unfamiliar with the process in the Second Circuit find that tough bench difficult and challenging.

Senator GRAHAM. If I may interject, Judge, they find you difficult and challenging more than your colleagues. And the only reason I mention this is that it stands out when you—you know, there are many positive things about you, and these hearings are—are—are designed to talk—talk about the good and the bad. And I—I never liked appearing before a judge that I thought was a bully. It's hard enough being a lawyer, having your client there to begin with, without the judge just beating you up for no good reason.

Do you think you have a temperament problem?

Judge SOTOMAYOR. No, sir. I can only talk about what I know of my relationship with the judges of my court and with the lawyers who appear regularly from our Circuit. And I believe that my rep-

utation is—is such that I ask the hard questions, but I do it evenly for both sides.

Senator GRAHAM. In fairness to you, there are plenty of statements in the record in support of you as a person that—that do not go down this line. But I would just suggest to you, for what it's worth, Judge, as you go forward here, that these statements about you are striking. They're not about your colleagues; you know, the 10-minute rule applies to everybody. Obviously you've accomplished a lot in your life, but maybe these hearings are a time for self-reflection. This is pretty tough stuff that you don't see from—about other judges on the Second Circuit.

Let's talk about the "wise Latino" comment yet again. And the only reason I want to talk about it yet again is that I think what you said—let me just put my biases on the table here. One of the things that I constantly say when I talk about the war on terror is that one of the missing ingredients in the Mideast is the rule of law that Senator Schumer talked about, that the hope for the Mideast, Iraq and Afghanistan, is that there will be a courtroom one day that, if you find yourself in that court, it would be about what you allegedly did, not who you are. It won't be about whether you're a Sunni, Shia, a Khurd or a Pastune, it will be about what you did.

And that's the hope of the world, really, that our legal system, even though we fail at times, will spread. And I hope one day that there will be more women serving in elected official and judicial offices in the Mideast, because I can tell you this from my point of view: one of the biggest problems in Iraq and Afghanistan is a mother's voice is seldom heard about the fate of her children. And if you wanted to change Iraq, apply the rule of law and have more women involved in having a say about Iraq. And I believe that about Afghanistan, and I think that's true here. I think for a long time a lot of talented women were asked, "Can you type," and we're trying to get beyond that and improve as a Nation.

So when it comes to the idea that we should consciously try to include more people in the legal process and the judicial process from different backgrounds, count me in. But your speeches don't really say that to me. They—along the lines of what Senator Kyl was saying, they kind of represent the idea, there's a day coming when there will be more of us, women and minorities, and we're going to change the law. And what I hope we'll take away from this hearing, is there needs to be more women and minorities in the law to make a better America, and the law needs to be there for all of us if, and when, we need it.

And the one thing that I've tried to impress upon you, through jokes and being serious, is the consequences of these words in the world in which we live in. You know, we're talking about putting you on the Supreme Court and judging your fellow citizens, and one of the things that I need to be assured of is that you understand the world as it pretty much really is, and we've got a long way to go in this country. And I can't find the quote, but I'll find it here in a moment, the "wise Latino" quote. Do you remember it?

[Laughter.]

Judge SOTOMAYOR. Yes.

Senator GRAHAM. Okay. Say it to me. Can you recite it from memory? I've got it. All right. "I would hope that a wise Latina woman, with the richness of her experience, would, more often than not, reach a better conclusion than a white male." And the only reason I keep talking about this is that I'm in politics, and you've got to watch what you say because, 1) you don't want to offend people you're trying to represent. But do you understand, ma'am, that if I had said anything like that, and my reasoning was that I'm trying to inspire somebody, they would have had my head? Do you understand that?

Judge SOTOMAYOR. I do understand how those words could be taken that way, particularly if read in isolation.

Senator GRAHAM. Well, I don't know how else you could take that. If Lindsey Graham said that I will make a better Senator than X because of my experience as a Caucasian male, makes me better able to represent the people of South Carolina, and my opponent was a minority, it would make national news, and it should.

Having said that, I am not going to judge you by that one statement. I just hope you'll appreciate the world in which we live in, that you can say those things meaning to inspire somebody and still have a chance to get on the Supreme Court; others could not remotely come close to that statement and survive. Whether that's right or wrong, I think that's a fact. Does that make sense to you?

Judge SOTOMAYOR. It does. And I would hope that we've come, in America, to the place where we can look at a statement that could be misunderstood and consider it in the context of the person's life and the work we have done.

Senator GRAHAM. You know what? If that comes of this hearing, the hearing has been worth it all, that some people deserve a second chance when they misspeak, and you would look at the entire life story to determine whether this is an aberration or just a reflection of your real soul. If that comes from this hearing, then we've probably done the country some good.

Now, let's talk about the times in which we live in. You're from New York. Have you grown up in New York all your life?

Judge SOTOMAYOR. My entire life.

Senator GRAHAM. What did September 11, 2001 mean to you?

Judge SOTOMAYOR. It was the most horrific experience of my personal life, and the most horrific experience in imagining the pain of the families of victims of that tragedy.

Senator GRAHAM. Do you know anything about the group that planned this attack, who they are and what they believe? Have you read anything about them?

Judge SOTOMAYOR. I've followed the newspaper accounts, I've read some books in the area. So, I believe I have an understanding of that——

Senator GRAHAM. What would a woman's life be in their world if they can control a government or a part of the world? What do they have in store for women?

Judge SOTOMAYOR. I understand that some of them have indicated that women are not equal to men.

Senator GRAHAM. I think that's a very charitable statement.

Do you believe that we're at war?

Judge SOTOMAYOR. We are, sir. We have—we have tens and thousands of soldiers in the battlefields of Afghanistan and Iraq. We are at war.

Senator GRAHAM. Are you familiar with military law much at all? And if you're not, that's Okay.

Judge SOTOMAYOR. No, no, no, no. I—I'm thinking, because I've never practiced in the area. I've only read the Supreme Court decisions in this area.

Senator GRAHAM. Right.

Judge SOTOMAYOR. I've obviously examined, by referencing cases, some of the procedures involved in military law. But I—I'm not personally familiar with military law.

Senator GRAHAM. From which——

Judge SOTOMAYOR. I haven't participated.

Senator GRAHAM. I understand.

From what you've read and what you understand about the enemy that this country faces, do you believe there are people out there right now plotting our destruction?

Judge SOTOMAYOR. Given the announcements of certain groups and the messages that have been sent with videotapes, et cetera, announcing that intent, then the answer would be on—based on that, yes.

Senator GRAHAM. Under the Law of Armed Conflict—and this is where I may differ a bit with my colleagues—it is an international concept, the Law if Armed Conflict. Under the Law of Armed Conflict, do you agree with the following statement, that if a person is detained who is properly identified through accepted legal procedures under the Law of Armed Conflict as a part of the enemy force, there is no requirement based on a length of time that they be returned to the battle or released. In other words, if you capture a member of the enemy force, is it your understanding of the law that you have to at some point of time let them go back to the fight?

Judge SOTOMAYOR. I—it's difficult to answer that question in the abstract, for the reason that I indicated later. I've not been a student of the law of war.

Senator GRAHAM. Okay.

Judge SOTOMAYOR. Other than to——

Senator GRAHAM. We'll have another round. I know you'll have a lot of things to do, but try to—try to look at that. Look at that general legal concept. And the legal concept I'm espousing is that, under the law of war, Article 5, specifically, of the Geneva Convention, requires a detaining authority to allow an impartial decisionmaker to determine the question of status, whether or not you're a member of the enemy force. And see if I'm right about the law, that if that determination is properly had, there is no requirement under the Law of Armed Conflict to release a member of the enemy force that still presents a threat. I would like you to look at that.

Judge SOTOMAYOR. Senator——

Senator GRAHAM. Now, let's talk about—thank you.

Let's talk about your time as a lawyer. The Puerto Rican Legal Defense Fund. Is that right? Is that the name of the organization?

Judge SOTOMAYOR. It was then. I think it—I—I know it has changed names recently.

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Senator GRAHAM. Okay. How long were you a member of that organization?

Judge SOTOMAYOR. Nearly 12 years.

Senator GRAHAM. Okay.

Judge SOTOMAYOR. If not 12 years.

Senator GRAHAM. Right. During that time you were involved in litigation matters. Is that correct?

Judge SOTOMAYOR. The Fund was involved in litigations. I was a board member of the Fund.

Senator GRAHAM. Okay. Are you familiar with the position that the Fund took regarding taxpayer-funded abortion, the briefs they filed?

Judge SOTOMAYOR. No. I never reviewed those briefs.

Senator GRAHAM. Well, in their briefs they argued—and I will submit the quotes to you—that if you deny a low-income woman Medicaid funding, taxpayer funds to have an abortion, if you deny her that, that's a form of slavery. And I can get the quotes.

Do you agree with that?

Judge SOTOMAYOR. I wasn't aware of what was said in those briefs. Perhaps it might be helpful if I explain what the function of a board member is and what the function of the staff would be in an organization like the Fund.

Senator GRAHAM. Okay.

Judge SOTOMAYOR. In a small organization, as the Puerto Rican Legal Defense Fund was back then, it wasn't the size of—of other Legal Defense Funds, like the NAACP Legal Defense Fund——

Senator GRAHAM. Right.

Judge SOTOMAYOR [continuing]. Or the Mexican-American Legal Defense Fund, which are organizations that undertook very similar work to PRLDF. In an organization like PRLDF, a board member's main responsibility is to fund-raise, and I'm sure that a review of the board meetings would show that that's what we spent most of our time on. To the extent that we looked at the organization's legal work, it was to ensure that it was consistent with the broad mission statement of the Fund.

Senator GRAHAM. Is the mission statement of the Fund to include taxpayer-funded abortion?

Judge SOTOMAYOR. Our mission——

Senator GRAHAM. Was that one of the goals?

Judge SOTOMAYOR. Our mission statement was broad like the Constitution.

Senator GRAHAM. Yeah.

Judge SOTOMAYOR. Which meant that it—its focus was on promoting the equal opportunities of Hispanics in the United States.

Senator GRAHAM. Well, Judge, I've got—and I'll share them with you and we'll talk about this more—a host of briefs for a 12-year period where the Fund is advocating to the State court and to the Federal courts that to deny a woman taxpayer funds, low-income woman taxpayer assistance in having an abortion, is a form of slavery, it's an unspeakable cruel—cruelty to the life and health of a poor woman. Was it—was it or was it not the position of the Fund to advocate taxpayer-funded abortions for low-income women?

Judge SOTOMAYOR. I wasn't, and I didn't as a board member, review those briefs. Our lawyers were charged with——

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Senator GRAHAM. Would it bother you if that's what they did?

Judge SOTOMAYOR. Well, I know that the Fund, during the years I was there, was involved in public health issues as it affected the Latino community. It was involved——

Senator GRAHAM. Is abortion a public health issue?

Judge SOTOMAYOR. Well, it was certainly viewed that way generally by a number of civil rights organizations at the time.

Senator GRAHAM. Do you personally view it that way?

Judge SOTOMAYOR. It wasn't a question of whether I personally viewed it that way or not. The issue was whether the law was settled on what issues the Fund was advocating on behalf of the community it represented. And——

Senator GRAHAM. Well, the Fund—I'm sorry. Go ahead.

Judge SOTOMAYOR. And so the question would become, was there a good-faith basis for whatever arguments they were making, as the Fund's lawyers were lawyers.

Senator GRAHAM. Well, yeah.

Judge SOTOMAYOR. They had an ethical obligation.

Senator GRAHAM. And quite frankly, that's—you know, lawyers are lawyers and people who have causes that they believe in have every right to pursue those causes. And the Fund, when you look—you may have been a board member, but I'm here to tell you, that filed briefs constantly for the idea that taxpayer-funded abortion was necessary and to deny it would be a form of slavery, challenged parental consent as being cruel, and I can go down a list of issues that the Fund got involved in, that the death penalty should be stricken because it has—it's a form of racial discrimination.

What's your view of the death penalty in terms of personally?

Judge SOTOMAYOR. The issue for me with respect to the death penalty is that the Supreme Court, since Gregg, has determined that the death penalty is constitutional under certain situations.

Senator GRAHAM. Right.

Judge SOTOMAYOR. I have rejected challenges to the Federal law and it's application in the one case I handled as a District Court judge, but it's a reflection of what my views are on the law.

Senator GRAHAM. As an advocate—as an advocate, did you challenge the death penalty as being an inappropriate punishment because the effect it has on race?

Judge SOTOMAYOR. I never litigated a death penalty case personally. The Fund——

Senator GRAHAM. Did you ever sign the memorandum saying that?

Judge SOTOMAYOR. I send the memorandum for the board to take under consideration what position, on behalf of the Latino community, the Fund should take on New York State reinstating the death penalty in the State. You—it's hard to remember because so much time has passed in the 30 years since I——

Senator GRAHAM. Yeah. Well, we'll give you a chance to look at some of the things I'm talking about because I want you to be aware of what I'm talking about.

Let me ask you this. We've got 30 seconds left. If a lawyer on the other side filed a brief in support of the idea that abortion is the unnecessary and unlawful taking of an innocent life and public

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money should never be used for such a heinous purpose, would that disqualify them, in your opinion, from being a judge?

Judge SOTOMAYOR. An advocate advocates on behalf of the client they have, and so that's a different situation than how a judge has acted in the cases before him or her.

Senator GRAHAM. Okay. And the only reason I mention this, Judge, is that the positions you took, or this Fund took, I think, like the speeches, tell us some things, and we'll have a chance to talk more about your full life. But I appreciate the opportunity to talk with you.

Judge SOTOMAYOR. Thank you, sir.

Chairman LEAHY. Thank you very much, Senator Graham.

Senator Durbin.

Senator DURBIN. Thank you, Mr. Chairman. Judge, good to see you again.

Judge SOTOMAYOR. Hello, Senator. Thank you. And I thank you again for letting me use your conference room when I was as hobbled as I was.

Senator DURBIN. You were more than welcome there and there was more traffic of Senators in my conference room than I have seen since I was elected to the Senate.

This has been an interesting exercise today for many of us who have been on the Judiciary Committee for a while, because the people new to it may not know, but there has been a little bit of a role reversal here. The Democratic side is now, largely speaking, in favor of our president's nominee. The other side is asking questions more critical. In the previous two Supreme Court nominees, the tables were turned. There were more critical questions coming from the Democratic side.

There is also another obvious contrast. The two previous nominees that were considered while I was on the committee, Chief Justice Roberts and Justice Alito, are white males, and, of course, you come to this as a minority woman candidate.

When we asked questions of the white male nominees of a Republican president, we were basically trying to make sure that they would go far enough in understanding the plight of minorities, because, clearly, that was not in their DNA.

The questions being asked of you from the other side primarily are along the lines of: will you go too far in siding with minorities? It is an interesting contrast, as I watch this play out.

Two things have really been the focus on the other side, although a lot of questions have been asked. One was, your speeches, one or two speeches. I took a look here at your questionnaire. I think you have given hundreds of speeches. So that they would only find fault in one or two to bring up is a pretty good track record from this side of the table.

If, as politicians, all we had were one or two speeches that would raise some questions among our critics, we would be pretty fortunate. And when it came down to your cases, it appears that you have been involved, at least as a Federal judge, in over 3,000 cases and it appears that the *Ricci* case really is the focus of more attention than almost any other decision.

I think that speaks pretty well of you for 17 years on the bench and I want to join, as others have said, in commending the other

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side, because although the questions have sometimes been pointed, I think they have been fair and I think you have handled the responses well.

I would like to say that on the speech which has come up time and again, the wise Latina speech, the next paragraph in that speech, I do not know if it has been read to the members, but it should be, because after you made the quote which has been the subject of many inquiries here, you went on to say, "Let us not forget that wise men like Oliver Wendell Holmes and Justice Cardozo voted on cases which upheld both sex and race discrimination in our society. Until 1972, no Supreme Court case ever upheld the claim of a woman in a gender discrimination case."

You went on to say, "I, like Professor Carter, believe that we should not be so myopic as to believe that others of different experiences or backgrounds are incapable of understanding the values and needs of people from a different group. Many are so capable."

"As Judge Cedarbaum," who may still be here, "pointed out to me, nine white men on the Supreme Court in the past have done so on many occasions and on many issues including Brown." That, to me, tells the whole story.

You are, of course, proud of your heritage, as I am proud of my own. But to suggest that a special insight and wisdom comes with it is to overlook the obvious. Wise men have made bad decisions. White men have made decisions favoring minorities. Those things have happened when people looked at the law and looked at the Constitution.

So I would like to get into two or three areas, if I might, to follow-up on, because they are areas of particular interest to me. I will return to one that Senator Graham just touched on and that is the death penalty.

A book, which I greatly enjoyed, I do not know if you ever had a chance to read, is "Becoming Justice Blackmun," a story of Justice Blackmun's career and many of the things that happened to him. Now, late in his career, he decided that he could no longer support the death penalty and it was a long, thoughtful process that brought him to this moment.

He made the famous statement, maybe the best known line attributed to him, in a decision, *Callins* v. *Collins*, "From this day forward, I no longer shall tinker with the machinery of death." The 1994 opinion said:

"Twenty years have passed since this court declared that the death penalty must be imposed fairly and with reasonable consistency, or not at all, see *Furman* v. *Georgia*, and despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice and mistake."

Judge Sotomayor, I know that you have thought about this issue. Senator Graham made reference to the Puerto Rican Legal Defense and Education Fund memo that you once signed on the subject. What is your thought about Justice Blackmun's view that despite our best legal efforts, the imposition of the death penalty in the United States has not been handled fairly?

Judge SOTOMAYOR. With respect to the position the fund took in 1980–1981 with respect to the death penalty, that was, as I noted,

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a question of being an advocate and expressing views on behalf of the community on a policy choice New York State was making: Should we or should we not reinstitute the death penalty?

As a judge, what I have to look at and realize is that in 30 years or 40, actually, there has been—excuse me, Senator. I'm sorry——

Senator DURBIN. It is all right.

Judge SOTOMAYOR [continuing]. Enormous changes in our society, many, many cases looked at by the Supreme Court addressing the application of the death penalty, addressing issues of its application and when they're constitutional or not.

The state of this question is different today than it was when Justice Blackmun came to his views. As a judge, I don't rule in an abstract. I rule in the context of a case that comes before me and a challenge to a situation and an application of the death penalty that arises in an individual case.

I've been and am very cautious about expressing personal views since I've been a judge. I find that people who listen to judges give—express their personal views on important questions that the courts are looking at; that they have a sense that the judge is coming into the process with a closed mind; that their personal views will somehow influence how they apply the law.

It's one of the reasons why, since I've been a judge, I've always been very careful about not doing that and I think my record speaks more loudly than I can——

Senator DURBIN. It does.

Judge SOTOMAYOR [continuing]. About the fact of how careful I am about ensuring that I'm always following the law and not my personal views.

Senator DURBIN. Well, you handled one death penalty case as a district court judge, *United States* v. *Heatley*, after, you had signed on to the Puerto Rican Legal Defense and Education Fund memo in 1981 recommending that the organization oppose reinstituting the death penalty in New York.

After you had done that, some years later, you were called on to rule on a case involving the death penalty. Despite the policy concerns that you and I share, you denied the defendant's motion to dismiss and you paved the way for the first Federal death penalty case in Manhattan in more than 40 years.

Now, the defendant ultimately accepted a plea bargain to a life sentence but you rejected his challenge to the death penalty and found that he had shown no evidence of discriminatory intent. So that makes your point. Whatever your personal feelings, you, in this case at the district court level, ruled in a fashion that upheld the death penalty.

I guess I am trying to take it a step beyond and maybe you will not go where I want to take you, and some nominees do not, but I guess the question that arises, in my mind, is how a man like Justice Blackmun, after a life on the bench, comes to the conclusion that despite all our best efforts, the premise of your 1981 memo is still the same, that, ultimately, the imposition of the death penalty in our country is too arbitrary.

Minorities in America today have accounted for a disproportionate 43 percent of executions, that is a fact, since 1976. And while white victims account for about one-half of all murder vic-

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tims, 80 percent of death penalty cases involve victims who are white.

This raises some obvious questions we have to face on this side of the table. I am asking you if it raises questions of justice and fairness on your side of the table.

Judge SOTOMAYOR. In the *Heatley* case, it was the first prosecution in the Southern District of New York of a death penalty case in over 40 years. Mr. Heatley was charged with being a gang leader of a crack and cocaine enterprise who engaged in over—if the number wasn't 13, it was very close to that—13 murders to promote that enterprise.

He did challenge the application of the death penalty, charges against him, on the ground that the prosecutor had made its decision to prosecute him and refused him a cooperation agreement on the basis of his race.

The defense counsel, much as you have Senator, raised any number of concerns about the application of the death penalty and in response to his argument, I held hearings not on that question, but on the broader question of what had—on the specific legal question—what had motivated this prosecutor to enter this prosecution and whether he was denied the agreement he sought on the basis of race. I determined that that was not the case and rejected his challenge.

With respect to the issues of concerns about the application of the death penalty, I noted for the defense attorneys that, in the first instance, one back question of the effects of the death penalty, how it should be done, what circumstances warrant it or don't in terms of the law, that that's a legislative question.

And, in fact, I said to him—I acknowledged his concerns, I acknowledged that many had expressed views about that, but that's exactly what I said, which is, "I can only look at the case that's before me and decide that case."

Senator DURBIN. There is a recent case before the Supreme Court I would like to make reference to, *District Attorney's Office* v. *Osborne*, involving DNA. It turns out there are only three states in the United States that do not provide state legislated post-conviction access to DNA evidence that might exonerate someone who is in prison.

I am told that since 1989, 240 post-conviction DNA exonerations have taken place across this country, 17 involving inmates on death row. Now, the Supreme Court, in the *Osborne* case, was asked, What about those three states? Is there a Federal right to post-conviction access to DNA evidence for someone currently incarcerated? It asked whether or not they were properly charged and convicted. And the court said, no, there was no Federal right. But it was a 5–4 case.

So though I do not quarrel with your premise that it is our responsibility on this side of the table to look at the death penalty, the fact is, in this recent case, this *Osborne* case, there was a clear opportunity for the Supreme Court, right across the street, to say, We think this gets to an issue of due process, regarding someone sitting on death row in Alaska, Massachusetts or Oklahoma, where their state law gives them no post-conviction right of access to DNA evidence.

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So I ask you, either from the perspective of DNA or from other perspectives, is it not clear that the Supreme Court does have some authority in the due process realm to make decisions relating to the arbitrariness of the death penalty?

Judge SOTOMAYOR. The court is not a legislative body. It is a reviewing body of whether a particular act by a state in a particular case is constitutional or not.

In a particular situation, the court may conclude that the state has acted unconstitutionally and invalidate the act. But it's difficult to answer a question about the role of the court outside of the functions of the court, which is we don't make broad policies. We decide questions based on cases and the principles implicated by that particular case before you.

Senator DURBIN. I follow you and I understand the limitations on policy-related questions that you are facing. So I would like to go to another area relating to policy and ask your thoughts on it.

We have, on occasion, every 2 years here, a chance to go across the street for an historic dinner. The members of the U.S. Senate sit down with the members of the U.S. Supreme Court. We look forward to it. It is a tradition that is maybe six or 8 years old, Mr. Chairman, I do not think much older.

Chairman LEAHY. It is a great tradition.

Senator DURBIN. Great tradition, and we get to meet them, they get to meet us. I sat down with one Supreme Court justice, I won't name this person, but I said at the time that I was chairing the Crime Subcommittee in Judiciary and said to this justice, "What topic do you think I should be looking into as a Senator when it comes to justice in the United States?" And this justice said, "Our system of corrections and incarceration in America, it has to be the worst."

It is hard to imagine how it could be much worse if we tried to design it that way. Today, in the United States, 2.3 million people are in prison. We have the most prisoners of any country in the world, as well as the highest per capita rate of prisoners in the world.

In America today, African-Americans are incarcerated at six times the rate of white Americans. Now, there is one significant reason for this and you have faced at least an aspect of it as a judge, and that is the crack-powder disparity in sentencing.

I will readily concede I voted for it, as did many members of the House of Representatives, frightened by the notion of this new narcotic called crack that was so cheap and so destructive that we had to do something dramatic. We did. We established a 100-to-1 ratio in terms of sentencing.

Now, we realize we made a serious mistake. Eighty-one percent of those convicted for crack offenses in 2007 were African-American, although only about 25 percent of crack cocaine users are African-Americans. I held a hearing on this and Judge Reggie Walton, the former associate director of the Office of National Drug Control Policy, testified and he basically said that this sentencing disparity between crack and powder has had a negative impact in courtrooms across America.

Specifically, he stated that people come to view the courts with suspicion as institutions that mete out unequal justice, and the

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moral authority of not only the Federal courts, but all courts, is diminished. I might say, for the record, that this administration has said they want to change this and make the sentencing ratio one-to-one. We are working on legislation on a bipartisan basis to do so.

You face this as a judge, at least some aspect of it. You sentenced Louis Gomez, a non-violent drug offender, to a 5-year mandatory minimum and you said, when you sentenced him, "You do not deserve this, sir. I am deeply sorry for you and your family, but I have no choice."

May I ask you to reflect for a moment, if you can, beyond this specific case or using this specific case, on this question of race and justice in America today? It goes to the heart of our future as a nation and whether we can finally come to grips and put behind us some of the terrible things that have happened in our history.

Judge SOTOMAYOR. It's so unsatisfying, I know, for you and probably the other Senators, when a nominee to the court doesn't engage directly with the societal issues that are so important to you, both as citizens and Senators. And I know they are important to you, because this very question you just mentioned to me is part of bipartisan efforts that you're making, and I respect that many have concerns on lots of different issues.

For me, as a judge, both on the circuit or potentially as a nominee to the Supreme Court, my role is a very different one. And in the Louis Gomez case, we weren't talking about the disparity. We were talking about the quantity of drug and whether I had to follow the law on the statutory minimum that Congress required for the weight of drugs at issue.

In expressing a recognition of the family's situation and the uniqueness of that case, it was at a time when Congress had not recognized the safety valve for first-time offenders under the drug laws. That situation had motivated many judges in many situations to comment on the question of whether the law should be changed to address the safety valve question, then make a statement, making any suggestions to Congress, I followed the law.

But I know that the attorney general's office, many people spoke to Congress on this issue and Congress passed a safety valve.

With respect to the crack-cocaine disparity, as you may know, the guidelines are no longer mandatory as a result of a series of recent Supreme Court—not so recent, but Supreme Court cases probably almost in the last 10 years. I think the first one, Apprendi, was in 2000, if my memory is serving me right, or very close to that.

At any rate, that issue was addressed recently by the Supreme Court in a case called *U.S.* v. *Kimbro* and the court noted that the Sentencing Commission's recommendation of sentences was not based on its considered judgment that the 100-to-1 ratio was an appropriate sentence for this conduct and the court recognized that sentencing judges could take that fact into consideration in fashioning an individual sentence for a defendant.

And, in fact, the Sentencing Commission, in very recent time, has permitted defendants who have been serving prior sentences, in certain situations, to come back to court and have the courts reconsider whether their sentences should be reduced in a way speci-

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fied under the procedures established by the Sentencing Commission.

This is an issue that I can't speak further about, because it is an issue that's being so actively discussed by Congress and which is controlled by law. But as I said, I can appreciate why not saying more would feel unsatisfying, but I am limited by the role I have.

Senator DURBIN. One last question I will ask you. I would like to hear your perspective on our immigration courts. A few years ago, Judge Richard Posner from my home state of Illinois brought this problem to my attention.

In 2005, he issued a scathing opinion criticizing our immigration courts in America. He wrote, "The adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice."

For those who do not know this Judge Posner, he is an extraordinary man. I would not know where to put him exactly on the political spectrum, because I am not sure what his next book will be. He has written so many books. He is a very gifted and thoughtful person.

In 2002, then Attorney General John Ashcroft issued so-called streamlining regulations that made dramatic changes in our immigration courts, reducing the size of the Board of Immigration Appeals from 23 to 11. This board stopped using three-member panels and board members began deciding cases individually, often within minutes and without written opinions.

In response, immigrants began petitioning the Federal appellate court in large numbers. In 2004, immigration cases constituted 17 percent of all Federal appeals, up from 3 percent in 2001, the last year before the regulations under Attorney General Ashcroft.

I raised this issue with Justice Alito during his confirmation hearing and he told me, "I agree with Judge Posner that the way these cases are handled leaves an enormous amount to be desired. I have been troubled by this."

What has been your experience on the circuit court when it came to these cases and what is your opinion of Judge Posner's observation in this 2005 case?

Judge SOTOMAYOR. There's been 4 years since Judge Posner's comments and they have to be placed somewhat in perspective. Attorney General Ashcroft's—what you described as streamlining procedures have been by, I think, all of the circuit courts that have addressed the issue, affirmed and given Chevron deference.

So the question is not whether the streamlined procedures are constitutional or not, but what happened when he instituted that procedure is that, with all new things, there were many imperfections. New approaches to things create new challenges and there's no question that courts faced with large numbers of immigration cases, as was the second circuit—I think we had the second largest number of new cases that arrived at our doorsteps, the ninth circuit being the first, and I know the seventh had a quite significantly large number—were reviewing processes that, as Justice Alito said, left something to be desired in a number of cases.

I will say that that onslaught of cases and the concerns expressed in a number of cases by the judges, in the dialog that goes on in court cases, with administrative bodies, with Congress, re-

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sulted in more cooperation between the courts and the immigration officials in how to handle these cases, how to ensure that the process would be improved.

I know that the attorney general's office devoted more resources to the handling of these cases. There's always room for improvement. The agency is handling so many matters, so many cases, has so many responsibilities, making sure that it has adequate resources and training is an important consideration, again, in the first instance, by Congress, because you set the budget.

In the end, what we can only do is ensure that due process is applied in each case, according to the law required for the review of ths cases.

Senator DURBIN. Do you feel that it has changed since 2005, when Judge Posner said the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice?

Judge SOTOMAYOR. Well, I wouldn't—I'm not endorsing his views, because he can only speak for himself. I do know that in, I would say, the last two or 3 years, the number of cases questioning the processes in published circuit court decisions has decreased.

Senator DURBIN. Thank you very much. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very, very much Senator Durbin. I have discussed this with Senator Sessions and, as I told him earlier, also, at his request, we have not finished the first round, but once we finish the first round of questions, we will have 20-minute rounds on the second.

I am going to urge Senators, if they do not feel the need to use the whole round, just as Senator Durbin just demonstrated, that they not.

But here will be the schedule. We will break for today. We will begin at 9:30 in the morning. We will finish the first round of questions, the last round will be asked by Senator Franken, and then we will break for the traditional closed door session with the nominee.

So for those who have not seen one of these before, we do this with all Supreme Court nominees. We have a closed session just with the nominee. We go over the FBI report. We do it with all of them. I think we can generally say it is routine. We did it with Chief Justice Roberts and Justice Alito and Justice Breyer and everybody else.

Then we will come back for a round of 20 minutes each, but during that round, I will encourage Senators, if they feel all the questions have been asked—I realize sometimes all questions may have been asked, but not everybody has asked all of the questions—that we try to ask at least something new to keep up the interest and then we can determine whether we are prepared—depending on how late it is—whether we can do the panels or whether we have to do the panels on Thursday.

Senator SESSIONS. Thank you, Chairman Leahy. I do think that the scheme you arranged for this hearing is good, the way we have gone forward. I thank you for that. We have done our best to be ready in a short timeframe, and I believe the members on this side are ready.

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Talking of questions, there is not any harm in asking. Is that not a legal rule? To get people to reduce their time. But there are still some important questions and I think we will certainly want to use—most members would want to use that 20 minutes.

I appreciate that and look forward to being with you in the morning.

Chairman LEAHY. That is why I asked the question. I probably have violated the first rule that I learned as a trial lawyer—you should not ask a question if you do not know what the answer is going to be. But then I also had that other aspect where hope springs eternal. As we have a whole lot of other things going on in the Senate, I would hope we might.

Senator Cardin, Senator Whitehouse, Senator Klobuchar, Senator Specter and Senator Franken, I am sorry that we do not get to you yet, but we will before we do the closed session.

Judge, thank you very much.

Judge SOTOMAYOR. Thank you.

Chairman LEAHY. We stand in recess.

[Whereupon, at 5:26 p.m., the Committee was recessed.]

[The biographical information of Sonia Sotomayor follows.]

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

QUESTIONNAIRE FOR JUDICIAL NOMINEES

PUBLIC

1. **Name**: State full name (include any former names used).

   Sonia Sotomayor. Former names include: Sonia Maria Sotomayor; Sonia Sotomayor de Noonan; Sonia Maria Sotomayor Noonan; Sonia Noonan

2. **Position**: State the position for which you have been nominated.

   Associate Justice of the Supreme Court of the United States

3. **Address**: List current office address. If city and state of residence differs from your place of employment, please list the city and state where you currently reside.

   Thurgood Marshall United States Courthouse
   40 Foley Square
   New York, NY 10007

4. **Birthplace**: State date and place of birth.

   June 25, 1954
   New York, NY

5. **Education**: List in reverse chronological order each college, law school, or any other institution of higher education attended and indicate for each the dates of attendance, whether a degree was received, and the date each degree was received.

   Yale Law School, New Haven, CT, September 1976-June 1979. J.D. received June 1979.

   Princeton University, Princeton, NJ, September 1972-June 1976. B.A., *summa cum laude*, received June 1976.

6. **Employment Record**: List in reverse chronological order all governmental agencies, business or professional corporations, companies, firms, or other enterprises, partnerships, institutions, or organizations, non-profit or otherwise, with which you have been affiliated as an officer, director, partner, proprietor, or employee since graduation from college, whether or not you received payment for your services. Include the name and address of the employer and job title or description.

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PRINCETON UNIVERSITY Princeton, NJ 08544 *Trustee*	2007 – present
COLUMBIA UNIVERSITY 435 West 116th Street New York, NY 10027 *Lecturer-in-Law*	1999 – 2009
UNITED STATES CIRCUIT JUDGE United States Court of Appeals for the Second Circuit Thurgood Marshall United States Courthouse 40 Foley Square New York, NY 10007	10/13/98 – present
NEW YORK UNIVERSITY LAW SCHOOL 40 Washington Square South New York, NY 10012 *Adjunct Professor*	1997 – 2007
UNITED STATES DISTRICT JUDGE Southern District of New York Daniel Patrick Moynihan United States Courthouse 500 Pearl Street New York, NY 10007	10/2/92 – 10/12/98
PAVIA & HARCOURT 600 Madison Avenue New York, NY 10022 *Partner* *Associate*	 1/1/88 – 9/30/92 4/84 – 12/87
NEW YORK CITY CAMPAIGN FINANCE BOARD 40 Rector Street New York, NY 10006 *Member, Board of Directors*	 1988 – 10/92
STATE OF NEW YORK MORTGAGE AGENCY 260 Madison Avenue New York, NY 10016 *Member, Board of Directors*	 1987 – 10/92
MATERNITY CENTER ASSOCIATION (currently known as Childbirth Connection) 48 East 92nd Street New York, NY 10128	 1985 – 1986

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56940.002

Member, Board of Directors

SOTOMAYOR & ASSOCIATES
10 Third Street
Brooklyn, NY 11231 1983 – 1986
Owner

PUERTO RICAN LEGAL DEFENSE & EDUCATION FUND
(currently known as LatinoJustice PRLDEF)
99 Hudson Street
New York, NY 10013 1980 – 10/92
I served at various points during this time frame in the following capacities:
Member and Vice President, Board of Directors
Chairperson, Litigation and Education Committees

NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE
One Hogan Place
New York, NY 10013
Assistant District Attorney 9/79 – 3/84

YALE LAW SCHOOL Mimeo Room
127 Wall Street
New Haven, CT 06520 9/78 – 5/79
Sales Person

PAUL, WEISS, RIFKIND, WHARTON & GARRISON
1285 Avenue of the Americas
New York, NY 10019 6/78 – 8/78
Summer Associate

THE GRADUATE-PROFESSIONAL STUDENT CENTER
306 York Street
New Haven, CT 06520 9/77 – 5/78
Sales Person

OFFICE OF THE GENERAL COUNSEL, Yale University
Woodbridge Hall
New Haven, CT 06520 6/77 – 9/77
Summer Intern

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES
1285 Avenue of the Americas
New York, NY 10019 6/76 – 8/76
Summer Clerk

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7. **Military Service and Draft Status**: Identify any service in the U.S. Military, including dates of service, branch of service, rank or rate, serial number (if different from social security number), and type of discharge received, and whether you have registered for selective service.

   I have never served in the military, and never was eligible to register for selective service.

8. **Honors and Awards**: List any scholarships, fellowships, honorary degrees, academic or professional honors, honorary society memberships, military awards, and any other special recognition for outstanding service or achievement.

   I received scholarships during my four years at Princeton University and my three years at Yale Law School. I graduated *summa cum laude*, Phi Beta Kappa, from Princeton. Princeton awarded me, as a graduating student co-winner, the M. Taylor Senior Pyne Prize, for scholastic excellence and service to the University. My senior thesis work received an honorable mention from the University's History Department.

   While at law school, I served as an Editor of the Yale Law Journal and Managing Editor of the Yale Studies in World Public Order. I was also a semi-finalist in the Barrister's Union competition, a mock trial presentation.

   I have been fortunate to receive a number of honors and awards throughout my career. I recall receiving, or have records of having received, the following:

   2009 Mujeres Destacadas Award
   Presented by El Diario La Prensa
   May 17, 2009

   2009 New York State
   Women of Excellence Award
   Presented by Gov. David A. Paterson
   March 24, 2009

   Urban Health Plan Wall of Fame
   Inducted, September 21, 2007

   Honorary Degree of Doctor of Laws
   Northeastern University
   School of Law
   May 25, 2007

   Outstanding Professional Leadership Award
   Presented by Latino Law Students Association
   Columbia Law School
   October 2006

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Public Service Award
Presented by Latino Law Students Association
Yale Law School
April 2006

John Carro Award for Judicial Excellence
Presented by Association of Judges of Hispanic Heritage, Inc.
October 30, 2005

Latina of the Year
Judiciary Award
Presented by Hispanic National Bar Association
October 2005

Judicial Intern Program Award
Presented by Puerto Rican Bar Association
March 16, 2005

Myles A. Paige Award
Presented by the Judicial Friends Foundation
December 2003

Degree of Doctor of Laws Honoris Causa
Pace Law School
May 18, 2003

Most Influential Latin American in the Law Award
Presented by Latin American Law Students Association
Benjamin N. Cardozo School of Law
April 2002

Degree of Juris Doctor Honoris Causa
Brooklyn Law School
June 7, 2001

Degree of Doctor of Laws Honoris Causa
Princeton University
June 5, 2001

Arabella Babb Mansfield Award
Presented by National Association of Women Lawyers
July 8, 2000

The Charles W. Froessel Award
Presented by The New York Law School Law Review
April 7, 2000

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Women's History Month Celebration Honor
Presented by Gender Bias Committee
12th Judicial District
Unified Court System of the State of New York
March 9, 2000

Distinguished Lawyers Award
Presented by Lawyers College of Puerto Rico
September 11, 1999

Award for Life-Long Commitment, Dedication & Perseverance to Ensure Fairness and Equality in the Legal Profession
Presented by Hispanic Bar Association of New Jersey
August 19, 1999

Degree of Doctor of Laws Honoris Causa
Lehman College of The City University of New York
June 2, 1999

Lance Liebman Nice Guys/Gals Do Not Necessarily Finish Last Award
Presented by Center for Public Interest Law
Columbia Law School
April 20, 1999

Gertrude E. Rush Award
Presented by National Bar Association
April 17, 1999

50 Outstanding Latinas of the Year Award
Presented by *el diario*/LA PRENSA
March 17, 1999

Key to the City
Presented by the City of Mayaguez, Puerto Rico
January 22, 1999

Women in Leadership Award
Presented by The Cervantes Society
October 28, 1998

Achievement Award
Connecticut Hispanic Bar Association
October 24, 1998

Certificate of Appreciation

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Presented by Brooklyn Metropolitan Detention Center
September 15, 1998

Tribute to the Puerto Rican Woman Award
Presented by the National Puerto Rican Day Parade
May 7, 1998

Graciela Olivarez Award
Presented by the Hispanic Law Students Association
Notre Dame Law School
February 26, 1998

Certificate of Appreciation
Presented by Department of Justice
Federal Bureau of Prisons
Metropolitan Correctional Facility
October 3, 1997

Distinguished Woman in the Field of Jurisprudence Award
Presented by the Secretary of State of Puerto Rico
July 4, 1996

Award in Recognition of Outstanding Achievement
Presented by Latino American Law Students Association
Hofstra Law School
March 15, 1996

Award for Outstanding and Dedicated Service to the People of New York County
Presented by the Hogan-Morgenthau Association
January 17, 1995

Lifetime Achievement Award
Presented by National Puerto Rican Coalition, Inc.
October 20, 1994

Certificate of Excellence
Presented by National Conference of Puerto Rican Women
New York City Chapter
March 24, 1994

Excellence With A Heart Medal
Presented by Cardinal Spellman High School
1993

Lifetime Achievement Award

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56940.007

Presented by the Latino Law Student Division of the Hispanic National Bar Association
September 25, 1993

Award for Commitment to the Preservation of Civil and Constitutional Rights for All Americans
Presented by Hispanic National Bar Association
September 24, 1993

Human Rights Award for Service to Humanity
Presented by the Paralegal Studies Program of
Bronx Community College of the City University of New York
June 17, 1993

Claude E. Hawley Medal for Scholarship and Service
Presented by John Jay College of Criminal Justice
May 27, 1993

Outstanding Hispanic Women Achievers Award
Presented by the State of New York Governor's Office for Hispanic Affairs
March 22, 1993

Emilio Nunez Award for Judicial Service
Presented by Puerto Rican Bar Association
1993

Citation of Merit
Presented by the Bronx Borough President
December 12, 1992

9. **Bar Associations**: List all bar associations or legal or judicial-related committees, selection panels, or conferences of which you are or have been a member, and give the titles and dates of any offices which you have held in such groups.

Organization	**Date**	**Title**
Criminal Justice Act Electronic Vouchers Working Group	August 2008 – present	Court Administration and Case Management ("CACM") Liaison
Second Circuit Backlog Committee	2008 – present	Member
Senior Judge Governance Working Group	2008	Member

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Organization	Date	Title
EDNY Merit Selection Committee for Bankruptcy Judges	2007 – 2008	Member
Second Circuit Judicial Council Judicial Misconduct Subcommittee	January – June 2007; January – June 2008	Member
Court Administration and Case Management ("CACM") Subcommittee on Long Range Planning	July 2006 – present	Member
CACM Subcommittee on the Implementation of the Electronic Case Management System	July 2006 – present	Member
CACM Subcommittee on Legislative Review	July 2006 – present	Member
Second Circuit Judicial Council Library Committee	June 2006 – present	Chair
Second Circuit Judicial Council	June 2006 – present	Member
SDNY Merit Selection Committee for Bankruptcy Judges	2006 – 2007	Member
CACM Subcommittee on Courtroom Usage	December 2005 – present	Member
CACM Subcommittee on Libraries and Lawbooks	July 2005 – present	Member, Chair (October 2005 to present)
Second Circuit Legal Affairs Committee	June 2005 – 2008	Member
CACM Subcommittee to Review Court Administration and Case Management Issues of the Ninth Circuit	January 2005 – September 2005	Member
Second Circuit Budget Committee	2005 – present	Chair
CACM Committee of the Judicial Conference	October 2004 – present	Member
Second Circuit Clerk's Office and Case Management Committee	2004 – present	CACM Liaison
Second Circuit Executive Committee	2003 – present	Member

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Organization	Date	Title
National Association of Women Judges	2000 – present	Member
Second Circuit Automation and Technology Committee	2000 – 2003	Member
New York Women's Bar Association	1998 – present	Member
Association of Judges of Hispanic Heritage	1998 – present	Member
Second Circuit CJA Vouchers, CJA, and Pro Bono Panels	1998 – 2005	Chair
Second Circuit Rules Committee	1998 – 2000	Member
SDNY Budget Committee	1996 – 1998	Member
SDNY Pro Se Committee	1996 – 1998	Member
Puerto Rican Bar Association	1994 – present	Member
Public Service Committee of the Federal Bar Council	1994 – 1998	Member
Second Circuit Task Force on Gender, Racial & Ethnic Fairness in the Courts	1993 – 1998	Member
SDNY Rules of Practice and Procedure Committee	1993 – 1998	Member
Hispanic National Bar Association	1992 – present	Member
SDNY Grievance Committee	1992 – 1998	Member
American Bar Association	1980 – present	Member

10. **Bar and Court Admission**:

a. List the date(s) you took the examination, the date you passed, and the date you were admitted to the bar of any state for all states where you sat for a bar examination. List any state in which you applied for reciprocal admission without taking the bar examination and the date of such admission or refusal of such admission. List and explain the reason for any lapses in membership.

I took and passed the New York State bar exam during the summer of 1979, and I was admitted on April 7, 1980. I did not apply for reciprocal admission to any other state. Since my confirmation as a district court judge on October 2, 1992, I have been in retired/judicial status.

b. List all courts in which you have been admitted to practice, including dates of admission and any lapses in membership. Explain the reason for any lapse in

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membership. Give the same information for administrative bodies that require special admission to practice.

United States District Court, Eastern District of New York: admitted on March 30, 1984.
United States District Court, Southern District of New York: admitted on March 27, 1984.
New York - First Department: admitted on April 7, 1980.

11. **Memberships**:

a. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed in response to Questions 9 or 10 to which you belong, or to which you have belonged, or in which you have participated, since graduation from law school. "Participation" means consistent or repeated involvement in a given organization, not merely attendance at a small number of events or meetings. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications. Describe briefly the nature and objectives of each such organization, the nature of your participation in each such organization, and identify an officer or other person from whom more detailed information may be obtained.

Belizean Grove 2008–present
Member
The Belizean Grove is a private organization of female professionals from the profit, non-profit and social sectors.
President: Susan Schiffer Stautberg
17 East 89th Street, Suite 7D
New York, NY 10128
(212) 987-6070

Princeton University 2007–present
Trustee
Member of Honorary Degrees Committee, Public Affairs Committee, and Student Life, Health & Athletics Committee
President: Shirley M. Tilghman
Office of the President
1 Nassau Hall, Princeton University
Princeton, NJ 08544
(609) 258-6100

American Philosophical Society 2002–present
Member

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The American Philosophical Society promotes useful knowledge in the sciences and humanities through excellence in scholarly research, professional meetings, publications, library resources, and community outreach.
Executive Officer: Mary Patterson McPherson
105 South Fifth Street
Philadelphia, PA 19106-3386
(215) 440-3400

Kirkland and Ellis New York Public Service Fellowship 2000–2001
Member of Selection Committee
The committee selects a fellow based on his or her ability to make a positive contribution to the New York City community.
Dean for Social Justice Initiatives: Ellen P. Chapnick
Columbia Law School
Center for Public Interest Law
435 West 116th Street
New York, NY 10027
(212) 854-4628

National Council of La Raza 1998–2004
Member
The Council works to improve opportunities for Hispanic Americans in five key areas: assets and investments, civil rights and immigration, education, employment and economic status, and health.
Mildred J. Reyes
Raul Yzaguirre Building
1126 16th Street NW
Washington, DC 20036
(202) 785-1670

Fordham Self Study Committee 2000
Member
The committee was responsible for drafting a study in furtherance of Fordham Law School's accreditation by the American Bar Association.
Assistant Dean of Student Affairs, Fordham Law School: Nitza Escalera
140 West 62nd Street
New York, NY 10023
(212) 636-7155

Public Service Committee of the Federal Bar Council 1994–1998
Member
The committee provides legal representation and non-legal public service, including bringing public school students together with federal judges.
Vilia Hayes
123 Main Street, Suite L100
White Plains, NY 10601

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(212) 837-6839

Root-Tilden-Snow (now Root-Tilden-Kern) Scholarship 1994–1996,
Member of Selection Committee 1998–2001
The committee selects recipients of a scholarship that is awarded to students of New York University Law School who intend to pursue careers in public service.
Associate Professor of Clinical Law Faculty Director: Margaret L. Satterthwaite
New York University School of Law
40 Washington Square South
New York, NY 10012
(212) 998-6657

Silver Gull Club, Inc. 1988–1995
Member, Summer Beach and Pool Club
Manager: Edward J. McManus
One Beach 193rd Street
Rockaway Point, NY 11695
(718) 634-2900

New York City Campaign Finance Board 1988–1992
Member, Board of Directors
This independent, nonpartisan city agency administers the Campaign Finance Program, publishes the Voter Guide, and oversees the Debate Program.
Executive Director: Amy M. Loprest
40 Rector Street, 7th Floor
New York, NY 10006
(212) 306-7100

State of New York Mortgage Agency ("NYSMA") 1987–1992
Member, Board of Directors
Member, Affirmative Action Committee
Member, Audit and Finance Committee
Member, Mortgage Insurance Committee
Administers programs for first time home buyers of owner-occupied, one-to-four unit residences that are required to meet eligibility criteria established by the Agency, which criteria are required by applicable Federal law.
Chairman: Judd S. Levy
641 Lexington Avenue, 4th Floor
New York, NY 10022
(212) 688-4000

Puerto Rican Legal Defense & Education Fund 1980–1992
I served at various points during this time frame in the following capacities:
Member and Vice President, Board of Directors
Chairperson, Litigation and Education Committees
PRLDEF provides legal resources for Latinos.

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President & General Counsel: Cesar A. Perales
99 Hudson Street, 14th Floor
New York, NY 10013
(212) 219-3360

New York State Advisory Panel for Inter-Group Relations 1990–1991
Member
This panel was created at the request of Governor Mario Cuomo to explore major issues that contribute to inter-group discord and provided recommendations on how the state could address those issues.
Former Chair: Margarita Rosa
Executive Director, Grand Street Settlement
80 Pitt Street
New York, NY 10002
(212) 674-1740, ext. 212

Selection Committee for the Stanley D. Heckman Educational Fund 1988
Member
The committee selects high school graduates in the New York area to be recipients of college scholarships.
Katherine Law
The Heckman-Takahara Family Foundation
(Formerly The Stanley D. Heckman Educational Trust)
1251 Avenue of Americas, 35th Floor
New York, NY 10020
(619)281-3410

Maternity Center Association 1985–1988
(now the Childbirth Connection)
Member, Board of Directors
This national not-for-profit organization is dedicated to improving the quality of maternity care through research, education, advocacy, and demonstration of maternity innovations.
Executive Director: Maureen P. Corry, MPH
281 Park Avenue South, 5th Floor
New York, NY 10010
(212) 777-5000

b. The American Bar Association's Commentary to its Code of Judicial Conduct states that it is inappropriate for a judge to hold membership in any organization that invidiously discriminates on the basis of race, sex, religion, or national origin. Indicate whether any of these organizations listed in response to 11a above currently discriminates or formerly discriminated on the basis of race, sex, religion, or national origin either through formal membership requirements or the practical implementation of membership policies. If so, describe any action you have taken to change these policies and practices.

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None of the above organizations, other than the Belizean Grove, discriminates on the basis of race, sex, religion, or national origin. The Belizean Grove is a private organization of female professionals from the profit, non-profit and social sectors, but I do not consider the Belizean Grove to invidiously discriminate on the basis of sex in violation of the Code of Judicial Conduct.

c. List all conferences, symposia, panels, and continuing legal education events you have attended after having been confirmed to the district court. For each event, provide the dates, a description of the subject matters addressed, the sponsors, and whether any funding was provided to you by the sponsors or other organizations.

This chart includes all entries from my calendar, information gathered from copies of invitations, general correspondence, and speeches that I have retained. To the best of my knowledge this list is substantially complete. While I do not accept honoraria from outside groups, where applicable I have noted when my travel expenses were paid by an organization. In each case, the express sponsor of the event supplied the reimbursement.

Date	**Event Sponsor**	**Nature of Participation**	**Funding**
8/27/93 (and intermitte -ntly thereafter until 1998)	Second Circuit Naturalization Proceedings & Attorney Admissions Proceedings	I have periodically conducted Naturalization Proceedings and Attorney Admissions ceremonies. Draft of standard comments provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.
11/12/93	Yale Law School Preiskel/Silverman Event	I spoke on "Doing What's Right: Ethical Questions for Private Practitioners Who Have Done or Will Do Public Service." Draft speech provided as attachment to Question 12(d).	My travel expenses were reimbursed by the sponsor of this event, Yale Law School.

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Date	Event Sponsor	Nature of Participation	Funding
1994	Federal Judicial Center	I appear on a video entitled "Your First Year on the Bench." Video provided as attachment to Question 12(d).	My travel expenses were reimbursed by the sponsor of this event, the Federal Judicial Center.
3/17/94	Revista Juridica de la Universidad Interamericana de Puerto Rico	I participated in a panel presentation on "Women in the Judiciary." Draft speech provided as attachment to Question 12(d).	My travel expenses were reimbursed by the sponsor of this event, la Universidad Interamericana de Puerto Rico.
3/19/94	Revista Juridica de la Universidad Interamericana de Puerto Rico	I attended the 40th National Law Review Conference. Draft speech provided as attachment to Question 12(d).	My travel expenses were reimbursed by the sponsor of this event, la Universidad Interamericana de Puerto Rico.
3/25/94	New York Intellectual Property Law Association, Inc.	I attended this event on intellectual property law.	Dinner was provided by the New York Intellectual Property Law Association, Inc.
10/1/94 – 10/2/94	New York Council of Defense Lawyers' Retreat	I attended this event on forfeiture law.	My travel and food expenses were reimbursed by the sponsor of this event, the New York Council of Defense Lawyers.
1/17/95	Hogan-Morgenthau Associates	I received the Hogan-Morgenthau award. Draft speech provided as attachment to Question 12(d).	Dinner was provided by the sponsor of this event, Hogan-Morgenthau Associates.
5/2/95	Federal Bar Council Annual Law Day Dinner	I attended this event.	Dinner was provided by the sponsor of this event, the Federal Bar Council.

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Date	Event Sponsor	Nature of Participation	Funding
2/5/96	Suffolk University Law School	I presented a speech entitled, "Returning Majesty to the Law and Politics: A Modern Approach." The basis for this speech is provided as an attachment to Question 12(a) and published at Sonia Sotomayor & Nicole A. Gordon, *Returning Majesty to the Law and Politics: A Modern Approach*, 30 Suffolk U. L. Rev. 35 (1996).	My travel expenses were reimbursed by the sponsor of this event, Suffolk University Law School.
2/7/96-2/25/96	Federal Bar Council Santo Domingo Conference	I attended this conference.	Travel, lodging and meals were provided by the sponsor of this event, the Federal Bar Council.
3/15/96	Latino and Latina American Law Students Association of Hofstra University School of Law	I gave remarks at the 3rd Annual Awards Banquet and Dinner Dance for the Latino and Latina American Law Students Association. Draft speech provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.
5/17/96	Hispanic National Bar Association	I gave remarks at the National Board of Governor's Reception. Draft speech provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.
6/2/96	Federal Bar Council Annual Law Day Dinner	I attended this event.	Dinner was provided by the sponsor of this event, the Federal Bar Council.
6/5/96	Anti-Defamation League Lawyer Dinner	I attended this event.	Dinner was provided by the sponsor of this event, the Anti-Defamation League.

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Date	Event Sponsor	Nature of Participation	Funding
7/2/96-7/7/96	Puerto Rico Dependence of State Fourth of July Celebration Award	I attended this event.	Travel and lodging was provided by the sponsor of this event, the Puerto Rico Dependence of State organization.
10/3/96	Hispanic National Bar Association Convention	I attended this event.	The registration fee was waived for this event by the Hispanic National Bar Association.
10/22/96	National Conference of Christians and Jews Lawyers Dinner	I attended this event.	Dinner was provided by the sponsor of this event, the National Conference of Christians and Jews.
11/1/96-11/3/96	Aspen Institute Seminar on International Human Rights	I attended this event on international human rights law.	Accommodations and meals were provided by the sponsor of this event, the Aspen Institute.
11/7/96	Princeton University	I gave remarks at the Latino Heritage Month Celebration. Draft speech provided as attachment to Question 12(d).	My travel expenses were reimbursed by the sponsor of this event, Princeton University.
2/16/97	PricewaterhouseCoopers Intellectual Property Seminar	I spoke at this event on intellectual property law. I participated in a panel discussion with other federal judges on the practice of patent law in the district courts.	My travel, lodging, and meals were covered by the sponsor of this event, Princeton University.
2/19/97	Puerto Rican Bar Association	I introduced Judge Jose A. Cabranes at the 1997 Cocktail Reception Recognizing Excellence in the Judiciary. Draft speech provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.

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Date	Event Sponsor	Nature of Participation	Funding
4/24/97	Minority Judicial Internship Program Reception	I attended this event on judicial internships for minority students.	I have no record of receiving funding from the sponsors of this event.
5/15/97	Association of Judges of Hispanic Heritage	I introduced John D. Feerick at this event, the Hispanic Judges Dinner. Draft speech provided as attachment to Question 12(d).	My meals were provided by the sponsor of this event, the Association of Judges of Hispanic Heritage.
9/14/97	Hunts Point Multi-Service Center, Inc.	I gave remarks at this 30th Anniversary Event. Draft speech provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.
9/23/97	Business Development Association: Women in the Law Panel	I appeared on a panel with Judge Denise Cote and discussed women and the law.	I have no record of receiving funding from the sponsors of this event.
10/13/97	New York County Lawyers Association Edward Weinfeld Award Luncheon	I attended this event.	A meal was provided by the sponsor of this event, the New York County Lawyers Association.
10/16/97	International Anti-Counterfeiting Coalition	I gave remarks at this luncheon. Draft speech provided as attachment to Question 12(d).	My travel, lodging, and meals were reimbursed by the sponsor of this event, International Anti-Counterfeiting Coalition.
10/17/97	Georgetown University Law School Employment Discrimination Seminar	I was a panelist at this event and spoke on Second Circuit employment discrimination cases.	My travel, lodging, and meals were provided by the sponsor of this event, Georgetown University.

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Date	Event Sponsor	Nature of Participation	Funding
11/13/97	National Puerto Rican Coalition Event Lifetime Achievement Award	I attended this event.	A meal was provided by the sponsor of this event, the National Puerto Rican Coalition.
11/19/97	Panel on Minority Clerkship Opportunities	I was a panel member at this event on minority clerkship opportunities. I spoke on the qualifications necessary to clerk for a federal judge.	I have no record of receiving funding from the sponsors of this event.
11/24/97	Association of Hispanic Judges	I attended this event on Hispanics and the law.	I have no record of receiving funding from the sponsors of this event.
11/26/97	Federal Bar Council Luncheon	I attended this event.	A meal was provided by the sponsor of this event, the Federal Bar Council.
3/27/98	New York Intellectual Property Law Association Event	I attended this event on intellectual property law.	A meal was provided by the sponsor of this event, the New York Intellectual Property Law Association.
3/28/98	Hispanic National Bar Association Moot Court	I judged a moot court competition.	Transportation, lodging, and meals were provided by the sponsor of this event, the Hispanic National Bar Association.
4/23/98	New York Women's Bar Association & Grand Street Settlement	I participated in "Take Our Daughters to Work Day" and spoke with a group of children about the work of a judge.	I have no record of receiving funding from the sponsors of this event.
4/24/98	ABA Section of Litigation	I attended The John Minor Wisdom Public Service and Professionalism Awards and Luncheon and may have given limited welcoming remarks.	I have no record of receiving funding from the sponsors of this event.

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Date	Event Sponsor	Nature of Participation	Funding
4/28/98	Anti-Defamation League New York Lawyers Division Dinner	I attended this event.	A meal was provided by the sponsor of this event, the Anti-Defamation League.
5/5/98	Speech at NYU Law School Honoring Xavier Romeu Matta	I gave remarks at this event honoring Xavier Romeu Matta. My remarks were similar to the speech I gave on 5/13/99, a copy of which is provided as an attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.
5/9/98	Yale Law School Barristers Union Competition	I presided over the John Fletcher Caskey/John Currier Gallagher Prize Trial event.	My travel expenses were reimbursed by the sponsor of this event, Yale Law School.
6/5/98	Panel on International Arbitration	I participated in a panel discussion with Jeff Livingston on international arbitration. I spoke on the differences between arbitration and litigation.	I have no record of receiving funding from the sponsors of this event.
9/15/98	US Dept. of Justice, Federal Bureau of Prisons, Metropolitan Detention Center	I gave remarks at Hispanic Heritage Month celebration of Women in Leadership. Draft speech provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.
9/22/98	New York County Lawyers Association, Committee on Minorities and the Law	I gave remarks at a reception for Ellis Cose's *The Best Defense*, NYCLA's Minority Judicial Internship Program, and Hon. Baer and Mrs. Baer. Draft speech provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.

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Date	Event Sponsor	Nature of Participation	Funding
9/23/98	N.Y. Women's Bar Association and NYU Center of Labor and Employment Law	I participated in a panel on "Sexual Harassment: How to Practice Safe Employment."	I have no record of receiving funding from the sponsors of this event.
9/24/98	National Puerto Rican Coalition, Inc.	I addressed the participants of the National Policy Conference during the membership luncheon. Draft speech provided as attachment to Question 12(d).	My travel and meal expenses were reimbursed by the sponsor of this event, the National Puerto Rican Coalition, Inc.
10/7/98	Winthrop, Stimson, Putnam & Roberts	I attended this program on "Breaking Down Barriers - Reaching New Heights" focusing on career strategies for minority professionals. News clippings provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.
10/15/98	South Bronx Mental Health Council, Inc. Community Mental Health Center	I attended this celebration of Hispanic Heritage month, Fifth Annual Dinner Dance. I spoke on my experience as a child with health care in the South Bronx.	I have no record of receiving funding from the sponsors of this event.
10/16-10/17/98	Georgetown University Law Center, Continuing Legal Education	I spoke on a panel entitled "Litigating Employment Cases: Views from the Bench."	I have no record of receiving funding from the sponsors of this event.

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Date	Event Sponsor	Nature of Participation	Funding
10/24/98	Connecticut Hispanic Bar Association	I gave remarks on the Fifth Annual Awards Celebration and Scholarship Presentation. The theme was "Hispanic Females in Leadership." Draft speech provided as attachment to Question 12(d).	My meals were paid by the sponsor of this event, the Connecticut Hispanic Bar Association.
10/26/98	Federal Correctional Institution at Otisville	I gave remarks at the Hispanic Heritage Month Program. Draft speech provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.
10/28/98	The Cervantes Society New York County Supreme Court	I gave remarks at the 3rd Annual celebration of Hispanic Heritage Month celebrating women in leadership. Draft speech provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.
11/19/98	New York Law School	I spoke on a panel at the Third Annual Forum on Clerkship Opportunities for Students of Color. I discussed the qualifications necessary to obtain a judicial clerkship.	I have no record of receiving funding from the sponsors of this event.
12/4/98	Beate Gordon and the Japanese Consulate	I spoke at a ceremony honoring Beate Gordon. Draft speech provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.

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Date	Event Sponsor	Nature of Participation	Funding
1/20/99	Panel Discussion at Facultad de Derecho Eugenio Maria de Hostos Mayaguez, Puerto Rico	I participated in this panel discussion and spoke on the United States Judicial System. News clipping provided as attachment to Question 12(d).	My travel, meal, and lodging expenses were reimbursed by the sponsor of this event, Derecho Eugenio Maria de Hostos.
2/26/99	Ida Castro Reception	I attended this reception honoring Ida Castro.	I have no record of receiving funding from the sponsors of this event.
3/14/99	New York Law School	I judged the final round of the Robert F. Wagner, Sr. National Labor & Employment Law Moot Court Competition.	I have no record of receiving funding from the sponsors of this event.
3/18/99	El Dario Award Luncheon	I attended this event.	Dinner was provided by the sponsor of this event, El Dario.
4/17/99	Metropolitan Black Bar Association	I attended this event and received an award at the 19th Annual Gertrude E. Rush Award Dinner. I spoke on the need for groups to work together to promote communities.	Dinner was provided by the sponsor of this event, the Metropolitan Black Bar Association.
4/19/99	NYU School of Law, Lawyering Program	I judged this moot court event.	I have no record of receiving funding from the sponsors of this event.
4/20/99	Columbia Law School, Center for Public Interest Law	I gave remarks at the 1999 Annual Public Interest Awards Dinner. Draft speech provided as attachment to Question 12(d).	Dinner was provided by the sponsor of this event, Columbia Law School.

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Date	Event Sponsor	Nature of Participation	Funding
4/22/99	New York Women's Bar Association & Grand Street Settlement	I participated in "Take Our Daughters to Work Day" and spoke with a group of children about the work of a judge.	I have no record of receiving funding from the sponsors of this event.
4/30/99	Women's Bar Association of the State of New York	I provided remarks at the Association's 1999 Convention, "Women Moving Forward." Draft speech and news clipping provided as attachment to Question 12(d).	My travel expenses were reimbursed by the sponsor of this event, the Women's Bar Association of the State of New York.
5/1/99	Panel on Appellate Advocacy Sponsor unknown.	I participated in this panel on effective appellate advocacy. I spoke on tips for improving appellate advocacy skills.	I have no record of receiving funding from the sponsors of this event.
5/13/99	Puerto Rican Bar Association	42nd Anniversary Gala Banquet. I presented Xavier Romeu Matta, Exec. Director for the Puerto Rico Industrial Development Corp., with the Hon. Felipe N. Torres Award for Outstanding Latino Attorney of the Year. Draft speech provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.

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Date	Event Sponsor	Nature of Participation	Funding
5/20/99	Association of Judges of Hispanic Heritage, Inc.	Annual Awards Dinner Celebrating Diversity and Judicial Excellence. I presented the Frank Torres Commitment to Diversity Award to Xavier Romeu Matta, Seyfarth, Shaw, Fairweather & Geraldson. I gave a variant of the speech presented on 5/13/99, a copy of which is provided as an attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.
8/19/99	Hispanic Bar Association of New Jersey	I attended the 30th Anniversary Scholarship Dinner Dance and cocktail reception in my honor. I spoke very briefly to express my gratitude for the support of the Association. News clipping provided as attachment to Question 12(d).	My travel and meal expenses were reimbursed by the sponsor of this event, the Hispanic National Bar Association of New Jersey.
9/11/99	Colegio de Abogados de Puerto Rico	I presented remarks at the Colegio de Abogados de Puerto Rico Asamblea Annual 1999 regarding the importance of an independent judiciary. Draft speech provided as attachment to Question 12(d).	My travel, meal, and lodging expenses were reimbursed by the sponsor of this event, Colegio de Abogados de Puerto Rico.
9/24/99	Hispanic Society of New York City Housing Authority	I spoke at this event without a prepared text on my experiences living in a housing project.	Dinner was provided by the sponsor of this event, the Hispanic Society of New York City Housing Authority.

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Date	Event Sponsor	Nature of Participation	Funding
9/27/99	Yale Law Women and The Collective on Women of Color in the Law	I participated in a panel discussion on "Gender and the Bench." My remarks were similar to my 3/17/94 speech on "Women in the Judiciary."	My travel expenses were reimbursed by the sponsor of this event, Yale Law School.
11/9/99	NYU Law School Clerkship Night	I attended this event on clerkship opportunities for law students. I spoke briefly on the qualifications necessary to obtain a judicial clerkship.	I have no record of receiving funding from the sponsors of this event.
3/9/00	Bronx County Gender Bias Committee Bronx Women's Bar Association	I attended the First Annual Program for Women's History Month.	I have no record of receiving funding from the sponsors of this event.
3/22/00	CUNY School of Law	I participated in a panel on "Latinas en la Ley," a celebration of Women's Heritage Month. My remarks were similar to my 3/17/94 speech on "Women in the Judiciary."	I have no record of receiving funding from the sponsors of this event.
4/6/00	Puerto Rico Bar Association	I attended the 43rd Annual Scholarship Gala Banquet. I spoke very briefly to thank the sponsors of the event.	I have no record of receiving funding from the sponsors of this event.
4/7/00	New York Law School Law Review	I received the Charles W. Froessel award at this event. Draft speech provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.

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Date	Event Sponsor	Nature of Participation	Funding
4/28/00 - 4/30/00	Yale University Law School Women, Justice and Authority Planning Committee	I gave a presentation to Yale law students. My remarks were similar to my 3/17/94 speech on "Women in the Judiciary."	My travel and lodging expenses were reimbursed by the sponsor of this event, Yale Law School.
5/30/00	New York Women's Bar Association	I participated in "Take Our Daughters to Work Day" and spoke with a group of children about the work of a judge.	I have no record of receiving funding from the sponsors of this event.
6/20/00	Litigation CLE	I spoke on appellate advocacy at this event. I gave tips on how to be a better appellate advocate.	I have no record of receiving funding from the sponsors of this event.
6/29/00	Association of the Bar of the City of New York "The Current Status of Minorities in Our Judicial System"	I attended this event on the status of minorities in the judicial system. I spoke on the number of federal judges who have come from minority backgrounds.	I have no record of receiving funding from the sponsors of this event.
7/7/00 (or possibly 6/28/00)	National Association of Women Lawyers	I participated in a panel discussion on "Beyond the Glass Ceiling for Women and Other Minorities."	I have no record of receiving funding from the sponsors of this event.
7/8/00	National Association of Women Lawyers	I attended this event and received the Arabella Babb Mansfield Award. I spoke briefly to express my gratitude for receiving the award and to underscore the need for collaborative efforts.	I have no record of receiving funding from the sponsors of this event.

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Date	Event Sponsor	Nature of Participation	Funding
7/9/00	American Bar Association	I spoke on successful models for bringing minorities into the legal profession at this event, the Presidential Showcase program entitled "Town Meeting on Diversity in the Legal Profession."	I have no record of receiving funding from the sponsors of this event.
9/19/00	Federal Bar Council Inns of Court	I participated in a panel discussion on end of life issues. I spoke on the state of the law on this topic. Video provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.
10/07/00	Hispanic National Bar Association	I attended the HNBA Convention. I spoke briefly on advocacy tips and on the importance of legal public service.	My travel, lodging, and meal expenses were reimbursed by the sponsor of this event, the Hispanic National Bar Association.
10/24/00	Association of the Bar of the City of New York	I participated in a panel on "The Ins and Outs of Judicial Clerkships."	I have no record of receiving funding from the sponsors of this event.
11/00	Puerto Rican Legal Defense and Education Fund	I attended a PRLDEF event.	I have no record of receiving funding from the sponsors of this event.
11/13/00	Lawyering for Social Justice	I presented the Jurist in Residence Lecture. Draft speech provided as attachment to Question 12(d).	My travel expenses were reimbursed by the sponsor of this event, Syracuse University College of Law.

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Date	Event Sponsor	Nature of Participation	Funding
11/30/00	Litigators' Club	I spoke about the difference between the Court of Appeals and the District Court at this breakfast meeting. Draft speech provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.
12/5/00	Fordham University School of Law	I judged the Sixteenth Annual Metropolitan Mentor Moot Court Competition.	I have no record of receiving funding from the sponsors of this event.
12/19/00	Federal Bar Council Committee on Second Circuit Courts	I spoke about what it means to be a lawyer and received questions at this event.	I have no record of receiving funding from the sponsors of this event.
1/20/01	Second Circuit Committee Meeting	I spoke about my experiences as a judge at the trial and appellate level at this event.	I have no record of receiving funding from the sponsors of this event.
1/25/01 - 1/28/01	Arizona State University College of Law	I spoke on the topic "Lawyering for Social Justice." I discussed my life experiences and the role of minority bar organizations. News clipping provided as attachment to Question 12(d).	My travel, meal, and lodging expenses were reimbursed by the sponsor of this event, Arizona State University College of Law.
2/27/01	National Hispanic Prosecutors Association	I attended this event. I gave tips on advocacy skills.	I have no record of receiving funding from the sponsors of this event.
4/22/01	Pace University School of Law	I judged the Grand Moot Competition.	I have no record of receiving funding from the sponsors of this event.

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56940.030

Date	Event Sponsor	Nature of Participation	Funding
5/15/01	Federal-State Judicial Council	I participated in a symposium on post-conviction relief. I spoke on the execution of judgments of conviction.	I have no record of receiving funding from the sponsors of this event.
6/3/01-6/5/01	Princeton University	I received an honorary degree at this event.	My travel, lodging, and meals were provided by the sponsor of this event, Princeton University.
9/9/01	Hofstra Law School	I introduced Justice Antonin Scalia at this event. Draft speech provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.
9/13/01	Columbia University Law School	I participated in the "Advice from the Judges" program. I gave tips on how to be a better advocate.	I have no record of receiving funding from the sponsors of this event.
10/20-10/23/01	Panel Discussion with Foreign Judges The Hague, Netherlands	I participated in a panel discussion on the 1980 Hague Convention on the Civil Aspects of International Child Abduction. I spoke on the implementation of the Hague Convention in the United States and abroad.	My travel expenses were reimbursed by the sponsor of this event, the United States Department of State.
10/26-10/28/01	University of California, Berkeley, Boalt Hall School of Law	I presented the Olmos Lecture at this event, "Raising the Bar: Latino and Latina Presence in the Judiciary and the Struggle for Representation." Draft speech provided as attachment to Question 12(a) and published as *A Latina Judge's Voice*, 13 Berkeley La Raza Law Journal 87 (2002).	My travel, lodging, and meal expenses were reimbursed by the sponsor of this event, the University of California, Berkeley, Boalt Hall School of Law.

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56940.031

Date	Event Sponsor	Nature of Participation	Funding
11/1/01	Rutgers Law School	I gave remarks for the introduction of Ida Castro for the Fannie Bear Besser Award at the Rutgers Law School Alumni Dinner. Draft speech provided as attachment to Question 12(d).	My travel expenses were reimbursed by the sponsor of this event, Rutgers University.
11/8/01	Bar Association of the City of New York Forum on Minorities in the Federal Courts	I participated in a panel discussion on minorities in the federal courts. I spoke on the qualifications for obtaining a judicial clerkship.	I have no record of receiving funding from the sponsors of this event.
11/30/01-12/1/01	Princeton University Seminar: "Puerto Ricans: Second Class Citizens in Our Democracy?"	I moderated a symposium panel on "Puerto Ricans: Second Class Citizens in Our Democracy?" I did not make any remarks of my own.	My travel, lodging, and meal expenses were reimbursed by the sponsor of this event, Princeton University.
1/22/02	Yale Law School Association of New York	I participated in a panel discussion entitled, "How Judges Really Work."	I have no record of receiving funding from the sponsors of this event.
1/24/02	University of Pennsylvania Law School, Keedy Cup Moot Court	I judged this moot court competition.	My travel, lodging, and meal expenses were reimbursed by the sponsor of this event, the University of Pennsylvania Law School.

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56940.032

Date	Event Sponsor	Nature of Participation	Funding
2/26/02	The Princeton Club	I spoke at "A Visit With Princeton Women's Network of New York City." Draft speech provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.
3/23/02	Villanova Law School	I judged the Reimel Finals, a moot court competition.	My travel, lodging, and meal expenses were reimbursed by the sponsor of this event, Villanova Law School.
4/14/02	New York University School of Law	I judged a moot court competition.	I have no record of receiving funding from the sponsors of this event.
4/18/02	Cardozo School of Law, Yeshiva University	I received the Most Influential Woman in the Law Award from the Latin American Law Students Association. Draft speech provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.
5/1/02	FBI Speech Sponsored by Hispanic, Black, Irish, and Asian/Pacific Islander Committees	I spoke at Unity Day. The theme was "United We Stand." Draft speech provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.
6/4/02	Second Circuit Judicial Assistants/Judicial Secretaries	I spoke at the Administrative and Operational Training Workshop for Second Circuit Judicial Assistants/Judicial Secretaries. Draft speech provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.

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56940.033

Date	Event Sponsor	Nature of Participation	Funding
6/6/02-6/8/02	Judicial Conference of the Second Circuit	I attended this event.	My travel, lodging, and meals were provided by the sponsor of this event, the Judicial Conference of the Second Circuit.
9/10/02	St. John's University	I had a conversation with the St. John University's student body and dinner at the 2002-2003 Visiting Jurist Series. Draft speech provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.
10/08/02	American Constitution Society	I participated in an ACS Panel discussion on the sentencing guidelines.	I have no record of receiving funding from the sponsors of this event.
10/21/02-10/22/02	The National Symposium for United States Circuit Judges Judicial Conference	I attended this conference.	My travel, lodging, and meals were provided by the sponsor of this event, the National Symposium for United States Circuit Judges.
11/21/02 & 2004	New York County Clerk's Office	I attended the Juror Appreciation Day Ceremonies twice. At both events, I spoke on the importance of jurors to our judicial system.	I have no record of receiving funding from the sponsors of this event.
12/12/02	Justice Resource Center, Fordham University School of Law	I presided over the final round of the 18th Annual Metropolitan Mentor Moot Court Competition.	I have no record of receiving funding from the sponsors of this event.

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56940.034

Date	Event Sponsor	Nature of Participation	Funding
2/14/03	Constitutional Studies Center, Georgetown University Law Center	I presided over this event, entitled "Rearguing *Marbury v. Madison*." Video provided as attachment to Question 12(d).	My travel, lodging and meal expenses were reimbursed by the sponsor of this event, Georgetown University Law Center.
2/28/03	Office of Legal Education Appellate Supervisors and Appellate Contacts Conference	I spoke about "A View from the Bench" at this event. I discussed advocacy tips.	My travel expenses were reimbursed by the sponsor of this event, the Office of Legal Education Appellate Supervisors and Appellate Contacts.
3/20 - 3/21/03	Indiana University, Maurer School of Law	I delivered guest lectures to Professor James Torke's Civil Procedure II Class, taught a criminal law class, and spoke at a Pro Bono Awards and Recognition Reception. Draft speech provided as attachment to Question 12(d).	My travel, lodging, and meal expenses were reimbursed by the sponsor of this event, Indiana University.
3/27/03	NYU School of Law, Annual Survey of American Law	I made a tribute to John Sexton at this event. Draft speech provided as attachment to Question 12(a) and published at: *Tribute to John Sexton*, 60 N.Y.U. Ann. Surv. Am. L. 23 (2004).	I have no record of receiving funding from the sponsors of this event.
4/9/03	Westchester Women's Bar Association	I participated in a program entitled "Pathways to the Judiciary for Women: Smooth Ride or Rocky Road?"	I have no record of receiving funding from the sponsors of this event.

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56940.035

Date	Event Sponsor	Nature of Participation	Funding
5/1/03	NAAG Corrections Seminar	I attended this seminar on corrections.	I have no record of receiving funding from the sponsors of this event.
5/3/03	Women's Bar Association of the State of New York	I spoke on a US Federal Sentencing Guidelines Panel at the 2003 "Where it all Began: Central New York Birthplace of Women's Rights" convention. Draft speeches provided as attachment to Question 12(d).	My travel, lodging, and meal expenses were reimbursed by the sponsor of this event, the Women's Bar Association of the State of New York.
6/21/03	Princeton University	I spoke on a panel entitled "The Judiciary and Democracy: Principle and Politics" at the Constitutional Principles in American History conference. Draft speech provided as attachment to Question 12(d).	My travel, lodging, and meal expenses were reimbursed by the sponsor of this event, Princeton University.
9/18/03	Yale Law School Association of New York City	I participated in a roundtable discussion and reception on "The Art of Judging."	I have no record of receiving funding from the sponsors of this event.
10/22/03	Latin American Law Students Association Seton Hall School of Law	I participated in the Seton Hall School of Law Distinguished Lecturer Series. Draft speech provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.

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56940.036

Date	Event Sponsor	Nature of Participation	Funding
10/30/03	Association of Judges of Hispanic Heritage, Inc.	I received the John Carro Award for Judicial Excellence at the Hispanic Heritage Awards Dinner. Draft speech provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.
1/28/04	New York State Bar Association Commercial and Federal Luncheon	I attended this event on commercial law.	I have no record of receiving funding from the sponsors of this event.
2/19/04	Dominican Bar Association	I attended this event.	I have no record of receiving funding from the sponsors of this event.
3/8/04	American Bankruptcy Institute Moot Court Final (hosted by St. John's Law School)	I judged this moot court competition.	I have no record of receiving funding from the sponsors of this event.
4/1/04	University of Illinois Frederick Green Moot Court Competition & *Brown v. Board* conference & Brown Bag Discussion with Sports Law Society hosted by Professor Stephen Ross	I participated in this moot court competition. I also participated in a brown bag lunch discussion on the baseball strike case. I also attended this event, entitled: "Promises to Keep? *Brown v. Board* and Equal Educational Opportunity."	My travel, lodging, and meal expenses were reimbursed by the sponsor of this event, the University of Illinois.
4/8/04	American Bankruptcy Institute and St. John's University School of Law	I judged the 12th Annual Judge Conrad B. Duberstein Moot Court Competition.	I have no record of receiving funding from the sponsors of this event.

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56940.037

Date	Event Sponsor	Nature of Participation	Funding
6/7/04	Brooklyn Law School, New York State-Federal Judicial Council	I participated in a panel discussion on "The State and Federal Courts Perspectives" at this event, entitled "Tale of Two Systems: The State and Federal Courts in New York. Current Issues Concerning Federal Preemption."	I have no record of receiving funding from the sponsors of this event.
6/19/04	American Constitution Society for Law and Policy	I contributed to the panel, "The Future of Judicial Review: The View from the Bench" at the 2004 National Convention. The theme was "Liberty and Equality in the 21st Century."	My travel, lodging, and meal expenses were reimbursed by the sponsor of this event, American Constitution Society for Law and Policy.
9/10/04	NYS Unified Court System	I gave remarks on "Celebration of Unity and Renewal in Tribute to the Sacrifices made on September 11, 2001." Draft speech provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.
10/10/04	2004 Hispanic National Bar Association Convention	I was a panelist in a discussion entitled, "How to Become a Law Clerk." I also accepted the Latina Judge of the Year Award. Draft speech provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.
11/9/04	Puerto Rican Legal Defense and Education Fund event honoring John Carro Sheridan	I presented remarks similar to those given on 10/30/03 at the Hispanic Heritage Awards Dinner.	I have no record of receiving funding from the sponsors of this event.

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56940.038

Date	Event Sponsor	Nature of Participation	Funding
11/10/04	Joseph A. Forgione Development School for Youth Benefit Luncheon	I attended this event.	I have no record of receiving funding from the sponsors of this event.
11/12/04	DRI The Voice of the Defense Bar	I participated in a panel entitled, "Appellate Practice from Both Sides of the Bench."	I have no record of receiving funding from the sponsors of this event.
12/1-12/4/04	Latin American Judges Seminar Monterrey, Mexico	I was invited to this event by the US State Department and Department of Justice. Judges from all levels of the Mexican Judiciary attended. I spoke on U.S. laws regarding the Hague Convention on the Civil Aspects of International Child Abduction.	My travel expenses were reimbursed by the sponsors of this event, the US State Department and Department of Justice.
1/16/05	Puerto Rican Bar Association	I attended this event and gave introductory remarks.	I have no record of receiving funding from the sponsors of this event.
2/23 - 2/24/05	The Federal Judicial Center The Hague Convention on the Civil Aspects on International Child Abduction	I attended this event.	My travel expenses were reimbursed by the sponsor of this event, the US State Department.

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56940.039

Date	Event Sponsor	Nature of Participation	Funding
2/25/05	Duke Law School	I participated in the Dean's Cup Moot Court Panel and Discussion. A video of this presentation is available at http://www.law.duke.edu/webcast/?match=Sonia+Sotomayor. I have requested a copy of the video from Duke Law School, and will provide it as soon as I receive it.	My travel, lodging, and meal expenses were reimbursed by the sponsor of this event, Duke Law School.
3/16/05	Puerto Rican Bar Association and Association of Judges of Hispanic Heritage	I gave remarks at this event, the Launching Reception for the Judicial Internship Placement Program. Draft speech provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.
4/14/05	Columbia Latino Organization	I attended this End of Semester Reception and spoke on the importance of clerking.	I have no record of receiving funding from the sponsors of this event.
4/15/05	Latino Law Students Association	I attended this event. Draft speech provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.
7/7/05	2005 Junior Statesman Summer School	I presented remarks to Yale Law students. I discussed how cases are assigned to panels on the Second Circuit and how panels operate.	I have no record of receiving funding from the sponsors of this event.
10/6/05	Latino Law Students Panel on Latinos in the Judiciary	I participated in this panel discussion on Latinos in the judiciary.	I have no record of receiving funding from the sponsors of this event.

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56940.040

Date	Event Sponsor	Nature of Participation	Funding
10/18/05	Hispanic National Bar Association	I received an Equal Justice Award and spoke on a panel entitled "A View from the Bench: Effective Courtroom Strategies and Techniques at the 30th Annual Convention."	My travel and meal expenses were reimbursed by the sponsor of this event, the Hispanic National Bar Association.
11/15/05	Federal Bar Association	I gave remarks at the Motion by the Federal Bar Association and Others to Admit New Members. Draft speech provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.
2/2/06	Puerto Rican Bar Association Panel	I participated in this discussion panel on "Perspectives from the Bench: Effective Courtroom Techniques."	I have no record of receiving funding from the sponsors of this event.
2/9/06	George Washington University Law School Moot Court Event	I judged a moot court competition.	My travel expenses were reimbursed by the sponsor of this event, George Washington University Law School.
2/18/06	PricewaterhouseCoopers	I participated in a U.S. Circuit Judges Panel at the PricewaterhouseCoopers Leadership Forum. I spoke on intellectual property issues.	My travel, lodging, and meal expenses were reimbursed by the sponsor of this event, PricewaterhouseCoopers.
2/26/06	New York University School of Law	I participated in a moot court competition on immigration law.	I have no record of receiving funding from the sponsors of this event.

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56940.041

Date	Event Sponsor	Nature of Participation	Funding
3/6/06	University of Puerto Rico School of Law	I participated in the Initiation Ceremony for the Law Review's 75th volume Board of Editors. The theme was: How to be an Effective Advocate in Court. Draft speech provided as attachment to Question 12(d).	My travel, lodging, and meal expenses were reimbursed by the sponsor of this event, University of Puerto Rico School of Law.
3/16/06, and every March thereafter	Pepperdine University School of Law	Beginning in 2006, I spoke about The Judicial Process at the Wm. Mattew Byrne, Jr. Judicial Clerkship Institute. Beginning in 2008, I also spoke on The Role of the Law Clerk, as a separate panelist.	My travel, lodging, and meal expenses were reimbursed by the sponsor of this event, Pepperdine University School of Law.
4/7/06	Yale Law School Sponsored by Simpson Thacher & Bartlett LLP	The Yale Latino Law Students Association honored me with the Latino Law Students Association's Public Service Award at the First Annual Public Service Award Dinner. Draft speech provided as attachment to Question 12(d).	My travel expenses were reimbursed by the sponsor of this event, the Latino Law Students Association at Yale.
6/14/06	City Bar Center for CLE at the New York City Bar	I spoke on "Appellate Practice-Effective Brief Writing and Oral Advocacy" at the 16 Hour Bridge-The-Gap (Litigation Day).	I have no record of receiving funding from the sponsors of this event.

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56940.042

Date	Event Sponsor	Nature of Participation	Funding
10/04/06	Latino Law Students Association	I received the Professional Leadership Award at this event. Draft speech provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.
10/12/06	Federal Judicial Center, Georgetown University Law Center	I spoke on a roundtable at this event regarding Immigration Law for Judges of the U.S. Courts of Appeals. Draft speech provided as attachment to Question 12(d).	My travel expenses were reimbursed by the sponsor of this event, Georgetown University Law Center.
11/9/06	Conference on International Law, Sponsored by St. John's Law School	I participated on a panel with foreign judges regarding international law. I spoke on the permissible uses of international law by American courts.	I have no record of receiving funding from the sponsors of this event.
1/9/07	University of Puerto Rico Visiting Professor	I spoke to a class on my life and being a judge.	My travel, lodging, and meal expenses were paid for by the sponsor of this event, the University of Puerto Rico.
2/14/07-2/16/07	Federal Judicial Center Roundtable	I spoke on a panel regarding the effective uses of information technology for judges.	My travel, lodging, and meal expenses were paid for by the sponsor of this event, the Federal Judicial Center.
3/8/07	Round Table Discussion Cardozo Law School	I participated in a panel and dinner with law faculty. I spoke on the need to assist students in becoming better writers.	I have no record of receiving funding from the sponsors of this event.

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56940.043

Date	Event Sponsor	Nature of Participation	Funding
4/5/07	Dinner with AnBryce Scholars New York University Law School	I attended this dinner. I spoke about my life experiences.	I have no record of receiving funding from the sponsors of this event.
9/21/07	Urban Health Plan, Inc.	I was inducted into the "Wall of Fame" at the 12th Annual Urban Health Plan Celebration Community Health Symposium and Kick-off Reception. Draft speech and video provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.
10/15/07	Latin American Law Students Association Event Cornell Law School	I gave remarks at this event. I spoke informally on my life experiences and on the qualifications necessary to become a judicial law clerk.	My travel expenses were reimbursed by the sponsor of this event, LALSA (Cornell Law School).
11/12/07	Vermont Law School	I presented remarks at "A Celebration of the Life and Service of the Honorable James L. Oakes." Draft speech provided as attachment to Question 12(d).	My travel expenses were reimbursed by the sponsor of this event, Vermont Law School.
1/18/08	United States Courthouse Burlington, VT	I gave remarks at the unveiling of a special commemorative portrait of Judge Fred I. Parker. Draft speech provided as attachment to Question 12(d).	My travel expenses were reimbursed by the sponsor of this event, US Court of Appeals for the Second Circuit.

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56940.044

Date	Event Sponsor	Nature of Participation	Funding
5/5/08	Yale Law School	I judged the Morris Tyler Moot Court of Appeals Thurman Arnold Prize Finals. I also attended the Yale Latino Students Luncheon with LLSA and the Women of Color Collective.	My travel expenses were reimbursed by the sponsor of this event, Yale Law School.
5/15/08	Roundtable Discussion with the Appellate Chiefs from six USAOs	I participated in this panel discussion. I spoke on appellate advocacy tips.	I have no record of receiving funding from the sponsors of this event.
6/5/08	Administrative Office of the US Courts Judicial Conference	I attended this conference.	My travel, lodging, and meal expenses were paid for by the sponsor of this event, the Administrative Office of the US Courts.
7/30/08	Legal Outreach, Inc.	I judged the preliminary round of the Columbia SLI mock trial competition for the 2008 Summer Law Institute.	I have no record of receiving funding from the sponsors of this event.
10/08/08	Cornell Law School Latino Law Students Association	I gave remarks at the LALSA Hispanic Heritage Month Discussion. Draft speech provided as attachment to Question 12(d).	My travel expenses were reimbursed by the sponsor of this event, Latino Law Students Association (Cornell Law School).
10/20/08	University of Hartford	I gave remarks at the Jon Newman Annual Lecture on Law and Justice. Draft speech provided as attachment to Question 12(d).	My travel expenses were reimbursed by the sponsor of this event, University of Hartford.

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56940.045

Date	Event Sponsor	Nature of Participation	Funding
10/29/08	New York University School of Law	At the Journal of International Law and Politics Symposium, "The Normalizing of Adjudication in Complex International Governance Regimes: Patterns, Possibilities, and Problems," I joined a roundtable discussion on "Dynamic Relations between International and National Tribunals."	I have no record of receiving funding from the sponsors of this event.
1/16/09	National Urban Fellows	I spoke on a panel about Social Justice in Public Education and Public Health at the Retreat and 39th Annual Leadership Conference: "A New Wave: Leaders Changing America."	My travel expenses were reimbursed by the sponsor of this event, the National Urban Fellows.
2/02/09 - 2/07/09	Belizean Grove Peru	I participated in a panel discussion on the importance of standards of review to the appellate process.	I have no record of receiving funding from the sponsors of this event.
2/28/09	Yale Law School Federalist Society	I moderated the "Confirmation Battles and Presidential Nominations" panel at the 2009 Federalist Society Student Symposium on Separation of Powers in American Constitutionalism. Draft speech provided as attachment to Question 12(d).	My travel expenses were reimbursed by the sponsor of this event, Yale Law School Federalist Society.

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56940.046

Date	Event Sponsor	Nature of Participation	Funding
4/17/09	Black, Latino, Asian Pacific American Law Alumni Association New York University School of Law	I gave the keynote address at this event, the BLAPA Annual Spring Dinner. The theme was "Being the Change We Need For Our Communities." Draft speech provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.
4/28/09	American Civil Liberties Union of Puerto Rico	I spoke on "How Federal Judges Look to International and Foreign Law Under Art. VI of the U.S. Constitution." Video provided as attachment to Question 12(d).	My travel expenses were reimbursed by the sponsor of this event, the American Civil Liberties Union of Puerto Rico.
5/07/09	New York County Lawyer's Association	I spoke at a discussion of Ellis Cose's radio documentary, "Nerds in the Hood." Draft speech provided as attachment to Question 12(d).	I have no record of receiving funding from the sponsors of this event.
Date Unknown	Colegio de Abogados, Puerto Rico	I participated in a panel discussion on "Women in the Judiciary." News clipping provided as attachment to Question 12(d).	My travel expenses were reimbursed by the sponsor of this event, Colegio de Abogados, Puerto Rico.

12. **Published Writings and Public Statements**:

a. List the titles, publishers, and dates of books, articles, reports, letters to the editor, editorial pieces, or other published material you have written or edited, including material published only on the Internet. Supply four (4) copies of all published material to the Committee.

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56940.047

I have done my best to identify all items called for in this question, including through a review of my personal files and searches of publicly available electronic databases. I have located the following:

Letter to the Editor: Anti-Latino discrimination at Princeton, *The Daily Princetonian* (May 10, 1974)

Letter to the Editor: Criticizing the process of selecting a 'minority dean,' *The Daily Princetonian* (September 12, 1974)

Letter to the Editor: Criticizing an anti-gay attack on campus, *The Daily Princetonian* (February 27, 1976)

Note, *Statehood and the Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights,* 88 Yale Law Journal 825 (1979).

Sonia Sotomayor & Nicole A. Gordon, *Returning Majesty to the Law and Politics: A Modern Approach*, 30 Suffolk University Law Review 35 (1996).

La Independencia Judicial: Que Necessitamos Para Conservarla, 60 Revista Del. Colegio De P.R. 59 (1999) (clip not available).

A Latina Judge's Voice, 13 Berkeley La Raza Law Journal 87 (2002).

Tribute to John Sexton, 60 N.Y.U. Annual Survey of American Law 23 (2004).

Foreword to Daniel Terris, et al., *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (2007).

b. Supply four (4) copies of any reports, memoranda, or policy statements you prepared or contributed to the preparation of on behalf of any bar association, committee, conference, or organization of which you were or are a member or in which you have participated as defined in 11a. Include reports, memoranda, or policy statements of any working group of any bar association, committee, or conference which produced a report, memorandum, or policy statement, even where you did not contribute to it. If you do not have a copy of a report, memorandum, or policy statement, give the name and address of the organization that issued it, the date of the document, and a summary of its subject matter.

Report to the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts, November 21, 1997.

Fordham University School of Law, Self-Study Report, February 2001. I requested a copy of this Report from Fordham University. The copy I received from Fordham, which appears to be missing some pages, is attached.

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56940.048

Puerto Rican Legal Defense and Education Fund, Letter to Governor Carey opposing the reinstatement of the death penalty, April 10, 1981.

As a member of various court committees, I have prepared and contributed to numerous reports and memoranda on court issues, which relate to internal court deliberations and are not available for public dissemination.

c. Supply four (4) copies of any testimony, official statements, or other communications relating, in whole or in part, to matters of public policy or legal interpretation, that you have issued or provided or that others presented on your behalf to public bodies or public officials.

Senate Judiciary Committee, Confirmation Hearing for United States District Court for the Southern District of New York (June 1992)

Senate Judiciary Committee, Confirmation Hearing for the United States Court of Appeals for the Second Circuit (September 1997)

d. Supply four (4) copies, transcripts, or recordings of all speeches or talks delivered by you, including commencement speeches, remarks, lectures, panel discussions, conferences, political speeches, and question-and-answer sessions. Include the date and place where they were delivered and readily available press reports about the speech or talk. If you do not have a copy of the speech or a transcript or recording of your remarks, give the name and address of the group before whom the speech was given, the date of the speech, and a summary of its subject matter. If you did not speak from a prepared text, furnish a copy of any outline or notes from which you spoke.

This chart includes all entries from my calendar, information gathered from copies of invitations, general correspondence, and speeches that I have retained. To the best of my knowledge this list is substantially complete. I am providing copies of those of my prepared draft texts that I could locate, but omissions and additions will have been made during the deliveries as a result of extemporaneous editing.

Date	**Event Sponsor and Event Location**	**Nature of Judge Sotomayor's Participation**
Early 1990's	Practicing Law Institute: "Facing the '90s as a Woman Lawyer in Corporate Law Practice"	I spoke on the topic of female lawyers in corporate practice. Video attached

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Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
4/1/93	American Bar Association Section on Litigation and Prentice Hall Law & Business Conference: "The Woman Advocate" Manhattan Grand Hyatt 109 East 42nd Street New York, NY	I participated in a panel discussion on female litigators. I spoke on my experiences as a lawyer and as a judge, and offered advice to female litigators. News clipping attached.
8/27/93 (and intermittently thereafter until 1998)	Second Circuit Naturalization Proceedings & Attorney Admissions Proceedings 40 Foley Square New York, NY	I have periodically conducted Naturalization Proceedings and Attorney Admissions ceremonies. Drafts of standard comments attached.
11/12/93	Yale Law School Preiskel/Silverman Event 127 Wall Street New Haven, CT	I spoke on "Doing What's Right: Ethical Questions for Private Practitioners Who Have Done or Will Do Public Service." Draft speech attached.
1994	Federal Judicial Center Federal Judicial Center Thurgood Marshall Federal Judiciary Building One Columbus Circle NE Washington, DC	I appear on a video entitled, "Your First Year on the Bench." Video attached.
3/17/94	Revista Juridica de la Universidad Interamericana de Puerto Rico The Condado Plaza Hotel 999 Ashford San Juan, Puerto Rico	I participated in a panel presentation on "Women in the Judiciary." Draft speech attached.

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56940.050

Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
3/19/94	Revista Juridica de la Universidad Interamericana de Puerto Rico The Condado Plaza Hotel 999 Ashford San Juan, Puerto Rico	I attended the 40th National Law Review Conference. Draft speech attached.
1/17/95	Hogan-Morgenthau Associates Address or location unknown	I received the Hogan-Morgenthau Award. Draft speech attached.
2/5/96	Suffolk University Law School 120 Tremont Street Boston, MA	I presented a speech entitled, "Returning Majesty to the Law and Politics: A Modern Approach." The basis for this speech is attached and published at Sonia Sotomayor & Nicole A. Gordon, *Returning Majesty to the Law and Politics: A Modern Approach,* 30 Suffolk U. L. Rev. 35 (1996).
3/15/96	Latino and Latina American Law Students Association of Hofstra University School of Law Hempstead, NY	I gave remarks at the 3rd Annual Awards Banquet and Dinner Dance for the Latino and Latina American Law Students Association. Draft speech attached.
5/17/96	Hispanic National Bar Association Ben Franklin Station P.O. Box 14347 Washington, DC	I gave remarks at the National Board of Governor's Reception. Draft speech attached.
11/7/96	Princeton University Princeton, NJ	I gave remarks at the Latino Heritage Month Celebration. Draft speech attached.

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Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
2/16/97	PricewaterhouseCoopers Intellectual Property Seminar Address or location unknown	I spoke at this event on intellectual property law. I participated in a panel discussion with other federal judges on the practice of patent law in the district courts. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
2/19/97	Puerto Rican Bar Association 14 Vesey Street New York, NY	I introduced Judge Jose A. Cabranes at the 1997 Cocktail Reception Recognizing Excellence in the Judiciary. Draft speech attached.
4/24/97	Minority Judicial Internship Program Reception 80 Centre Street, Room 533 New York, NY	I do not recall whether I gave any remarks at this event. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
5/15/97	Association of Judges of Hispanic Heritage Address or location unknown	I introduced John D. Feerick at the Hispanic Judges Dinner. Draft speech attached.
9/14/97	Hunts Point Multi-Service Center, Inc. 754 East 151st Street Bronx, NY	I attended this 30th Anniversary Event. Draft speech attached.
9/23/97	Business Development Association: Women in the Law Panel Marriot Marquis 1535 Broadway New York, NY	I appeared on a panel with Judge Denise Cote. My remarks were similar to my 3/17/94 speech on "Women in the Judiciary." I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.

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Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
10/16/97	International Anti-Counterfeiting Coalition 1730 M Street NW Suite 1020 Washington, DC	I gave remarks at this luncheon on international counterfeiting. Draft speech attached.
10/17/97	Georgetown University Law School Employment Discrimination Seminar 600 New Jersey Avenue NW Washington, DC	I was a panelist at this event and spoke on Second Circuit employment discrimination cases. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
11/13/97	National Puerto Rican Coalition Event Crown Plaza Hotel 1605 Broadway New York, NY	I attended this event. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
11/19/97	Panel on Minority Clerkship Opportunities New York Law School 57 Worth Street New York, NY	I was a panel member at this event on minority clerkship opportunities. I spoke on the qualifications necessary to clerk for a federal judge. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
11/24/97	Association of Hispanic Judges 122 East 42nd Street, Suite 3700 New York, NY	I attended this event. I do not recall whether I gave any remarks. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
3/28/98	Hispanic National Bar Association Ben Franklin Station P.O. Box 14347 Washington, DC	I judged a moot court competition. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.

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Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
4/7/98	Columbia Law School 435 West 116th Street New York, NY	I spoke at a federal court externship class on Access to Justice. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
4/23/98	New York Women's Bar Association & Grand Street Settlement U.S. Courthouse Room 410 40 Foley Square New York, NY	I participated in "Take Our Daughters to Work Day" and spoke with a group of children about the work of a judge. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
4/24/98	ABA Section of Litigation The Plaza Hotel 768 5th Avenue New York, NY	I attended The John Minor Wisdom Public Service and Professionalism Awards and Luncheon and may have given limited welcoming remarks. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
5/5/98	Speech at NYU Law School Honoring Xavier Romeu Matta NYU Law School Vanderbilt Hall 40 Washington Square South New York, NY	My remarks were similar to the speech I gave on 5/13/99, a copy of which is attached.
5/9/98	Yale Law School 127 Wall Street New Haven, CT	I presided over a mock trial at the John Fletcher Caskey/John Currier Gallagher Prize Trial Event. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.

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Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
6/5/98	Panel on International Arbitration New York Marriot Hotel 525 Lexington Avenue New York, NY	I participated in a panel discussion with Jeff Livingston on international arbitration. I spoke on the differences between arbitration and litigation. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
8/11/98	Rosenman & Colin LLP 575 Madison Avenue New York, NY	I addressed professional issues with a group of summer associates. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
8/21/98	CUNY School of Law at Queens College 65-21 Main Street Flushing, NY	I participated in a first-year orientation program. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
9/15/98	US Dept. of Justice, Federal Bureau of Prisons Metropolitan Detention Center P.O. Box 329001 Brooklyn, NY	I gave remarks at a Hispanic Heritage Month celebration of Women in Leadership. Draft speech attached.
9/22/98	New York County Lawyers Association, Committee on Minorities and the Law 14 Vesey Street New York, NY	I attended the reception for Ellis Cose's *The Best Defense*, NYCLA's Minority Judicial Internship Program, and Hon. Baer and Mrs. Baer. Draft speech attached.

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Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
9/23/98	N.Y. Women's Bar Association and NYU Center of Labor and Employment Law Davis Polk & Wardwell 450 Lexington Avenue New York, NY	I participated in a panel entitled, "Sexual Harassment: How to Practice Safe Employment." I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
9/24/98	National Puerto Rican Coalition, Inc. Senate Dirksen Building Washington, DC	I addressed the participants of the National Policy Conference during the membership luncheon. Draft speech attached.
10/7/98	Winthrop, Stimson, Putnam & Roberts The Sky Club 200 Park Avenue New York, NY	I attended a program on "Breaking Down Barriers - Reaching New Heights," focusing on career strategies for minority professionals. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists. News clippings attached.
10/15/98	South Bronx Mental Health Council, Inc. Community Mental Health Center Villa Barone Manore 737 Throgs Neck Expressway Bronx, NY	I attended the "Celebration of the Hispanic Heritage month, Fifth Annual Dinner Dance." I spoke on my experience as a child with health care in the South Bronx. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
10/16-10/17/98	Georgetown University Law Center, Continuing Legal Education New York Helmsley Hotel 680 Madison Avenue New York, NY	I spoke on a panel entitled "Litigating Employment Cases: Views from the Bench." I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.

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Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
10/24/98	Connecticut Hispanic Bar Association Amarante's 62 Cove Street New Haven, CT	I attended the Fifth Annual Awards Celebration and Scholarship Presentation. The theme was Hispanic Females in Leadership. Draft speech attached.
10/26/98	Federal Correctional Institution at Otisville 2 Two Mile Drive Otisville, NY	I attended the Hispanic Heritage Month Program. Draft speech attached.
10/28/98	The Cervantes Society New York County Supreme Court 60 Centre Street New York, NY	I attended the 3rd Annual celebration of Hispanic Heritage Month Celebrating Women in Leadership. Draft speech attached.
11/6/98	United States Court of Appeals for the Second Circuit Moynihan Federal Courthouse 500 Pearl Street New York, NY	I was inducted into the U.S. Court of Appeals for the Second Circuit. Draft speech attached.
11/19/98	New York Law School 57 Worth Street New York, NY	I spoke on a panel at the Third Annual Forum on Clerkship Opportunities for Students of Color. I discussed the qualifications necessary to obtain a judicial clerkship. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
12/4/98	Beate Gordon and the Japanese Consulate Japanese Consulate 299 Park Avenue - # 18 New York, NY	I spoke at a ceremony honoring Beate Gordon. Draft speech attached.

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Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
1/20/99	Panel Discussion at Facultad de Derecho Eugenio Maria de Hostos, Calle Peral #57 Sur – Esquina Calle Muñoz Rivera Apartado Postal 1900 Mayagüez, Puerto Rico	I spoke on the United States Judicial System. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists. News clipping attached.
3/5/99	Riverside Church 490 Riverside Drive New York, NY	I presented the eulogy at the Memorial Service for the Hon. Mary Johnson Lowe. Draft speech attached.
3/14/99	New York Law School 57 Worth Street New York, NY	I judged the final round of the Robert F. Wagner, Sr. National Labor & Employment Law Moot Court Competition. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
4/17/99	Metropolitan Black Bar Association New York Marriott 333 Adams Street New York, NY	I received an award at the 19th Annual Gertrude E. Rush Award Dinner. I spoke on the need for groups to work together to promote our communities. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
4/19/99	NYU School of Law, Lawyering Program Moynihan Federal Courthouse 500 Pearl Street, Room 610 New York, NY	I judged this moot court event. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
4/20/99	Columbia Law School, Center for Public Interest Law 435 West 116th Street New York, NY	I attended the 1999 Annual Public Interest Awards Dinner. Draft speech attached.

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56940.058

Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
4/22/99	New York Women's Bar Association & Grand Street Settlement U.S. Courthouse Room 410 40 Foley Square New York, NY	I participated in "Take Our Daughters to Work Day" and spoke with a group of children about the work of a judge. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
4/30/99	Women's Bar Association of the State of New York Tarrytown, New York	I attended the Association's 1999 Convention, "Women Moving Forward." Draft speech and news clipping attached.
5/1/99	Panel on Appellate Advocacy I have been unable to discover the sponsor of this event and where it was held.	I spoke on a panel on effective appellate advocacy. I offered tips for improving appellate advocacy skills. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
5/13/99	Puerto Rican Bar Association Marriot World Trade Center 3 World Trade Center New York, NY	I presented Xavier Romeu Matta, Exec. Director for the Puerto Rico Industrial Development Corp., with the Hon. Felipe N. Torres Award for Outstanding Latino Attorney of the Year. Draft speech attached.
5/20/99	Association of Judges of Hispanic Heritage, Inc. Columbia University Faculty House 400 West 117th Street New York, NY	I presented the Frank Torres Commitment to Diversity Award to Xavier Romeu Matta, Seyfarth, Shaw, Fairweather & Geraldson, at the Annual Awards Dinner Celebrating Diversity and Judicial Excellence. I gave a variant of the speech I presented on 5/13/99.
6/2/99	Lehman College 250 Bedford Park Boulevard West Bronx, NY	I received an Honorary Doctor of Laws at Commencement. Draft speech attached.

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Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
8/19/99	Hispanic Bar Association of New Jersey Spanish Tavern 103 Mcwhorter Street - # A Newark, NJ	I attended the 30th Anniversary Scholarship Dinner Dance and cocktail reception in my honor. I spoke very briefly to express my gratitude for the support of the Association. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists. News clipping attached.
9/11/99	Colegio de Abogados de Puerto Rico P.O. Box 9021900 San Juan, Puerto Rico	I presented remarks at the Colegio de Abogados de Puerto Rico Asamblea Annual 1999 regarding the importance of an independent judiciary. Draft speech attached.
9/24/99	Hispanic Society of New York City Housing Authority Terrace on the Park 5211 111th Street Flushing, NY	I spoke without a prepared text at this event of the Hispanic Society of the New York City Housing Authority. I discussed my experiences living in a housing project. I have no knowledge if a video of this event exists.
9/27/99	Yale Law Women and The Collective on Women of Color in the Law 127 Wall Street New Haven, CT	I attended this panel discussion on "Gender and the Bench" and reception. My remarks were similar to my 3/17/94 speech on "Women in the Judiciary." I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
11/9/99	NYU Law School Clerkship Night NYU Law School Vanderbilt Hall 40 Washington Square South New York, NY	I attended an event on clerkship opportunities for law students, and spoke briefly on the qualifications necessary to obtain a judicial clerkship. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.

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56940.060

Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
3/9/00	Bronx County Gender Bias Committee Bronx Women's Bar Association Bronx Supreme Court 851 Grand Concourse - # 118 Bronx, NY	I attended the First Annual Program for Women's History Month. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
3/22/00	CUNY School of Law 65-21 Main Street Flushing, NY	I participated in a panel on Latinas en la Ley, a celebration of Women's Heritage Month. My remarks were similar to my 3/17/94 speech on "Women in the Judiciary." I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
4/6/00	Puerto Rican Bar Association Marriott World Trade Center 3 World Trade Center New York, NY	I attended the 43rd Annual Scholarship Gala Banquet. I spoke very briefly to thank the sponsors of the event. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
4/7/00	New York Law School Law Review 200 Fifth Club 200 Fifth Ave New York, NY	I received the Charles W. Froessel award at this banquet. Draft speech attached.
4/28/00 - 4/30/00	Yale University Law School Women, Justice and Authority Planning Committee 127 Wall Street New Haven, CT	I gave a presentation at this event on Women, Justice and Authority. My remarks were similar to my 3/17/94 speech on "Women in the Judiciary." I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.

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Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
5/30/00	New York Women's Bar Association 5009 Broadway New York, NY	I participated in "Take Our Daughters to Work Day" and spoke with a group of children about the work of a judge. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
6/20/00	Litigation CLE 195 Broadway, 4th Floor New York, NY	I spoke on appellate advocacy. I gave tips on how to be a better appellate advocate. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
6/21/00	Law School Admission Council 662 Penn Street Newtown, PA	Taping for a Hispanic recruitment video production for the Law School Admission Council. Video attached.
6/26/00	Bronx Leadership Academy 1710 Webster Avenue Bronx, NY	I attended this graduation event. Draft speech attached.
6/29/00	Association of the Bar of the City of New York 42 West 44th Street New York, NY	I participated in a panel discussion on "The Current Status of Minorities in Our Judicial System" at this event. I spoke on federal judges who have come from minority backgrounds. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
7/7/00 (or possibly 6/28/00)	National Association of Women Lawyers New York Hilton 1335 Avenue of the Americas New York, NY	I participated in a panel discussion on "Beyond the Glass Ceiling for Women and Other Minorities" at this event. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.

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56940.062

Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
7/8/00	National Association of Women Lawyers Warwick Hotel 65 West 54th Street New York, NY	I received the Arabella Babb Mansfield Award at this event. I spoke briefly to express my gratitude for receiving the award and to underscore the need for collaborative efforts. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
7/9/00	American Bar Association Hilton Hotel 1335 Avenue of the Americas New York, NY	I spoke on "successful models for bringing minorities into the legal profession" at the Presidential Showcase program entitled "Town Meeting on Diversity in the Legal Profession." I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
9/19/00	Federal Bar Council Inns of Court Lankler Siffert & Wohl 500 Fifth Avenue 33rd Floor New York, NY	I participated in a panel discussion on end-of-life issues. I spoke on the state of the law on this topic. Video attached.
9/26/00	National Labor Relations Board Court of International Trade 1 Federal Plaza New York, NY New York Law School 57 Worth St New York, NY	I attended the Installation of Celeste J. Mattina as the regional director of the NLRB, region 2. Draft speech attached.
10/07/00	Hispanic National Bar Association Chicago, IL	I attended the HNBA Convention in Chicago, IL. I spoke briefly on advocacy tips and on the importance of legal public service. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.

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Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
10/24/00	Association of the Bar of the City of New York 42 West 44th Street New York, NY	I participated in a panel on "The Ins and Outs of Judicial Clerkships." I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
11/13/00	Lawyering for Social Justice Syracuse University College of Law Syracuse, New York	I presented the Jurist in Residence Lecture at this event. Draft speech attached.
11/30/00	Litigators Club Salans Hertzfeld Heilbron Christy & Viener 620 Fifth Avenue New York, NY	I spoke about the difference between the Court of Appeals and the District Court at this breakfast meeting. The draft of this speech in my files is missing some pages. The pages that I retained are attached.
12/5/00	Fordham University School of Law 140 West 62nd Street New York, NY	I judged the Sixteenth Annual Metropolitan Mentor Moot Court competition. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
12/19/00	Federal Bar Council Committee on Second Circuit Courts Simpson Thatcher & Bartlett, LLP 425 Lexington Avenue New York, NY	I spoke about what it means to be a lawyer. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
1/20/01	Second Circuit Committee Meeting Thurgood Marshall U.S. Courthouse 40 Foley Square New York, NY 10007	I spoke about my experiences as a judge at the trial and appellate level. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.

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56940.064

Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
1/25/01 - 1/28/01	Arizona State University College of Law University Drive and Mill Avenue Tempe, AZ	I spoke on the topic "Lawyering for Social Justice." I discussed my life experiences and the role of minority bar organizations. News clipping attached.
2/27/01	National Hispanic Prosecutors Association Moynihan Federal Courthouse 500 Pearl Street, Room 850 New York, NY	I attended this event of national Hispanic prosecutors. I gave tips on advocacy skills. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
4/22/01	Pace University School of Law 78 North Broadway White Plains, NY	I judged the Grand Moot Competition. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
5/15/01	Federal-State Judicial Council Address or location unknown	I participated in a symposium on post-conviction relief. I spoke on the execution of judgments of conviction. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
6/01/01	Eastern District of New York 225 Cadman Plaza East Brooklyn, NY	I spoke at the induction of Lois Bloom as a district court judge. Draft speech attached.
6/3/01-6/5/01	Princeton University Princeton, NJ	I received an honorary degree at this event. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
6/07/01	Brooklyn Law School Commencement Avery Fisher Hall Lincoln Center for the Performing Arts, Inc. 70 Lincoln Center Plaza New York, NY	I gave the commencement address at this event. Draft speech attached.

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56940.065

Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
7/23/01	State of New York - Office of the Attorney General 120 Broadway New York, NY	I addressed law students interning at the Attorney General's office at this event. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
9/9/01	Hofstra Law School 121 Hofstra University Hempstead, NY	I introduced Justice Antonin Scalia at this event. Draft speech attached.
9/13/01	Columbia University Law School 435 West 116th Street New York, NY	I participated in the "Advice from the Judges" program. I offered tips on how to be a better advocate. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
10/20-10/23/01	Panel Discussion with Foreign Judges The Hague, Netherlands	I participated in a panel discussion on the 1980 Hague Convention on the Civil Aspects of International Child Abduction. I spoke on the implementation of the Hague Convention in the United States and abroad. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
10/26-28/01	Raising the Bar: Latino and Latina Presence in the Judiciary and the Struggle for Representation Boalt Hall School of Law University of California, Berkeley 215 Boalt Hall Berkeley, CA	I presented the Olmos Lecture at this event. Draft speech provided as attachment to Question 12(a) and published at: *A Latina Judge's Voice,* 13 Berkeley La Raza Law Journal 87 (2002).
11/1/01	Rutgers Law School Hilton Short Hills 41 John F. Kennedy Parkway Short Hills, NJ 07078	I introduced Ida Castro for the Fannie Bear Besser Award at the Rutgers Law School Alumni Dinner. Draft speech attached.

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56940.066

Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
11/8/01	Bar Association of the City of New York Forum on Minorities in the Federal Courts 42 West 44th Street New York, NY	I participated in a panel discussion on minorities in the federal courts. I spoke on the qualifications for obtaining a federal judicial clerkship. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
11/30-12/1/01	Princeton University Seminar: "Puerto Ricans: Second Class Citizens in Our Democracy?" Program in Latin American Studies 58 Prospect Avenue Princeton, NJ	I moderated a symposium panel on Puerto Ricans in a democracy. I did not make any remarks of my own. News clipping attached.
1/22/02	Yale Law School Association of New York Moynihan Federal Courthouse 500 Pearl Streer New York, NY	I participated in a "How Judges Really Work" panel discussion and reception. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
1/24/02	Keedy Cup Moot Court University of Pennsylvania Law School 3400 Chestnut Street Philadelphia, PA	I judged this moot court competition. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
2/26/02	The Princeton Club 15 West 43rd Street New York, NY	I attended "A Visit With Princeton Women's Network of New York City." Draft speech attached.
3/23/02	Reimel Finals - Moot Court The Villanova Law School 299 North Spring Mill Road Villanova, PA	I judged this moot court competition. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.

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56940.067

Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
4/14/02	New York University School of Law 40 Washington Square South New York, NY	I judged the final argument of a moot court competition. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
4/18/02	Cardozo School of Law, Yeshiva University 55 Fifth Avenue New York, NY	I received the "Most Influential Woman in the Law Award" from the Latin American Law Students Association at this event. Draft speech attached.
5/1/02	FBI Speech Sponsored by: Hispanic, Black, Irish, and Asian/Pacific Islander Committees 26 Federal Plaza, 6th Floor Conference Room New York, NY	I spoke at "Unity Day." The theme was "United We Stand." Draft speech attached.
6/4/02	Second Circuit Judicial Assistants/Judicial Secretaries Millennium Hotel New York 145 West 44th Street New York, NY	I spoke at the Administrative and Operational Training Workshop for Second Circuit Judicial Assistants/Judicial Secretaries. Draft speech attached.
9/10/02	St. John's University 8000 Utopia Parkway Queens, NY	I had a conversation with the student body at the 2002-2003 Visiting Jurist Series. Draft speech attached.
10/08/02	American Constitution Society Columbia Law School 435 West 116th Street New York, NY	I participated in an ACS Panel discussion on the sentencing guidelines. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.

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56940.068

Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
11/21/02 & 2004	New York County Clerk's Office Central Jury Room 452 60 Centre Street New York, NY	I have appeared twice at the Juror Appreciation Day Ceremony annual event and both times spoke extemporaneously on the importance of jurors to our judicial system. I have not found a draft of prepared remarks. It is possible that a video of this event exists. If so, I have not been provided with a copy.
12/12/02	Justice Resource Center, Fordham University School of Law Moynihan Federal Courthouse 40 Foley Square New York, NY	I presided over the final round of the 18th Annual Metropolitan Mentor Moot Court Competition. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
2/14/03	Constitutional Studies Center, Georgetown University Law Center 600 New Jersey Avenue NW Washington, DC	I presided over this event, entitled "Rearguing *Marbury v. Madison*." Video attached.
2/28/03	Office of Legal Education Appellate Supervisors and Appellate Contacts Conference National Advocacy Center 1620 Pendleton Street Columbia, SC	I participated in a panel discussion with other judges entitled, "View from the Bench." I gave tips on how to be a better advocate. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
3/20 - 3/21/03	Indiana University, Maurer School of Law 211 South Indiana Avenue Bloomington, IN	I delivered guest lectures to Professor James Torke's Civil Procedure II Class, taught a criminal law class, and spoke at a Pro Bono Awards and Recognition Reception. Draft speech attached.

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56940.069

Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
3/27/03	NYU School of Law, Annual Survey of American Law NYU Law School Vanderbilt Hall 40 Washington Square South New York, NY	I made a tribute to John Sexton at this event. Draft speech provided as attachment to Question 12(a) and published at: *Tribute to John Sexton*, 60 N.Y.U. Ann. Surv. Am. L. 23 (2004).
4/9/03	Westchester Women's Bar Association Whitby Castle 330 Boston Post Road Rye, NY	I participated in a program entitled "Pathways to the Judiciary for Women: Smooth Ride or Rocky Road?" I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
5/1/03	NAAG Corrections Seminar Holiday Inn Martinique 49 West 32nd Street New York, NY	I attended this seminar on corrections. I do not recall whether I spoke at this event. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
5/03/03	Women's Bar Association of the State of New York Sheraton Syracuse University Hotel & Conference Center, 801 University Avenue Syracuse, NY	I spoke on a US Federal Sentencing Guidelines Panel at this event, entitled "Convention 2003; Where it all Began: Central New York Birthplace of Women's Rights." Two draft speeches reflecting my comments on the panel are attached.
5/09 - 5/10/03	University at Buffalo Law School John Lord O'Brian Hall Buffalo, NY	I was the 114th Annual Commencement Speaker at this event. Draft speech attached.
5/18/03	Pace University Law School 78 North Broadway White Plains, NY	I received an Honorary Doctorate and spoke at Commencement. Draft speech attached.

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56940.070

Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
6/21/03	Princeton University Williamsburg, VA	I spoke on panel entitled "The Judiciary and Democracy: Principle and Politics" at a conference entitled "Constitutional Principles in American History." Draft speech attached.
6/27/03	New York City Law Department 100 Church Street New York, NY	I spoke to summer interns at the Annual Seminar Lunch Program. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
9/18/03	Yale Law School Association of New York City Moynihan Courthouse 500 Pearl Street New York, NY	I participated in a roundtable discussion and reception on "The Art of Judging" at this event. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
10/22/03	Latin American Law Students Association Seton Hall University School of Law One Newark Center Newark, NJ	I spoke at the Seton Hall School of Law Distinguished Lecturer Series. Draft speech attached.
10/26/03	Boy Scout Troop 96 of Ringwood, NJ St. Catherine of Bologna Church 112 Erskine Road Ringwood, NJ	I attended the Eagle Scout Court of Honor for Thomas J. Butler, Jr. Video attached.
10/30/03	Association of Judges of Hispanic Heritage, Inc. Columbia Faculty House 400 W 117th Street New York, NY	I received the John Carro Award for Judicial Excellence at the "Hispanic Heritage Awards Dinner." Draft speech attached.

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56940.071

Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
12/4/03	Myles A. Paige Award Brooklyn Marriott 333 Adams Street Brooklyn, NY	I was honored with an award at this event. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
12/10/03	Development School for Youth Daniel Patrick Moynihan United States Courthouse 500 Pearl Street New York, NY	I attended the fall 2003 Graduation Ceremony. Draft speech attached.
9/04 or 10/04	Turn of River Middle School Stamford, CT	I spoke on the topic of Hispanic heritage. Video attached.
1/28/04	New York State Bar Association Commercial and Federal Luncheon New York Marriott Marquis 1535 Broadway New York, NY	I attended this event on commercial law. I do not recall whether I spoke at this event. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
2/19/04	Dominican Bar Association New York Law School 57 Worth Street New York, NY	I attended this event. I spoke very briefly to thank the sponsors of the event. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
3/8/04	American Bankruptcy Institute Moot Court Final (hosted by St. John's Law School) Moynihan Courthouse 40 Foley Square New York, NY	I judged this moot court competition. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.

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56940.072

Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
4/1/04	University of Illinois Frederick Green Moot Court Competition & *Brown v. Board* conference & Brown Bag Discussion with Sports Law Society hosted by Professor Stephen Ross 504 East Pennsylvania Avenue Champaign, IL	I judged a moot court competition. I also participated in a brown bag lunch discussion on the baseball strike case. I also attended this event, entitled: "Promises to Keep? *Brown v. Board* and Equal Educational Opportunity." I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
4/8/04	American Bankruptcy Institute and St. John's University School of Law U.S. Courthouse 40 Foley Square New York, NY	I judged the 12th Annual Judge Conrad B. Duberstein Moot Court Competition. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
5/18/04	Columbia Law School Graduation Avery Fisher Hall, Lincoln Center New York, NY	I gave the commencement speech at this event. Draft speech attached.
6/7/04	Brooklyn Law School, New York State-Federal Judicial Council 250 Joralemon Street Brooklyn, NY	I participated in a panel discussion on "The State and Federal Courts Perspectives" at "A Tale of Two Systems: The State and Federal Courts in New York. Current Issues Concerning Federal Preemption." I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.

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56940.073

Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
6/19/04	American Constitution Society for Law and Policy Marriot Wardman Park Hotel 2660 Woodley Road NW Washington, DC	I contributed to the panel, "The Future of Judicial Review: The View from the Bench" at the 2004 National Convention. The official theme was "Liberty and Equality in the 21st Century." I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
9/10/04	NYS Unified Court System 60 Centre Street New York, NY	I spoke at "A Celebration of Unity and Renewal in Tribute to the Sacrifices made on September 11, 2001." Draft speech attached.
10/10/04	2004 Hispanic National Bar Association Convention Marriott Marquis Hotel 1535 Broadway New York, NY	I participated in a panel entitled, "How to Become a Law Clerk," and I accepted the Latina Judge of the Year Award. Draft speech attached.
11/9/04	PRLDEF Event Honoring John Carro Sheridan 52st and 7th Avenue New York, NY	I presented remarks similar to those given on 10/30/03 at the Hispanic Heritage Awards Dinner.
11/12/04	DRI The Voice of the Defense Bar Westin New York at Times Square 270 West 43rd Street New York, NY	I participated in a panel entitled, "Appellate Practice from Both Sides of the Bench" at the Appellate Advocacy Seminar. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.

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56940.074

Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
12/1-12/4/04	Latin American Judges Seminar Monterrey, Mexico	I was invited to this event by the US State Department and Department of Justice. Judges from all levels of the Mexican Judiciary attended. I spoke on U.S. laws regarding the Hague Convention on the Civil Aspects of International Child Abduction. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
1/16/05	Puerto Rican Bar Association Church Street Station P.O. Box 3494 New York, NY	I attended this event and gave brief introductory remarks in which I thanked the Association. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
2/23 - 2/24/05	The Federal Judicial Center Thurgood Marshall Federal Judiciary Building One Columbus Cir NE Washington DC	I attended an event on The Hague Convention on the Civil Aspects on International Child Abduction. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
2/25/05	Duke Law School Corner of Science Drive and Towerview Road Durham, NC	I judged the Dean's Cup Moot Court Panel and Discussion. A video of this presentation is available at http://www.law.duke.edu/webcast/?match=Sonia+Sotomayor. I have requested a copy of the video from Duke Law School, and will provide it as soon as I receive it.
3/16/05	Puerto Rican Bar Association and Association of Judges of Hispanic Heritage Mayer Brown Rowe & Maw 1675 Broadway, Suite 1900 New York, NY	I participated in the Launching Reception for the Judicial Internship Placement Program. Draft speech attached.

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56940.075

Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
4/14/05	Columbia Latino Organization Columbia Law School 435 West 116th Street Mail Code 4004 New York, NY	I spoke at this End of Semester Reception on the importance of clerking. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
4/15/05	Latino Law Students Association Columbia Law School 435 West 116th Street New York, NY	I presented remarks at this LALSA Dinner. Draft speech attached.
7/7/05	2005 Junior Statesman Summer School 40 Foley Square, Room 1705 New York, NY	I presented remarks to Yale Law students. I discussed how cases are assigned to panels on the Second Circuit and how panels operate. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
10/6/05	Latino Law Students Panel on Latinos in the Judiciary CUNY School of Law 65-21 Main Street Flushing, NY	I participated in this panel discussion on Latinos in the Judiciary. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
10/18/05	Hispanic National Bar Association Mandarin Oriental Hotel 1330 Maryland Avenue Washington, DC	30th Annual Convention. I received an Equal Justice Award and spoke on a panel titled "View from the Bench: Effective Courtroom Strategies and Techniques." I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
11/15/05	The Federal Bar Association 1220 North Fillmore Street Suite 444 Arlington, VA	I gave remarks at the Motion by the Federal Bar Association and Others to Admit New Members. Draft speech attached.

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56940.076

Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
2/2/06	Puerto Rican Bar Association Moynihan Federal Courthouse Lebron Room 500 Pearl Street New York, NY	I participated in this discussion panel on "Perspectives from the Bench: Effective Courtroom Techniques." I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
2/9/06	George Washington University Law School Moot Court Event 700 20th Street, NW Washington, DC	I judged a moot court competition. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
2/18/06	PricewaterhouseCoopers Fairmont Scottsdale Princess Resort 7575 East Princess Drive Scottsdale, AZ	I participated in a U.S. Circuit Judges Panel at the PricewaterhouseCoopers Leadership Forum. I spoke on intellectual property issues. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
2/26/06	New York University School of Law 40 Washington Square South New York, NY	I participated in a moot court competition on immigration law I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
3/6/06	University of Puerto Rico School of Law P.O. Box 23349 UPR Station San Juan, PR	I participated in an Initiation Ceremony for the Law Review's 75th volume Board of Editors: "How to be an Effective Advocate in Court." Draft speech attached.
3/16/06, and every March thereafter	Pepperdine University School of Law 24255 Pacific Coast Highway Malibu, CA	I spoke about "The Judicial Process," starting in 2006. Starting in 2008, I also spoke on "The Role of the Law Clerk," as a separate panelist. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.

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56940.077

Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
4/7/06	Yale Law School 127 Wall Street New Haven, CT	The Yale Latino Law Students Association honored me with the "Latino Law Students Association's Public Service Award" at the First Annual Public Service Award Dinner. Draft speech attached
5/21/06	Hofstra University School of Law 121 Hofstra University Hempstead, NY	I accepted an honorary doctoral degree and gave commencement speech at this event. Draft speech attached.
6/14/06	Association of the Bar of the City of New York 42 West 44th Street New York, NY	Program on 16 Hour Bridge-The-Gap (Litigation Day). I spoke on "Appellate Practice—Effective Brief Writing and Oral Advocacy." I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
10/04/06	Latino Law Students Association Columbia Law School 435 West 116th Street New York, NY	I received the Professional Leadership Award at this event. Draft speech attached.
10/12/06	Federal Judicial Center, Georgetown University Law Center 600 New Jersey Avenue NW Washington, DC	I spoke on a roundtable at this event, entitled "Immigration Law for Judges of the U.S. Courts of Appeals." Draft speech attached.
11/03/06	Cardinal Spellman High School 1 Cardinal Spellman Place Bronx, NY	I attended Cardinal Spellman Career Day. Draft speech attached.

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56940.078

Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
11/9/06	Conference on International Law, Sponsored by St. John's Law School Moynihan Federal Courthouse 500 Pearl Street New York, NY	I participated on a panel with foreign judges. I spoke about the permissible uses of international law by American courts. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
1/07	Fordham Law School Legal Writing Class Moynihan Federal Courthouse 500 Pearl Street New York, NY	I spoke to the class about legal writing. I gave a condensed version of my standard lecture on Standards of Review.
1/9/07	University of Puerto Rico Visiting Professor Exact campus location unknown	I spoke to a class on my life and being a judge. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
2/14/07-2/16/07	Federal Judicial Center Roundtable Thurgood Marshall Federal Judiciary Building One Columbus Cir NE Washington DC	I spoke on a panel regarding the effective uses of information technology for judges. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
3/8/07	Round Table Discussion Cardozo Law School 55 Fifth Avenue New York, NY	I participated in a panel and dinner with faculty. I spoke on the need to assist students in becoming better writers. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
4/5/07	Dinner with AnBryce Scholars NYU Law School Vanderbilt Hall 40 Washington Square South New York, NY	I attended this dinner. I spoke about my life experiences. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.

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Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
7/10/07	LeBouf Lamb & Greene, LLP 1301 Avenue of the Americas New York, NY	I spoke to the firm's summer associates regarding professional issues. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
9/21/07	Urban Health Plan, Inc. 1065 Southern Blvd. Bronx, NY	I was inducted into the "Wall of Fame" at the 12th Annual Urban Health Plan Celebration Community Health Symposium and Kick-off Reception. Draft speech and video attached.
10/15/07	LALSA Event Cornell Law School Ithaca, NY	I gave remarks to the Latin American Law Students Association. Draft speech attached.
11/12/07	Vermont Law School 164 Chelsea Street PO Box 96 South Royalton, VT	I presented remarks at "A Celebration of the Life and Service of the Honorable James L. Oakes." Draft speech attached.
1/18/08	United States Courthouse 11 Elmwood Avenue Burlington, VT	I participated in the unveiling of a special commemorative portrait of Judge Fred I. Parker. Draft speech attached.
5/5/08	Yale Law School 127 Wall Street New Haven, CT	I judged the Morris Tyler Moot Court of Appeals Thurman Arnold Prize Finals. I also attended the Yale Latino Students Luncheon with LLSA and the Women of Color Collective. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.

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Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
5/15/08	Roundtable Discussion with the Appellate Chiefs from six USAOs Moynihan Federal Courthouse 500 Pearl Street New York, NY	I participated in this panel discussion on appellate work. I gave tips on how to be a better appellate advocate. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
7/30/08	Legal Outreach, Inc. Columbia Law School 435 West 116th Street New York, NY	I judged the preliminary round of the Columbia SLI mock trial competition at the 2008 Summer Law Institute. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
10/08/08	Latino Law Students Association Cornell Law School Ithaca, NY	I participated in the LALSA Hispanic Heritage Month Discussion. Notes attached.
10/20/08	University of Hartford 200 Bloomfield Avenue West Hartford, CT	I participated in the Jon Newman Annual Lecture on Law and Justice Draft speech attached.
10/29/08	New York University School of Law 40 Washington Square South New York, NY	I joined a round table on "Dynamic Relations between International and National Tribunals at the Journal of International Law and Politics Symposium, The Normalizing of Adjudication in Complex International Governance Regimes: Patterns, Possibilities, and Problems." I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
1/6/09	Congressional Hispanic Caucus Institute 911 2nd Street NE Washington, DC	I presided over the Swearing-In Ceremony and Reception Honoring Hispanic American Members of the 111th Congress. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.

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56940.081

Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
1/16/09	National Urban Fellows Gallery One Hotel, 2670 East Sunrise Boulevard Fort Lauderdale, FL	I spoke on a panel about "Social Justice in Public Education and Public Health at the Retreat and 39th Annual Leadership Conference: A New Wave: Leaders Changing America." I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
2/02/09 - 2/07/09	Belizean Grove Peru	I participated in a panel discussion on the importance of standards of review to the appellate process. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
2/28/09	Yale Law School Federalist Society 127 Wall Street New Haven, CT	I attended the 2009 Federalist Society Student Symposium on "Separation of Powers in American Constitutionalism." I moderated the "Confirmation Battles and Presidential Nominations" panel. Draft speech attached
3/24/09	Ceremony with Governor Paterson Albany, NY	I received a Woman of Justice award at this event, the Women of Excellence Awards 2009. I have not found a draft of prepared remarks. It is likely that a video of this event exists. If so, I have not been provided with a copy.
4/17/09	Black, Latino, Asian Pacific American Law Alumni Association of New York University School of Law Battery Gardens Battery Park 20 State St New York, NY	I gave the keynote address at this event, the BLAPA Annual Spring Dinner. The theme was "Being the Change We Need For Our Communities." Draft speech attached.

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56940.082

Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
4/28/09	American Civil Liberties Union of Puerto Rico ACLU of Puerto Rico Union Plaza, Ste 205 416 Avenue Ponce de León San Juan, PR	I spoke on "How Federal Judges Look to International and Foreign Law Under Art. VI of the U.S. Constitution" Video attached.
5/07/09	New York County Lawyer's Association New York County Lawyers' Association 14 Vesey Street New York, NY	I spoke at the Presentation and Discussion of Ellis Cose's radio documentary: "Nerds in the Hood." Draft speech attached.
5/26/09	The White House 1600 Pennsylvania Ave Washington, DC	Nomination to the United States Supreme Court. Draft speech attached.
Date Unknown	Panel: Women in the Judiciary Colegio de Abogados de Puerto Rico P.O. Box 9021900 San Juan, PR	I participated in a panel discussion at this event on women in the judiciary. News clipping attached.

e. List all interviews you have given to newspapers, magazines, or other publications, or radio or television stations, providing the dates of these interviews and four (4) copies of the clips or transcripts of these interviews where they are available to you.

I have frequently been interviewed by the newspaper and television press concerning my personal background. I have done my best to identify all items called for in this question, including through a review of my personal files and searches of publicly available electronic databases. I have located the following:

English Print Interviews

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56940.083

Lizette Alvarez & Michael Wilson, *Up and Out of New York's Projects*, The New York Times, May 31, 2009 (referencing a quote published in a "1999 article in a housing authority publication").

Pamela A. MaClean, *New 2nd Circuit Chief No Ideologue,* The Connecticut Law Tribune, November 27, 2006.

Ina R. Bort, *Judicial Profile*, The Federal Lawyer, February 2006

Nancy Carson, *Believing in Ourselves* 24-27 (2002).

Joe Beck, *Sonia Sotomayor Reflects on Her Success: First Puerto Rican Woman to be a Federal Judge*, The Hispanic Outlook in Higher Education, November 4, 2002.

American Bar Association, *National Hispanic Heritage Month 2000*, available at http://www.abanet.org/publiced/hispanic_s.html

Larry Neumeister, *Judge Finds Humility in Journey from Housing Projects to High Court*, The Associated Press BC Cycle, November 16, 1998.

Larry Neumeister, *Judge Learns Life in Tough Childhood*, The Associated Press State & Local Wire, November 9, 1998.

Judge's Journey was Uphill from the Start, Rochester Democrat and Chronicle, November 8, 1998.

Woman Rises from Projects to High Court, Connecticut Post, November 8, 1998.

Greg B. Smith, *Judge's Journey to Top*, New York Daily News, October 24, 1998.

Camille Martinez, *Hit for Baseball Strike Ender,* Newsday, July 14, 1997.

Jane Furse, *From Bench, She Hits Hard*, Daily News (New York), August 1, 1995.

Patricia Cohen, *Loads of Praise for Judge Wood*, Newsday, February 9, 1993.

Viva en Foco, Daily News (New York), October 1992

Jan Hoffman, *A Breakthrough Judge: What She Always Wanted*, New York Times, September 25, 1992.

Los Angeles Daily Journal, September 1992 (clip not available)

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56940.084

Deborah Pines, *New Women Judges Took Different Routes to Court*, New York Law Journal, August 26, 1992

M. P. McQueen, *Great Hispanic Hope: Lawyer May Be State's First Latina Federal Court Judge*, New York Newsday, May 31, 1992.

Trish Donnally, *Fashion's Assault on Counterfeiters; Companies Fight to Stop Others Cashing in on Their Good Name*, The San Francisco Chronicle, May 20, 1992.

Sam Howe Verhovek, *Political Talk, New Faces on the Bench,* New York Times, December 1, 1991.

P.R. Native Becomes Judge on 2nd Circuit Court of Appeals, San Juan Star, November 7, 1990.

Michael Gross, *Notes on Fashion*, New York Times, November 11, 1986.

Catherine Lawton, *A Touch of Class*, Mademoiselle, September 1986.

The D.A. 's Right Arms, The New York Times, November 27, 1983.

M.A. Farber, *As He Seeks a 4th Term, Morgenthau Confronts First Sustained Criticism*, New York Times, June 17, 1985.

Two Men Imprisoned in Child Pornography, New York Times, April 5, 1983.

Students complain about selection of 'minority dean,' *The Daily Princetonian,* September 12, 1974.

Latin student groups assail University hiring performance, *The Daily Princetonian,* April 22, 1974.

Lori Ferguson, *Continually Defining What's Right and Just,* Princeton Alumni Magazine.

Spanish Print Interviews

Jose Acosta, *El Diario Reconoce Liderazgo de la Mujer Hispana*, El Dario, May 18, 2009.

AP, *Se retira juez del Supremo*, El Vocero, May 2, 2009

Cynthia Lopez Caban, *"Seria Un Regalo Maravilloso,"* El Neuvo Dia, May 2, 2009, at 6.

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Beatriz de la Torre, *Suena Sotomayor*, El Vocero, May 2, 2009, at 6, 16.

Yvonne M. Conde, *Sotomayor, su Senoria!*, Hoy, March 9, 2003.

Por la union puertorriquena, El Nuevo Dia, January 25, 1999, at 30.

Gladys Nieves Ramirez, *En la Isla la Juez Sotomayor*, El Nuevo Dia, January 21, 1999, at 44.

Leonor Mulero, *Una Carrera Judicial Ilena de Logros*, De El Nuevo Dia, December 28, 1998.

Lisa M.F. Younes, *Con Mucho Que Agradecer al 98 Sotomayor,* El Mundo, May 8, 1998.

Primera Juez Hispana del Distrito Federal, Caras de Puerto Rico.

Leonor Mulero, *Sotomayor al apelativo federal*, Primo Plano, 1998.

Maria Vega, *Frentes y Perfiles de una Jueza*, El Dario La Prensa, October 10, 1998, at 3.

Margarita Santori, *Educacion "la unica solucion,"* El Mundo.

Video Interviews

Interview with Fox News (local affiliate) about Second Circuit confirmation, October 7, 1998.

Interview with *Visiones* regarding my childhood and career, June 12, 1997.

Interview with Channel 41 (New York Spanish language station) in connection with Lifetime Achievement Award from National Puerto Rican Coalition, Inc., October 20, 1994.

Spanish language interview regarding confirmation as a district court judge, 1991.

Interview with Good Morning America, related to women and careers, 1986.

Interview with Channel 9 (New York) on counterfeit watches, November 1986.

f. If, in connection with any public office you have held (see 15a), there were any reports, memoranda, or policy statements prepared or produced with your participation, supply four (4) copies of these materials. Also provide four (4)

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copies of any resolutions, motions, legislation, nominations, or other matters on which you voted as an elected official, the corresponding votes and minutes, as well as any speeches or statements you made with regard to policy decisions or positions taken. "Participation" includes, but is not limited to, membership in any subcommittee, working group, or other such group, which produced a report, memorandum, or policy statement, even where you did not contribute to it. If any of these materials are not available to you, please give the name of the document, the date of the document, a summary of its subject matter, and where it can be found.

New York City Campaign Finance Board, *Dollars and Disclosure: Campaign Finance Reform in New York City* (1990).

Report of the Advisory Panel on Inter-Group Relations, August 16, 1991 (convened by Commissioner Margarita Rosa of the New York State Division of Human Rights at the behest of Governor Mario Cuomo).

New York City Campaign Finance Board, *Windows of Opportunity: Campaign Finance Reform and the New City Council* (1992).

Advisory opinions issued by the New York City Campaign Finance Board (1988-1992) are attached.

Minutes from meetings of the New York City Campaign Finance Board (1990-1992), the State of New York Mortgage Agency ("NYSMA") Board of Directors (1987-1992), the NYSMA Audit and Finance Committee (1989-1992), the NYSMA Mortgage Insurance Committee (1989-1992), and the NYSMA Affirmative Action Committee (1989-1992) are attached.

13. **Judicial Office**: State (chronologically) any judicial offices you have held, including positions as an administrative law judge, whether such position was elected or appointed, and a description of the jurisdiction of each such court.

UNITED STATES CIRCUIT JUDGE
United States Court of Appeals for the Second Circuit 10/13/98 to present
I was appointed to this position by President William Jefferson Clinton.

UNITED STATES DISTRICT JUDGE
Southern District of New York 10/2/92 to 10/12/98
I was appointed to this position by President George H. W. Bush.

a. As a trial judge, approximately how many cases did you preside over that went to verdict or judgment? 61

i. Of these, approximately what percent were:

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jury trials? 75%; bench trials 25% [total 100%]

civil proceedings? 69%; criminal proceedings? 31% [total 100%]

b. Provide citations for all opinions you have written, including concurrences and dissents.

Please see appendix.

c. Provide citations to all cases in which you were a panel member, but did not write an opinion.

Please see appendix.

d. Provide a list and copies of all your unpublished opinions.

Please see appendix.

e. For each of the 10 most significant cases over which you presided, provide: (1) a capsule summary of the nature the case; (2) the outcome of the case; (3) the name and contact information for counsel who had a significant role in the trial of the case; and (4) the citation of the case (if reported) or the docket number (if not reported).

Note: I obtained the attorney contact information from the docket sheets of the respective cases. I have attempted to update the information through searches of Martindale-Hubbell's online database on LexisNexis and Westlaw's "Attorney/Judge Directory" online database. I represent only that I have, to the best of my ability, provided the most current information available.

(1) *Silverman v. Major League Baseball Player Relations Committee, Inc.*, No. 95 Civ. 2054 (SS), 880 F. Supp. 246 (S.D.N.Y. 1995) (District Judge Sotomayor), *affirmed*, 67 F.3d 1054 (2d Cir. 1995)

Nature of the Case: This action by the National Labor Relations Board alleged that the major league baseball owners engaged in unfair labor practices during the 1994-1995 players strike.

Disposition: The district court issued a preliminary injunction against the major league owners, ordering them to restore the terms and conditions of employment provided under their most recent agreement with the players. The court concluded that the National Labor Relations Board, which brought the action against the owners, had reasonable cause to believe that the owners committed unfair labor practices when they revoked the salary arbitration clause and the free agency anticollusive provision in their most recent agreement with the players absent a good faith impasse. The court also concluded that an injunction was just and proper based on the possible harm to the public, the players, and the NLRB. The Second Circuit affirmed the preliminary injunction order. The case was administratively closed on June 26, 2001.

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(2) *Clarett v. National Football League*, 369 F.3d 124 (2d Cir. 2004) (Judge Sotomayor, writing for a panel including Judge Sack, and District Judge Kaplan, of the Southern District of New York, sitting by designation)

Nature of the Case: A football player sued the NFL, arguing that an NFL rule that limited eligibility for the NFL entry draft to players who were three full college football seasons removed from high school graduation constituted an unreasonable restraint of trade in violation of section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and section 4 of the Clayton Act, 15 U.S.C. § 15. The district court entered summary judgment in favor of the player, and the NFL appealed.

Disposition: On appeal, the Court of Appeals ordered judgment in favor of the NFL. The Court held that the NFL's eligibility rules are immune from antitrust scrutiny under the non-statutory labor exemption, a long-recognized rule that, in order to accommodate the collective bargaining process, certain concerted activity among and between labor and employers must be held to be beyond the reach of the antitrust laws. The Court concluded that the conditions under which a prospective player will be considered for employment as an NFL player are for the union representative and the NFL to determine, and that the fact that the NFL and players' union did not bargain over the rule did not exclude the rule from the scope of the non-statutory exemption.

Subsequent history: The Court reversed the district court's judgment and remanded to the district court with directions to enter judgment in favor of the NFL. The player's petition for certiorari was denied. On remand, the district court denied the plaintiff's motion for reimbursement of attorneys' fees and litigation expenses on the ground that he was not the prevailing party, and closed the case.

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(3) *United States v. Quattrone*, 402 F.3d 304 (2d Cir. 2005) (Judge Sotomayor, writing for a panel including Judges Cardomone and Cabranes)

Nature of the Case: This case arose from the prosecution of Frank Quattrone, a former executive of the bank Credit Suisse First Boston, for allegedly obstructing investigations into the bank's handling of initial public offerings of certain technology companies during the Internet boom of the late 1990s. In an effort to protect the integrity of Mr. Quattrone's second criminal trial, after the first ended in a deadlocked jury and mistrial, the district court issued an order forbidding members of the media from publishing, during the trial, the names of jurors that were disclosed in open court.

Disposition: The Court of Appeals struck down the district court's order as an unjustified prior restraint on expression in violation of the Free Speech and Free Press Clauses of the First Amendment. Although sensitive to the district court's attempt to protect the fairness of the criminal trial, the Court reasoned that the order unnecessarily infringed both the right against prior restraints on speech and the right to report freely on events that transpire in an open courtroom.

Subsequent history: Mr. Quattrone was convicted, but the conviction was vacated by a later panel of the Court of Appeals. *See United States v. Quattrone*, 441 F.3d 153 (2d Cir. 2006). On remand from that appeal, Mr. Quattrone and the government entered into a deferred prosecution agreement.

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(4) *Ford v. McGinnis*, 352 F.3d 582 (2d Cir. 2003) (Judge Sotomayor, writing for a panel including Judge Wesley, and District Court Judge Pollack, of United States District Court for the Southern District of New York, sitting by designation)

Nature of the Case: A prison inmate brought a First Amendment action under 42 U.S.C. § 1983 against corrections officials, alleging that the refusal to serve a religious feast in a high-security area infringed his religious rights. The district court granted the corrections officials' motion for summary judgment, and the inmate appealed.

Disposition: The Court of Appeals held that the that the corrections officials were not entitled to summary judgment on the grounds relied upon by the district court. The Court explained that the district court had erroneously focused its analysis under the Free Exercise Clause on the objective validity of the religious belief, instead of on the sincerity of the inmate's belief in the feast's religious significance. The Court further held that there existed a factual dispute concerning whether the inmate's religious exercise had been substantially burdened and that the record was insufficient to determine whether legitimate penological interests justified the officials' conduct.

Subsequent history: The Court of Appeals vacated the district court's grant of summary judgment and remanded for further proceedings consistent with the decision. The parties subsequently stipulated to dismiss the case.

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(5) *In re NYSE Specialists Securities Litigation*, 503 F.3d 89 (2d Cir. 2007) (Judge Sotomayor, writing for a panel including Chief Judge Jacobs and Judge Leval)

Nature of the Case: Investors filed class actions under federal securities laws, alleging that the New York Stock Exchange ("NYSE") failed to adequately monitor and police trading by its floor-trading firms, and made misrepresentations about the market's integrity. The district court dismissed the claims, and the investors appealed.

Disposition: The Court of Appeals held that the NYSE's absolute immunity, arising from its quasi-governmental role in the regulation of the securities market, extended to the nonexercise of its regulatory power. Consequently, the NYSE was entitled to absolute immunity from liability based on its alleged regulatory failure to take action against the firms' conduct. But the

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Court held that plaintiffs had standing to bring their Rule 10b-5 claim for the NYSE's alleged misrepresentations.

Subsequent history: The Court of Appeals affirmed the judgment of the district court that the NYSE was entitled to absolute immunity based on its alleged regulatory failure, vacated the judgment with respect to plaintiffs' standing and remanded for proceedings consistent with its decision. The petition for writ of certiorari was subsequently denied. *California Public Employees' Retirement System v. New York Stock Exchange*, 128 S.Ct. 1707 (2008).

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(6) *Farrell v. Burke*, 449 F.3d 470 (2d Cir. 2006) (Judge Sotomayor, writing for a panel including Judge Katzmann, and Judge Eaton of the United States Court of International Trade, sitting by designation)

Nature of the Case: A former state parolee, who had been convicted of sexual crimes involving minors, brought an action under 42 U.S.C. § 1983 against his parole officers, alleging that they violated his constitutional rights under the due process clause of the Fourteenth Amendment by imposing and enforcing a special condition of parole that prohibited his possession of "pornographic material." The district court granted the defendants' motion for summary judgment, and the plaintiff appealed.

Disposition: The Court of Appeals affirmed the district court's judgment in favor of the defendants. The Court explained that even if the term "pornography" is inherently vague, the materials the plaintiff possessed – which contained sexually explicit pictures and lurid descriptions of sex between men and boys – fit within "any reasonable understanding of the term [pornography]." Accordingly, the Court concluded that the plaintiff's parole condition was not unconstitutionally vague as applied to his conduct. Because the plaintiff's as-applied vagueness challenge failed, and because he could not demonstrate that the no-pornography condition threatened to chill the exercise of substantial constitutionally protected conduct, the Court did not reach the question whether the parole condition was impermissibly vague on its face. The Court also rejected the plaintiff's First Amendment overbreadth challenge.

For plaintiff-appellant:
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(7) *United States v. Falso*, 544 F.3d 110 (2d Cir. 2008) (Judge Sotomayor, writing for the panel, with Chief Judge Jacobs joining in part and dissenting in part and Judge Livingston joining in part and concurring in the judgment); 293 Fed. Appx. 838 (2d Cir. 2008) (summary order) (Chief Judge Jacobs and Judges Sotomayor and Livingston)

Nature of the Case: In this criminal action, the defendant was convicted, upon a conditional guilty plea, of 242 counts relating to child pornography and traveling with intent to engage in illicit sexual conduct with minors. The district court had previously denied the defendant's motion to suppress evidence seized from his home and computer pursuant to a search warrant and statements he made to Federal Bureau of Investigation agents. The district court sentenced the defendant to 30 years in prison. The defendant appealed the denial of his motion to suppress.

Disposition: The Court of Appeals affirmed the defendant's conviction, and Judge Sotomayor drafted the panel opinion. A majority of the panel (Jacobs, C.J. & Sotomayor, J.) held that the search warrant was not supported by probable cause, and a differently aligned majority of the panel (Sotomayor & Livingston, J.J.) held that the motion to suppress was nevertheless properly denied because the good-faith exception to the exclusionary rule applied. Accordingly, a majority of the panel affirmed the denial of the defendant's motion to suppress the physical evidence seized from his home. The opinion explained that the good-faith exception applied because the judge that issued the search warrant was not knowingly misled and the affidavit in support of the warrant was not so lacking in indicia of probable cause as to render reliance unreasonable. In a separate order, the Court of Appeals unanimously held that the district court properly denied the defendant's motion to suppress his statements to the FBI agents.

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(8) *Shi Liang Lin v. United States Department of Justice*, 494 F.3d 296 (2d Cir. 2007) (en banc) (Judge Sotomayor, concurring, in an opinion joined by Judge Pooler)

Nature of the Case: Three applicants, whose respective girlfriends and fiancée allegedly were victimized by China's family planning policies, appealed the decisions of the Board of Immigration Appeals (BIA) denying asylum. The Second Circuit ordered a hearing en banc to consider the BIA's rationale for extending a per se presumption of persecution to spouses, but not to non-married partners, of individuals who had been involuntarily subjected to an abortion or sterilization.

Disposition: The Second Circuit held that the statute providing refugee status to applicants who had undergone forced abortions or involuntary sterilization does not provide those applicants' spouses, boyfriends, or fiancés with automatic eligibility for refugee status. Judge Sotomayor's opinion concurring in the judgment argued that, because the cases before the Court involved only unmarried petitioners, it was inappropriate for the majority to opine on whether its holding extended to spouses. In particular, the opinion explained that "the majority's conclusion disregards the immutable fact that a desired pregnancy in a country with a coercive population control program necessarily" affected both spouses "and that the state's interference with this fundamental right may have subtle, far reaching and devastating effects for both husband and wife." *Id.* at 330.

Subsequent history: The petitioners' petition for certiorari was denied.

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(9) *United States v. Real Property Known as 77 East 3rd Street, New York, NY*, No. 85 Civ. 3351, 849 F. Supp. 876 (S.D.N.Y. 1994); 869 F. Supp. 1042 (S.D.N.Y. 1994); 1994 WL 4288 (S.D.N.Y. Jan. 4, 1994); 1994 WL 4276 (Jan. 4, 1994) (District Judge Sotomayor)

Nature of the Case: This case was a civil forfeiture action brought by the government pursuant to 21 U.S.C. § 881(a)(7) to forfeit defendant *in rem*, the building and real property located at 77 East 3rd Street, New York, New York (together the "Building"). The government alleged that the New York City Chapter of the Hells Angels Motorcycle Club (the "Club") used the Building to store and distribute narcotics. Sandy Alexander, his wife Colette Alexander, and the Church of Angels subsequently intervened as claimants.

Disposition: Following an approximately five-week trial, the jury returned a verdict in favor of all of the claimants. The jury found that the claimants had proven, by a preponderance of the evidence, that defendant-in-rem, the Building, was not used, or intended to be used, to commit, or to facilitate the commission of, a felony drug violation between October 12, 1984 and May 2, 1985. The district court issued two published opinions in connection with this action. One opinion resolved pre-trial motions. 849 F. Supp. 876 (S.D.N.Y. 1994) (granting the government's motion to impanel an anonymous jury in light of the Club members' history of violence). The second opinion denied the government's post-trial motion for judgment as a

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matter of law pursuant to Rule 50(b) or for a new trial under Rule 59(a). 869 F. Supp. 1042 (S.D.N.Y. 1994). The district court also issued two unpublished opinions resolving pre-trial motions. 1994 WL 4288 (S.D.N.Y. Jan. 4, 1994) (denying intervenor claimants' motion to dismiss the government's Third Amended Complaint on the grounds that the forfeiture violates the Fifth Amendment's Double Jeopardy Clause); 1994 WL 4276 (S.D.N.Y. Jan. 4, 1994) (denying intervenor claimants' motions (1) to bifurcate the probable cause hearing from the innocent owner portion of the forfeiture trial; (2) to allow them to present their evidence on the question of their innocent ownership of the Building before the Government presents its case on probable cause and to then be allowed to rebut the Government's case; and (3) to dismiss the forfeiture complaint and to suppress evidence seized at the Building at the time of the Building's arrest).

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(10) *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000) (Judge Sotomayor, dissenting from a decision authored by Judge Jacobs and joined by Judge Michel, of the United States Court of Appeals for the Federal Circuit, sitting by designation)

Nature of the Case: A father sought an order compelling his wife to return their minor child to Hong Kong under the Hague Convention on the Civil Aspects of International Child

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Abduction, implemented by the International Child Abduction Remedies Act. The district court entered judgment in favor of the father and issued the order.

Disposition: On appeal, the majority held that the district court lacked jurisdiction to order the return of the child to Hong Kong because a *ne exeat* provision in a Hong Kong custody order (which provided, with limited exceptions, that the child not be removed from Hong Kong without leave until she attained 18 years of age) did not confer "rights of custody" on either the father or the Hong Kong court. Judge Sotomayor dissented, arguing that the *ne exeat* clause gave "rights of custody" to the father within the meaning of the Hague Convention and the father's petition to return the child to Hong Kong therefore should have been granted. Judge Sotomayor concluded that the mother had breached the father's right of custody by removing the child from Hong Kong without the consent of the father or the Hong Kong court.

Subsequent history: The father's petition for certiorari was denied. On remand, the district court dismissed the father's petition for return of the child and closed the case. The federal courts of appeals are split on the question whether a *ne exeat* clause can confer "rights of custody" upon a parent. A number of the decisions addressing this issue have cited the *Croll* majority and/or dissent. *See Furnes v. Reeves*, 362 F.3d 702, 718 n.13, 719, 720 n.15, 721 n.16, 722 nn.17-18 (11th Cir. 2004) (following the *Croll* dissent); *but see Abbott v. Abbott*, 542 F.3d 1081, 1087 (5th Cir. 2008) (holding, with the *Croll* majority, that *ne exeat* clauses do not confer "rights of custody" upon a parent); *Fawcett v. McRoberts*, 326 F.3d 491, 500 (4th Cir. 2003) (same); *Gonzalez v. Gutierrez*, 311 F.3d 942, 944 (9th Cir. 2002) (same). A petition for certiorari raising this question is pending before the United States Supreme Court. *Abbott v. Abbott*, Docket No. 08-645. Legal opinions in the United Kingdom and South Africa have analyzed the *Croll* decision and favorably discussed the dissent's reasoning. *See Sonderup v. Tondelli*, [2001] 1 SA 1171 (CC) at 22-24 (S. Afr.); *In re D (A Child)*, [2007] 1 A.C. 619, 628-29, 634-35 (H.L.).

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f. Provide a list of all cases in which certiorari was requested or granted.

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The Second Circuit issues both precedential and nonprecedential opinions. In part A of my response, I list the cases in which certiorari was granted or denied from a decision of a panel of which I was a member, including cases in which I dissented. In part B, I list the cases in which certiorari was granted or denied from a nonprecedential opinion issued by panels of which I was a member.

A. PRECEDENTIAL OPINIONS

OPINIONS

Certiorari Granted

City of New York v. Smokes-Spirits.com, Inc., 541 F.3d 425 (2d Cir. 2008) certiorari granted by Hemi Group v. New York, 2009 U.S. LEXIS 3310 (May 4, 2009)

Ricci v. Destefano, 530 F.3d 87 (2d Cir. 2008) (*per curiam*) certiorari granted by Ricci v. DeStefano, 2009 U.S. LEXIS 392 (Jan. 9, 2009) certiorari granted by Ricci v. DeStefano, 2009 U.S. LEXIS 394 (Jan. 9, 2009)

Johns-Manville Corp. v. Chubb Indem. Ins. Co. (In re Johns-Manville Corp.), 517 F.3d 52 (2d Cir. 2008) certiorari granted by Travelers Indem. Co. v. Bailey, 2008 U.S. LEXIS 9124 (Dec. 12, 2008) certiorari granted by Common Law Settlement Counsel v. Bailey, 2008 U.S. LEXIS 9125 (Dec. 12, 2008)

Riverkeeper, Inc. v. United States EPA, 475 F.3d 83 (2d Cir. 2007) certiorari granted by Entergy Corp. v. EPA, 128 S. Ct. 1867, 170 L. Ed. 2d 743 (2008) certiorari granted by, in part Util. Water Act Group v. Riverkeeper, Inc., 128 S. Ct. 1868, 170 L. Ed. 2d 743 (2008) certiorari granted by, in part PSEG Fossil LLC v. Riverkeeper, Inc., 128 S. Ct. 1867, 170 L. Ed. 2d 743 (2008) reversed by, remanded by Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498 173 L. Ed. 2d 369 (Apr. 1, 2009)

William L. Rudkin Testamentary Trust v. Comm'r, 467 F.3d 149 (2d Cir. 2006) certiorari granted by Knight v. Comm'r, 127 S. Ct. 3005, 168 L. Ed. 2d 725 (2007) affirmed by 128 S. Ct. 782, 169 L. Ed. 2d 652 (2008)

Lopez Torres v. N.Y. State Bd. of Elections, 462 F.3d 161 (2d Cir. 2006) certiorari granted by N.Y. State Bd. of Elections v. Lopez Torres, 127 S. Ct. 1325, 167 L. Ed. 2d 72 (2007) reversed by New York State Bd. of Elections v. Lopez Torres, 128 S. Ct. 791, 169 L. Ed. 2d 665 (2008)

Empire Healthchoice Assur., Inc. v. McVeigh, 396 F.3d 136 (2d Cir. 2005) certiorari granted by 126 S. Ct. 978, 163 L. Ed. 2d 721 (2006) affirmed by 547 U.S. 677 (2006)

Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 395 F.3d 25 (2d Cir. 2005) certiorari granted by Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 126 S. Ct. 34, 162 L. Ed. 2d 932 (2005) vacated by, remanded by 547 U.S. 71 (2006)

Swedenburg v. Kelly, 358 F.3d 223 (2d Cir. 2004) certiorari granted by Swedenburg v. Kelly, 541 U.S. 1062, 158 L. Ed. 2d 962, 124 S. Ct. 2391

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(2004) reversed and remanded by Granholm v. Heald, 2005 U.S. LEXIS 4174 (May 16, 2005)

European Cmty. v. RJR Nabisco, Inc., 355 F.3d 123 (2d Cir. 2004) certiorari granted by European Cmty. v. RJR Nabisco, Inc., 161 L. Ed. 2d 845, 125 S. Ct. 1968 (2005)

Malesko v. Correctional Servs. Corp., 229 F.3d 374 (2d Cir. 2000) U.S. App. LEXIS 25220; 47 Fed. R. Serv. 3d (Callaghan) 1264, Certiorari Granted March 5, 2001, Reported at: 2001 U.S. LEXIS 1

Tasini v. New York Times Co., 972 F. Supp. 804 (S.D.N.Y. 1997) reversed by 206 F.3d 161 (2d Cir. 2000), reversal affirmed by New York Times Co. v. Tasini, 533 U.S. 483 (2001).

Bartlett v. New York State Bd. of Law Examiners, 970 F. Supp. 1094 (S.D.N.Y. 1997) affirmed in part and vacated in part by 156 F.3d 321 (2d Cir. 1998), vacated by New York State Bd. of Law Examiners v. Bartlett, 527 U.S. 1031 (1999).

Certiorari Denied

United States v. Gutierrez, 555 F.3d 105 (2d Cir. 2009) certiorari denied by Gutierrez v. United States, 2009 U.S. LEXIS 2831 (Apr. 20, 2009)

Catskill Dev., L.L.C. v. Park Place Entm't Corp., 547 F.3d 115 (2d Cir. 2008) certiorari denied by Catskill Dev. v. Harrah's Operating Co., 2009 U.S. LEXIS 2552 (Apr. 6, 2009)

Bankruptcy Serv. v. Ernst & Young (In re CBI Holding Co.), 529 F.3d 432 (2d Cir. 2008) certiorari denied by Ernst & Young v. Bankr. Servs., 2009 U.S. LEXIS 3012 (Apr. 20, 2009)

Thompson v. Choinski, 525 F.3d 205 (2d Cir. 2008) certiorari denied by Thompson v. Choinski, 2009 U.S. LEXIS 185 (Jan. 12, 2009)

United States v. Rittweger, 524 F.3d 171 (2d Cir. 2008) certiorari denied by Rittweger v. United States, 2009 U.S. LEXIS 1086 (Feb. 23, 2009)

United States v. Duong -Cam Tran, 519 F.3d 98 (2d Cir. 2008) certiorari denied by Tran v. United States, 2008 U.S. LEXIS 6860 (Oct. 6, 2008)

United States v. Schulz, 517 F.3d 606 (2d Cir. 2008) (*per curiam*) certiorari denied by Schulz v. United States, 2008 U.S. LEXIS 7716 (Oct. 14, 2008)

United States v. Hawkins, 513 F.3d 59 (2d Cir. 2008) certiorari denied by Hawkins v. United States, 2008 U.S. LEXIS 4249 (May 19, 2008)

Clark v. Perez, 510 F.3d 382 (2d Cir. 2008) certiorari denied by Clark v. Perez, 2008 U.S. LEXIS 6521 (Oct. 6, 2008)

United States v. Ganim, 510 F.3d 134 (2d Cir. 2007) certiorari denied by Ganim v. United States, 2008 U.S. LEXIS 3269 (Apr. 14, 2008)

Calif. Pub. Empls.' Ret. Sys. v. N.Y. Stock Exch., Inc. (In re NYSE Specialists Sec. Litig.), 503 F.3d 89 (2d Cir. 2007) certiorari denied by Cal. Pub. Empls. Ret. Sys. v. N.Y. Stock Exch., Inc., 2008 U.S. LEXIS 2855 (Mar. 24, 2008)

Karpova v. Snow, 497 F.3d 262 (2d Cir. 2007) certiorari denied by Karpova v. Paulson, 2008 U.S. LEXIS 4195 (May 19, 2008)

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Shi Liang Lin v. United States DOJ, 494 F.3d 296 (2d Cir. 2007) certiorari denied by Dong v. Dep't of Justice, 128 S. Ct. 2472 (U.S. 2008)

United States v. Howard, 489 F.3d 484 (2d Cir. 2007) certiorari denied by Howard v. United States, 128 S. Ct. 525, 169 L. Ed. 2d 365 (2007). Related proceeding at United States v. Howard, 2008 U.S. Dist. LEXIS 18275 (N.D.N.Y, Mar. 7, 2008)

Iouri v. Ashcroft, 487 F.3d 76 (2d Cir. 2007) certiorari denied by Iouri v. Mukasey, 128 S. Ct. 2986 (2008)

United States v. Ubiera, 486 F.3d 71 (2d Cir. 2007) certiorari denied by Ubiera v. United States, 128 S. Ct. 173, 169 L. Ed. 2d 117 (2007). Post-conviction proceeding at Ubiera v. United States, 2009 U.S. Dist. LEXIS 19504 (S.D.N.Y., Mar. 5, 2009)

United States v. Ferrell, 485 F.3d 687 (2d Cir. 2007) (*per curiam*) certiorari denied by Ferrell v. United States, 2007 U.S. LEXIS 10767 (Oct. 1, 2007)

ABN AMRO Verzekeringen BV v. Geologistics Ams., Inc., 485 F.3d 85 (2d Cir. 2007) certiorari denied by ABN Amro Verzekeringen BV v. Geologistics Ams., Inc., 128 S. Ct. 1739, 170 L. Ed. 2d 539 (Mar. 31, 2008)

United States v. Reich, 479 F.3d 179 (2d Cir. 2007) certiorari denied by Reich v. United States, 128 S. Ct. 115, 169 L. Ed. 2d 26 (Oct. 1, 2007)

E & L Consulting, Ltd. v. Doman Indus., 472 F.3d 23 (2d Cir. 2006) certiorari denied by E & L Consulting v. Doman Indus., 128 S. Ct. 97, 169 L. Ed. 2d 22 (Oct. 1, 2007)

Armstrong v. Guccione, 470 F.3d 89 (2d Cir. 2006) certiorari denied by Armstrong v. Guccione, 128 S. Ct. 486, 169 L. Ed. 2d 338 (2007)

G&T Terminal Packaging Co. v. USDA, 468 F.3d 86 (2d Cir. 2006) certiorari denied by G & T Terminal Packaging Co. v. Dep't of Agric., 2007 U.S. LEXIS 10402 (Oct. 1, 2007)

Burrell v. United States, 467 F.3d 160 (2d Cir. 2006) certiorari denied by Burrell v. United States, 127 S. Ct. 2031, 167 L. Ed. 2d 773 (2007). Post-conviction relief dismissed at Burrell v. United States, 2007 U.S. Dist. LEXIS 60594 (E.D.N.Y., Aug. 15, 2007)

United States v. Sloley, 464 F.3d 355 (2d Cir. 2006) certiorari denied by Sloley v. United States, 2007 U.S. LEXIS 3737 (Mar. 26, 2007)

Iouri v. Ashcroft, 464 F.3d 172 (2d Cir. 2006) certiorari denied by Iouri v. Mukasey, 2008 U.S. LEXIS 5170 (June 23, 2008)

United States v. Dupre, 462 F.3d 131 (2d Cir. 2006) certiorari denied by Stambaugh v. United States, 127 S. Ct. 1030, 166 L. Ed. 2d 773 (2007)US Supreme Court certiorari denied by Dupre v. United States, 127 S. Ct. 1026, 166 L. Ed. 2d 773 (2007). On remand at United States v. Dupre, 2007 U.S. Dist. LEXIS 18325 (S.D.N.Y., Mar. 16, 2007)

Guiles v. Marineau, 461 F.3d 320 (2d Cir. 2006) certiorari denied by Marineau v. Guiles, 2007 U.S. LEXIS 8793 (June 29, 2007)

Reuland v. Hynes, 460 F.3d 409 (2d Cir. 2006) certiorari denied by Hynes v. Reuland, 128 S. Ct. 119, 169 L. Ed. 2d 27 (Oct. 1, 2007)

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United States v. Blackburn, 461 F.3d 259 (2d Cir. 2006) (Sotomayor, J., dissenting) certiorari denied by Blackburn v. United States, 2007 U.S. LEXIS 6122 (May 29, 2007)
Earley v. Murray, 451 F.3d 71 (2d Cir. 2006) certiorari denied by Burhlre v. Earley, 127 S. Ct. 3014, 168 L. Ed. 2d 752 (2007)
Brown v. Miller, 451 F.3d 54 (2d Cir. 2006) certiorari denied by Brown v. Miller, 127 S. Ct. 938, 166 L. Ed. 2d 718 (Jan. 8, 2007)
United States v. Novak, 443 F.3d 150 (2d Cir. 2006) certiorari denied by Novak v. United States, 2006 U.S. LEXIS 8077 (Oct. 30, 2006)
United States v. Giordano, 442 F.3d 30 (2d Cir. 2006) certiorari denied by Giordano v. United States, 127 S. Ct. 1253, 167 L. Ed. 2d 88 (2007)
United States v. Vaughn, 430 F.3d 518 (2d Cir. 2005) certiorari denied by Lindo v. United States, 126 S. Ct. 1665, 164 L. Ed. 2d 405 (Apr. 3, 2006)
United States v. Estrada, 430 F.3d 606 (2d Cir. 2005) certiorari denied by DeJesus v. United States, 126 S. Ct. 1637, 164 L. Ed. 2d 348 (2006)
United States v. Estrada, 428 F.3d 387 (2d Cir. 2005) certiorari denied by Herredia v. United States, 126 S. Ct. 1451, 164 L. Ed. 2d 148 (Feb. 27, 2006) certiorari denied by Jacobs v. United States, 126 S. Ct. 1454, 164 L. Ed. 2d 151 (Feb. 27, 2006)
Sash v. Zenk, 428 F.3d 132 (2d Cir. 2005) certiorari denied by Sash v. Zenk, 2006 U.S. LEXIS 6248 (Oct. 2, 2006)
Rationis Enters. Inc. of Panama v. Hyundai Mipo Dockyard Co., 426 F.3d 580 (2d Cir. 2005) certiorari denied by Rationis Enters. v. Hyundai Mipo Dockyard Co., 2006 U.S. LEXIS 7469 (Oct. 2, 2006)
United States v. Smith, 426 F.3d 567 (2d Cir. 2005) certiorari denied by Smith v. United States, 164 L. Ed. 2d 109 (Feb. 21, 2006)
European Cmty. v. RJR Nabisco, 424 F.3d 175 (2d Cir. 2005) certiorari denied by European Cmty. v. RJR Nabisco, Inc., 163 L. Ed. 2d 858 (Jan. 9, 2006)
Greiner v. Wells, 417 F.3d 305 (2d Cir. 2005) certiorari denied by Wells v. Ercole, 2006 U.S. LEXIS 1346 (Feb. 21, 2006)
United States v. Martinez, 413 F.3d 239 (2d Cir. 2005) certiorari denied by Martinez v. United States, 126 S. Ct. 1086, 163 L. Ed. 2d 902 (2006)
Serrano v. Fischer, 412 F.3d 292 (2d Cir. 2005) certiorari denied by Serrano v. Fischer, 2006 U.S. LEXIS 1312 (Feb. 21, 2006)
Seinfeld v. Gray, 404 F.3d 645 (2d Cir. 2005) certiorari denied by Seinfeld v. Gray, 2006 U.S. LEXIS 2034 (Mar. 6, 2006)
Guzman v. United States, 404 F.3d 139 (2d Cir. 2005) certiorari denied by Guzman v. United States, 2005 U.S. LEXIS 8649 (Nov. 28, 2005)
Fernandez v. Artuz, 402 F.3d 111 (2d Cir. 2005) certiorari denied by Haponik v. Fernandez, 126 S. Ct. 79, 163 L. Ed. 2d 54 (2005)
Hobbs v. County of Westchester, 397 F.3d 133 (2d Cir. 2005) certiorari denied by Hobbs v. Westchester County, 546 U.S. 815, 126 S. Ct. 340, 163 L. Ed. 2d 51 (Oct. 3, 2005)
Lentell v. Merrill Lynch & Co., 396 F.3d 161 (2d Cir. 2005) certiorari denied by Lentell v. Merrill Lynch & Co., 126 S. Ct. 421, 163 L. Ed. 2d 321 (Oct. 11, 2005)

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Galdamez v. Keane, 394 F.3d 68 (2d Cir. 2005) certiorari denied by Galdamez v. Fischer, 161 L. Ed. 2d 868, 125 S. Ct. 1996 (May 2, 2005)

Kern ex rel. Estate of Kern v. Siemens Corp., 393 F.3d 120 (2d Cir. 2004) certiorari denied by Kern v. Siemens Corp., 161 L. Ed. 2d 1061, 125 S. Ct. 2272 (2005)

Doe v. Menefee, 391 F.3d 147 (2d Cir. 2004) certiorari denied by Doe v. Menefee, 2005 U.S. LEXIS 7677 (Oct. 17, 2005)

Abrams v. Societe Nationale des Chemins de Fer Francais, 389 F.3d 61 (2d Cir. 2004) (*per curiam*) certiorari denied by Abrams v. Societe Nationale des Chemins de Fer Francais, 2005 U.S. LEXIS 3353 (Apr. 18, 2005)

Wills v. Amerada Hess Corp., 379 F.3d 32 (2d Cir. 2004) certiorari denied by Wills v. Amerada Hess Corp., 2005 U.S. LEXIS 6044 (Oct. 3, 2005)

United States v. Saget, 377 F.3d 223 (2d Cir. 2004) certiorari denied by Saget v. United States, 2005 U.S. LEXIS 260 (Jan. 10, 2005)

Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc., 373 F.3d 296 (2d Cir. 2004) certiorari denied by Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc., 125 S. Ct. 1704, 161 L. Ed. 2d 525 (2005)

State St. Bank & Trust Co. v. Inversiones Errazuriz Limitada, 374 F.3d 158 (2d Cir. 2004) certiorari denied by Inversiones Errazuriz Limitada v. State St. Bank & Trust Co., 161 L. Ed. 2d 161, 125 S. Ct. 1309 (Feb. 22, 2005)

Clarett v. NFL, 369 F.3d 124 (2d Cir. 2004) certiorari denied by Clarett v. NFL, 544 U.S. 961, 125 S. Ct. 1728, 161 L. Ed. 2d 602 (2005)

Church of the Am. Knights of the KKK v. Kerik, 356 F.3d 197 (2d Cir. 2004) certiorari denied by Church of the Am. Knights of the KKK v. Kelly, 2004 U.S. LEXIS 7987 (Dec. 6, 2004)

European Cmty. v. RJR Nabisco, Inc., 355 F.3d 123 (2d Cir. 2004) certiorari granted European Cmty. v. RJR Nabisco, Inc., 161 L. Ed. 2d 845, 125 S. Ct. 1968 (2005)Reinstated by European Cmty. v. RJR Nabisco, 2005 cert. denied, 537 U.S. 1000, 154 L. Ed. 2d 394, 123 S. Ct. 513 (2002)

United States v. Rybicki, 354 F.3d 124 (2d Cir. 2003) certiorari denied by Rybicki v. United States, 2004 U.S. LEXIS 5519 (Oct. 4, 2004)

Bakowski v. Kurimai, 2003 certiorari denied by Bakowski v. Kurimai, 161 L. Ed. 2d 481, 125 S. Ct. 1669 (2005)

United States v. Mercado, 349 F.3d 708 (2d Cir. 2003) certiorari denied by Mercado v. United States, 540 U.S. 1169, 157 L. Ed. 2d 1220, 124 S. Ct. 1190 (2004)

United States v. Jackson, 345 F.3d 59 (2d Cir. 2003) certiorari denied by Mazyck v. United States, 540 U.S. 1157, 157 L. Ed. 2d 1055, 124 S. Ct. 1165 (2004) certiorari denied by Jackson v. United States, 541 U.S. 956, 158 L. Ed. 2d 391, 124 S. Ct. 1705 (2004), and Mazyck v. United States, 2005 U.S. LEXIS 7156 (Oct. 3, 2005)

Tueros v. Greiner, 343 F.3d 587 (2d Cir. 2003) certiorari denied by Tueros v. Phillips, 2004 U.S. LEXIS 3485 (May 17, 2004)

United States v. Mingo, 340 F.3d 112 (2d Cir. 2003) (*per curiam*) certiorari denied by Mingo v. United States, 157 L. Ed. 2d 805, 124 S. Ct. 975 (Dec. 15, 2003)

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Idaho Potato Comm'n v. M&M Produce Farm & Sales, 335 F.3d 130 (2d Cir. 2003) certiorari denied by, motion granted by Idaho Potato Comm'n v. M & M Produce Farm & Sales, 541 U.S. 1027, 124 S. Ct. 2066, 158 L. Ed. 2d 642 (2004)

Gerber v. MTC Elec. Techs. Co., 329 F.3d 297 (2d Cir. 2003) certiorari denied by Daiwa Sec. Am., Inc. v. Kayne, 540 U.S. 966, 157 L. Ed. 2d 311, 124 S. Ct. 432 (2003)

Peck v. Pub. Serv. Mut. Ins. Co., 326 F.3d 330 (2d Cir. 2003) certiorari denied by Pub. Serv. Mut. Ins. Co. v. Peck, 540 U.S. 1005, 157 L. Ed. 2d 410, 124 S. Ct. 540 (2003)

United States v. Henry, 325 F.3d 93 (2d Cir. 2003) certiorari denied by Panek v. United States, 540 U.S. 907, 124 S. Ct. 203, 157 L. Ed. 2d 194 (2003)

Miller v. Wolpoff & Abramson, L.L.P., 321 F.3d 292 (2d Cir. 2003) certiorari denied by Wolpoff & Abramson, L.L.P. v. Miller, 540 U.S. 823, 124 S. Ct. 153, 157 L. Ed. 2d 44 (2003)

Lerner v. Fleet Bank, N.A., 318 F.3d 113 (2d Cir. 2003) certiorari denied by Lerner v. Fleet Bank, 540 U.S. 1012, 157 L. Ed. 2d 424, 124 S. Ct. 532 (2003)

Tigue v. United States DOJ, 312 F.3d 70 (2d Cir. 2002) certiorari denied by Tigue v. Dep't of Justice, 2003 U.S. LEXIS 4077 (May 27, 2003)

LNC Invs., Inc. v. Nat'l Westminster Bank, 308 F.3d 169 (2d Cir. 2002) certiorari denied by LNC Invs. v. First Fid. Bank, 2003 U.S. LEXIS 3729 (May 19, 2003)

Thyssen, Inc. v. Calypso Shipping Corp., S.A., 310 F.3d 102 (2d Cir. 2002) (*per curiam*) certiorari denied by Thyssen Inc. v. M/V Markos N, 2003 U.S. LEXIS 2202 (Mar. 24, 2003)

Krimstock v. Kelly, 306 F.3d 40 (2d Cir. 2002) certiorari denied by, motion granted by Kelly v. Krimstock, 539 U.S. 969, 156 L. Ed. 2d 675, 123 S. Ct. 2640 (2003)

Gryl ex rel. Shire Pharms. Group Plc v. Shire Pharms. Group Plc, 298 F.3d 136 (2d Cir. 2002) certiorari denied by Gryl v. Shire Pharms. Group, PLC, 2003 U.S. LEXIS 1155 (Feb. 24, 2003).

Pappas v. Giuliani, 290 F.3d 143 (2d Cir. 2002) (Sotomayor, J., dissenting) certiorari denied by Pappas v. Bloomberg, 156 L. Ed. 2d 657, 123 S. Ct. 2642 (2003)

United States v. Moloney, 287 F.3d 236 (2d Cir. 2002) certiorari denied by Moloney v. United States, 2002 U.S. LEXIS 7647 (Oct. 15, 2002).

York v. Ass'n of the Bar, 01-7908, 286 F.3d 122 (2d Cir. 2002) certiorari denied by York v. Ass'n of the Bar, 2002 U.S. LEXIS 9280 (U.S. Dec. 16, 2002).

King v. First Am. Investigations, Inc., 287 F.3d 91 (2d Cir. 2002) (*per curiam*) certiorari denied by King v. First Am. Investigations, 2002 U.S. LEXIS 7780 (U.S. Oct. 15, 2002).

CFTC v. Armstrong, 284 F.3d 404 (2d Cir. 2002) (*per curiam*) certiorari denied by Armstrong v. CFTC, 2002 U.S. LEXIS 5828 (U.S. Oct. 7, 2002).

Devlin v. Empire Blue Cross & Blue Shield, 274 F.3d 76 (2d Cir. 2001) certiorari denied by Empire Blue Cross & Blue Shield v. Byrnes, 2003 U.S. LEXIS

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913 (Jan. 27, 2003) certiorari denied by Empire Blue Cross & Blue Shield v. Byrnes, 154 L. Ed. 2d 911, 123 S. Ct. 1015 (2003)

Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104 (2d Cir. 2001) certiorari denied by Nat'l Elec. Mfgs. Ass'n v. Sorrell, 2002 U.S. LEXIS 4244 (June 10, 2002).

United States v. Ubaldo-Hernandez, 271 F.3d 78 (2d Cir. 2001) certiorari denied by 2002 U.S. LEXIS 1259 (February 25, 2002).

United States v. Encarnacion-Mendez, 271 F.3d 80 (2d Cir. 2001) certiorari denied by 2002 U.S. LEXIS 1465 (March 4, 2002).

In re Visa Check/Mastermoney Antitrust Litig. v. Visa, United States, 280 F.3d 124 (2d Cir. 2001) certiorari denied by Visa U.S.A., Inc. v. Wal-Mart Stores, 2002 U.S. LEXIS 4394 (June 10, 2002).

United States v. Santiago, 268 F.3d 151 (2d Cir. 2001) certiorari denied by 2002 U.S. LEXIS 3477 (May 13, 2002).

Kellogg v. Strack, 269 F.3d 100 (2d Cir. 2001) (*per curiam*) certiorari denied by 2002 U.S. LEXIS 1607 (March 18, 2002).

Gilchrist v. O'Keefe, 260 F.3d 87 (2d Cir. 2001) certiorari denied by 2002 U.S. LEXIS 3390 (May 13, 2002).

Hizbullahankhamon v. Walker, 255 F.3d 65 (2d Cir. 2001) certiorari denied by Hizbullahankhamon v. Walker, 2002 U.S. LEXIS 4510 (June 17, 2002).

Lainfiesta v. Artuz, 253 F.3d 151 (2d Cir. 2001) certiorari denied by 2002 U.S. LEXIS 2886 (April 22, 2002).

Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423 (2d Cir. 2001) certiorari denied by 2001 U.S. LEXIS 6580 (October 1, 2001)

United States v. Santiago, 238 F.3d 213 (2d Cir. 2001) (*per curiam*) certiorari denied by 2001 U.S. App. LEXIS 3970 (May 21, 2001)

Sanders v. United States, 237 F.3d 184 (2d Cir. 2001) (*per curiam*) certiorari denied by 2001 U.S. LEXIS 3325 (April 23, 2001).

Iavorski v. United States INS, 232 F.3d 124 (2d Cir. 2000) certiorari denied by 2001 U.S. LEXIS 5490 (October 1, 2001).

United States v. Brown, 232 F.3d 44 (2d Cir. 2000) (*per curiam*) certiorari denied by 2001 U.S. LEXIS 2125 (March 5, 2001).

M.S. v. Yonkers Bd. of Educ., 231 F.3d 96 (2d Cir. 2000) certiorari denied by 2001 U.S. LEXIS 2492 (March 26, 2001).

United States v. Gori, 230 F.3d 44 (2d Cir. 2000) (Sotomayor, J., dissenting) certiorari denied by 2001 U.S. LEXIS 5639 (October 1, 2001).

Leslie v. Artuz, 230 F.3d 25 (2d Cir. 2000) certiorari denied by 2001 U.S. LEXIS 1837 (February 26, 2001).

Croll v. Croll, 229 F.3d 133 (2d Cir. 2000) (Sotomayor, J., dissenting) certiorari denied by 2001 U.S. LEXIS 9462 (October 9, 2001).

New Haven Projects LLC v. City of New Haven (In re New Haven Projects LLC), 225 F.3d 283 (2d Cir. 2000) certiorari denied by 2001 U.S. LEXIS 1200 (February 20, 2001).

United States v. Acevedo, 229 F.3d 350 (2d Cir. 2000) certiorari denied by 2000 U.S. LEXIS 8045 (November 27, 2000).

Viacom Int'l, Inc. v. Kearney, 212 F.3d 721 (2d Cir. 2000) certiorari denied by 2000 U.S. LEXIS 8323 (December 11, 2000).

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United States v. Sanders, 211 F.3d 711 (2d Cir. 2000) certiorari denied by 2000 U.S. LEXIS 7859 (November 27, 2000).
Lucidore v. New York State Div. of Parole, 209 F.3d 107 (2d Cir. 2000) certiorari denied by 2000 U.S. LEXIS 5864 (October 2, 2000).
Abed v. Armstrong, 209 F.3d 63 (2d Cir. 2000) certiorari denied by 2000 U.S. LEXIS 6212 (October 2, 2000).
Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp., 204 F.3d 384 (2d Cir. 2000) certiorari denied by 2001 U.S. LEXIS 2002 (March 5, 2001).
National Loan Investors L.P. v. Town of Orange, 204 F.3d 407 (2d Cir. 2000) certiorari denied by 2000 U.S. LEXIS 5209 (October 2, 2000).
Freeman v. Burlington Broadcasters, Inc., 204 F.3d 311 (2d Cir. 2000) certiorari denied by 2000 U.S. LEXIS 6516 (October 2, 2000).
Havana Club Holding, S.A. v. Galleon, S.A., 203 F.3d 116 (2d Cir. 2000) certiorari denied by Havana Club Holding, S.A. v. Bacardi & Co., 531 U.S. 918, 148 L. Ed. 2d 201, 121 S. Ct. 277 (2000)
Tinelli v. Redl, 199 F.3d 603 (2d Cir. 1999) (*per curiam*) certiorari denied by 2000 U.S. LEXIS 4913 (October 2, 2000).
Valicenti Advisory Servs. v. SEC, 198 F.3d 62 (2d Cir. 1999) (*per curiam*) certiorari denied by 2000 U.S. LEXIS 4562 (June 29, 2000).
Greater N.Y. Metro. Food Council, Inc. v. Giuliani, 195 F.3d 100 (2d Cir. 1999) certiorari denied by 2000 U.S. LEXIS 2585 (April 17, 2000).
Burnette v. Carothers, 192 F.3d 52 (2d Cir. 1999) certiorari denied by 2000 U.S. LEXIS 8336 (December 11, 2000).
United States v. Walker, 191 F.3d 326 (2d Cir. 1999) certiorari denied by 2000 U.S. LEXIS 2788 (April 17, 2000).
United States v. Gallego, 191 F.3d 156 (2d Cir. 1999) certiorari denied by 2000 U.S. LEXIS 754 (January 18, 2000) certiorari denied by 2000 U.S. LEXIS 3840 (June 5, 2000)
United States v. Klisser, 190 F.3d 34 (2d Cir. 1999) (*per curiam*) certiorari denied by 2000 U.S. LEXIS 3235 (May 15, 2000).
Circle Indus. USA v. Parke Constr. Group, Inc., 183 F.3d 105 (2d Cir. 1999) certiorari denied by 1999 U.S. LEXIS 8288 (December 13, 1999).
Wilkinson v. Russell, 182 F.3d 89 (2d Cir. 1999) certiorari denied by 2000 U.S. LEXIS 1038 (February 22, 2000).
United States v. Napoli, 179 F.3d 1 (2d Cir. 1999) certiorari denied by 2000 U.S. LEXIS 1140 (February 22, 2000).
Levy v. United States GAO, 175 F.3d 254 (2d Cir. 1999) (*per curiam*) certiorari denied by 1999 U.S. LEXIS 5874 (October 4, 1999).
Houston v. Greiner, 174 F.3d 287 (2d Cir. 1999) certiorari denied by 2000 U.S. LEXIS 6774 (October 10, 2000).
Hollander v. American Cyanamid Co., 172 F.3d 192 (2d Cir. 1999) certiorari denied by 1999 U.S. LEXIS 7097 (November 1, 1999)
Okunieff v. Rosenberg, 166 F.3d 507 (2d Cir. 1999) (*per curiam*) certiorari denied by 2000 U.S. LEXIS 962 (January 24, 2000)

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United States v. Palozie, 166 F.3d 502 (2d Cir. 1999) (*per curiam*) certiorari denied by 1999 U.S. LEXIS 3773 (June 1, 1999)

B. NONPRECEDENTIAL OPINIONS

Certiorari Granted

United States v. Sanchez-Villar, 99 Fed. Appx. 256 (2d Cir. 2004) vacated by, remanded by, and writ of cert. granted by Sanchez-Villar v. United States, 2005 U.S. LEXIS 3932 (May 16, 2005) (vacating and remanding for further consideration in light of United States v. Booker, 543 U.S. 220 (2005)).

United States v. Wagner, 103 Fed. Appx. 422 (2d Cir. 2004) cert. granted by and judgment vacated by Wagner v. United States, 544 U.S. 958 (2005) (vacating and remanding for further consideration in light of United States v. Booker, 543 U.S. 220 (2005)).

United States v. Williams, 90 Fed. Appx. 412 (2d Cir. 2004) cert. denied by Lopez v. United States 543 U.S. 883 (2004); cert. granted and judgments vacated by Restrepo v. United States, 543 U.S. 1100 (2005) (vacating and remanding for further consideration in light of United States v. Booker, 543 U.S. 220 (2005)) and Torres v. United States, 543 U.S. 1105 (2005) (same).

United States v. LaFontaine, 87 Fed. Appx. 776 (2d Cir. 2004) cert. granted and judgment vacated by LaFontaine v. United States, 543 U.S. 801 (2004) (vacating and remanding for further consideration in light of Crawford v. Washington, 541 U.S. 36 (2004)).

Certiorari Denied

United States v. Sarpong, Nos. 07-1034-cr (L), 07-4007-cr (Con), 2009 U.S. App. LEXIS 2710 (2d Cir. February 11, 2009) cert. denied by Sarpong v. United States, 2009 U.S. LEXIS 2823 (Apr. 20, 2009).

United States v. Gadsden, 300 Fed. Appx. 108 (2d Cir. 2008) cert. denied by Gadsden v. United States, 129 S. Ct. 1375 (Feb. 23, 2009).

United States v. Hilligus, 295 Fed. Appx. 387 (2d Cir. 2008) cert. denied by Perkins v. United States, 129 S. Ct. 652, 172 L. Ed. 2d 631 (Dec. 1, 2008).

United States v. Rotmistrenko, 288 Fed. Appx. 742 (2d Cir. 2008) cert. denied by Rotmistrenko v. United States, 2008 U.S. LEXIS 8981 (Dec. 8, 2008).

United States v. Vitug, 285 Fed. Appx. 833 (2d Cir. 2008) cert. denied by Vitug v. United States, 2008 U.S. LEXIS 8990 (Dec. 8, 2008).

United States v. Voss, 283 Fed. Appx. 874 (2d Cir. 2008) cert. denied by Voss v. United States, 2008 U.S. LEXIS 8667 (Dec. 1, 2008).

United States v. Libbett, 287 Fed. Appx. 905 (2d Cir. 2008) cert. denied by Libbett v. United States, 2008 U.S. LEXIS 8205 (Nov. 10, 2008).

Rivenburgh v. CSX Transp., 280 Fed. Appx. 61 (2d Cir. 2008) cert. denied by CSX Transp., Inc. v. Rivenburgh, 2008 U.S. LEXIS 7993 (Nov. 3, 2008).

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United States v. Garcia, 282 Fed. Appx. 14 (2d Cir. 2008) cert. denied by Silva v. United States, 2008 U.S. LEXIS 6329 (Oct. 6, 2008); Garcia v. United States, 2008 U.S. LEXIS 7734 (Oct. 14, 2008).
United States v. Hill, 279 Fed. Appx. 90 (2d Cir. 2008) cert. denied by Hill v. United States, 2008 U.S. LEXIS 6223 (Oct. 6, 2008).
United States v. Yoon Shik Park, 278 Fed. Appx. 66 (2d Cir. 2008) cert. denied by Park v. United States, 2008 U.S. LEXIS 6291 (Oct. 6, 2008).
United States v. Ardila, 275 Fed. Appx. 39 (2d Cir. 2008) cert. denied by Ardilla v. United States, 2008 U.S. LEXIS 6062 (Oct. 6, 2008).
United States v. Rittweger, 274 Fed. Appx. 78 (2d Cir. 2008) cert. denied by Rittweger v. United States, 129 S. Ct. 1391 (2009).
United States v. Martinez, Nos. 04-4414-cr(L), 06-0204-cr, 06-0342-cr, 06-1558, 2008 U.S. App. LEXIS 8101 (2d Cir. April 15, 2008) cert. denied by Burgess v. United States, 2008 U.S. LEXIS 5850 (Oct. 6, 2008).
United States v. Fleming, 273 Fed. Appx. 87 (2d Cir. 2008) cert. denied by Fleming v. United States, 2008 U.S. LEXIS 5786 (Oct. 6, 2008).
Dempster v. Dempster, 273 Fed. Appx. 67 (2d Cir. 2008) cert. denied by Dempster v. Dempster, 173 L. Ed. 2d 107 (2009).
United States v. Gonzalez, 272 Fed. Appx. 134 (2d Cir. 2008) cert. denied by Estrada v. United States, 2008 U.S. LEXIS 5659 (Oct. 6, 2008); Hilliard v. United States, 2008 U.S. LEXIS 5817 (Oct. 6, 2008); Gonzalez v. United States, 2008 U.S. LEXIS 7971 (Nov. 3, 2008).
United States v. Rodriguez, 270 Fed. Appx. 28 (2d Cir. 2008) certiorari denied by Rodriguez v. United States, 2008 U.S. LEXIS 7208 (Oct. 6, 2008).
United States v. Mercado, 270 Fed. Appx. 23 (2d Cir. 2008) cert. denied by Mercado v. United States, 2008 U.S. LEXIS 6952 (Oct. 6, 2008).
United States v. Lagasse, 269 Fed. Appx. 87 (2d Cir. 2008) cert. denied by Lagasse v. United States, 2008 U.S. LEXIS 8725 (Dec. 1, 2008).
United States v. Xiao Qin Zhou, 268 Fed. Appx. 139 (2d Cir. 2008) cert. denied by Lin Xian Wu v. United States, 128 S. Ct. 2980 (2008); Xiang v. United States, 2008 U.S. LEXIS 6548 (Oct. 6, 2008).
Watson v. Smith, 268 Fed. Appx. 86 (2d Cir. 2008) cert. denied by Watson v. Smith, 2008 U.S. LEXIS 6842 (Oct. 6, 2008).
United States v. Spencer, 267 Fed. Appx. 35 (2d Cir. 2008) cert. denied by Boghgosian v. United States, 2008 U.S. LEXIS 7551 (Oct. 14, 2008).
United States v. Ray Argentina, 267 Fed. Appx. 31 (2d Cir. 2008) cert. denied by Argentina v. United States, 128 S. Ct. 2916 (June 9, 2008).
United States v. Bernal-Ibanos, 266 Fed. Appx. 59 (2d Cir. 2008) cert. denied by Bernal-Ibanos v. United States, 2008 U.S. LEXIS 5115 (June 23, 2008).
United States v. St. John, 267 Fed. Appx. 17 (2d Cir. 2008) cert. denied by Roth v. United States, 2008 U.S. LEXIS 7679 (Oct. 14, 2008).
United States v. Triumph, 266 Fed. Appx. 53 (2d Cir. 2008) cert. denied by Triumph v. United States, 2009 U.S. LEXIS 1864 (Mar. 9, 2009).
United States v. Russell, 266 Fed. Appx. 23 (2d Cir. 2008) cert. denied by King v. United States, 2008 U.S. LEXIS 7041 (Oct. 6, 2008).

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United States v. Patterson, 266 Fed. Appx. 17 (2d Cir. 2008) cert. denied by Patterson v. United States, 128 S. Ct. 2895 (2008).
Funches v. Walsh, 264 Fed. Appx. 45 (2d Cir. 2008) cert. denied by Funches v. Walsh, 128 S. Ct. 2087, 170 L. Ed. 2d 823 (2008).
United States v. Ramos, 264 Fed. Appx. 57 (2d Cir. 2008) cert. denied by Ramos v. United States, 2008 U.S. LEXIS 4873 (June 9, 2008).
Gegaj v. Mukasey, 262 Fed. Appx. 343 (2d Cir. 2008) cert. denied by Gegaj v. Mukasey, 2008 U.S. LEXIS 5459 (Oct. 6, 2008).
Daigle v. United States Dep't of Veterans Affairs, 260 Fed. Appx. 406 (2d Cir. 2008) cert. denied by Daigle v. VA, 2008 U.S. LEXIS 5990 (Oct. 6, 2008).
United States v. Dixon, 262 Fed. Appx. 300 (2d Cir. 2008) cert. denied by Dixon v. United States, 2008 U.S. LEXIS 6974 (Oct. 6, 2008).
Sterngass v. Palisades Interstate Park Comm'n, 260 Fed. Appx. 395 (2d Cir. 2008) cert. denied by 2008 U.S. LEXIS 5176 (June 23, 2008).
United States v. Foster, No. 06-4871-cr(L), 2008 U.S. App. LEXIS 1062 (2d Cir. January 18, 2008) certiorari denied by Foster v. United States, 2008 U.S. LEXIS 4178 (May 19, 2008).
Morris v. United States, 259 Fed. Appx. 414 (2d Cir. 2008) cert. denied by Morris v. United States, 2008 U.S. LEXIS 7924 (Nov. 3, 2008).
Pritchard v. INS, 267 Fed. Appx. 6 (2d Cir. 2008) cert. denied by Pritchard v. INS, 2008 U.S. LEXIS 5090 (June 23, 2008).
Tokarz v. LOT Polish Airlines, 258 Fed. Appx. 377 (2d Cir. 2007) cert. denied by Tokarz v. Lot Polish Airlines, 2008 U.S. LEXIS 6621 (Oct. 6, 2008).
United States v. Schick, 258 Fed. Appx. 370 (2d Cir. 2007) cert. denied by Schick v. United States, 2008 U.S. LEXIS 6465 (Oct. 6, 2008).
United States v. Abreu-Vasquez, 253 Fed. Appx. 132 (2d Cir. 2007) cert. denied by Abreu-Vasquez v. United States, 2008 U.S. LEXIS 2602 (Mar. 17, 2008).
Martinez v. Kelly, 253 Fed. Appx. 127 (2d Cir. 2007) cert. denied by Martinez v. Conway, 2008 U.S. LEXIS 7343 (Oct. 6, 2008).
United States v. Forbes, 253 Fed. Appx. 50 (2d Cir. 2007) cert. denied by Forbes v. United States, 128 S. Ct. 1678, 170 L. Ed. 2d 375 (2008).
Sterngass v. Town of Woodbury, 251 Fed. Appx. 21 (2d Cir. 2007) cert. denied by Sterngass v. Town of Woodbury, 2008 U.S. LEXIS 3930 (May 12, 2008).
United States v. Restrepo, 250 Fed. Appx. 434 (2d Cir. 2007) cert. denied by Restrepo v. United States, 2008 U.S. LEXIS 1908 (Feb. 19, 2008).
United States v. Lopez, 250 Fed. Appx. 381 (2d Cir. 2007) cert. denied by Lopez v. United States, 128 S. Ct. 1311, 170 L. Ed. 2d 127 (2008) certiorari denied by Lopez v. United States, 2008 U.S. LEXIS 7269 (Oct. 6, 2008).
United States v. Youmans, 249 Fed. Appx. 907 (2d Cir. 2007) cert. denied by Youmans v. United States, 2008 U.S. LEXIS 1741 (Feb. 19, 2008).
United States v. Gonzalez, 249 Fed. Appx. 859 (2d Cir. 2007) certiorari denied by Gonzalez v. United States, 128 S. Ct. 1294, 170 L. Ed. 2d 117 (Feb. 19, 2008).

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United States v. Watson, 249 Fed. Appx. 253 (2d Cir. 2007) cert. denied by Watson v. United States, 128 S. Ct. 1754, 170 L. Ed. 2d 551 (Mar. 31, 2008).
United States v. Capoccia, 247 Fed. Appx. 311 (2d Cir. 2007) cert. denied by Cappocia v. United States, 128 S. Ct. 2449, 171 L. Ed. 2d 246 (2008).
Rehman v. Bd. of Immigration Appeals, 239 Fed. Appx. 645 (2d Cir. 2007) cert. denied by Rehman v. BIA, 128 S. Ct. 2443, 171 L. Ed. 2d 242 (May 12, 2008).
United States v. Reyes, 236 Fed. Appx. 731 (2d Cir. 2007) cert. denied by Reyes v. United States, 128 S. Ct. 516, 169 L. Ed. 2d 360 (Oct. 29, 2007).
Reynoso v. Swezey, 238 Fed. Appx. 660 (2d Cir. 2007) cert. denied by Reynoso v. Swezey, 2008 U.S. LEXIS 1782 (Feb. 19, 2008).
Pender v. Union of C.S.E.A., 225 Fed. Appx. 17 (2d Cir. 2007), cert. denied by Pender v. Union of C.S.E.A., 2007 U.S. LEXIS 9942 (Oct. 1, 2007).
United States v. Agudelo, 235 Fed. Appx. 21 (2d Cir. 2007), cert. denied by Agudelo v. United States, 2007 U.S. LEXIS 10985 (Oct. 1, 2007).
United States v. Myton, 224 Fed. Appx. 125 (2d Cir. 2007), cert. denied by Myton v. United States, 2007 U.S. LEXIS 11130 (Oct. 9, 2007).
United States v. Thaler, 229 Fed. Appx. 7 (2d Cir. 2007), cert. denied by Thaler v. United States, 2007 U.S. LEXIS 12078 (Nov. 5, 2007).
Smith v. Woods, 219 Fed. Appx. 110 (2d Cir. 2007), cert. denied by Smith v. Woods, 2008 U.S. LEXIS 2224 (Mar. 3, 2008).
Johnson v. Constantellis, 221 Fed. Appx. 48 (2d Cir. 2007), cert. denied by Johnson v. Constantellis, 2008 U.S. LEXIS 388 (Jan. 7, 2008).
United States v. McPhatter, 216 Fed. Appx. 55 (2d Cir. 2007) cert. denied by McPhatter v. United States, 168 L. Ed. 2d 255 (June 4, 2007).
United States v. Williams, 216 Fed. Appx. 67 (2d Cir. 2007), cert. denied by Williams v. United States, 127 S. Ct. 2901, 167 L. Ed. 2d 1169 (2007).
United States v. Kiltinivichious, 210 Fed. Appx. 118 (2d Cir. 2006) cert. denied by Kiltinivichious v. United States, 2007 U.S. LEXIS 6893 (June 4, 2007).
Michaelesco v. Katz (In re Michaelesco), 223 Fed. Appx. 11 (2d Cir. 2006) cert. denied by Michaelesco v. Katz, 128 S. Ct. 199, 169 L. Ed. 2d 134 (Oct. 1, 2007).
Boone v. Jackson, 206 Fed. Appx. 30 (2d Cir. 2006) cert. denied by Boone v. Jackson, 2007 U.S. LEXIS 9166 (Oct. 1, 2007).
United States v. Santiago, 204 Fed. Appx. 50 (2d Cir. 2006) cert. denied by Santiago v. United States, 127 S. Ct. 1501, 167 L. Ed. 2d 240 (2007).
United States v. Thomas, 202 Fed. Appx. 531 (2d Cir. 2006) cert. denied by Reese-Thomas v. United States, 127 S. Ct. 1320, 167 L. Ed. 2d 129 (2007).
United States v. Ellis, 201 Fed. Appx. 39 (2d Cir. 2006) cert. denied by Ellis v. United States, 167 L. Ed. 2d 134 (Feb. 20, 2007).
Vatansever v. New York City, 210 Fed. Appx. 26 (2d Cir. 2006) cert. denied by Vatansever v. New York, 2007 U.S. LEXIS 6194 (May 29, 2007).

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United States v. Camara, 196 Fed. Appx. 48 (2d Cir. 2006) cert. denied by Camara v. United States, 127 S. Ct. 839, 166 L. Ed. 2d 671 (Dec. 11, 2006).

United States v. Khan, 196 Fed. Appx. 45 (2d Cir. 2006) cert. denied by Khan v. United States, 2007 U.S. LEXIS 1245 (Jan. 22, 2007).

United States v. Novak, 188 Fed. Appx. 9 (2d Cir. 2006) cert. denied by Novak v. United States, 549 U.S. 997, 127 S. Ct. 525, 166 L. Ed. 2d 371 (2006).

United States v. Bedoya-Cano, 186 Fed. Appx. 56 (2d Cir. 2006) cert. denied by Bedoya-Cano v. United States, 127 S. Ct. 447, 166 L. Ed. 2d 317 (2006).

United States v. Cooper, 186 Fed. Appx. 59 (2d Cir. 2006) cert. denied by Cooper v. United States, 127 S. Ct. 449, 166 L. Ed. 2d 319 (Oct. 16, 2006).

Sewell v. 1199 Nat'l Ben. Fund for HHS, 187 Fed. Appx. 36 (2d Cir. 2006) cert. denied by Sewell v. 1199 Nat'l Ben. Fund for Health & Human Servs., 127 S. Ct. 1841, 167 L. Ed. 2d 324 (2007).

United States v. Rodriguez, 187 Fed. Appx. 30 (2d Cir. 2006) certiorari denied by Rodriguez v. United States, 127 S. Ct. 999, 166 L. Ed. 2d 754 (2007).

Brown v. Miller, 185 Fed. Appx. 25 (2d Cir. 2006) cert. denied by Brown v. Miller, 2007 U.S. LEXIS 173 (Jan. 8, 2007).

United States v. Tavera, 184 Fed. Appx. 25 (2d Cir. 2006) cert. denied by Tavera v. United States, 127 S. Ct. 259, 166 L. Ed. 2d 201 (2006).

United States v. Spence, 180 Fed. Appx. 298 (2d Cir. 2006) cert. denied by Spence v. United States, 2006 U.S. LEXIS 8285 (Oct. 30, 2006).

Fifth Ave. Presbyterian Church v. City of New York, 177 Fed. Appx. 198 (2d Cir. 2006) cert. denied by City of New York v. Fifth Ave. Presbyterian Church, 2006 U.S. LEXIS 7532 (Oct. 10, 2006).

Didden v. Vill. of Port Chester, 173 Fed. Appx. 931 (2d Cir. 2006) cert. denied by Didden v. Vill. of Port Chester, 2007 U.S. LEXIS 1036 (Jan. 16, 2007).

Hotte v. United States, 174 Fed. Appx. 595 (2d Cir. 2006) cert. denied by Hotte v. United States, 2006 U.S. LEXIS 5843 (Oct. 2, 2006).

United States v. Echeverri, 170 Fed. Appx. 206 (2d Cir. 2006) cert. denied by Echeverri v. United States, 127 S. Ct. 363, 166 L. Ed. 2d 136 (2006).

Karaha Bodas Co., L.L.C. v. Bank of Indon., No. 04-6551-cv(L), 04-6672-cv(C) , 2006 U.S. App. LEXIS 5932 (2d Cir. March 9, 2006) cert. denied by Pt Pertamina (Persoro) v. Karaha Bodas Co., 2006 U.S. LEXIS 5837 (Oct. 2, 2006) certiorari denied by Ministry of Fin. v. Karaha Bodas Co., 2006 U.S. LEXIS 5836 (Oct. 2, 2006).

Turner v. FAA, 169 Fed. Appx. 641 (2d Cir. 2006) cert. denied by Turner v. FAA, 2007 U.S. LEXIS 2405 (Feb. 20, 2007).

United States v. Giordano, 172 Fed. Appx. 340 (2d Cir. 2006) cert. denied by Giordano v. United States, 127 S. Ct. 1253, 167 L. Ed. 2d 88 (2007).

Butler v. N.Y. State Teamsters Conf. Pension & Ret. Fund, 171 Fed. Appx. 893 (2d Cir. 2006) cert. denied by Butler v. NY Teamsters Conf., 2007 U.S. LEXIS 2163 (Feb. 20, 2007).

Bellanich v. Doe, 164 Fed. Appx. 193 (2d Cir. 2006) cert. denied by Bellanich v. Doe, 2006 U.S. LEXIS 7493 (Oct. 10, 2006).

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Den Hollander v. Flash Dancers Topless Club, 173 Fed. Appx. 15 (2d Cir. 2006) cert. denied by Hollander v. Flash Dancers Topless Club, 127 S. Ct. 49, 166 L. Ed. 2d 49 (Oct. 2, 2006).

Ross v. Spitzer, 161 Fed. Appx. 175 (2d Cir. 2006) cert. denied by Ross v. Spitzer, 547 U.S. 1194, 126 S. Ct. 2865, 165 L. Ed. 2d 899 (2006).

Buric v. Kelly, 157 Fed. Appx. 391 (2d Cir. 2005) cert. denied by Buric v. Kelly, 547 U.S. 1112, 126 S. Ct. 1918, 164 L. Ed. 2d 665 (May 1, 2006).

Martinez v. United States, 216 Fed. Appx. 6 (2d Cir. 2005) cert. denied by Martinez v. United States, 547 U.S. 1103, 126 S. Ct. 1894, 164 L. Ed. 2d 578 (2006).

United States v. Herredia, 153 Fed. Appx. 50 (2d Cir. 2005) certiorari denied by Herredia v. United States, 126 S. Ct. 1451, 164 L. Ed. 2d 148 (2006); Jacobs v. United States, 126 S. Ct. 1454, 164 L. Ed. 2d 151 (2006).

Singh v. U.S. Sec. Assocs., 152 Fed. Appx. 36 (2d Cir. 2005) certiorari denied by Singh v. U.S. Sec. Assocs., 126 S. Ct. 2967 (2006).

Zagre v. Dep't of Homeland Sec., 145 Fed. Appx. 388 (2d Cir. 2005) cert. denied by Zagre v. Dep't of Homeland Sec., 2006 U.S. LEXIS 3170 (Apr. 17, 2006).

United States v. Henry, 150 Fed. Appx. 68 (2d Cir. 2005) cert. denied by Henry v. United States, 2007 U.S. LEXIS 3712 (Mar. 26, 2007).

Dobson v. Walker, 150 Fed. Appx. 49 (2d Cir. 2005) cert. denied by Dobson v. Burge, 2006 U.S. LEXIS 2348 (Mar. 20, 2006).

Lawrence v. Antonucci, 144 Fed. Appx. 193 (2d Cir. 2005) cert. denied by Lawrence v. Antonucci, 2006 U.S. LEXIS 2864 (Apr. 17, 2006).

United States v. Clemons, 140 Fed. Appx. 325 (2d Cir. 2005) cert. denied by McCrorey v. United States, 126 S. Ct. 841 (Dec. 12, 2005).

Schulz v. Williamson, 145 Fed. Appx. 704 (2d Cir. 2005) certiorari denied by Schulz v. Wash. Cty Bd of Supervisors, 2006 U.S. LEXIS 4933 (June 26, 2006).

Heron v. Coughlin, 146 Fed. Appx. 516 (2d Cir. 2005) cert. denied by Heron v. Goord, 2006 U.S. LEXIS 727 (Jan. 9, 2006).

Hassan v. United States VA, 137 Fed. Appx. 418 (2d Cir. 2005) cert. denied by Hassan v. Dep't of Va, 126 S. Ct. 393, 163 L. Ed. 2d 228 (Oct. 3, 2005).

United States v. Martinez, 136 Fed. Appx. 415 (2d Cir. 2005) supplemental opinion at United States v. Martinez, 413 F.3d 239 (2d Cir. N.Y., 2005) certiorari denied by Martinez v. United States, 126 S. Ct. 1086, 163 L. Ed. 2d 902 (2006).

United States v. Diomedes, 136 Fed. Appx. 400 (2d Cir. 2005) cert. denied by Diomedes v. United States, 126 S. Ct. 276, 163 L. Ed. 2d 246 (Oct. 3, 2005).

Cain v. Herbert, 129 Fed. Appx. 644 (2d Cir. 2005) cert. denied by Herbert v. Cain, 126 S. Ct. 366, 163 L. Ed. 2d 72 (2005).

United States v. LaFontaine, 124 Fed. Appx. 684 (2d Cir. 2005) cert. denied by LaFontaine v. United States, 2005 U.S. LEXIS 5780 (Oct. 3, 2005).

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Chao v. Harold Levinson Assocs., 121 Fed. Appx. 918 (2d Cir. 2005) cert. denied by Harold Levinson Assoc. v. Chao, 2005 U.S. LEXIS 7286 (Oct. 11, 2005).

Moses v. United States, 119 Fed. Appx. 357 (2d Cir. 2005) certiorari denied by Moses v. United States, 161 L. Ed. 2d 1121 (May 31, 2005).

Ognibene v. Niagara County Sheriff's Dep't, 117 Fed. Appx. 798 (2d Cir. 2005) cert. denied by Ognibene v. Niagara County Sheriff's Dep't, 2005 U.S. LEXIS 7009 (Oct. 3, 2005).

SEC v. U.S. Envtl. Inc., 114 Fed. Appx. 426 (2d Cir. 2004) certiorari denied by Studer v. SEC, 2005 U.S. LEXIS 9077 (Dec. 5, 2005).

United States v. Saget, 108 Fed. Appx. 667 (2d Cir. 2004) cert. denied by Saget v. United States, 160 L. Ed. 2d 821 (Jan. 10, 2005).

Murphy v. Bd. of Educ., 106 Fed. Appx. 746 (2d Cir. 2004) cert. denied by Seils v. Rochester City Sch. Dist., 125 S. Ct. 1640, 161 L. Ed. 2d 477 (2005).

Wagner v. First Unum Life Ins. Co., 100 Fed. Appx. 862 (2d Cir. 2004) cert. denied by Wagner v. First Unum Life Ins. Co., 2004 U.S. LEXIS 7148 (Nov. 1, 2004).

Allen v. Senkowski, 97 Fed. Appx. 346 (2d Cir. 2004) cert. denied by Allen v. Senkowski, 2005 U.S. LEXIS 889 (Jan. 24, 2005).

Hanna v. Infotech Contract Servs., 91 Fed. Appx. 737 (2d Cir. 2004) cert. denied by Hanna v. Infotech Contract Servs., 2004 U.S. LEXIS 6235 (Oct. 4, 2004).

United States v. Williams, 90 Fed. Appx. 412 (2d Cir. 2004) cert. denied by Lopez v. United States, 543 U.S. 883, 125 S. Ct. 130, 160 L. Ed. 2d 139 (2004).

United States v. Johnson, 87 Fed. Appx. 195 (2d Cir. 2004) cert. denied by Johnson v. United States, 541 U.S. 1053, 158 L. Ed. 2d 750, 124 S. Ct. 2188 (May 17, 2004).

DeSordi v. Walker, 84 Fed. Appx. 160 (2d Cir. 2004) cert. denied by Desordi v. Burge, 2004 U.S. LEXIS 5556 (Oct. 4, 2004).

Donnelly v. Barnhart, 80 Fed. Appx. 701 (2d Cir. 2003) cert. denied by Donnelly v. Barnhart, 2004 U.S. LEXIS 4095 (June 7, 2004).

Regan v. Metro. Life Ins. Co., 80 Fed. Appx. 718 (2d Cir. 2003) cert. denied by Regan v. Metro. Life Ins. Co., 2004 U.S. LEXIS 6643 (Oct. 4, 2004).

United States v. Dreizler, 78 Fed. Appx. 734 (2d Cir. 2003) cert. denied by Dreizler v. United States, 158 L. Ed. 2d 136, 124 S. Ct. 1488 (Feb. 23, 2004).

United States v. Newman, 74 Fed. Appx. 126 (2d Cir. 2003) cert. denied by Newman v. United States, 158 L. Ed. 2d 492, 124 S. Ct. 2026 (2004); Orandello v. United States, 2005 U.S. LEXIS 786 (Jan. 24, 2005); Difrisco v. United States, 2005 U.S. LEXIS 787 (Jan. 24, 2005); and McInerney v. United States, 2005 U.S. LEXIS 797 (Jan. 24, 2005).

United States v. Washington, 73 Fed. Appx. 501 (2d Cir. 2003) cert. denied by Washington v. United States, 540 U.S. 997, 124 S. Ct. 501, 157 L. Ed. 2d 399 (2003).

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Adams v. Rose, No. 03-7011 , 2003 U.S. App. LEXIS 17270 (2d Cir. August 20, 2003) cert. denied by Siemon-Netto v. Rose, 2004 U.S. LEXIS 849 (Jan. 26, 2004).

Brown v. Wolstein, 71 Fed. Appx. 96 (2d Cir. 2003) cert. denied by Brown v. Wolstein, 543 U.S. 930, 125 S. Ct. 324, 160 L. Ed. 2d 231 (2004).

United States v. Newton, 72 Fed. Appx. 855 (2d Cir. 2003) cert. denied by Newton v. United States, 2004 U.S. LEXIS 1506 (Feb. 23, 2004).

Martone v. Neiswanger, 69 Fed. Appx. 476 (2d Cir. 2003) cert. denied by Martone v. Neiswanger, 2003 U.S. LEXIS 9217 (Dec. 15, 2003).

United States v. Efrosman, 62 Fed. Appx. 24 (2d Cir. 2003) cert. denied by Efrosman v. United States, 2003 U.S. LEXIS 6973 (Oct. 6, 2003).

United States v. Rivera, 60 Fed. Appx. 854 (2d Cir. 2003) cert. denied by Santiago v. United States, 155 L. Ed. 2d 497, 123 S. Ct. 1639 (2003).

JAMES v. HERBERT, 57 Fed. Appx. 894 (2d Cir. 2003) cert. denied by James v. Herbert, 2003 U.S. LEXIS 5570 (Oct. 6, 2003).

United States v. Monegro Maldonado, 56 Fed. Appx. 6 (2d Cir. 2003) cert. denied by Moronta v. United States, 156 L. Ed. 2d 619 (June 16, 2003).

United States v. Paneque, 60 Fed. Appx. 339 (2d Cir. 2002) cert. denied by Darco v. United States, 538 U.S. 968, 155 L. Ed. 2d 525, 123 S. Ct. 1767 (2003).

Gonsa v. Stinson, 51 Fed. Appx. 902 (2d Cir. 2002) cert. denied by Gonsa v. Donnelly, 2003 U.S. LEXIS 6076 (Oct. 6, 2003).

United States v. Mitchell, 51 Fed. Appx. 355 (2d Cir. 2002) certiorari denied by Mason v. United States, 538 U.S. 939, 155 L. Ed. 2d 343, 123 S. Ct. 1610 (2003).

Jianrong Chen v. City of New York, 51 Fed. Appx. 352 (2d Cir. 2002) cert. denied by Chen v. New York, 2003 U.S. LEXIS 2975 (Apr. 21, 2003).

United States v. Rivera, 51 Fed. Appx. 47 (2d Cir. 2002) corrected by United States v. Rivera, 60 Fed. Appx. 854 (2d Cir. 2003) and certiorari denied by Santiago v. United States, 155 L. Ed. 2d 497, 123 S. Ct. 1639 (2003).

Shabtai v. Giuliani, 48 Fed. Appx. 18 (2d Cir. 2002) cert. denied by Shabtai v. Giuliani, 2003 U.S. LEXIS 3051 (Apr. 21, 2003).

Shabtai v. City of New York, 47 Fed. Appx. 614 (2d Cir. 2002) cert. denied by Shabtai v. New York, 2003 U.S. LEXIS 3303 (Apr. 28, 2003).

Celaj v. Artuz, 49 Fed. Appx. 331 (2d Cir. 2002) cert. denied by Celaj v. Greiner, 2003 U.S. LEXIS 2077 (Mar. 10, 2003).

Li-Lan Tsai v. Rockefeller Univ., 46 Fed. Appx. 657 (2d Cir. 2002) cert. denied by Li-Lan Tsai v. Rockefeller Univ., 2003 U.S. LEXIS 1204 (Feb. 24, 2003).

United States v. Diaz, 40 Fed. Appx. 643 (2d Cir. 2002) cert. denied by Berrocal v. United States, 2002 U.S. LEXIS 8885 (Dec. 2, 2002).

United States v. Adderley, 40 Fed. Appx. 627 (2d Cir. 2002) cert. denied by Adderley v. United States, 2002 U.S. LEXIS 7961 (Oct. 21, 2002).

United States v. Whyte, 39 Fed. Appx. 676 (2d Cir. 2002) cert. denied by Whyte v. United States, 2002 U.S. LEXIS 8400 (Nov. 12, 2002).

United States v. Mittal, 36 Fed. Appx. 20 (2d Cir. 2002) cert. denied by Mittal v. United States, 537 U.S. 1089, 154 L. Ed. 2d 633, 123 S. Ct. 703 (2002).

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United States v. Quinones, 36 Fed. Appx. 462 (2d Cir. 2002) cert. denied by Quinones v. United States, 2002 U.S. LEXIS 7540 (Oct. 15, 2002).
Vapne v. Apfel, 36 Fed. Appx. 670 (2d Cir. 2002) cert. denied by Vapne v. Barnhart, 2002 U.S. LEXIS 7478 (Oct. 15, 2002).
United States v. DeLuna, 38 Fed. Appx. 644 (2d Cir. 2002) cert. denied by Moises v. United States, 537 U.S. 888, 123 S. Ct. 44, 154 L. Ed. 2d 150 (2002).
United States v. Colon, 38 Fed. Appx. 636 (2d Cir. 2002) cert. denied by Colon v. United States, 537 U.S. 919, 123 S. Ct. 305, 154 L. Ed. 2d 206 (2002).
Grievance Comm. for the Eastern Dist. of N.Y. v. Farrell (In re Farrell), 31 Fed. Appx. 50 (2d Cir. 2002) cert. denied by Farrell v. Griev. Comm., 2003 U.S. LEXIS 55 (Jan. 13, 2003).
United States v. Fleury, 38 Fed. Appx. 50 (2d Cir. 2002) cert. denied by Fleury v. United States, 2002 U.S. LEXIS 7053 (Oct. 7, 2002).
United States v. Sanchez, No. 01-1076(L), 01-1207(CON), 38 Fed. Appx. 42 (2d Cir. 2002) cert. denied by Sanchez v. United States, 2002 U.S. LEXIS 4151 (June 3, 2002).
Wells v. Goord, No. 01-172, 29 Fed. Appx. 693 (2d Cir. 2002) cert. denied 2002 U.S. LEXIS 4790 (June 24, 2002).
United States v. Arroyo, 31 Fed. Appx. 9 (2d Cir. 2002) cert. denied by Rosario v. United States, 536 U.S. 911, 122 S. Ct. 2372, 153 L. Ed. 2d 192 (2002); Urena v. United States, 536 U.S. 969, 122 S. Ct. 2686, 153 L. Ed. 2d 856 (2002).
United States v. Gallo, 33 Fed. Appx. 542 (2d Cir. 2002) cert. denied by Cox Cable Advisory Council v. Conn. Dep't of Public Util., 2002 U.S. LEXIS 5569 (Oct. 7, 2002).
Hom v. Reubins, 28 Fed. Appx. 104 (2d Cir. 2002) cert. denied 2002 U.S. LEXIS 5625 (Oct. 7, 2002).
United States v. Velaj, 26 Fed. Appx. 88 (2d Cir. 2002) cert. denied by Elledge v. United States, 2002 U.S. LEXIS 4004 (May 28, 2002).
Ortiz v. Artuz, 36 Fed. Appx. 1 (2d Cir. 2002) cert. denied by Ortiz v. Greiner, 2002 U.S. LEXIS 4297 (June 10, 2002).
United States v. Jennings, 29 Fed. Appx. 645 (2d Cir. 2002) cert. denied by Jennings v. United States, 537 U.S. 936, 123 S. Ct. 37, 154 L. Ed. 2d 237 (2002).
Longo v. Greiner, 23 Fed. Appx. 86 (2d Cir. 2002) cert. denied by Longo v. Fischer, 2002 U.S. LEXIS 6715 (Oct. 7, 2002).
Lewal v. Wiley, 29 Fed. Appx. 26 (2d Cir. 2002) cert. denied by Lewal v. Wiley, 2002 U.S. LEXIS 4106 (June 3, 2002).
Benaim v. HSBC Bank USA, 23 Fed. Appx. 55 (2d Cir. 2001) cert. denied 2002 U.S. LEXIS 2104 (March 25, 2002).
United States v. Min Kim Lee, 25 Fed. Appx. 20 (2d Cir. 2001) cert. denied 2002 U.S. LEXIS 1966 (March 25, 2002) cert. denied by In Suk Chang v. United States, 535 U.S. 955, 152 L. Ed. 2d 355, 122 S. Ct. 1360 (2002).
United States v. Cyrus, 27 Fed. Appx. 19 (2d Cir. 2001) cert. denied by Cyrus v. United States, 2002 U.S. LEXIS 5835 (Oct. 7, 2002).

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United States v. Algea, 25 Fed. Appx. 14 (2d Cir. 2001) cert. denied 2002 U.S. LEXIS 1319 (February 25, 2002).

United States v. DiConstanza, 20 Fed. Appx. 24 (2d Cir. 2001) cert. denied by Alexandrini v. U.S., 534 U.S. 1153, 122 S. Ct. 1122, 151 L. Ed. 2d 1014 (2002); DiPietro v. U.S., 534 U.S. 1149, 122 S. Ct. 1113, 151 L. Ed. 2d 1007 (2002); Bloome v. U.S., 535 U.S. 1010, 122 S. Ct. 1590, 152 L. Ed. 2d 507 (April 15, 2002).

Law v. Camp, 15 Fed. Appx. 24 (2d Cir. 2001) cert. denied 2002 U.S. LEXIS 1190 (February 25, 2002).

Austin v. Hanover Ins. Co., 14 Fed. Appx. 109 (2d Cir. 2001) cert. denied Austin v. Hanover Ins. Co., 534 U.S. 954, 151 L. Ed. 2d 268, 122 S. Ct. 354 (2001).

United States v. Fermin, 13 Fed. Appx. 60 (2d Cir. 2001) cert. denied 2002 U.S. LEXIS 2995 (April 22, 2002).

Chamberlin v. Comm'r, 14 Fed. Appx. 69 (2d Cir. 2001) cert. denied 2002 U.S. LEXIS 1204 (February 25, 2002).

Riccitelli v. Sensenwich (In re Riccitelli), 14 Fed. Appx. 57 (2d Cir. 2001) cert. denied 2002 U.S. LEXIS 2376 (April 15, 2002).

Harrison v. Artuz, 12 Fed. Appx. 56 (2d Cir. 2001) cert. denied 2002 U.S. LEXIS 395 (January 7, 2002).

Johnson v. N.Y. City Emples. Income Ret. Sys. Pension Plan, 11 Fed. Appx. 20 (2d Cir. 2001) cert. denied 2002 U.S. LEXIS 391 (January 7, 2002).

Postlewaite v. McGraw-Hill, Inc., 10 Fed. Appx. 16 (2d Cir. 2001) cert. denied Postlewaite v. McGraw-Hill, Inc., 534 U.S. 997, 151 L. Ed. 2d 384, 122 S. Ct. 468 (2001).

Sceravino v. Reno, 8 Fed. Appx. 87 (2d Cir. 2001) cert. denied 2002 U.S. LEXIS 1231 (February 25, 2002).

United States v. Miller, 7 Fed. Appx. 59 (2d Cir. 2001) Writ of cert. denied Miller v. United States, 534 U.S. 874, 122 S. Ct. 169, 151 L. Ed. 2d 116 (2001).

Eisenstein v. Whitman, 4 Fed. Appx. 24 (2d Cir. 2001) cert. denied 2002 U.S. LEXIS 744 (February 19, 2002).

United States v. Hamilton, 3 Fed. Appx. 7 (2d Cir. 2001) cert. denied 2001 U.S. LEXIS 4749 (June 25, 2001).

United States v. Montague, No. 00-1215, 2000 U.S. App. LEXIS 27208 (2d Cir. October 27, 2000) cert. denied 2001 U.S. LEXIS 1867 (February 26, 2001).

United States v. Ida, No. 00-1092, 2000 U.S. App. LEXIS 23456 (2d Cir. September 14, 2000) cert. denied 2001 U.S. App. LEXIS 3873 (May 21, 2001).

Liberman v. Weinberg (In re Liberman), No. 00-5011, 2000 U.S. App. LEXIS 23459 (2d Cir. September 14, 2000) cert. denied 2001 U.S. LEXIS 1402 (February 20, 2001).

Li Ah v. Greiner, No. 99-2518, 2000 U.S. App. LEXIS 23469 (2d Cir. September 14, 2000) cert. denied 2001 U.S. LEXIS 4218 (June 4, 2001).

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United States v. Muyet, No. 98-1421(L), 98-1538, 98-1550, 98-1565, 98-1633, 2000 U.S. App. LEXIS 22881 (2d Cir. September 8, 2000) cert. denied 2001 U.S. LEXIS 1433 (February 20, 2001).

United States v. Aquino, No. 99-1476, 216 F.3d 1073; 2000 U.S. App. LEXIS 15075 (2d Cir. June 23, 2000) cert. denied 2000 U.S. LEXIS 6937 (October 16, 2000).

United States v. Hughley, No. 99-1550, 2000 U.S. App. LEXIS 12472 (2d Cir. June 2, 2000) cert. denied 2000 U.S. LEXIS 6689 (October 10, 2000).

Stevens v. Stearns, No. 99-9432, 2000 U.S. App. LEXIS 12035 (2d Cir. May 30, 2000) cert. denied 2000 U.S. LEXIS 8379 (December 11, 2000).

Ott v. Department of Mental Health, No. 99-9018, 2000 U.S. App. LEXIS 11917 (2d Cir. May 25, 2000) cert. denied 2000 U.S. LEXIS 6177 (October 2, 2000).

Deskovic v. Mann, No. 97-2946, 2000 U.S. App. LEXIS 15400 (2d Cir. April 26, 2000) cert. denied 2001 U.S. LEXIS 382 (January 8, 2001).

Chertkova v. Connecticut Gen. Life Ins. Co., No. 99-7859, 2000 U.S. App. LEXIS 6217 (2d Cir. April 4, 2000) cert. denied 2001 U.S. LEXIS 1735 (February 26, 2001).

Colin v. Vermont, No. 99-9045, 2000 U.S. App. LEXIS 5603 (2d Cir. March 28, 2000) cert. denied 2000 U.S. LEXIS 6664 (October 10, 2000).

Donato v. United States, No. 98-2991, 2000 U.S. App. LEXIS 3788 (2d Cir. March 7, 2000) cert. denied 2000 U.S. LEXIS 6240 (October 2, 2000).

United States v. Esquilin, No. 98-1333, 2000 U.S. App. LEXIS 2734 (2d Cir. February 18, 2000) cert. denied 2000 U.S. LEXIS 8056 (November 27, 2000).

United States v. Walker, No. 99-1060, 2000 U.S. App. LEXIS 2735 (2d Cir. February 18, 2000) cert. denied 2000 U.S. LEXIS 4284 (June 19, 2000).

United States v. United States Currency, in the Amount of Five Hundred Thirty-Two Thousand Forty-Three Dollars, 208 F.3d 204 (2d Cir. 2000) cert. denied 2000 U.S. LEXIS 3938 (June 5, 2000).

United States v. Porter, No. 99-1235, 2000 U.S. App. LEXIS 1865 (2d Cir. February 1, 2000) cert. denied 2000 U.S. LEXIS 4123 (June 12, 2000).

United States v. Raposo, No. 99-1339, 2000 U.S. App. LEXIS 898 (2d Cir. January 25, 2000) cert. denied 2000 U.S. LEXIS 3751 (May 30, 2000).

Altschuler v. University of Pennsylvania Sch. of Law, No. 99-7423, 1999 U.S. App. LEXIS 34303 (2d Cir. December 27, 1999) cert. denied 2000 U.S. LEXIS 4556 (June 29, 2000).

Khan v. Abercrombie & Fitch, Inc., No. 99-7399, 1999 U.S. App. LEXIS 34102 (2d Cir. December 23, 1999) cert. denied 2000 U.S. LEXIS 4563 (June 29, 2000).

United States v. Torres, Nos. 98-1075(L), 98-1115, 98-1372, 1999 U.S. App. LEXIS 27386 (2d Cir. October 25, 1999) cert. denied 2001 U.S. LEXIS 1491 (February 20, 2001).

Casellas v. McGinnis, No. 99-2127, 1999 U.S. App. LEXIS 26873 (2d Cir. October 22, 1999) cert. denied 2000 U.S. LEXIS 2945 (April 24, 2000).

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Chan v. Pataki, No. 99-7348, 201 F.3d 430 (2d Cir. October 20, 1999) cert. denied 2000 U.S. LEXIS 5512 (October 2, 2000).

Cicero v. United States, No. 98-2893, 1999 U.S. App. LEXIS 22822 (2d Cir. September 16, 1999) cert. denied 2000 U.S. LEXIS 773 (January 18, 2000).

McLean v. McGinnis, No. 98-3753, 1999 U.S. App. LEXIS 20209 (2d Cir. August 20, 1999) cert. denied 1999 U.S. LEXIS 8091 (December 6, 1999).

United States v. Hotte, No. 98-1684, 1999 U.S. App. LEXIS 20142 (2d Cir. August 20, 1999) cert. denied 2000 U.S. LEXIS 4520 (June 29, 2000).

Talyansky v. Mercury Print Prod., Inc., No. 98-9438, 1999 U.S. App. LEXIS 20211 (2d Cir. August 20, 1999) cert. denied 2000 U.S. LEXIS 614 (January 18, 2000).

United States v. Masciandaro, No. 98-1692, 1999 U.S. App. LEXIS 18143 (2d Cir. July 22, 1999) cert. denied 2000 U.S. LEXIS 1713 (February 28, 2000).

Falbaum v. Leslie Fay Cos., No. 98-5051, 1999 U.S. App. LEXIS 14625 (2d Cir. June 29, 1999) cert. denied 2000 U.S. LEXIS 118 (January 10, 2000).

United States v. Fedee, No. 98-1373, 1999 U.S. App. LEXIS 11273 (2d Cir. May 28, 1999) cert. denied 2000 U.S. LEXIS 375 (January 10, 2000).

Howard v. New York Times Co., No. 98-9237, 1999 U.S. App. LEXIS 11806 (2d Cir. May 28, 1999) cert. denied 2000 U.S. LEXIS 189 (January 10, 2000).

Velardi v. New York City Fire Dep't Pension Fund, No. 98-9358, 1999 U.S. App. LEXIS 11810 (2d Cir. May 28, 1999) cert. denied 2000 U.S. LEXIS 3675 (May 30, 2000).

United States v. Barclay, Nos. 98-1464(L) & 98-1473, 1999 U.S. App. LEXIS 11794 (2d Cir. May 28, 1999) cert. denied 1999 U.S. LEXIS 7036 (October 18, 1999).

Farrell v. Grievance Comm., No. 98-6900, 1999 U.S. App. LEXIS 11970 (2d Cir. May 28, 1999) cert. denied 1999 U.S. LEXIS 7184 (November 1, 1999).

United States v. Napoli, No. 98-1124, 1999 U.S. App. LEXIS 8207 (2d Cir. April 28, 1999) cert. denied 2000 U.S. LEXIS 1140 (February 22, 2000).

Quinones v. New York, 173 F.3d 845 (table), No. 98-7995, 1999 U.S. App. LEXIS 7770 (2d Cir. April 16, 1999) cert. denied 1999 U.S. LEXIS 7572 (November 15, 1999).

United States v. Fulton, No. 97-1681, 1999 U.S. App. LEXIS 3826 (2d Cir. March 9, 1999) cert. denied 2001 U.S. LEXIS 2114 (March 5, 2001).

United States v. Mederos, No. 98-1181, 1998 U.S. App. LEXIS 30922 (2d Cir. December 1, 1998) cert. denied 1999 U.S. LEXIS 2222 (March 29, 1999).

Oygard v. Town of Coventry, No. 98-7578, 1998 U.S. App. LEXIS 30978 (2d Cir. December 1, 1998) cert. denied 1999 U.S. LEXIS 2622 (April 19, 1999).

g. Provide a brief summary of and citations for all of your opinions where your decisions were reversed by a reviewing court or where your judgment was

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affirmed with significant criticism of your substantive or procedural rulings. If any of the opinions listed were not officially reported, provide copies of the opinions.

I. Second Circuit Cases

Riverkeeper, Inc. v. E.P.A., 475 F.3d 83 (2d Cir. 2007) (Sotomayor, J.)

Reversed by *Entergy Corp. v. Riverkeeper, Inc.*, 129 S.Ct. 1498 (2009)

Riverkeeper and other environmental groups petitioned for review of final rules promulgated by the Environmental Protection Agency pursuant to the Clean Water Act ("CWA") regarding cooling-water intake structures at power plants. The Second Circuit granted the petitions in part and denied them in part, holding that the CWA did not allow the use of cost-benefit analysis in determining the "best technology available for minimizing adverse environmental impact" at cooling water intake structures. A divided Supreme Court reversed, finding that it was permissible for the EPA to rely on cost-benefit analysis in setting the applicable national performance standards and in providing for variances from those standards at existing power plant facilities.

William L. Rudkin Testamentary Trust v. Commissioner of Internal Revenue, 467 F.3d 149 (2d Cir. 2006) (Sotomayor, J.)

Affirmed by *Knight v. Commissioner of Internal Revenue*, 128 S.Ct. 782 (2008)

A testamentary trust (funded by the sale of Pepperidge Farm to the Campbell Soup Company) petitioned for a redetermination of asserted federal income tax deficiencies arising from the IRS's position that fees the trust paid to an outside firm for investment management advice were deductible only to the extent that they exceeded two percent of the trust's adjusted gross income (i.e., were deductible "below the line" rather than "above the line"). The tax court ruled in favor of the IRS, and the Second Circuit affirmed on the ground that section 67(e) of the Internal Revenue Code required certainty that a cost "would not have been incurred" if the property were not held in trust for that cost to be fully deductible. Because an individual taxpayer holding the property could have paid investment advisory fees, the fees paid by the trust did not meet the criteria of section 67(e) and were not fully deductible.

The Supreme Court granted certiorari *sub nom Knight v. CIR* to resolve a circuit split and affirmed. The Supreme Court rejected the Second Circuit's construction of the statute as too stringent, however, because that construction asked whether the relevant cost "*could not* have been incurred" if the property were held by an individual, while the statutory language asked whether the cost "*would not* have been incurred" if the property was not held in trust. *Knight*, 128 S.Ct. at 787

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(emphasis added). Although the Commissioner of Internal Revenue had adopted the Second Circuit's construction by regulations, and the Solicitor General had urged the Supreme Court to adopt it as the best reading of the statute and an easily administrable rule, *id.* at 787 n.3, the Supreme Court nevertheless held that the statute required inquiry into whether the costs are "commonly" or "customarily" incurred by individuals, *id.* at 789.

Lopez-Torres v. New York State Board of Elections, 462 F.3d 161 (2d Cir. 2006) (Straub, J.)

Reversed by *New York State Board of Elections v. Lopez-Torres*, 549 U.S. 1204 (2008)

This case arose from a challenge to the New York electoral law governing the selection of judges, which required successful candidates, among other burdens, to recruit and manage separate slates of delegates in each assembly district on an expedited basis and to conduct individualized voter education campaigns because the delegates could not be associated with the candidate on the ballot. The Second Circuit affirmed the district court's decision that the State's procedures imposed severe burdens on the First Amendment associational rights of candidates and voters, were not narrowly tailored to serve a compelling governmental interest, and were not justified by the political parties' associational rights. The Supreme Court reversed, focusing its analysis on political parties' associational right to structure procedures for selecting candidates, regardless of the actual burden imposed on voters and candidates who were not endorsed by the party leadership.

Dabit v. Merrill Lynch, Pierce, Fenner & Smith Inc., 395 F.3d 25 (2d Cir. 2005) (Sotomayor, J.)

Vacated by *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71 (2006)

The Second Circuit held that the Securities Litigation Uniform Standards Act ("SLUSA"), which preempted certain state law causes of action alleging misrepresentations or deceit "in connection with the purchase or sale of a covered security," did not preempt state law class action claims brought by holders of securities, rather than buyers or sellers. The parties and the SEC agreed that SLUSA's "in connection with" language should be construed consistently with how courts had construed the same language in section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder, and the Supreme Court in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), had construed that statute to give standing only to purchasers or sellers of securities, and not mere holders. The Second Circuit reasoned that construing SLUSA in this way was

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appropriate because it would preempt only those claims for which there was a federal remedy under section 10(b) and Rule 10b-5. It explained that its interpretation was consistent with every circuit court that had considered the question thus far, specifically the Eighth, Ninth and Eleventh Circuits. On certiorari, the Supreme Court nevertheless reversed, holding that the *Blue Chip Stamps* rule of standing was based on policy considerations and not the statutory language. Noting that other precedents had construed the language broadly, the Court held that SLUSA should be construed to preempt claims by holders of securities even if holders would have no federal remedies.

Swedenburg v. Kelly, 358 F.3d 223 (2d Cir. 2004) (Wesley, J.)

Reversed by *Granholm v. Heald*, 544 U.S. 460 (2005)

Proprietors of out-of-state wineries and in-state consumers brought a suit challenging the constitutionality of a New York State law that allowed direct shipment of wine to in-state consumers by out-of-state wineries only if the winery first established a distribution operation in New York. The Second Circuit held that the regulatory scheme did not violate the Privileges and Immunities Clause and was within the scope of powers granted by the Twenty-First Amendment, which had repealed the Eighteenth Amendment but reaffirmed states' power to control in-state delivery and use of alcohol, by prohibiting "[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors." A divided Supreme Court reversed, holding that the scheme violated the Commerce Clause and exceeded the scope of authority granted to states by the Twenty-First Amendment.

United States v. Sanchez-Villar, 99 Fed. App'x 256 (2d Cir. 2004) (Summary Order)

Vacated by *Sanchez-Villar v. U.S.*, 544 U.S. 1029 (2005) in light of *U.S. v. Booker*, 543 U.S. 220 (2005).

Sanchez-Villar challenged his conviction, following a jury trial, of distribution of 1.2 kg of cocaine base (*i.e.*, "crack" cocaine), on the ground that his attorney had rendered ineffective assistance of counsel by not raising certain arguments. The Second Circuit rejected that claim on the ground that the arguments were frivolous. The Supreme Court vacated and remanded the case for further consideration in light of its intervening decision in *Booker* rendering the United States Sentencing Guidelines advisory in nature.

United States v. LaFontaine, 87 Fed. App'x 776 (2d Cir. 2004) (Summary Order)

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Vacated by *LaFontaine v. United States*, 543 U.S. 801 (2004) in light of *Crawford v. Washington*, 541 U.S. 36 (2004).

Sonia LaFontaine raised several challenges to her judgment of conviction and subsequent sentence for insurance fraud and money laundering, including a challenge to the introduction into evidence of her co-defendant's plea allocution without requiring the codefendant to testify at her trial. The Second Circuit rejected that argument, and LaFontaine's other arguments, based upon binding Circuit precedent.

The Supreme Court subsequently held in *Crawford* that the Confrontation Clause prohibited the admission against a defendant of prior out-of-court testimonial statements by declarants who do not testify at the trial unless the declarants are unavailable to testify and the defendant had a prior opportunity to cross-examine them. The Court then vacated the Second Circuit's decision in *LaFontaine*, as it did with many other cases, and remanded for further proceedings in light of *Crawford*. On remand, the Second Circuit held that the introduction of LaFontaine's plea allocution was error, in light of *Crawford*, but that the error was harmless.

United States v. Wagner, 103 Fed. App'x 422 (2d Cir. 2004) (Summary Order)

Vacated by *Wagner v. United States*, 544 U.S. 958 (2005) in light of *United States v. Booker*, 543 U.S. 220 (2005).

The defendants in *Wagner* challenged the sufficiency of the evidence to support their convictions, certain pretrial and trial rulings by the district court, and the district court's calculation of the appropriate sentence under the then-mandatory federal Sentencing Guidelines. The Second Circuit rejected all of the defendants' arguments pursuant to binding Second Circuit precedent. The Supreme Court vacated and remanded the case for further consideration in light of its intervening decision in *Booker* rendering the United States Sentencing Guidelines advisory in nature.

European Community v. RJR Nabisco, Inc., 355 F.3d 123 (2d Cir. 2004) (Sotomayor, J.)

Vacated by *European Community v. RJR Nabisco, Inc.*, 544 U.S. 1012 (2005) for further consideration in light of *Pasquantino v. United States*, 544 U.S. 349 (2005), and then reinstated by *European Community v. RJR Nabisco, Inc.*, 424 F.3d 175 (2d Cir. 2005) *cert. denied* 546 U.S. 1092 (2006).

The European Community, various of its member states, and certain Departments of Colombia brought a civil RICO suit against certain tobacco companies for

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allegedly masterminding schemes to smuggle contraband cigarettes into the plaintiffs' territories. The district court dismissed the action on the ground that the plaintiffs' claims were premised on alleged violations of foreign tax laws and violated the "revenue rule," which generally precludes U.S. courts from interpreting and enforcing foreign revenue laws, as that rule had been construed by *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir.2001) ("*Canada*"), *cert. denied*, 537 U.S. 1000 (2002). The Second Circuit agreed that *Canada* was controlling, held that Congress had not abrogated the revenue rule by enacting the RICO statute, and held that the rule therefore barred the plaintiffs' claims. The Supreme Court issued a memorandum decision vacating the judgment in light of its intervening decision in *Pasquantino v. United States* that the revenue rule did not preclude a criminal prosecution for wire fraud arising from a scheme to defraud a foreign government of tax revenue. On remand, the Second Circuit found that *Pasquantino* did not "cast doubt" on the initial decision in *European Community*, and reinstated it as the controlling opinion. The Supreme Court denied the petition for certiorari from that decision.

Abrams v. Société Nationale des Chemins de Fer Francais, 332 F.3d 173 (2d Cir. 2003) (Cardamone, J.)

Vacated by *Société Nationale des Chemins de Fer Francais v. Abrams*, 542 U.S. 901 (2004) for further consideration in light of *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).

The plaintiffs-appellants in this case, survivors of the Holocaust, brought suit against the French national railroad company SNCF for its operation of trains from 1942 to 1944 that were used to transport many thousands of French civilians to Nazi death and slave labor camps. The district court dismissed the complaint for lack of jurisdiction on the ground that SNCF was an "agency or instrumentality of a foreign state" within the scope of the Foreign Sovereign Immunities Act ("FSIA"), and that the Act applied to claims filed after the Act's enactment regardless of when the underlying conduct occurred. The Second Circuit agreed that SNCF met the definition of "agency or instrumentality" in the FSIA, but held that the record was insufficient to determine whether application of the Act would be impermissibly retroactive and therefore vacated the district court's decision and remanded for further proceedings. The defendants petitioned the Supreme Court for certiorari, and the Supreme Court issued a memorandum decision vacating the Second Circuit's decision and remanding for further consideration in light of the Supreme Court's intervening decision in *Altmann*, which held that the FSIA applies to conduct prior to its enactment and prior to the State Department's 1952 adoption of the restrictive theory of sovereign immunity. On remand, the Second Circuit recalled the mandate from its prior decision and affirmed the decision of the district court.

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United States v. Segura, 33 Fed. App'x 19 (2d Cir. 2002) (Summary Order); *United States v. Williams*, 90 Fed. App'x 412 (2d Cir. 2004) (Summary Order) *cert. denied sub nom. Lopez v. United States*, 543 U.S. 883 (2004); *United States v. Barrientos*, 117 Fed. App'x 794 (2d Cir. 2005)

Vacated by *Restrepo v. United States*, 543 U.S. 1100 (2005) and *Torres v. United States*, 543 U.S. 1105 (2005) in light of *United States v. Booker*, 543 U.S. 220 (2005).

Arising from a single prosecution for conspiracy to distribute cocaine, the appeals in this case were multiplied by the fact that the case involved multiple defendants and the Second Circuit's decision to remand some issues to the district court for further consideration and fact finding. Ultimately, the Second Circuit rejected the defendants-appellants' challenges to their convictions and sentences based upon binding Circuit precedent. The Supreme Court vacated and remanded the case for further consideration in light of its intervening decision in *Booker* rendering the United States Sentencing Guidelines advisory in nature.

Malesko v. Correctional Services Corp., 229 F.3d 374 (2d Cir. 2000) (Sotomayor, J.)

Reversed by *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001)

A federal offender with a heart condition, proceeding *pro se*, brought suit against a corporation that operated a halfway house and certain individual employees thereof, alleging that he suffered a heart attack as a result of the defendants' enforcement against him, notwithstanding his heart condition, of a policy requiring residents living below the sixth floor to use stairs rather than the elevator. The district court (1) dismissed the claim against the corporation on the ground that a corporation could not be subject to a constitutional claim under *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1999), (2) held that the corporation would, in any event, be immune from suit by virtue of the government contractor defense, and (3) dismissed the claims against the individual employees as time-barred. The Second Circuit affirmed dismissal of the claims against individual defendants, but reversed dismissal of the claims against the corporate defendant, joining other circuits that had held that *Bivens* claims could be asserted against corporations. A divided Supreme Court reversed and held that a *Bivens* claim could not be brought against a private corporation.

II. District Court Cases

United States v. Moreno, 94 CR. 0165 (SS) (S.D.N.Y.) (Sotomayor, J.)

Vacated, in part, by *United States v. Moreno*, 181 F.3d 206 (2d Cir. 1999)

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The government indicted defendants for large-scale distribution of both powered and crack cocaine, and a jury convicted. After the appellate briefs were filed, defendants raised a new issue based on the then-recent decision in *United States v. Barnes*, 158 F.3d 662 (2d Cir. 1998), which held that where defendants are indicted for distribution of multiple types of narcotics and a special jury verdict is not used at trial, a sentencing court should interpret the verdict as only authorizing the lowest mandatory minimum among the drugs charged. Accordingly, the Second Circuit directed that a specific finding be made as to the amount of powered cocaine distributed by defendants.

United States v. Laljie, 97 CR. 160 (SS) (S.D.N.Y.) (Sotomayor, J.)

Reversed, in part, by *United States v. Laljie*, 184 F.3d 180 (2d Cir. 1999)

Defendant was convicted by a jury of mail and bank fraud. In light of *United States v. Rodriguez*, 140 F.3d 163 (2d Cir. 1998), which was issued after defendant's conviction, the Second Circuit reversed two of the fourteen bank fraud counts because it concluded that the government had failed to establish bank fraud with respect to checks written on the employer's account.

Shabazz v. Pico, No. 93 Civ. 1424 (SS), 1999 WL 345596 (S.D.N.Y. May 25, 1999) (Sotomayor, J.)

Reversed, in part, by *Shabazz v. Pico*, 205 F.3d 1324 (2d Cir. 2000)

The district court dismissed a claim under 42 U.S.C. § 1983, in which petitioner alleged that he was denied due process in prison disciplinary hearings and that strip searches during prison transfers violated his First Amendment rights. The Second Circuit remanded for reconsideration of petitioner's due process claim in light of a then-recent decision, *Jenkins v. Haubert*, 179 F.3d 19 (2d Cir. 1999), which held that a former prisoner may bring a § 1983 action to challenge disciplinary sanctions that do not affect the length of confinement, without having to show that criminal proceedings terminated in prisoner's favor.

Santana v. Artuz, No. 97 Civ. 3387 (SS), 1998 WL 9378 (S.D.N.Y. Jan. 13, 1998) (Sotomayor, J.)

Vacated pursuant to *Ross v. Artuz*, 150 F.3d 97 (2d Cir. 1998)

Petitioner brought a habeas corpus action in 1997, six years after his state-court conviction for attempted first-degree murder became final. In 1996, the Antiterrorism and Effective Death Penalty Act ("AEDPA") introduced a statute of

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limitations requiring most habeas corpus petitions to be filed within one year of a final conviction. At the time of the district court's decision in *Santana*, the Second Circuit had stated in *Peterson v. Demskie*, 107 F.3d 92 (2d Cir. 1997), that where a state prisoner had several years to bring a habeas corpus petition prior to AEDPA's enactment, there was no need to accord him or her a full year after AEDPA's effective date in which to file a petition retroactively. Subsequently, in *Ross v. Artuz*, 150 F.3d 97 (2d Cir. 1998), the Second Circuit characterized the statement in *Peterson* adopting a case-by-case approach as *dictum* and favored a one-year grace period from AEDPA's effective date. The Second Circuit remanded for proceedings consistent with the new standard set forth in *Ross*.

Albert v. Strack, No. 97 Civ. 2978 (SS), 1998 WL 9382 (S.D.N.Y. Jan. 13, 1998) (Sotomayor, J.)

Reversed by *Albert v. Strack*, 173 F.3d 843 (2nd Cir. Mar. 5, 1999)

The district court's dismissal of a habeas petition as time-barred was reversed in light of *Ross v. Artuz*, 150 F.3d 97 (2d Cir. 1998) (*see above*).

Carlisle Ventures, Inc. v. Banco Espanol de Credito, S.A., No. 94 Civ. 5835 (SS), 1998 WL 259928 (S.D.N.Y. May 21, 1998) (Sotomayor, J.)

Reversed, in part, by *Carlisle Ventures, Inc. v. Banco Espanol de Credito, S.A.*, 176 F.3d 601 (2d Cir. 1999).

In this breach of contract case based on alleged misrepresentations regarding share purchases, the district court granted summary judgment and awarded to the buyer the difference between (1) the price it paid for shares, and (2) the "true value" of those shares at the time of the purchase. On appeal, the Second Circuit determined that the proper measure of damages was the interest on the stock's purchase price.

Bartlett v. New York State Bd. of Law Examiners, 970 F. Supp. 1094 (S.D.N.Y. 1997) (Sotomayor, J.)

Vacated, in part, by *Bartlett v. New York State Bd. of Law Examiners*, 156 F.3d 321 (2d Cir. 1998)

Second Circuit decision vacated by *New York State Bd. of Law Examiners v. Bartlett*, 527 U.S. 1031 (1999)

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On remand from Supreme Court, district court decision was re-evaluated and vacated, in part, by *Bartlett v. New York State Bd. of Law Examiners*, 226 F.3d 69 (2d Cir. 2000)

Plaintiff, who suffered from dyslexia, claimed that the New York State Board of Law Examiners violated the Americans with Disabilities Act ("ADA") and the Rehabilitation Act by failing to provide reasonable accommodations on the New York State Bar Examination. Following a 21-day trial, the district court held that plaintiff was "disabled" within the meaning of the statutes. Although the district court concluded that plaintiff was not impaired in her life activity of reading because she had developed "self-accommodations" that enabled her to achieve average reading skills, the district court found that plaintiff was disabled in the life activity of working because, without accommodation on the bar exam, she would be precluded from an entire field of employment. The district court concluded that plaintiff was entitled to reasonable accommodations in taking the exam, and awarded her injunctive relief and compensatory damages for fees associated with her failed attempts to take the exam.

The Second Circuit vacated and remanded on the issue of compensatory damages, concluding that the district court should not have considered plaintiff's ability to "self-accommodate" in evaluating whether her reading was impaired.

The Supreme Court vacated and remanded without analysis in light of *Sutton v. United Air Lines*, 527 U.S. 471 (1999), *Murphy v. United Parcel Serv.*, 527 U.S. 516 (1999), and *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999). *New York State Bd. of Law Examiners v. Bartlett*, 527 U.S. 1031 (1999). These cases addressed the standard for determining when a disability exists under the ADA and Rehabilitation Act.

On remand from the Supreme Court, the Second Circuit remanded for the district court to determine (1) whether plaintiff was substantially limited in the major life activity of reading, and (2) if plaintiff's impairment substantially limited her work. 226 F.3d 69 (2d Cir. 2000). The district court held a remand trial, and ruled in favor of the plaintiff. 2001 WL 930792 (S.D.N.Y. Aug. 15, 2001).

Nat'l Helicopter Corp. of Am. v. City of New York, 952 F. Supp. 1011 (S.D.N.Y. 1997) (Sotomayor, J.)

Reversed, in part, by *Nat'l Helicopter Corp. of Am. v. City of New York*, 137 F.3d 81 (2d Cir. 1998)

The district court upheld curfews on a heliport as reasonable regulations of noise but concluded that federal law preempted other restrictions. The Second Circuit affirmed the decision regarding curfews and agreed that federal law preempted certain restrictions, but it upheld (1) a ban on all weekend operations at the heliport, and (2) the requirement that the heliport's operations be reduced by 47%.

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Holton v. Fraitellone, No. 96 Civ. 1312(SS), 1997 WL 328066 (S.D.N.Y. June 16, 1997) (Sotomayor, J.)

Vacated, in part, by *Holton v. Oral Surgeon Sing Sing Corr. Facility*, 24 Fed. Appx. 37 (2d Cir. 2001)

The district court granted summary judgment against a prisoner's claim under 42 U.S.C. § 1983, alleging that a prison dentist had denied him proper care. The district court concluded that plaintiff was a vexatious litigant, enjoined him from filing any further civil actions without obtaining judicial leave, and ordered him to pay $5,000. Although affirming the grant of summary judgment, the Second Circuit concluded that the district court erred in not holding a hearing before sanctioning plaintiff.

United States v. Gottesman, 95 CR. 1131 (SS) (S.D.N.Y.) (Sotomayor, J.)

Vacated, in part, by *United States v. Gottesman*, 122 F.3d 150 (2d Cir. 1997)

Pursuant to a plea agreement, the defendant pled guilty to tax evasion. The district court sentenced defendant according to the Guidelines and ordered restitution in the amount of $249,442. The Second Circuit vacated that portion of the sentence imposing restitution on the ground that defendant's promise in his plea agreement to pay back taxes, on terms and conditions agreed upon between defendant and IRS, did not authorize court-ordered restitution.

Tasini v. New York Times Co., 972 F. Supp. 804 (S.D.N.Y. 1997) (Sotomayor, J.)

Reversed by *Tasini v. New York Times Co.*, 206 F.3d 161 (2d Cir. 2000)

Reversal affirmed by *New York Times Co. v. Tasini*, 533 U.S. 483 (2001) (Ginsburg, J., joined by Rehnquist, O'Connor, Scalia, Kennedy, Souter, and Thomas, JJ.) (Stevens, J., dissenting, joined by Breyer, J.).

The district court held that publishers did not violate freelance authors' copyrights by placing the contents of the publishers' periodicals into electronic databases (e.g., Lexis/Nexis) and onto CD-ROMs without first securing the writers' permission, because section 201(c) of the Copyright Act granted publishers the privilege of reissuing or revising collective works, and did not limit such republications to the original medium. The Second Circuit reversed, holding that section 201(c) does not permit publishers of collective works to license individually copyrighted works for inclusion in electronic databases, and that the

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publishers therefore were required to negotiate such licenses in their contracts. The Supreme Court affirmed the Second Circuit's decision.

Seabrook v. Jacobson, 970 F. Supp. 252, (S.D.N.Y. 1997) (Sotomayor, J.)

Vacated by *Seabrook v. Jacobson*, 153 F.3d 70 (2d Cir. 1998)

Corrections officers facing criminal charges brought suit against the City of New York for suspending them without pay. Prior to trial, the district court and parties agreed that if plaintiffs would voluntarily dismiss their federal claims, then the district court would retain supplemental jurisdiction and decide the state-law claim. The Second Circuit vacated the judgment, holding that the district court should have dismissed the state law claim, instead of retaining supplemental jurisdiction.

Aurora Maritime Co. v. Abdullah Moham Fahem & Co., 890 F. Supp. 322 (S.D.N.Y. 1995) (Sotomayor, J.)

Affirmed on other grounds by *Aurora Maritime Co. v. Abdullah Moham Fahem & Co.*, 85 F.3d 44 (2d Cir. 1996)

The Second Circuit affirmed the district court's decision denying a bank's motion to vacate various Supplemental Admiralty Rule B attachments of plaintiff's bank account. The district court held that "because plaintiffs obtained Rule B attachments before [the bank] exercised its set-off rights . . . plaintiffs gained a limited property interest under federal law that cannot be defeated by a subsequently executed state law set-off right." Although upholding the district court's ruling, the Second Circuit disagreed with that court's conclusion "that [the bank's set-off right and appellees' Rule B attachments d[id] not conflict." Instead, the Second Circuit reached the constitutional issue and held that the dismissal was proper because federal law preempted the bank's right, under Section 151 of state law, to the funds in the disputed account.

Bernard v. Las Americas Communications, Inc., (no written opinion)

Affirmed in part, vacated in part, *Bernard v. Las Americas Communications, Inc.*, 84 F.3d 103 (2d Cir. 1996)

Pursuant to a jury verdict, the district court entered judgment in favor of plaintiff, an attorney, seeking legal fees in connection with his representation of defendant in proceedings before the Federal Communications Commission. Applying

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Washington, D.C. law, the Second Circuit approved of the district court's jury instructions on the issues of proximate causation and damages, but found error with respect to the instruction on materiality. Specifically, the district court had instructed that a material breach "defeats the purpose of [an] entire transaction"; the Second Circuit held that D.C. law requires only that defendant prove that he received "something substantially less or different from that for which he bargained." On remand, a jury again found for plaintiff, and judgment was entered accordingly.

Hellenic Am. Action Comm. v. City of New York, 933 F. Supp. 286 (S.D.N.Y. 1996) (Sotomayor, J.)

Reversed by *Hellenic Am. Action Comm. v. City of New York*, 101 F.3d 877 (2d Cir. 1996)

The district court granted a preliminary injunction in favor of a contractor who alleged that he was *de facto* debarred from city procurements and thereby deprived of property and liberty interests without due process. The Second Circuit held that the contractor's due process rights were not violated because of an adequate post-deprivation remedy provided under New York law.

American Fuel Corp. v. Utah Energy Dev. Co., No. 96 Civ. 2805, 1996 WL 396131 (S.D.N.Y. July 16, 1996) (Sotomayor, J.)

Reversed by *American Fuel Corp. v. Utah Energy Dev. Co.*, 122 F.3d 130 (2d Cir. 1997)

The district court granted plaintiff's motion to compel arbitration after finding that a corporate president had created a sham entity in order to avoid an arbitration clause in his employment contract. Although acknowledging that the president had not observed certain corporate formalities, the Second Circuit concluded that the corporate veil should not be pierced because the entity had a fifty percent co-owner who was actively involved.

United States v. Bauers, 93 CR. 459 (SS) (S.D.N.Y.) (Sotomayor, J)

Vacated, in part, by *United States v. Bauers*, 47 F.3d 535 (2d Cir. 1995)

After defendant pled guilty to mail fraud, the district court departed upward from the Sentencing Guidelines based upon its conclusion that the likelihood of defendant's recidivism was not adequately represented in his original criminal history category. Defendant received 33 months in prison, followed by five years

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of supervised release. On appeal, the Second Circuit upheld the departure but vacated the term of supervised release and remanded for resentencing. The Second Circuit held that the term of supervision should have been three years, instead of five, pursuant to 18 U.S.C. §§ 3559(a)(4) & 3583(b)(2).

European Am. Bank v. Benedict, No. 94 Civ. 7110 (SS), 1995 WL 422089 (S.D.N.Y. July 17, 1995) (Sotomayor, J.)

Vacated by *In re Benedict*, 90 F.3d 50 (2d Cir. 1996)

The district court affirmed the bankruptcy court's order (1) rescinding its prior order extending the time period for the creditor to file a dischargeability complaint after the time period to file complaints had expired, (2) enjoining the creditor from filing future complaints, and (3) discharging debt owed to the creditor. The Second Circuit held that (1) the time period imposed for filing dischargeability complaints is not jurisdictional, (2) debtor's recalcitrant behavior in complying with the creditor's discovery requests was an insufficient ground for allowing the creditor to file an untimely complaint, and (3) the debtor waived the right to object to an extension of time period for filing a dischargeability complaint.

Bolt Elec., Inc. v. City of New York, No. 93 Civ. 3186, 1994 WL 97048 (S.D.N.Y. Mar. 23, 1994) (Sotomayor, J.)

Reversed by *Bolt Elec., Inc. v. City of New York,* 53 F.3d 465 (2d Cir. 1995)

In a diversity action for contract nonpayment, the district court granted defendant City of New York's motion to dismiss for failure to state a claim. The district court held that the contract at issue did not comply with New York regulations regarding procurement agreements, and that to enforce the contract would violate New York's public policy against recognizing agreements by municipal agents who were not authorized to contract on behalf of the municipality. The Second Circuit reversed, holding that the regulation at issue did not establish a mandatory condition that, absent fulfillment, barred enforcement of the contract.

Runquist v. Delta Capital Mgmt., No. 91 Civ. 3335, 1994 WL 62965 (S.D.N.Y. Feb. 18, 1994) (Sotomayor, J.)

Reversed by *Runquist v. Delta Capital Mgmt.*, 48 F.3d 1212 (2d Cir. 1994)

The district court denied plaintiff's motion for reconsideration of its decision to (1) grant summary judgment to defendant regarding plaintiff's federal securities

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fraud claim, and (2) dismiss plaintiff's common law claims for failure to prosecute. The district court concluded that the alleged errors of plaintiff's counsel did not justify reconsideration under Fed. R. Civ. P. 60(b), and that the original opinion was correct on the merits. The Second Circuit reversed without opinion.

h. Provide citations to all cases in which, as a district court judge, you sat by designation on a federal court of appeals, including a brief summary of any opinions you authored, whether majority, dissenting, or concurring, and any dissenting opinions you joined.

United States v. Hendrickson, 26 F.3d 321 (2d Cir. 1994) (Sotomayor, D.J. (author of majority opinion), Oakes, Winter)

Hendrickson was convicted of various drug-related crimes stemming from an international heroin-importation ring in which he participated. At sentencing, the district court adopted the presentence report's finding that Hendrickson conspired to distribute between 50 and 60 kilograms of heroin. Hendrickson objected, contending that he had argued throughout trial that he was unable to procure that amount of heroin through his international connections, and that his assertions to the contrary were mere puffery. He asserted that he had only supplied a total of 77 grams of heroin during the time period underlying his conviction.

During the time at issue, the Sentencing Guidelines directed that if a defendant is convicted of a drug-related conspiracy, "the offense level shall be the same as if the object of the conspiracy or attempt had been completed." The Application Note directed that the "weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount." The Application Note also directed that, "where the court finds that the defendant did not intend to produce and was not reasonably capable of producing the negotiated amount," the court shall exclude from the base offense level the quantity the defendant "did not intend and was not reasonably capable of producing."

Hendrickson argued that the government bore the burden of proof in the intent and capability inquiry under the Application Note. Observing a circuit split on the burden of proof issue, the Court noted that the language of the Sentencing Guideline and the Application Note were inconsistent, in that the Sentencing Guideline emphasized the conspiratorial agreement while the Application Note underscored the intent and capability inquiry. The Court ruled that "[t]he conspiratorial agreement to produce a particular quantity of narcotics should be informed by all of the circumstances of the case, notably the conspirators' intent to produce such amounts. Thus, where the Government asserts that a defendant negotiated to produce a contested amount, we hold that the Government bears the burden of proving the defendant's intent to produce such an amount, a task necessarily informed, although not determined, by the defendant's ability to

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produce the amount alleged to have been agreed upon." 26 F.3d at 332. The Court remanded for resentencing to allow the trial court to set forth in greater detail the evidence that supported its finding of the amount of narcotics agreed upon, "explaining why contrary evidence is not persuasive." *Id.* at 341.

United States v. Int'l Bhd. of Teamsters, 986 F.2d 15 (2d Cir. 1993) (Oakes, J.).

United States v. Zuluaga, 981 F.2d 74 (2d Cir. 1992) (per curiam).

Appellate counsel appointed for a defendant convicted and sentenced for narcotics conspiracy filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), asking to be relieved as counsel and stating that there were no non-frivolous grounds for reversal. The panel deemed the brief conclusory and therefore inadequate under *Anders*, which requires that counsel conduct a "conscientious examination" of the possible grounds for appeal. The panel concluded that instead of reviewing the record itself and appointing new counsel only if the Court discovered non-frivolous arguments, the constitutionally proper course was to appoint new counsel to pursue the appeal.

Thomas E. Otta v. Commissioner of Internal Revenue, Docket No. 92-4054 (2d Cir. 1992)

Kamyr AB, Kvaerner A.S. v. Kamyr, Inc., Docket No. 92-7764 (2d Cir. 1992)

United States v. See Yee Ko, Docket No. 92-1412 (2d Cir. 1992)

14. **Recusal**: Identify the basis by which as a judge you have assessed the necessity or propriety of recusal. (If your court employs an "automatic" recusal system by which you may be recused without your knowledge, please include a general description of that system and a list of cases from which you were recused.) Provide a list of any cases, motions, or matters that have come before you in which a litigant or party has requested that you recuse yourself due to an asserted conflict of interest or in which you have recused yourself sua sponte. Identify each such case and, for each, provide the following information:

    a. whether your recusal was requested by a motion or other suggestion by a litigant or a party to the proceeding or by any other person or interested party; or if you recused yourself sua sponte;

    b. a brief description of the asserted conflict of interest or other ground for recusal;

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c. the procedure you followed in determining whether or not to recuse yourself;

d. your reason for recusing or declining to recuse yourself, including any action taken to remove the real, apparent, or asserted conflict of interest or to cure any other ground for recusal.

From my date of appointment through May 7, 2001, each judge conducted a conflicts review of each briefed case before the case was calendared. A judicial disqualification ("DQ") was forwarded to the Clerk's Office where it was recorded on the docket. From May 7, 2001 to date, the procedure has been that each judge reviews only the cases calendared for a day that judge is scheduled to sit.

The Clerk's Office records a DQ on the docket as an internal entry, available only to court personnel. The entry is coded and retrieved either by reviewing a particular case docket or by running a data base report that captures the DQ code.

During my tenure the Court has operated two case management systems. Reports have been generated in each system to retrieve the judge's DQs. These reports have identified 120 cases in which I have recused myself from hearing the matter.

Ten additional cases in which I recused myself have been identified through the manual review of weekly calendar records from the period 1999-2000. It is possible that additional cases may be identified during the course of this review. Human error is the most likely explanation for why these recusals do not appear in the database reports.

Database reports also have been generated to identify cases in which a party moved for the recusal of a judge. Each motion will have to be manually reviewed in order to determine if I was the subject of the motion.

One small category of cases in which the Clerk's Office might not have a complete record of judicial disqualifications relates to en banc votes.

The table below lists the cases from which I have been recused and my reasons for recusal, to the extent that I can recall them. Our Circuit practice does not require judges to explain reasons for recusal, and these are left to each judge's discretion. I have chosen to remove myself from cases, even when not technically required by ethical rules. These include cases: (1) in which former law clerks are involved; (2) where I had worked extensively with an attorney or client in private practice; and (3) where a lawyer is a close friend. Because I am not required to provide reasons for my recusal, there is no court record to review. Moreover, many of these cases are old, and I have no independent recollection of my reasons for recusal. In general, however, I believe that the majority of my recusals from 1998 to 2000 were the result of my involvement in a case as a district court judge. But I do not make that representation unless I have a specific recollection.

No.	Caption	Reason

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91-7114	Fowler v. Kelly	I was involved in the case against the defendant as an Assistant District Attorney
93-6491	German v. FHL	I had prior contact from private practice with issues in the case and counsel.
94-241	Cohen v. Blue Cross	I used Blue Cross as an insurer and was involved in a court subcommittee that addressed Blue Cross policy changes.
94-7367	Alivar v. Palazzetti	My former law firm represented a party.
95-10701	Seneca Insurance Co. V. Morelli	One of the attorneys represented a close friend in a pending action.
96-5123	Feliz v. FHL	I had prior contact from private practice with issues in the case and counsel.
96-8864	Century 21 v. Mendi	One of the parties was a client in my private practice.
97-4979	Gucci v. Clifford	I had prior contact from private practice with one of the attorneys.
97-5008	Red Rock Holdings, Ltd., et al. v. Union Bank Trust Co., et al.	One of the parties was a client in my private practice.
97-6593	Levine v. Museum of Jewish Heritage	I recused myself because of my relationship with interested persons in the action.
97-6802	Beatty v. WABAN, Inc., d/b/a BJ's Wholesale Club, Inc.	I was a member of the BJ's Wholesale Club, Inc.
97-7300	John Doe v. City of New York, et al.	I had personal knowledge regarding the claims.
96-1688	US v. Mercurris	This appeal was taken from a case in which I was involved as a district court judge.
97-1451	US v. Westcott	This appeal was taken from a case in which I was involved as a district court judge.
97-1650	US v. Lopez	This appeal was taken from a case in which I was involved as a district court judge.
97-1680	US v. Heron	This appeal was taken from a case in which I was involved as a district court judge.
97-2251	Malloy v. City of New York	This appeal was taken from a case in which I was involved as a district court judge.

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97-9181	Tasini v. New York Times	This appeal was taken from a case in which I was involved as a district court judge.
98-1043	US v. Medina	This appeal was taken from a case in which I was involved as a district court judge.
98-1295	US v. Laljie	This appeal was taken from a case in which I was involved as a district court judge.
98-1330	US v. Fisher	This appeal was taken from a case in which I was involved as a district court judge.
98-1376	US v. Zichettello	I have no recollection of the reason.
98-1506	US v. Davis	This appeal was taken from a case in which I was involved as a district court judge.
98-1602	US v. Williams	This appeal was taken from a case in which I was involved as a district court judge.
98-1608	US v. Livoti	This appeal may have been taken from a case in which I was involved as a district court judge, but I have no clear recollection.
98-1670	US v. Thorpe	This appeal was taken from a case in which I was involved as a district court judge.
98-1722	US v. Shkolir	This appeal was taken from a case in which I was involved as a district court judge.
98-2252	Rodriguez v. Artuz	This appeal was taken from a case in which I was involved as a district court judge.
98-2307	Chisolm v. People of New York	This appeal was taken from a case in which I was involved as a district court judge.
98-2350	Albert v. Strack	This appeal was taken from a case in which I was involved as a district court judge.
98-2381	Alexander v. Keane	This appeal was taken from a case in which I was involved as a district court judge.
98-2648	Papeskov v. Brown	This appeal was taken from a case in which I was involved as a district court judge.
98-2733	Vicioso v. US	This appeal was taken from a case in which I was involved as a district court judge.
98-2743	Perez v. Warden of M.C.C.	This appeal was taken from a case in which I was involved as a district court judge.
98-2807	Steed v. Morgenthau	I have no recollection of the reason.

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98-2876	Dones v. Johnson	This appeal was taken from a case in which I was involved as a district court judge.
98-4328	NLRB v. Ras Carting	I have no recollection of the reason.
98-4003	Ad-Hoc Assoc. v. FCC	I have no recollection of the reason.
98-4005	Ad-Hoc Assoc. v. FCC	I have no recollection of the reason.
98-4025	Ad-Hoc Assoc. v. FCC	I have no recollection of the reason.
98-4122	Cellular Phone v. FCC	I have no recollection of the reason.
98-5035	St. Johnsbury Trucking Co. v. Adams	This appeal was taken from a case in which I was involved as a district court judge.
98-5040	Federal Ins. Co. v. Horowitz (In re. Donald Sheldon & Co.)	This appeal may have been taken from a case in which I was involved as a district court judge, but I have no clear recollection.
98-5058	Klein v. Ulster Savings Bank (In re Moses Stein)	I have no recollection of the reason.
98-6902	Kramer v. Committee on Greivances for SDNY	I was likely a member of the Committee of Grievances for the Southern District of New York during the relevant time period of the decision appealed.
98-7127	Baba v. Japan Travel Bureau	This appeal was taken from a case in which I was involved as a district court judge.
98-7825	Norris v. Metro-North Commuter R.R.	This appeal was taken from a case in which I was involved as a district court judge.
98-7869	Carlisle Ventures, I v. Banco Espanol de Cre	This appeal was taken from a case in which I was involved as a district court judge.
98-9040	New York State NOW v. Pataki	I likely recused based on a close friendship with one of the parties.
98-9220	Red Rock Holdings v. Union Bank Trust	This appeal was taken from a case in which I was involved as a district court judge.
98-9343	Emile v. Browner	I have no recollection of the reason.
99-111	Holton v. Sing Sing Corr. Fac., et al	I have no recollection of the reason.
99-223	Shabazz v. Pico	This appeal was taken from a case in which I was involved as a district court judge.
99-1057	US v. Perez-King	I have no recollection of the reason.

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99-1063	US v Okafor	I have no recollection of the reason.
99-1155	US v. Ul-Haq	I recused based a close friendship with one of the attorneys.
99-1415	US v. Okafor	This appeal was taken from a case in which I was involved as a district court judge.
99-1277	US v. King	This appeal may have been taken from a case in which I was involved as a district court judge, but I have no clear recollection.
99-1282	US v. Santana-Cruz	This appeal may have been taken from a case in which I was involved as a district court judge, but I have no clear recollection.
99-1326	US v. Shkolir	A related case had been assigned to me when I was a district court judge.
99-1551	US v. Grullon	This appeal was taken from a case in which I was involved as a district court judge.
99-1744	US v. Valencia	I recused based on a close friendship with one of the attorneys.
99-2545	Sacco v. Cooksey	I have no recollection of the reason.
99-5074	In re Treco	This appeal may have been taken from a case in which I was involved as a district court judge, but I have no clear recollection.
99-5059	Pereira v. Felzenberg (In re Felzenberg)	I have no recollection of the reason.
99-6343	Jones v. Newman	I recused because one of the attorneys had worked for me as a law clerk.
99-7101	Smith/Enron Cogeneration Partnership v. Smith Cogeneration	This appeal was taken from a case in which I was involved as a district court judge.
99-7125	Kwalbrun v. Glenayre Technologies, Inc.	I have no recollection of the reason.
99-7144	Speirs v. Scholastic, Inc.	This appeal was taken from a case in which I was involved as a district court judge.
99-7235	Parachute Press v. Scholastic, Inc.	This appeal was taken from a case in which I was involved as a district court judge..
99-7327	Terwilliger v. Terwilliger	This appeal was taken from a case in which I was involved as a district court judge.

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99-7853	Darnet Realty Assoc. v. !36 East 56th Street	I was close friends with one of the attorneys.
99-7884	Valentine v. Standard & Poor's	This appeal was taken from a case in which I was involved as a district court judge.
99-7976	Herrick Company v. Vetta Sports, Inc.	I was close friends with one of the attorneys.
99-7996	Herrick Company v. Vetta Sports, Inc.	I was close friends with one of the attorneys.
99-7998	Herrick Company v. Vetta Sports, Inc.	I was close friends with one of the attorneys.
99-9226	Huang v. Johnson	This appeal was taken from a case in which I was involved as a district court judge.
99-9369	Gelb v. Board of Elections	This appeal was taken from a case in which I was involved as a district court judge.
99-9414	Francis v. DAN Joint Venture	One of the attorneys was the parent of a student who worked in my chambers
00-1031	US v. Champion	I recused because one of the attorneys had worked for me as a law clerk.
00-1155	US v. Grullon	A related case had been assigned to me when I was a district court judge.
00-1195	US v. Summers	This appeal was taken from case in which I was involved as a district court judge.
00-1255	US v. Gufield	I recused because one of the attorneys had worked for me as a law clerk.
00-1354	US v. Gufield	I recused because one of the attorneys had worked for me as a law clerk.
00-1408	US v. Garcia	I recused because one of the attorneys had worked for me as a law clerk.
00-1456	US v. Harvey	I recused because one of the attorneys had worked for me as a law clerk.
00-1463	US v. Green	I recused based on a close friendship with one of the attorneys.
00-1471	US v. Parker	I recused based on a close friendship with one of the attorneys.
00-2053	Sacco v. Cooksey	I have no recollection of the reason.

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00-6019	Baldwin v. United States Army	This appeal may have been taken from a case in which I was involved as a district court judge, but I have no clear recollection.
00-6154	McGann v. US	I recused because one of the attorneys had worked for me as a law clerk.
00-6287	Romeu v. Cohen	I recused because of the involvement of a former law clerk.
00-7045	First Riverside Inv. v. Oppenheimer & Co.	I had previously worked with the one of the attorneys.
00-7289	Knight v. Connecticut Dept. of Health	This appeal may have been taken from a case in which I was involved as a district court judge, but I have no clear recollection.
00-7769	Allstate Ins. Co. v. Serio	This appeal was taken from case in which I was involved as a district court judge.
00-7803	Castellano v. Young & Rubicam, Inc.	I have no recollection of the reason.
01-1526	US v. Lauersen	I have no recollection of the reason.
01-6040	In re Grand Jury Subpoena	One of the attorneys was the parent of a student who worked in my chambers.
01-7119	Hollander v. American Cyanamid	This appeal may have been taken from a case in which I was involved as a district court judge, but I have no clear recollection.
01-7307	Texas Int'l Magnetics v. BASF Aktiengesellschaft	I recused based on a close friendship with one of the attorneys.
01-7440	Halperin v. eBanker USA.com, Inc.	I previously worked with one of the attorneys in private practice.
01-7626	Seabury Const. Corp. v. Jeffrey Chain Corp.	This appeal may have been taken from a case in which I was involved as a district court judge, but I have no clear recollection.
02-1253	US v. Taubman	I have no recollection of the reason.
02-6056	Lee v. US	This appeal may have been taken from a case in which I was involved as a district court judge, but I have no clear recollection.
02-6102	US v. City of New York	I recused because one of the attorneys was a former law clerk.

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03-1332	US v. Gonzalez	This appeal may have been taken from a case in which I was involved as a district court judge, but I have no clear recollection.
03-1516	US v. Danson	I recused based a close friendship with one of the attorneys.
03-1582	US v. Russo	I recused because one of the attorneys was a former law clerk.
03-4508	Chen v. BIA	I recused because one of the attorneys was a former law clerk.
03-6146	In re: NRG Energy	I recused because one of the attorneys was a former law clerk.
03-6248	El v. Colon	I recused because one of the attorneys was a former law clerk.
03-7534	Dattner v. Conagra Foods, Inc.	I recused because a party was represented by Lankler Siffert & Wohl LLP, the firm in which a close friend and co-teacher was a partner.
03-7859	Capital Rec. v. Naxos America, Inc.	I have no recollection of the reason.
03-40063	Xiao v. Ashcroft	I recused because one of the attorneys was a former law clerk.
03-40783	Chowdhury v. TSA	I recused because one of the attorneys was a former law clerk.
04-3502	US v. Greene	I recused because one of the attorneys was a former intern and close friend.
04-5474	National Co. v. Dept. of Justice	I recused because one of the attorneys was a former law clerk.
05-293	Shaprio v. Children's Services	I have no recollection of the reason.
05-1732	Burt v. Rumsfeld	I recused based on close friendships with two of the parties.
05-2174	US v. Selinger	I have no recollection of the reason.
05-5782	US v. Giffen	I have no recollection of the reason.
05-7057	Lauersen v. US	I recused because one of the attorneys was a former law clerk.

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05-8902	Ross ex rel. Dunham v. Lantz	I recused because I was traveling abroad during a time-sensitive call for an en banc.
06-2173	Irwin v. Federal Aviation Administration	I recused because one of the attorneys was a former law clerk.
06-3725	In re: Parmalat Secs. Litig.	I recused because one of the parties was a former client.
06-4176	US v. Almonte	I recused because one of the attorneys was a former intern and close friend.
06-4675	US v. Gandia	I recused because one of the attorneys was a former law clerk.
07-663	Crews v. Trustees of Columbia	I have no recollection of the reason.
07-685	In re: Parmalat Secs. Litig.	I recused because one of the parties was a former client.
07-2491	Wolters Kluwer Financial Servs., Inc. v. Scivantage	I recused because a party was represented by Lankler Siffert & Wohl LLP, the firm in which a close friend and NYU co-teacher was a partner.
07-2949	In re: Parmalat Secs. Litig.	I recused because one of the parties was a former client.
07-3238	US v. Rivera	I recused based on a close friendship with one of the attorneys.
07-3674	In re. Computer Assocs. 2002	I have no recollection of the reason.
07-3720	In re. George K. Boyer	I have no recollection of the reason.
07-4300	Ponterio v. Kay	I personally knew and was close friends with state-court judges named in the complaint.
08-992	Cunningham v. New York State Dept. of Labor	I recused because one of the attorneys was a former law clerk.
08-1625	US v. Hepburn (Borden)	I recused because one of the attorneys was a former intern and close friend.
08-1890	In re. George K. Boyer	I have no recollection of the reason.
08-2985	Noel v. NYS Office of Mental Health	I recused because one of the attorneys was a former law clerk.
08-3701	In re. Manhattan Investment Fund Ltd.	I recused because one of the attorneys had worked for me as an associate when I was in private practice.

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09-279	Proctor v. Kelly	I recused because one of the attorneys was a former law clerk.

15. **Public Office, Political Activities, and Affiliations**:

a. List chronologically any public offices you have held, other than judicial offices, including the terms of service and whether such positions were elected or appointed. If appointed, please include the name of the individual who appointed you. Also, state chronologically any unsuccessful candidacies you have had for elective office or unsuccessful nominations for appointed office.

New York State Advisory Panel for Inter-Group Relations—1990 to 1991, appointed by Governor Mario Cuomo

New York City Campaign Finance Board—1988 to 10/92, appointed by Mayor Edward Koch.

State of New York Mortgage Agency—1987 to 10/92, appointed by Governor Mario Cuomo.

b. List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title, and responsibilities.

None.

16. **Legal Career**: Answer each part separately.

a. Describe chronologically your law practice and legal experience after graduation from law school including:

i. whether you served as clerk to a judge, and if so, the name of the judge, the court, and the dates of the period you were a clerk;

I did not serve as a clerk to a judge.

ii. whether you practiced alone, and if so, the addresses and dates;

Yes, with Sotomayor & Associates, 10 3rd Street, Brooklyn, New York 11231, from 1983 to 1986, but this work was as a consultant to family and friends in their real estate, business, and estate planning decisions. If their

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circumstances required more substantial legal representation, I referred the matter to my firm, Pavia & Harcourt, or to others with appropriate expertise.

iii. the dates, names, and addresses of law firms or offices, companies, or governmental agencies with which you have been affiliated, and the nature of your affiliation with each;

UNITED STATES CIRCUIT JUDGE	
United States Court of Appeals for the Second Circuit	10/13/98 to present
Thurgood Marshall United States Courthouse	
40 Foley Square	
New York, NY 10007	
UNITED STATES DISTRICT JUDGE	
Southern District of New York	10/2/92 to 10/12/98
Daniel Patrick Moynihan United States Courthouse	
500 Pearl Street	
New York, NY 10007	
NEW YORK STATE ADVISORY PANEL FOR INTER-GROUP RELATIONS	1990 to 1991
80 Pitt Street	
New York, NY 10002	
Member	
PAVIA & HARCOURT	
600 Madison Avenue	
New York, New York 10022	
Partner	1/1/88 to 9/30/92
Associate	4/84 to 12/87
NEW YORK CITY CAMPAIGN FINANCE BOARD	
40 Rector Street	
New York, NY 10006	1988 to 10/92
Member, Board of Directors	
STATE OF NEW YORK MORTGAGE AGENCY	
260 Madison Avenue	
New York, NY 10016	1987 to 10/92
Member, Board of Directors	
NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE	
One Hogan Place	
New York, NY 10013	
Assistant District Attorney	9/79 to 3/84

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SOTOMAYOR & ASSOCIATES
10 Third Street
Brooklyn, NY 11231 1983 to 1986
Owner

iv. whether you served as a mediator or arbitrator in alternative dispute resolution proceedings and, if so, a description of the 10 most significant matters with which you were involved in that capacity.

I have never served as a mediator or arbitrator in alternative dispute resolution proceedings.

b. Describe:

i. the general character of your law practice and indicate by date when its character has changed over the years;

From September 1979 to March 1984, as a prosecutor in New York County, my cases typically involved "street crimes," i.e., murders, robberies, etc. I also investigated child pornography, child abuse, police misconduct, and fraud matters. I further prepared the responsive papers for five criminal appeals, two of which I argued and all of which resulted in affirmances of the convictions.

From April 1984 as an associate, and from January 1988 until October 1992 as a partner, I was a general civil litigator involved in all facets of commercial work including, but not limited to, real estate, employment, banking, contract, distribution and agency law. Moreover, my practice had significant concentration in intellectual property law involving trademark, copyright and unfair competition commodity trading law under the North American Grain Association Contract. I participated in over fifteen arbitration hearings involving the banking, fashion, grain, and tire distribution industries.

ii. your typical clients and the areas at each period of your legal career, if any, in which you have specialized.

Beginning in September 1979, I worked in the office of Manhattan District Attorney Robert Morgenthau, where I spent five years prosecuting individuals accused of perpetrating all kinds of crimes, including violent crimes such as murder. Many of those cases went to trial, but others did not, such as when a defendant agreed to plead guilty. My participation in those cases included negotiating plea agreements and making recommendations to the court regarding sentencing. In some cases, I was the sole or lead

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prosecutor, while in others I acted as a second chair to another prosecutor. In all cases, I represented the people of New York County.

I left the District Attorney's office in 1984, and joined the firm of Pavia & Harcourt. My typical clients were significant European companies doing business in the United States. My practice at that firm focused on commercial litigation, much of which involved pre-trial and discovery proceedings for cases that were typically settled before trial. I appeared in numerous preliminary injunction hearings in trademark and copyright cases, and post-motion hearings before magistrate judges on a variety of issues. My work also involved advising clients on a wide variety of legal issues, including, but not limited to, product liability, warranty, antitrust, securities, environmental, banking, real estate, patents, employment, partnership, joint venture and shareholder laws; customs, automobile and joint tire regulations; and franchising and licensing matters. Morover, I conducted over fifteen arbitration hearings involving, predominantly, export grain commodity trading on behalf of foreign buyers, but also hearings involving banking, partnership, tire and fashion industry disputes.

c. Describe the percentage of your practice that has been in litigation and whether you appeared in court frequently, occasionally, or not at all. If the frequency of your appearances in court varied, describe such variance, providing dates.

As a prosecutor, I appeared in court daily. As a civil commercial litigator in New York with a predominantly federal practice, I appeared regularly in court.

i. Indicate the percentage of your practice in:

	Private practice	As a prosecutor
Federal courts:	Approx. 70%	0%
State courts of record:	Approx. 20 %	100%
Other courts:	Approx. 10%	0%
Administrative agencies:	0%	0%

ii. Indicate the percentage of your practice in:

Civil proceedings:	99%	0%
Criminal proceedings:	1%	100%

d. List, by case name, all cases in courts of record, including cases before administrative law judges, you tried to verdict, judgment, or final decision (rather than settled), indicating whether you were sole counsel, chief counsel, or associate counsel. For each such case, include the docket number and provide any opinions or filings available to you.

Fratelli Lozza (USA) Inc. v. Lozza (USA) & Lozza SpA, 90 Civ. 4170 (SDNY 1992): Chief counsel (No opinions or filings available.)

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Ferrari of Sacramento, Inc. v. Ferrari North America, PR-973-88 (State of California New Motor Vehicle Board (1990): Associate counsel (No opinions or filings available.)

The People of the State of New York v. Clemente D'Alessio and Scott Hyman, Indictment No.: 4581/82 (1983) (Supreme Court, New York County): Lead Counsel (The Manhattan District Attorney's Office is searching its records for information on this case.)

The People of the State of New York v. Richard Maddicks, Indictment No.:886/82 (Supreme Court, New York County): Co-counsel (The Manhattan District Attorney's Office is searching its records for information on this case.)

The People of the State of New York v. Manny Morales a.k.a. Joey Hernandez, Joseph Pacheco, and Eduardo Pacheco, Indictment No.: 4399/82 (Supreme Court, New York County): Lead counsel (The Manhattan District Attorney's Office is searching its records for information on this case.)

I tried an additional 14 cases during my time as an assistant district attorney, from 1979 to 1984. The Manhattan District Attorney's Office is searching its records for further information on these cases.

i. What percentage of these trials were:
   1. jury — Approx. 90%
   2. non-jury — Approx. 10%

e. Describe your practice, if any, before the Supreme Court of the United States,the highest court of any state, or any state or federal courts of appeals. Supply four (4) copies of any briefs, amicus or otherwise, and, if applicable, any oral argument transcripts before these courts in connection with your practice. Give a detailed summary of the substance of each case, outlining briefly the factual and legal issues involved, the party or parties whom you represented, the nature of your participation in the litigation, and the final disposition of the case. Also provide the individual names, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

I have requested the briefs and any available transcripts from these cases from the Clerk of the Court of the Second Circuit on May 30th and will forward to the Committee as soon as I receive them.

Republic of the Philippines v. New York Land Co., et al. (The "Philippines Case") and *Security Pacific Mortgage and Real Estate Service Inc. v. Canadian Land Company, et al.* (The "Security Pacific Case")

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Case Nos.:	90-7322 and 90-7398
Court:	United States Court of Appeals for the Second Circuit
Panel:	Judge Thomas J. Meskill Judge Lawrence J. Pierce Judge George C. Pratt
Co-Counsel:	David A Botwinik, Esq. (Deceased) Pavia & Harcourt 600 Madison Avenue New York, New York 10022 (212) 980-3500 David Glasser, Esq. Levin & Glasser, P.C. 420 Lexington Avenue, Suite 805 New York, New York 10170 (212) 867-3636 Roy L. Reardon, Esq. ((212) 455-2840) David E. Massengill, Esq. ((212) 455-3555) Simpson Thacher & Bartlett 425 Lexington Avenue New York, New York 10017
Adversaries:	Jeffrey J. Greenbaum, Esq. James M. Hirschhorn, Esq. Sills Cummis & Gross, P.C. Attorneys for the Republic of the Philippines Legal Center 1 Riverfront Plaza Newark, New Jersey 07102 (201) 643-7000
Date of Argument:	6/15/90 (Argued by Roy L. Reardon, Esq. of Simpson, Thacher & Bartlett)

AND

District Court Case Name:	*Republic of the Philippines v.New York Land Co., et al.* (the "Philippines Case") and *Security Pacific Mortgage and Real Estate Service Inc. v. Canadian Land Company, et al.* (the "Security Pacific Case").

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56940.148

Case Nos.:	The Philippines Case: 86 Civ. 2294 The Security Pacific Case: 87 Civ. 3629
Court:	United States District Court, Southern District of New York
Judge:	Judge Pierre N. Leval
Co-Counsel:	David A. Botwinik, Esq. (deceased) David Glasser, Esq. Levin & Glasser, P.C. 420 Lexington Avenue, Suite 805 New York, New York 10170 (212) 867-3636
Participating Adversaries Opposing Motion:	Jeffrey J. Greenbaum, Esq. James M. Hirschhorn, Esq. Sills Cummis & Gross, P.C. Attorneys for the Republic of the Philippines Legal Center 1 Riverfront Plaza Newark, New Jersey 07102 (201) 643-7000 Michael Stanton, Esq. Weil, Gotshal & Manges Attorney for Security Pacific 767 Fifth Avenue New York, New York 10153 (212) 310-8000 (last know address and telephone number)
Date of Argument:	2/12/90
Case Description:	My former firm, Pavia & Harcourt, represented Bulgari Corporation of America ("Bulgari"), an international retailer of fine jewelry and a tenant in the Crown Building at 730 Fifth Avenue, New York, New York. The Crown Building was the subject of a foreclosure sale in the Security Pacific Action, and its beneficial ownership was in dispute in the Philippines Action. Bulgari was not a party to these actions. The district court denied Bulgari's request, by way of Order to Show Cause, to approve a rental amount it had reached with the manager of the Crown Building. I primarily drafted the papers presented to the district court and argued the motion. Bulgari's motion attempted to demonstrate that no

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competent evidence existed to dispute Bulgari's proof that the rental amount agreed upon was at or above fair market value and benefited the Crown Building and its claimants. Bulgari appealed the district court's denial of its approval of the rent agreement on the grounds that the denial was effectively an injunction against Bulgari's exercise of its contractual lease rights to have its rent fixed by agreement during the term of the lease, and that the district court improperly granted the injunction without a hearing. I did not argue the appeal but participated extensively in the drafting of appellant's brief and reply. The district court's order was affirmed on appeal, without a published opinion. 909 F.2d 1473 (2d Cir. 1990).

Miserocchi & C., SpA v. Alfred C. Toepfer International, G.m.b.H.

Case No.:	85-7734
Court:	United States Court of Appeals for the Second Circuit
Panel:	Judge J. Edward Lumbard Judge James L. Oakes Judge George C. Pratt
Adversary:	Stephen P. Sheehan Wistow & Barylick 61 Weybosset Street Providence, Rhode Island (401) 272-9752
Date of Argument:	9/17/84
District Court Case Name:	Miserocchi & C., SpA v. Alfred C. Toepfer International, G.m.b.H.
Case No.:	84 Civ. 6112
Court:	United States District Court, Southern District of New York
Judge:	Judge Kevin Thomas Duffy
Co-Counsel:	David A. Botwinik, Esq. (deceased) Pavia & Harcourt 600 Madison Avenue

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New York, New York 10022
(212) 980-3500

Adversary: Stephen P. Sheehan
Wistow & Barylick
61 Weybosset Street
Providence, Rhode Island
(401) 272-9752

Date of Argument: 9/5/84 (argued by David Botwinik of Pavia & Harcourt)

Case Description: This action involved the bankruptcy of an Italian corporation, Miserocchi & C., SpA ("Miserocchi"), with affiliates in London and elsewhere. The London affiliate of Miserocchi breached a grain commodity trading contract with my then-client, Alfred C. Toepfer International, G.m.b.H. ("Toepfer"). Toepfer demanded arbitration of the dispute against both Miserocchi and its London affiliate under the terms of the grain commodity trading agreement between the parties and a guarantee signed by Miserocchi. Shortly before the arbitration hearing was to commence, Miserocchi moved to stay the arbitration against it, arguing that it was not a party to the arbitration agreement. Although my partner, David A. Botwinik, argued the motion before the district court, I primarily drafted Toepfer's responsive papers to the motion to stay arbitration and the cross-motion to compel arbitration. Toepfer argued that Miserocchi was bound to arbitrate both as an alter ego of its London affiliate and under the terms of its guarantee. After the district court ruled in Toepfer's favor, Miserocchi filed a notice of appeal and sought an expedited stay of the district court's order denying the stay of arbitration and compelling arbitration. I argued the motion to stay. At the conclusion of the argument on the motion, the Second Circuit not only denied the motion for a stay but also dismissed the appeal. I participated extensively as co-counsel in the arbitration that followed and subsequently appeared in the post-confirmation proceedings resulting from the arbitration award rendered in favor of Toepfer. The matter settled before the hearing on appeal of the confirmation order.

17. **Litigation**: Describe the ten (10) most significant litigated matters which you personally handled, whether or not you were the attorney of record. Give the citations, if the cases were reported, and the docket number and date if unreported. Give a capsule summary of the substance of each case. Identify the party or parties whom you represented; describe in detail the nature of your participation in the litigation and the final disposition of the case. Also state as to each case:

    a. the date of representation;

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b. the name of the court and the name of the judge or judges before whom the case was litigated; and

c. the individual name, addresses, and telephone numbers of co-counsel and of principal counsel for each of the other parties.

(1) *Fratelli Lozza (USA) Inc. v. Lozza (USA) & Lozza SpA*

Court: United States District Court, Southern District of New York

Index No.: 90 Civ. 4170

Judge: Judge Fred I. Parker

Date of Trial: March 16, 1992

Co-Counsel: Allison C. Collard, Esq.
Attorney for co-defendant Lozza (USA)
Collard & Roe, P.C.
1077 Northern Blvd.
Roslyn, New York 11576
(516) 365-9802

Adversaries: Charles E. Temko
Of Counsel
Graham, Campaign P.C.
36 West 44th Street
New York, New York 10036
(212) 354-5650

Case Description: I represented the defendant Lozza SpA in this trademark infringement abandonment, unfair competition, breach of contract, and rescission action. The plaintiff, a corporation owned and operated by a former shareholder of the defendant corporation, claimed the defendant had breached an agreement with the plaintiff for the trademark use of "Lozza" in the United States, had abandoned use of its marks in the United States, and had infringed certain of the plaintiff's trademarks. I conducted the trial for the lead defendant, and secured a dismissal of all of the plaintiff's claims. The Court also issued an injunction against the plaintiff's use of the defendants' marks, and of false and misleading terms in its advertising. Findings of Fact, Conclusions of Law and Order reported at 789 F. Supp. 625 (S.D.N.Y. 1992).

(2) *Ferrari of Sacramento, Inc. v. Ferrari North America*

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Agency:	State of California New Motor Vehicle Board (Appeared pro hac vice)
Protest No.:	PR-973-88
Administrative Law Judges:	Marilyn Wong Robert S. Kendell
Dates of Hearings:	10/16/90, 10/17/90, 10/31/90, 11/1/90, and 11/2/90
Co-Counsel:	Nicholas Browning, III, Esq. Beck & Browning 3828 W. Carson Street, Suite 100 Torrance, California 90503 (310) 316-4332
Adversaries:	Jay-Allen Eisen Jay-Allen Eisen Law Corporation 2431 Capitol Avenue Sacramento, California 95816 (916) 441-5810 Donald M. Licker, Esq. 2443 Fair Oaks Boulevard Room 340 Sacramento, California 95825 (916) 924-6600 (last known address and telephone number)
Case Description:	In or about 1988, Ferrari North America ("Ferrari") terminated the plaintiff dealer. Thereafter, the dealer filed a timely protest of the termination with the California New Motor Vehicle Board (the "Board"). At a prehearing settlement conference, Ferrari and the dealer entered into a Stipulated Settlement that permitted Ferrari to terminate the dealer, without a hearing, if the dealer failed timely to cure specified obligations under its franchise agreement with Ferrari. When the dealer breached the terms of the Stipulated Settlement, Ferrari terminated the dealer, with the Board's approval and without a hearing. The dealer then secured a writ of mandate from a California court directing the Board to hold an administrative hearing. I had primary responsibility for representing Ferrari at the administrative hearing. The Board determined that 1) the dealer had violated the terms of the Stipulated Settlement, 2) the violations constituted good cause for

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Ferrari's termination of the dealer under California's Automobile Franchise Law, and 3) the plaintiff's loss of its franchise was not an illegal forfeiture under California law.

While the hearing before the Board proceeded after issuance of the mandate, Ferrari also appealed the judgment on the writ, which judgment was reversed on appeal in an unpublished opinion. The California Court of Appeals, Third Appellate District, determined that enforcing the Stipulated Settlement and terminating the dealer, without a hearing, did not violate due process.

Although not listed as counsel for appellant's briefs, I contributed significantly to the drafting of the briefs. The appellate case was captioned Ferrari of Sacraments, Inc., Respondent v. New Motor Vehicles Board and San Jennings as Secretary, Appellants, and Ferrari North America, Real Party in Interest and Appellant; No. C008840 in the Court of Appeal of the State of California in and for the 3rd Appellate District; Sacramento Superior Court, Case No. 360734.

(3) *In re: Van Ness Auto Plaza, Inc., a California Corporation, d/b/a/ Auto Plaza Lincoln Mercury, Auto Plaza Porsche and Auto Plaza Ferrari, Debtors*

Court:	United States Bankruptcy Court, Northern District of California (Appeared pro hac vice)
Case No.:	3-89-03450-TC
Judge:	Judge Thomas E. Carlson
Dates of Hearing:	1/22/90 and 3/19/90
Co-Counsel:	Nicholas Browning, III, Esq. Beck & Browning 3828 W. Carson Street, Suite 100 Torrance, California 90503 (310) 316-4332
Adversaries:	Henry Cohen, Esq. Cohen and Jacobson 900 Veterans Boulevard, Suite 600 Redwood City, Ca 94063 (650) 261-6280 William Kelly, Esq. (retired) Address Unknown Home Tel. No. (415) 641-1544

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Case Description: I represented Ferrari North America ("Ferrari"), a franchisor of a bankrupt dealer, in hearings related to Ferrari's opposition to the rejection of customer contracts, assumption of the dealer's franchise agreement, and confirmation of the proposed sale of the dealer's franchise. At the time, Ferrari was introducing a limited production and valuable new car model to the marketplace. A rejection by the dealer of contracts for that model would have frustrated the expectations of customers and subjected Ferrari to potential multiple claims. After a number of hearings, the Bankruptcy Court ruled that the dealer could not reject the customer contracts, although financially burdensome, and then assume the franchise agreement with Ferrari. The case also involved alleged claims by the dealer and customers that Ferrari had violated the California automobile franchise, antitrust, and securities laws. The case settled with the sale of the dealership and resolution of claims among the bankrupt dealer, the new franchise buyer, Ferrari, and customers.

(4) *Fendi S.A.S. di Paola Fendi e Sorelle v. Burlington Coat Factory Warehouse Corp., et al.*

Case No.: 86 Civ. 0671

Court: United States District Court, Southern District of New York

Judge: Judge Leonard B. Sand

Co-Counsel: Frances B. Bernstein, Esq.
(Deceased)
Pavia & Harcourt
600 Madison Avenue
New York, New York 10022
(212) 980-3500

Adversaries: Stacy J. Haigney, Esq.
Gen. Attorney Burlington Coat Factory Corp.
263 West 38th Street
New York, New York
(no telephone number listed)

Dennis C. Kreiger, Esq.
Attorneys for Firestone Mills, Inc. and Leo Freund
Katsky Korins
605 Third Avenue, 16th Floor
New York, New York 10158
(212) 953-6000

Dates of Trial: 5/18/87 to 5/19/87

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Case Description: Combined Case Description in 5, below.

(5) *Fendi S.A.S. di Paola Fendi e Sorelle v. Cosmetic World, Ltd., Loradan Imports, Inc., Linea Prima, Inc. A/k/a/ Lina Garbo Shoes, Daniel Bensoul, Michael Bensoul a/k/a Nathan Bendel, Paola Vincelli and Mario Vincelli*

Case No.: 85 Civ. 9666

Court: United States District Court, Southern District of New York

Judge: Judge Leonard B. Sand

Magistrate Judge Joel J. Tyler

Co-Counsel: Frances B. Bernstein, Esq.
(Deceased)
Pavia & Harcourt
600 Madison Avenue
New York, New York 10022
(212) 980-3500

Adversary: Stanley Yaker, Esq.
Attorney for Paolo Vincelli and Mario Vincelli
Former Address:
114 East 32nd Street
Suite 1104
New York, New York 10016
(212) 983-7241
(Telephone not in service. I have been unable to locate Mr. Yaker)
(last known address and telephone number)

Date of Inquest Hearing: 1/6/88

Case Descriptions: From 1985, my former firm represented Fendi S.A.S. di Paola Fendi e Sorelle ("Fendi") in Fendi's national anticounterfeiting work. Frances B. Bernstein, a partner at Pavia & Harcourt (now deceased), and I created Fendi's anticounterfeiting program. From 1988 until the time I left the firm for the bench in 1992, I was the partner in charge of that program. I handled almost all discovery work and substantive court appearances in cases involving Fendi. This work implicated a broad range of trademark issues including, but not limited to trademark and trade dress infringement, false designation of origin, and unfair competition claims.

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Approximately once every two months from 1989 to 1992, I, for Fendi, applied for provisional injunctive relief in district court to seize counterfeit goods from street vendors or retail stores. The applications required extensive submission of evidence documenting Fendi's trademark rights, its protection of its marks, the nature of the investigation against the vendors, and Fendi's right to ex parte injunctive relief. Generally, the street vendors defaulted but others appeared and settled pro se. Two of these cases filed in the Southern District of New York were captioned *Jane Doe v. John Doe and Various ABC Companies*, 89 Civ. 3122m the Hon. Thomas P. Griesa presiding (Tel. No. (212) 805-0210), and *Fendi S.a.s. di Paola Fendi e Sorelle v. Dapper Dan's Boutique*, 89 Civ. 0477, the Hon. Miriam G. Cedarbaum presiding (Tel No. (2312) 805-0198).

The above-captioned cases involved a trial and a damages hearing on Fendi's trademark claims against the defendants. In the first, the *Burlington* case, Fendi alleged that defendants knowingly trafficked in counterfeit goods and Fendi sought triple profits from the defendants and punitive damages. After extensive discovery, submission of a pre-trial order and memorandum, and Fendi's presentation of its expert at trial, the case settled. I was sole counsel present at trial. In the *Cosmetic World* case, the Court granted Fendi's summary judgment motion on liability and referred the matter to a magistrate judge for an inquest on damages. *See* 642 F. Supp. 1143 (S.D.N.Y. 1986). I conducted the contested hearing on damages before the magistrate judge who recommended an award in Fendi's favor.

(6) *Republic of the Philippines v. New York Land Co., et al. (The "Philippines Case") and Security Pacific Mortgage and Real Estate Service Inc. v. Canadian Land Company, et al. (The "Security Pacific Case").*

Case Nos.: 90-7322 and 90-7398

Court: United States Court of Appeals for the Second Circuit

Panel: Judge Thomas J. Meskill

Judge Lawrence J. Pierce

Judge George C. Pratt

Co-Counsel: David A Botwinik, Esq. (Deceased)
Pavia & Harcourt
600 Madison Avenue
New York, New York 10022
(212) 980-3500

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David Glasser, Esq.
Levin & Glasser, P.C.
420 Lexington Avenue, Suite 805
New York, New York 10170
(212) 867-3636

Roy L. Reardon, Esq. ((212) 455-2840)
David E. Massengill, Esq. ((212) 455-3555)
Simpson Thacher & Bartlett
425 Lexington Avenue
New York, New York 10017

Adversaries: Jeffrey J. Greenbaum, Esq.
James M. Hirschhorn, Esq.
Sills Cummis & Gross, P.C.
Attorneys for the Republic of the Philippines
Legal Center
1 Riverfront Plaza
Newark, New Jersey 07102
(201) 643-7000

Date of Argument: 6/15/90 (Argued by Roy L. Reardon, Esq. of Simpson, Thacher & Bartlett)

AND

District Court Case Name: *Republic of the Philippines v.New York Land Co., et al.* (the "Philippines Case") and *Security Pacific Mortgage and Real Estate Service Inc. v. Canadian Land Company, et al.* (the "Security Pacific Case").

Case Nos.: The Philippines Case: 86 Civ. 2294
The Security Pacific Case: 87 Civ. 3629

Court: United States District Court, Southern District of New York

Judge: Judge Pierre N. Leval

Co-Counsel: David A. Botwinik, Esq. (deceased)

David Glasser, Esq.
Levin & Glasser, P.C.
420 Lexington Avenue, Suite 805
New York, New York 10170
(212) 867-3636

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Participating Adversaries Opposing Motion: Jeffrey J. Greenbaum, Esq.
James M. Hirschhorn, Esq.
Sills Cummis & Gross, P.C.
Attorneys for the Republic of the Philippines
Legal Center
1 Riverfront Plaza
Newark, New Jersey 07102
(201) 643-7000

Michael Stanton, Esq.
Weil, Gotshal & Manges
Attorney for Security Pacific
767 Fifth Avenue
New York, New York 10153
(212) 310-8000
(last know address and telephone number)

Date of Argument: 2/12/90

Case Description: My former firm, Pavia & Harcourt, represented Bulgari Corporation of America ("Bulgari"), an international retailer of fine jewelry, who was a tenant in the Crown Building at 730 Fifth Avenue, New York, New York. The Crown Building was the subject of a foreclosure sale in the Security Pacific Action, and its beneficial ownership was in dispute in the Philippines Action. Bulgari was not a party to these actions. The district court denied Bulgari's request, by way of Order to Show Cause, to approve a rental amount it had reached with the manager of the Crown Building. I primarily drafted the papers presented to the district court and argued the motion. Bulgari's motion attempted to demonstrate that no competent evidence existed to dispute Bulgari's proof that the rental amount agreed upon was at or above fair market value and benefited the Crown Building and its claimants. Bulgari appealed the district court's denial of its approval of the rent agreement on the grounds that the denial was effectively an injunction against Bulgari's exercise of its contractual lease rights to have its rent fixed by agreement during the term of the lease, and that the district court improperly granted the injunction without a hearing. I did not argue the appeal but participated extensively in the drafting of appellant's brief and reply. The district court's order was affirmed on appeal, without a published opinion. 909 F.2d 1473 (2d Cir. 1990).

(7) *Miserocchi & C., SpA v. Alfred C. Toepfer International, G.m.b.H.*

Case No.: 85-7734

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Court:	United States Court of Appeals for the Second Circuit
Panel:	Judge J. Edward Lumbard Judge James L. Oakes Judge George C. Pratt
Adversary:	Stephen P. Sheehan Wistow & Barylick 61 Weybosset Street Providence, Rhode Island (401) 272-9752
Date of Argument:	9/17/84
District Court Case Name:	Miserocchi & C., SpA v. Alfred C. Toepfer International, G.m.b.H.
Case No.:	84 Civ. 6112
Court:	United States District Court, Southern District of New York
Judge:	Judge Kevin Thomas Duffy
Co-Counsel:	David A. Botwinik, Esq. (deceased) Pavia & Harcourt 600 Madison Avenue New York, New York 10022 (212) 980-3500
Adversary:	Stephen P. Sheehan Wistow & Barylick 61 Weybosset Street Providence, Rhode Island (401) 831-2700
Date of Argument:	9/5/84 (argued by David Botwinik of Pavia & Harcourt)
Case Description:	This action involved the bankruptcy of an Italian corporation, Miserocchi & C., SpA ("Miserocchi"), with affiliates in London and elsewhere. The London affiliate of Miserocchi breached a grain commodity trading contract with my then-client, Alfred C. Toepfer International, G.m.b.H. ("Toepfer"). Toepfer demanded arbitration of the dispute against both

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Miserocchi and its London affiliate under the terms of the grain commodity trading agreement between the parties and a guarantee signed by Miserocchi. Shortly before the arbitration hearing was to commence, Miserocchi moved to stay the arbitration against it, arguing that it was not a party to the arbitration agreement. Although my partner, David A. Botwinik, argued the motion before the district court, I primarily drafted Toepfer's responsive papers to the motion to stay arbitration and the cross-motion to compel arbitration. Toepfer argued that Miserocchi was bound to arbitrate both as an alter ego of its London affiliate and under the terms of its guarantee. After the district court ruled in Toepfer's favor, Miserocchi filed a notice of appeal and sought an expedited stay of the district court's Order denying the stay of arbitration and compelling arbitration. I argued the motion to stay. At the conclusion of the argument on the motion, the Second Circuit not only denied the motion for a stay but also dismissed the appeal. I participated extensively as co-counsel in the arbitration that followed and subsequently appeared in the post-confirmation proceedings resulting from the arbitration award rendered in favor of Toepfer. The matter settled before the hearing on appeal of the confirmation order.

(8) *The People of the State of New York v. Clemente D'Alessio and Scott Hyman*

Indictment No.: 4581/82

Judge: Judge Thomas B. Galligan

Associate Counsel: Karen Greve Milton
Circuit Executive
Second Circuit Court of Appeals
U.S. Courthouse
40 Foley Square, Rm. 2904
New York New York 10007
(212) 857-8555

Adversaries: Steven Kimelman
Attorney for Scott Hyman
Arent Fox
1675 Broadway
New York, New York 10019
(212) 484-3938

James Bernard, Esq.
Attorney for Clemente D'Alessio
150 Broadway
New York, New York 10038

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(212) 233-0260
(last known address and telephone number)

Date of Trial: 2/2/83 to 3/2/83

Case Description: I was lead counsel in this action in which defendants were charged with selling videotapes depicting children engaged in pornographic activities. Defendant Scott Hyman dealt directly with the undercover agent and attempted to raise numerous defenses at trial based upon his alleged drug addiction. The proof against defendant Clemente D'Alessio was circumstantial and he raised a misidentification defense at trial. This action was the first child pornography case prosecuted in New York State after the U.S. Supreme Court upheld the constitutionality of New York's laws in *New York v. Ferber*, 458 U.S. 747 (1982). The defendants filed a plethora of motions before and during trial. The defendants' request for severance was denied, as were, after a hearing, the defendants' motions for the suppression of statements, evidence, and identification. Other issues addressed at trial included whether the trial court should or could, upon defendants' request, require the government to stipulate to the pornographic nature of the evidence, whether defendant Hyman could present expert testimony on the effects of drug addiction on mens rea, and whether defendant Hyman was entitled to jury charges on diminished capacity or intoxication. The jury convicted defendants after trial. The defendants received sentences, respectively, of 3 ½ to 7 years and 2 to 6 years. The convictions were affirmed on appeal. *People v. D'Alessio*, 62 N.Y.2d 619, 476 N.Y.S. 2d 1031 (Ct. App. 1984); *People v. Hyman*, 62 N.Y.2d 620, 476 N.Y.S.2d 1033 (Ct. App. 1984).

(9) *The People of the State of New York v. Richard Maddicks*

Indictment No.: 886/82

Court: Supreme Court of the State of New York, County of New York

Judge: Judge James B. Leff

Lead Counsel: Hugh H. Mo. Esq.
Law Offices of Hugh H. Mo
225 Broadway, Rm. 702
New York, New York 10022
(212) 385-1500

Adversary: Peter A. Furst, Esq.
Furst & Pendergrast

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1630 Union Street
San Francisco, California 94123
(415) 749-3200

Dates of Trial: Almost all of January 1983

Case Description: The defendant was dubbed the "Tarzan Murderer" by the local Harlem press because he committed burglaries by acrobatically jumping or climbing from roof tops or between buildings and entering otherwise inaccessible apartments. If the defendant found a person in the apartment, he shot them. I was co-counsel on the case, and prepared and argued the motion, before Justice Harold Rothwax, that resulted in the court consolidating the trial of four murders and seven attempted murders relating to eleven of the defendant's burglaries. The consolidation was unusual in that up to that point, most New York courts had limited consolidation to crimes in which an identical modus operandi warranted consolidation. I participated extensively in preparing and presenting expert and civilian witnesses at trial. The defendant was convicted after trial, and sentenced to 62 ½ years to life. The conviction was affirmed on appeal. *People v. Maddicks*, 70 N.Y.2d 752, 520 N.Y.S.2d 1028 (Ct. App. 1987).

(10) *The People of the State of New York v. Manny Morales a.k.a. Joey Hernandez, Joseph Pacheco, and Eduardo Pacheco*

Indictment No.: 4399/82

Judge: Judge Alfred H. Kleiman

Adversaries: Ira I. Van Leer (deceased)
(Associates present at portions of the trial: Valerie Van Leer-Greenberg and Howard Greenberg)
Van Leer and Greenberg
Attorneys for defendant Manny Morales a.k.a. Joey Hernandez
132 Nassau Street, Suite 523
New York, New York 10038
(212) 962-1596

Lawrence Rampulla, Esq.
Attorney for defendant Edwardo Pacheco
78 Martin Avenue
Staten Island, New York 10314
(718) 761-3333
(last known address and telephone number)

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Stephen Goldenberg, Esq.
233 Broadway #38
New York, New York 10279
(212) 346-0600
(last known address and telephone number)

Dates of Trial: March 25, 1983 to May 12, 1983

Case Description: This multiple-defendant case involved a Manhattan housing project shooting between rival family groups. I was sole counsel in this action on behalf of the government. Prior to trial, I conducted various hearings opposing defense motions to suppress statements and identifications. This lengthy trial involved witnesses with significant credibility issues. The jury convicted one of the three defendants who was sentenced to 3 to 6 years for Criminal Possession of a Weapon in the Third Degree. The conviction was affirmed on appeal. *People v. Pacheco*, 70 N.Y.2d 802, 522 N.Y.S.2d 120 (Ct. App. 1987).

18. **Legal Activities**: Describe the most significant legal activities you have pursued, including significant litigation which did not progress to trial or legal matters that did not involve litigation. Describe fully the nature of your participation in these activities. List any client(s) or organization(s) for whom you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organizations(s). (Note: As to any facts requested in this question, please omit any information protected by the attorney-client privilege.)

As an attorney at the firm of Pavia & Harcourt, I worked to establish a national anti-counterfeiting program for Fendi S.A.S. Paola Fendi e Sorelle, and also participated, on behalf of Fendi, in establishing a task force of prominent trademark owners to change New York State's anti-counterfeiting criminal statutes. I also supervised and participated in national dealer and customer warranty relations programs for Ferrari North America, Inc., a division of Fiat Auto USA, Inc.

19. **Teaching**: What courses have you taught? For each course, state the title, the institution at which you taught the course, the years in which you taught the course, compensation received, and describe briefly the subject matter of the course and the major topics taught. If you have a syllabus of each course, provide four (4) copies to the committee.

(a) *Trial and Appellate Advocacy*, New York University Law School (1998-2007) (co-taught with Adjunct Professor John Siffert).
The Trial and Appellate Advocacy course takes eight third year law school students through the critical stages of a case from inception through appeal. The eight students are

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teamed in four groups of two, with each team rotating as prosecutor/defense counsel, appellant/appellee, and trial/appellate judge at the various stages of the proceeding. The class uses two fact patterns that are followed from trial through appeal. Special emphasis is placed on ethical considerations, preserving issues for appeal, and trial and appellate strategy. Copies of syllabi for academic years 2001, 2003, 2004, and 2007 are attached. My compensation was as follows: 1998: $10,000; 1999: $10,000; 2000: $12,000; 2001: $10,000; 2002: $13,500; 2003: $14,600; 2004: $13,205; 2005: $14,315; 2006: $14,780; 2007: $14,780.

(b) *Appellate Advocacy*, Columbia University (1999-2009) (co-taught during different periods with Professor Gerard Lynch and Asst. Dean and Lecturer-in-Law Ellen P. Chapnick, and with Lecturer-in-Law Ilene Strauss)
The class combines an externship in the chambers of a Second Circuit Judge with approximately eight class sessions. I lead the class sessions and also supervise three externs. Work with the Judge involves legal research, analysis, and writing regarding cases pending before the Second Circuit. The class sessions are taught in a variety of styles. Several classes involve lectures by me on topics such as standards of review, federal jurisdiction, and appellate advocacy. Other classes involve distinguished guest speakers who discuss various aspects of appellate practice. In other sessions, students discuss their externship experiences. Finally, there is a moot court exercise in which students argue before Second Circuit Judges. Copies of the course syllabi for 1999-2000 are attached. I did not distribute a formal syllabus in later years. A document listing the lecture schedule and reading assignments for a representative semester (spring 2009) is attached. My compensation was $10,000 per annum from 2000-2007, and was $25,830 for 2008.

(c) *Byrne Judicial Clerkship Institute*, Pepperdine University (2006-09)
The purpose of the Byrne Judicial Clerkship Institute is to improve the effectiveness and efficiency of judicial law clerks. In consultation with judges, the Institute identifies subjects that new clerks most need to learn, and offers lectures on these topics. I am one of several judges who participates in the Institute. My lecture was entitled, "Standards of Review." The lecture discusses the traditional categories by which decisions of trial judges are reviewed, and also addresses recent limits on appellate review by the Supreme Court and Congress. I was not compensated, but did receive reimbursement for travel, lodging, and meals.

(d) *Federal Appellate Procedure and Advocacy*, University of Puerto Rico (2007)
I taught a five-class seminar at the University of Puerto Rico. My lectures addressed the differences between the work of trial and appellate judges, strategies for effective appellate advocacy, appellate jurisdiction, and standards of appellate review. The syllabus for this course is attached to the questionnaire. I was not compensated, but did receive reimbursement for travel, lodging, and meals.

(e) *Guest Lectures*, University of Indiana Law School (2003)
I gave three lectures at the University of Indiana Law School. My lectures addressed standards of appellate review, criminal law issues that have arisen as a result of the events

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of September 11, and the duty of lawyers to provide pro bono services. I was not compensated, but did receive reimbursement for travel, lodging, and meals.

(f) *Jurist in Residence*, Syracuse University (2000)
I served as a Jurist in Residence at Syracuse University, where I gave a lecture entitled "Pro Bono Work – A Professional and Moral Duty." The lecture discussed the definition of pro bono work, lawyers' professional responsibility to undertake such work, reports that lawyers have been spending less time fulfilling their obligations, and the response in the profession to increase pro bono work. I was not compensated, but did receive reimbursement for incidentals.

20. **Deferred Income/ Future Benefits**: List the sources, amounts, and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts, and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, former employers, clients, or customers. Describe the arrangements you have made to be compensated in the future for any financial or business interest.

None.

21. **Outside Commitments During Court Service**: Do you have any plans, commitments, or agreements to pursue outside employment, with or without compensation, during your service with the court? If so, explain.

None.

22. **Sources of Income**: List sources and amounts of all income received during the calendar year preceding your nomination and for the current calendar year, including all salaries, fees, dividends, interest, gifts, rents, royalties, licensing fees, honoraria, and other items exceeding $500 or more (if you prefer to do so, copies of the financial disclosure report, required by the Ethics in Government Act of 1978, may be substituted here).

See attached financial disclosure report.

23. **Statement of Net Worth**: Please complete the attached financial net worth statement in detail (add schedules as called for).

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FINANCIAL STATEMENT
NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks		31	985	Notes payable to banks-secured			
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities-add schedule				Notes payable to relatives			
Unlisted securities--add schedule				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due		5	752
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable-add schedule		381	775
Real estate owned-add schedule	1	017	500	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		108	918	Credit card bills		15	823
Cash value-life insurance				Dentist bill (estimate)		15	000
Other assets itemize:							
				Total liabilities		418	350
				Net Worth		740	053
Total Assets	1	158	403	Total liabilities and net worth	1	158	403
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	NO		
On leases or contracts				Are you defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

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FINANCIAL STATEMENT

NET WORTH SCHEDULES

Real Estate Owned	
Personal residence	$ 997,500
1/3rd interest in Condominium	20,000
Total Real Estate Owned	1,017,500
Real Estate Mortgages Payable	
Personal residence	$ 381,775

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24. **Potential Conflicts of Interest**:

a. Identify the family members or other persons, parties, categories of litigation, and financial arrangements that are likely to present potential conflicts of interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to arise.

Actual or apparent conflicts of interest could arise from matters involving my longtime former client Fendi; attorney John Siffert or his firm, Lankler Siffert & Wohl LLP, with whom I taught a class at New York University Law School for a number of years; and Princeton University, for which I currently serve as a Trustee. In addition, actual or apparent conflicts could arise from matters involving close personal friends, some of whom are attorneys, or recently-departed law clerks. Finally, a conflict of interest would arise from any appeal arising from a decision issued by a panel of the Second Circuit that included me as a member.

In all of the above-described cases, I expect that I would address the actual or apparent conflict of interest by recusing myself from the case.

b. Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

If confirmed, I would seek to follow the letter and spirit of the Code of Conduct for United States Judges, even though it is not binding upon justices of the Supreme Court of the United States, the Ethics Reform Act of 1989, 28 U.S.C. § 455, and any other relevant guidelines. In particular, I would recuse myself from cases of the types described above that might give rise to an actual or apparent conflict of interest.

25. **Pro Bono Work**: An ethical consideration under Canon 2 of the American Bar Association's Code of Professional Responsibility calls for "every lawyer, regardless of professional prominence or professional workload, to find some time to participate in serving the disadvantaged." Describe what you have done to fulfill these responsibilities, listing specific instances and the amount of time devoted to each.

The Code of Judicial Conduct limits my ability to provide legal service to the disadvantaged. While a judge, I nevertheless contribute my time as permitted by law to bar and law school activities. From 1994 to 1997, I served as an honorary member of the Public Service Committee of the Federal Bar Council. From 1994 to 1996, and again from 1998 to 2001, I also served on the selection committee for the Root-Tilden-Snow (now Root-Tilden-Kern) Scholarship granted to selected New York University Law students interested in public service. In 2000 and 2001, I similarly sat on the Kirkland & Ellis New York Public Service Fellowship selection panel, a fellowship granted to a Columbia Law School graduate to support a year's employment in public service. Further, I frequently participate in moot court panels and in trial advocacy courses at local law schools and for the Office of the District Attorney of New York County; I also speak regularly at bar association functions on issues such as judicial clerkships for

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minority students and women in the law. Once a year I host a workshop for inner city school children, age 16 to 21, with the Development School for Youth. I first discuss opportunities in the practice of law, and then the students conduct a mock trial of Goldilocks, who is charged with third degree burglary with intent to commit larceny. Finally, I have lectured about trial advocacy skills at the Office of the Attorney General for the State of New York. Specific date and location information related to these activities can be found in the response attached to Question 12(d). It is difficult to quantify the time I spend on these activities because I participate in functions as my schedule permits. I estimate that I attend numerous community service functions each month.

Before my appointment as a judge, all of the non-profit organizations with which I had been affiliated, listed fully in response to Question 9, served the disadvantaged either directly or through projects I had participated in developing. The Puerto Rican Legal Defense and Education Fund, for example promotes, through legal and educational activities, the civil and human rights of disadvantaged Hispanics. I had served, at various times, as the First Vice President of the Board of Directors of the Fund and as Chairperson of its Litigation and Education Committees.

The State of New York Mortgage Agency ("SONYMA") structures affordable housing programs for residents of the State of New York. During my five years of service on its Board of Directors, SONYMA, among many other projects, implemented special mortgage programs for low-income families to purchase homes.

I was also a member, in 1988, of the Selection Committee for the Stanley D. Heckman Educational Trust which granted college scholarships to minorities and first generation immigrants. I had, moreover, served, in 1990-1991, as a member of New York State's Advisory Panel on Inter-Group Relations, which was convened by Governor Mario Cuomo and focused on ways to address problems of bias violence through economic opportunity and development.

Finally, I had been a member of the New York City Campaign Finance Board from its inception in 1988 until 1992. This Board distributes public funds to candidates for certain elective positions in New York City when such candidates agree to limit the amount of the contributions they will accept, and expenditures they will make, during campaigns.

The time I devoted to my service to these assorted organizations varied through the years but it was never fewer than two hours a week and had been over eight hours a week during certain periods. I devoted an average of approximately six hours a week cumulatively to the various non-profit organizations of which I was a member.

26. **Selection Process**:

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a. Describe your experience in the entire judicial selection process, from beginning to end (including the circumstances which led to your nomination and the interviews in which you participated). List all interviews or communications you had with anyone in the Executive Office of the President, Justice Department, or outside organizations or individuals at the behest of anyone in the Executive Office of the President or Justice Department regarding this nomination, the dates of such interviews or communications, and all persons present or participating in such interviews or communications. Do not include any contacts with Federal Bureau of Investigation personnel concerning your nomination.

I was contacted by Gregory Craig, White House Counsel, on Monday, April 27, 2009, with respect to the possibility of a future Supreme Court vacancy. Between that date and the present, I have had frequent telephone conversations with Cassandra Butts, Deputy White House Counsel, including near daily phone calls after Justice Souter on May 1, 2009 announced his intention to resign at the end of the current Supreme Court term. On May 14, 2009, I was interviewed in person at my office by Leslie Kiernan, an attorney at Zuckerman Spaeder LLP. I was interviewed by telephone on Saturday, May 16 by Gregory Craig, Cynthia Hogan, Counsel to the Vice President, Ron Klain, Chief of Staff to the Vice President, David Axelrod, Senior Advisor to the President, Daniel Pfeiffer, White House Deputy Communications Director and Cassandra Butts. I was interviewed on Thursday, May 21, 2009 by members of the Administration including Gregory Craig, Cassandra Butts, Associate Counsel to the President Susan Davies, Chief of Staff Rahm Emanuel, David Axelrod, Ronald Klain, and Cynthia Hogan. Finally, I was interviewed by the President on May 21, 2009, and by the Vice President by telephone on Sunday, May 24, 2009. I have also had numerous phone conversations with different groupings of the individuals listed above. Other individuals have at times participated in these conversations, including Trevor Morrison, Associate Counsel to the President, Alison Nathan, Associate Counsel to the President, and Diana Beinart, Tax Counsel.

b. Has anyone involved in the process of selecting you for this nomination (including, but not limited to anyone in the Executive Office of the President, the Justice Department, or the Senate and its staff) ever discussed with you any currently pending or specific case, legal issue, or question in a manner that could reasonably be interpreted as seeking any express or implied assurances concerning your position on such case, issue, or question? If so, explain fully. Identify each communication you had prior to the announcement of your nomination with anyone in the Executive Office of the President, the Justice Department, or the Senate or its staff referring or relating to your views on any case, issue, or subject that could come before the Supreme Court of the United States, state who was present or participated in such communication, and describe briefly what transpired.

No.

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c. Did you make any representations to any individuals or interest groups as to how you might rule as a Justice, if confirmed? If you know of any such representations made by the White House or individuals acting on behalf of the White House, please describe them, and if any materials memorializing those communications are available to you, please provide four (4) copies.

No.

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CONTINUATION OF THE NOMINATION OF HON. SONIA SOTOMAYOR, TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

WEDNESDAY, JULY 15, 2009

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 9:31 a.m., in room SH–216, Hart Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Kohl, Feinstein, Feingold, Schumer, Durbin, Cardin, Whitehouse, Klobuchar, Kaufman, Specter, Franken, Sessions, Hatch, Grassley, Kyl, Graham, Cornyn, and Coburn.

Chairman LEAHY. Good morning, everyone. Judge, it is good to see you back, and your family.

Judge Sotomayor, yesterday you answered questions from 11 Senators. Frankly, I feel you demonstrated your commitment to the fair and impartial application of law. You certainly demonstrated your composure and patience and your extensive legal knowledge.

Today we will have questioning from the remaining eight members of the Committee, and then just to set the schedule, once we finish that questioning, we will arrange a time to go into the traditional—something that we do every time for the Supreme Court nominee—closed-door session, which is usually not very lengthy, and then go back to others. I have talked with Senator Sessions. We will then go to a second round of questions of no more than 20 minutes each. I have talked with a number of Senators who have told me they will not use anywhere near that 20 minutes, although every Senator has the right to do it. Then I would hope we might be able to wrap it up.

But we are going to go to Senator Cornyn, himself a former member of the Texas Supreme Court and former Attorney General. And, Senator Cornyn, it is yours.

Senator CORNYN. Thank you, Mr. Chairman. Good morning, Judge.

STATEMENT OF HON. SONIA SOTOMAYOR, TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Judge SOTOMAYOR. Good morning, Senator. It's good to see you again.

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Senator CORNYN. Good to see you. I recall when we met in my office, you told me how much you enjoy the back-and-forth that lawyers and judges do, and I appreciate the good humor and attitude that you brought to this. And I very much appreciate your willingness to serve on the highest Court in the land. I am afraid that sometimes in the past these hearings have gotten so downright nasty and contentious that some people are dissuaded from willingness to serve, which I think is a great tragedy. And, of course, some have been filibustered. They have been denied the opportunity to have an up-or-down vote on the Senate floor.

I told you when we visited in my office, that is not going to happen to you, if I have anything to say about it. You will get that up-or-down vote on the Senate floor.

But I want to ask your assistance this morning to try to help us reconcile two pictures that I think have emerged during the course of this hearing. One is, of course, as Senator Schumer and others have talked about, your lengthy tenure on the Federal bench as a trial judge and court of appeals judge. And then there is the other picture that has emerged from your speeches and your other writings, and I need your help trying to reconcile those two pictures, because I think a lot of people have wondered about that.

The reason why it is even more important that we understand how you reconcile some of your other writings with your judicial experience and tenure is the fact that, of course, now you will not be a lower-court judge subject to the appeals to the Supreme Court. You will be free as a United States Supreme Court Justice to basically do what you want with no court reviewing those decisions, harkening back to the quote we started with during my opening statement about the Supreme Court being infallible only because it is final.

So I want to just start with the comments that you made about the wise Latina speech that, by my count, you made at least five times between 1994 and 2003. You indicated that this was really—and please correct me if I am wrong, I am trying to quote your words—"a failed rhetorical flourish that fell flat." I believe at another time you said they were "words that don't make sense." And another time I believe you said it was "a bad idea."

Am I accurately characterizing your thoughts about the use of that phrase that has been talked about so much?

Judge SOTOMAYOR. Yes, generally, but the point I was making was that Justice O'Connor's words, the ones that I was using as a platform to make my point about the value of experience generally in the legal system, was that her words literally and mine literally made no sense, at least not in the context of what judges do or—what judges do.

I didn't and don't believe that Justice O'Connor intended to suggest that when two judges disagree, one of them has to be unwise. And if you read her literal words that wise old men and wise old women would come to the same decisions in cases, that's what the words would mean. But that's clearly not what she meant. And if you listen to my words, it would have the same suggestion, that only Latinos would come to wiser decisions. But that wouldn't make sense in the context of my speech either, because I pointed out in the speech that eight, nine white men had decided *Brown*

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v. *Board of Education*. And I noted in a separate paragraph of the speech that no one person speaks in the voice of any group.

So my rhetorical flourish, just like hers, can't be read literally. It had a different meaning in the context of the entire speech.

Senator CORNYN. But, Judge, she said that a wise man and a wise woman would reach the same conclusion. You said that a wise Latina woman would reach a better conclusion than a male counterpart.

What I am confused about is, are you standing by that statement? Or are you saying that it was a bad idea and are you disavowing that statement?

Judge SOTOMAYOR. It is clear from the attention that my words have gotten and the manner in which it has been understood by some people that my words failed. They didn't work. The message that the entire speech attempted to deliver, however, remains the message that I think Justice O'Connor meant, the message that prior nominees including Justice Alito meant when he said that his Italian ancestry he considers when he's hearing discrimination cases. I don't think he meant, I don't think Justice O'Connor meant that personal experiences compel results in any way. I think life experiences generally, whether it's that I'm a Latina or was a State prosecutor or have been a commercial litigator or been a trial judge and an appellate judge, that the mixture of all of those things, the amalgam of them, helped me to listen and understand. But all of us understand, because that's the kind of judges we have proven ourselves to be, we rely on the law to command the results in the case.

So when one talks about life experiences and even in the context of my speech, my message was different than I understand my words have been understood by some.

Senator CORNYN. So do you stand by your words of yesterday when you said it was "a failed rhetorical flourish that fell flat," that they are "words that don't make sense," and that they are "a bad idea"?

Judge SOTOMAYOR. I stand by the words. It fell flat. And I understand that some people have understood them in a way that I never intended and I would hope that in the context of the speech that they would be understood.

Senator CORNYN. You spoke about the law students to whom these comments were frequently directed and your desire to inspire them. If, in fact, the message that they heard was that the quality of justice depends on the sex, race, or ethnicity of the judge, is that an understanding that you would regret?

Judge SOTOMAYOR. I would regret that because for me the work I do with students—and it's just not in the context of those six speeches. As you know, I give dozens more speeches to students all the time, and to lawyers of all backgrounds, and I give—and have spoken to community groups of all types. And what I do in each of those situations is to encourage both students and, as I did when I spoke to new immigrants that I was admitting as students, to try to encourage them to participate on all levels of our society. I tell people that that's one of the great things about America, that we can do so many different things and participate so fully in all of the opportunities America presents. And so the message that I de-

liver repeatedly as the context of all of my speeches is: I have made it. So can you. Work hard at it. Pay attention to what you're doing and participate.

Senator CORNYN. Let me ask about another speech you gave in 1996 that was published in the Suffolk University Law Review where you wrote what appears to be an endorsement of the idea that judges should change the law. You wrote, "Change, sometimes radical change, can and does occur in the legal system that serves a society whose social policy itself changes." You noted with apparent approval that, "A given judge or judges may develop a novel approach to a specific set of facts or legal framework that pushes the law in a new direction."

Can you explain what you meant by those words?

Judge SOTOMAYOR. The title of that speech was "Returning Majesty to the Law." As I hope I communicated in my opening remarks, I'm passionate about the practice of law and judging, passionate in the sense of respecting the rule of law so much, the speech was given in the context of talking to young lawyers and saying, "Don't participate in the cynicism that people express about our legal system." I——

Senator CORNYN. What kind of—excuse me. I am sorry. I didn't mean to interrupt you.

Judge SOTOMAYOR. And I was encouraging them not to fall into the trap of calling decisions that the public disagrees with, as they sometimes do, "activism" or using other labels; but to try to be more engaged in explaining the law and the process of law to the public. And in the context of the words that you quoted to me, I pointed out to them explicitly about evolving social changes, that what I was referring to is Congress is passing new laws all the time, and so whatever was viewed as settled law previously will often get changed because Congress has changed something.

I also spoke about the fact that society evolves in terms of technology and other developments, and so the law is being applied to a new set of facts.

In terms of talking about different approaches in law, I was talking about the fact that there are some cases that are viewed as radical, and I think I mentioned just one case, *Brown* v. *Board of Education*, and explaining and encouraging them to explain that process, too. And there are new directions in the law in terms of the Court. The Court, the Supreme Court, is often looking at its precedents and considering whether in certain circumstances—because precedent is owed deference for very important reasons. But the Court takes a new direction, and those new directions rarely, if ever, come at the initiation of the Court. They come because lawyers are encouraging the Court to look at a situation in a new way, to consider it in a different way.

What I was telling those young lawyers is, "Don't play into people's skepticism about the law. Look to explain to them the process."

I also, when I was talking about returning majesty to the law, I spoke to them about what judges can do, and I talked about, in the second half of that speech, that we had an obligation to ensure that we were monitoring the behavior of lawyers before us so that when questionable ethical or other conduct could bring disrepute to

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the legal system, that we monitor our lawyers, because that would return a sense——

Senator CORNYN. Judge, if you would let me—I think we are straying away from the question I had talking about oversight of lawyers. Would you explain how, when you say judges should—I am sorry. Let me just ask. Do you believe that judges ever change the law? I take it from your statement that you do.

Judge SOTOMAYOR. They change—we can't change law. We're not lawmakers. But we change our view of how to interpret certain laws based on new facts, new developments of doctrinal theory, considerations of whether—what the reliance of society may be in an old rule. We think about whether a rule of law has proven workable. We look at how often the Court has affirmed a prior understanding of how to approach an issue. But in those senses, there's changes by judges in the popular perception that we're changing the law.

Senator CORNYN. In another speech in 1996, you celebrated the uncertainty of the law. You wrote that the law is always in a, and I quote, "necessary state of flux." You wrote that the law judges declare is not "a definitive, capital 'L' law that many would like to think exists," and "that the public fails to appreciate the importance of indefiniteness in the law."

Can you explain those statements? And why do you think indefiniteness is so important to the law?

Judge SOTOMAYOR. It's not that it's important to the law as much as it is that it's what legal cases are about. People bring cases to courts because they believe that precedents don't clearly answer the fact situation that they are presenting in their individual case. That creates uncertainty. That's why people bring cases. And they say, Look, the law says this, but I'm entitled to that. I have this set of facts that entitle me to relief under the law.

It's the entire process of law. If law was always clear, we wouldn't have judges. It's because there is indefiniteness not in what the law is, but its application to new facts that people sometimes feel it's unpredictable. That speech, as others I've given, is an attempt to encourage judges to explain to the public more of the process.

The role of judges is to ensure that they are applying the law to those new facts, that they're interpreting that law with Congress' intent, being informed by what precedents say about the law and Congress' intent and applying it to the new facts.

But that's what the role of the courts is, and obviously, the public is going to become impatient with that if they don't understand that process. And I'm encouraging lawyers to do more work in explaining the system, in explaining what we are doing as courts.

Senator CORNYN. In a 2001 speech at Berkeley, you wrote, "Whether born from experience or inherent physiological or cultural differences, a possibility I abhor less or discount less than my colleague Judge Cedarbaum, our gender and national origins may and will make a difference in our judging."

A difference is physiological if it relates to the mechanical, physical or biochemical functions of the body, as I understand the word. What do you mean by that?

Judge SOTOMAYOR. I was talking just about that. There are in the law—there have been upheld in certain situations that certain job positions have a requirement for a certain amount of strength or other characteristics that maybe a person who fits that characteristic can have that job. But there are differences that may affect a particular type of work. We do that all the time. You need to——

Senator CORNYN. We are talking about judging, though, aren't——

Judge SOTOMAYOR [continuing]. Be a pilot who has good eyesight.

Senator CORNYN. We are not talking about pilots. We are talking about judging, right?

Judge SOTOMAYOR. No, no, no, no. What I was talking about there, because the context of that was talking about the difference in the process of judging, and the process of judging for me is what life experiences bring to the process. It helps you listen and understand. It doesn't change what the law is or what the law commands.

A life experience as a prosecutor may help me listen and understand an argument in a criminal case. It may have no relevancy to what happens in an antitrust suit. It's just a question of the process of judging. It improves both the public's confidence that there are judges from a variety of different backgrounds on the bench, because they feel that all issues will be more—better at least addressed—not that it's better addressed, but that it helps that process of feeling confidence that all arguments are going to be listened to and understood.

Senator CORNYN. So you stand by the comment or the statement that inherent physiological differences will make a difference in judging?

Judge SOTOMAYOR. I'm not sure—I'm not sure exactly where that would play out, but I was asking a hypothetical question in that paragraph. I was saying, look we just don't know. If you read the entire part of that speech, what I was saying is let's ask the question. That's what all of these studies are doing. Ask the question if there's a difference. Ignoring things and saying, you know, it doesn't happen isn't an answer to a situation. It's consider it. Consider it as a possibility and think about it. But I certainly wasn't intending to suggest that there would be a difference that affected the outcome. I talked about there being a possibility that it could affect the process of judging.

Senator CORNYN. As you can tell, I am struggling a little bit to understand how your statement about physiological differences could affect the outcome or affect judging and your stated commitment to fidelity to the law as being your sole standard and how any litigant can know where that will end.

Let me ask you on another topic, there was a Washington Post story on May 29, 2009, that starts out saying, "The White House scrambled yesterday to assuage worries from liberal groups about Judge Sonia Sotomayor's scant record on abortion rights." And it goes on to say, "The White House Press Secretary said the President did not ask Sotomayor specifically about abortion rights during their interview."

Is that correct?

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Judge SOTOMAYOR. Yes. It is absolutely correct. I was asked no question by anyone, including the President, about my views on any specific legal issue.

Senator CORNYN. Do you know then on what basis, if that is the case—and I accept your statement—on what basis the White House officials would subsequently send a message that abortion rights groups do not need to worry about how you might rule in a challenge to *Roe* v. *Wade*?

Judge SOTOMAYOR. No, sir, because you just have to look at my record to know that in the cases that I addressed, on all issues I follow the law.

Senator CORNYN. On what basis would George Pavia, who is apparently a senior partner in the law firm that hired you as a corporate litigator, on what basis would he say that he thinks support of abortion rights would be in line with your generally liberal instincts? He is quoted in this article saying, "I can guarantee she'll be for abortion rights." On what basis would Mr. Pavia say that, if you know?

Judge SOTOMAYOR. I have no idea, since I know for a fact I never spoke to him about my views on abortion, frankly, my views on any social issue. George was the head partner of my firm, but our contact was not on a daily basis. I have no idea why he's drawing that conclusion because if he looked at my record, I have ruled according to the law in all cases addressed to the issue of the termination of abortion rights—of women's right to terminate their pregnancy, and I voted in cases in which I have upheld the application of the Mexico City policy, which was a policy in which the government was not funding certain abortion-related activities.

Senator CORNYN. Do you agree with his statement that you have generally liberal instincts?

Judge SOTOMAYOR. If he was talking about the fact that I served on a particular board that promoted equal opportunity for people, the Puerto Rican Legal Defense and Education Fund, then you could talk about that being a liberal instinct in the sense that I promote equal opportunity in America and the attempts to ensure that. But he has not read my jurisprudence for 17 years, I can assure you. He's a corporate litigator, and my experience with corporate litigators is that they only look at the law when it affects the case before them.

[Laughter.]

Senator CORNYN. Well, I hope, as you suggested, not only liberals endorse the idea of equal opportunity in this country. That is, I think, a bedrock doctrine that undergirds all of our law. But that brings me, in the short time I have left, to the *New Haven firefighter* case. As you know, there are a number of the New Haven firefighters who are here today and will testify tomorrow. And I have to tell you, Your Honor, as a former judge myself, I was shocked to see the sort of treatment that the three-judge panel you served on gave to the claims of these firefighters by an unpublished summary order, which has been pointed out in the press would not be likely to be reviewed or even caught by other judges on the Second Circuit, except for the fact that Judge Cabranes read about a comment made by the lawyer representing the firefighters in the

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press that the court gave short shrift to the claims of the firefighters.

Judge Cabranes said, "The core issue presented by this case, the scope of a municipal employer's authority to disregard examination results based solely on the successful applicant, is not addressed by any precedent of the Supreme Court or our circuit." And looking at the unpublished summary order, this three-judge panel of the Second Circuit doesn't cite any legal authority whatsoever to support its conclusion.

Can you explain to me why you would deal with it in a way that appears to be so—well, "dismissive" may be too strong a word—but that avoids the very important claim such that the Supreme Court ultimately reversed you on, that was raised by the firefighters' appeal?

Judge SOTOMAYOR. Senator, I can't speak to what brought this case to Judge Cabranes' attention. I can say the following, however: When parties are dissatisfied with a panel decision, they can file a petition for rehearing en banc. And, in fact, that's what happened in the *Ricci* case. Those briefs are routinely reviewed by judges, and so publishing by summary order—or addressing an issue by summary order or by published opinion doesn't hide a party's claims from other judges. They get the petitions for rehearing.

Similarly, parties, when they are dissatisfied with what a circuit has done, file petitions for certiorari, which is a request for the Supreme Court to review a case, and so the Court looks at that as well. And so regardless of how a circuit decided a case, it's not a question of hiding it from others.

With respect to the broader question that you are raising, which is why do you do it by summary order or why do you do it in a published opinion or in a per curiam, the question—or the practice is that about 75 percent of circuit court decisions are decided by summary order, in part because we can't handle the volume of our work if we were writing long decisions in every case; but, more importantly, because not every case requires a long opinion if a district court opinion has been clear and thorough on an issue. And in this case, there was a 78-page decision by the district court. It adequately explained the question that the Supreme Court addressed and reviewed.

And so to the extent that a particular panel considers that an issue has been decided by existing precedent, that's a question that the court above can obviously revisit, as it did in *Ricci*, where it looked at it and said, well, we understand what the circuit did, we understand what existing law is, but we should be looking at this question in a new way. That's the job of the Supreme Court. I would——

Senator CORNYN. But, Judge, even the district court admitted that a jury could rationally infer that city officials worked behind the scenes to sabotage the promotional examinations because they knew that the exams—they knew that were the exams certified, the mayor would incur the wrath of Reverend Boise Kimber and other influential leaders of New Haven's African American community. You decided that based on their claim of potential disparate impact liability that there was no recourse, that the city was justified in disregarding the exams and, thus, denying these fire-

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fighters, many of whom suffered hardship in order to study and to prepare for these examinations and were successful, only to see that hard work and effort disregarded and not even acknowledged in the court's opinion. And ultimately, as you know, the Supreme Court said that you just can't claim potential disparate impact liability as a city and then deny someone a promotion based on the color of their skin. There has to be a strong basis in evidence. But you didn't look to see whether there was a basis in evidence to the city's claim. Your summary opinion, unpublished summary order, didn't even discuss that.

Don't you think that these firefighters and other litigants deserve a more detailed analysis of their claims and an explanation for why you ultimately denied their claim?

Judge SOTOMAYOR. As you know, the court's opinion, issued after discussions en banc, recognized, as I do, the hardship that the firefighters experienced. That's not been naysayed by anyone.

The issue before the court was a different one, and the one that the district court addressed was what decision the decision makers made, not what people behind the scenes wanted the decision makers to make, but what they were considering. And what they were considering was the state of the law at the time. And in an attempt to comply with what they believed the law said and what the panel recognized as what the Second Circuit precedent said, that they made a choice under that existing law.

The Supreme Court in its decision set a new standard by which an employer and lower court should review what the employer is doing by the substantial evidence test. That test was not discussed with the panel. It wasn't part of the arguments below. That was a decision by the Court, borrowing from other areas of the law and saying we think this would work better in this situation.

Senator CORNYN. My time is up. Thank you.

Chairman LEAHY. Thank you. Thank you very much.

I will put in the record a letter of support for Judge Sotomayor's nomination from the United States Hispanic Chamber of Commerce on behalf of its 3 million Hispanic-owned business members, 16 undersigned organizations, including the El Paso Hispanic Chamber of Commerce, Greater Dallas Hispanic Chamber of Commerce, the Houston Hispanic Chamber of Commerce, the Odessa Hispanic Chamber of Commerce, and a similar letter from the Arizona Hispanic Chamber of Commerce. I had meant to put those in the record before. We will put them in the record now.

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

Senator SESSIONS. Mr. Chairman, I would offer a letter for the record from the National Rifle Association in which they express serious concern about the nomination of Judge Sonia Sotomayor.

Also I noticed that the head of that organization, Mr. LaPierre, wrote an article this morning raising increased concern after yesterday's testimony, and I would also offer for the record a letter from Mr. Richard Land, of the Ethics and Religious Liberty Commission of the Southern Baptist Convention, also raising concerns.

Chairman LEAHY. Without objection, those will be made part of the record.

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

Chairman LEAHY. Do you have anything else?

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Senator SESSIONS. Nothing else.

Chairman LEAHY. I will yield to Senator Cardin.

Senator CARDIN. Thank you, Mr. Chairman. Judge Sotomayor, good morning. Welcome back to our committee. I just want you to know that the baseball fans of Baltimore knew there was a judge somewhere that changed in a very favorable way the reputation of Baltimore forever. You are a hero and they now know it is Judge Sotomayor. You are a hero to Baltimore baseball fans.

Let me explain. The major league baseball strike, you allowed the season to continue so Cal Ripken could become the iron man of baseball in September 1995. So we just want to invite you—as a baseball fan, we want to invite you to an Orioles game and we promise it will not be when the Yankees are playing, so you can root for the Baltimore Orioles.

[Laughter.]

Judge SOTOMAYOR. That's a great invitation, and good morning, Senator. You can assure your Baltimore fans that I have been to Camden Yards. It's a beautiful stadium.

Senator CARDIN. Well, we think it is the best. Of course, it was the beginning of the new trends of baseball stadiums, and you are certainly welcome.

Before this hearing, the people of this country knew that the president had selected someone with incredible credentials to be a Supreme Court member. Now, they know the person is able and is capable and understands the law and has been able to understand what the appropriate role is for a judge in interpreting the law and has done very well in responding to the members of the U.S. Senate, which I think bodes well for your interaction with attorneys and your colleagues on the bench in having a thorough discussion of the very important issues that will affect the lives of all people in our nation.

I do want to, first, start with the judicial temperament issue and the reference to the Almanac on the Federal Judiciary. I just really want to quote from other statements that were included in that almanac, where they were commenting about you and saying that she is very good, she is bright, she is a good judge, she is very smart, she is frighteningly smart, she is intellectually tough, she is very intelligent, she has a very good commonsense approach to the law, she looks at the practical issues, she is good, she is an exceptional judge overall, she is engaged in oral argument, she is well prepared, she participates actively in oral argument, she is extremely hardworking and well prepared.

And I want to quote from one of the judges on your circuit, Judge Miner, who was appointed by President Reagan, when he said, "I don't think I go as far as to classify her in one camp or another. I think she just deserves the classification of an outstanding judge."

I say that because maybe you would like to comment to these more favorable comments about how the bar feels about your service on the bench.

Judge SOTOMAYOR. I thank those who have commented in the way they did. I think that most lawyers who participate in argument before me know how engaged I become in their arguments and trying to understand them. And as I indicated yesterday, that

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can appear tough to some people, because active engagement can sometimes feel that way.

But my style is to engage as much as I can so I can ensure myself that I understand what a party is intending to tell me. I am, in terms of what I do, always interested in understanding, and so that will make me an active participant in argument.

As I noted yesterday, I have colleagues who never ask questions. There are some judges on the Supreme Court who rarely ask questions and others ask a lot of questions. Judges approach issues in different ways, with different styles, and mine happens to be on one end of the style and others choose others.

Senator CARDIN. Well, I thank you for that response. I agree with you that the Constitution and Bill of Rights are timeless documents and have served our nation well for over 200 years and are the envy of many other nations.

Now, there are many protections in the Constitution, but I would like to talk a little bit about civil rights and the basic protections in our Constitution and how we have seen a progression in the Constitution and Bill of Rights through constitutional amendments, including the 13th, 14th, 15th and 19th, through congressional action, through the passage of such bills as the Civil Rights Act of 1964, the Voting Rights Act of 1965, Supreme Court decisions that we have talked about that have changed civil rights in America and made it possible for many people to have the opportunities of this country that otherwise would have been denied.

We have made a lot of progress since the days of segregated schools and restrictions on people's opportunities to vote. But I think we would all do well to remember the advice given to us by our colleague, Senator Edward Kennedy, the former chairman of this Committee, as we talk about the civil rights struggle; he says, "The work goes on, the cause endures, the hope still lives, and the dream shall never die."

So I say that as an introduction to one area of civil rights, and that is the right to vote, a fundamental right. My own experience in 2006, that is just a few years ago, causes me to have concerns. In my own election, I found that there were lines longer in the African-American precincts to vote than in other precincts, and I was curious as to why this took place. They did not have as many voting machines. There were a lot of irregularities, and it caused a lot of people who had to get back to work to be denied their right to participate.

We also found, on election day, fraudulent sample ballots that were targeted to minority voters in an effort to diminish their importance in the election. I mention that because that happened not 50 years ago, but happened just a few years ago.

Congress renewed the Voting Rights Act by rather large votes, 98–0 in the U.S. Senate, 390–33 in the House of Representatives; this reflects a clear intent of Congress to continue to protect voters in this country.

In *Northwest Austin Municipal Utility District Number One* v. *Holder*, one justice on the court, in dictum, challenged Congress' authority to extend the civil rights case. Now, I say that knowing your view about giving due deference to Congress, particularly as it relates to expanding and extending civil rights protections.

So my question to you is tell me a little bit about your passion for protecting the right to vote, to make sure that the laws are enforced as Congress intended, to guarantee to every American the right to participate at the voting place.

Judge SOTOMAYOR. When we speak about my passion, I don't think that the issue of guaranteeing each citizen the right to vote is unique to me or that it's different among any Senator or among any group of people who are Americans.

It is a fundamental right and it is one that you've recognized, Congress has addressed for decades and has done an amazing job in passing a wide variety of statutes in an effort to protect that right.

The question that a court would face in any individual situation is whether an act of Congress conflicts with some right of either the state or an individual with respect to the issue of voting. There could be other challenges raised on a wide variety of different bases, but each case would present its own unique circumstance.

There is one case involving the Voting Rights Act where I addressed the issue of the right to vote and in that case, I issued a dissent on an en banc ruling by my court. For the public who may not understand what en banc ruling means, when the whole court is considering an issue.

In that case, if it wasn't 13, it may have been 12 members of the court, we're a complement of 13 judges, but I, right now, can't remember if we were a full complement at the time, considering an issue. The majority upheld a state regulation barring a group of people from voting.

I dissented on a very short opinion, one-paragraph opinion, saying, "These are the words of Congress in the statute it passed, and the words are that no state may impose a—and I'm paraphrasing it now. I'm not trying to read the statute, but no condition or restriction on voting that denies or abridges the right to vote on the basis of race.

I noted that given the procedural posture of that case, that the plaintiff had alleged that that's exactly what the state was doing, and I said that's the allegation on the complaint. That's what a judge has to accept on the face of the complaint. We've got to give him a chance to prove that, and that, to me, was the end of the story.

To the extent that the majority believed that—and there was a lot of discussion among the variety of different opinions in the case as to whether this individual could or could not prove his allegation and there was a suggestion by both sides that he might never be able to do it.

My point was a legal one. These are Congress' words. We have to take them at their word. And if there's an end result of this process that we don't like, then we have to leave that to Congress to address that issue. We can't fix it by ruling against what I viewed as the express words of Congress.

Senator CARDIN. Let me use your quote there, because I thought it was particularly appropriate. You said, "I trust the Congress would prefer to make needed changes itself rather than have the courts do so for it," and I think the members of this Committee would agree with you.

As you responded to Senator Grassley in regard to the *Riverkeeper* case, you said you give deference to Congress. I think we all share that. One of my concerns is that we are seeing judicial activism in restricting the clear intent of Congress in moving forward on fundamental protections.

Let me move, if I might, to the environment, which is an area that is of great concern to all of us. In the past 50 years, Congress has passed important environmental laws, including the Clean Air Act, the Clean Water Act, the National Environmental Policy Act, the Endangered Species Act, the Safe Drinking Water Act, and Superfund.

Despite the progress we have made over the years, it is important that we keep advancing the protections in our environment. During your testimony yesterday, you made it clear that you understand that Senators and Members of Congress elected by the people are the ones making policy by passing laws and you also made it clear that judges apply the laws enacted and that they should do so or least they should do so with deference to the intent of Congress.

Yet, we have seen, in recent decisions of the Supreme Court, like the Solid Waste Agency of *Northern Cook County* v. *U.S. Corps of Engineers* and *Rapanos* v. *United States*, that they have forced the EPA to drop more than 500 cases against alleged polluters.

These decisions have impact and it is clear to many of us that they reject longstanding legal interpretations and ignore the science that served as the foundations for the laws passed by Congress and the intent of Congress to protect American people by providing them with clean water, clean air and a healthy environment.

As a Senator from Maryland, I am particularly concerned about that as it relates to the efforts that we are making on the Chesapeake Bay.

Now, I understand that these decisions are now precedent and they are binding and that it may very well require the Congress to pass laws further clarifying what we meant to say so that we can try to get back on track. I understand that.

But I would like you to comment and, I hope, reinforce the point that you have said that in reaching decisions that come to the bench, whether they are environmental laws or other laws to protect our society, you will follow the intent of Congress and will not try to supplant individual judgment that would restrict the protections that Congress has passed for our community.

Judge SOTOMAYOR. I believe my cases, my entire record shows that I look at the acts of Congress, as I think the Supreme Court does, with deference, because that is the bedrock of our constitutional system, which is that each branch has a different set of constitutional powers; that deference must be given to the rights of each branch in each situation; that it is exercising its powers; and, to the extent that the court has a role, because it does have a role, to ensuring that the Constitution is followed, it attempts to do that.

When I say "attempt," but it always attempts it with a recognition of the deference it owes to the elected branches in terms of setting policy and making law.

Senator CARDIN. Thank you for that response. Let me turn, if I might, to our personal backgrounds. There has been a lot of discussion here about what each of us brings to our position in public life.

Progress for women in this country has not come easily or quickly. At one time, women could not vote, could not serve on juries, could not hold property. I sit here today wanting to feel confident that the Supreme Court and its justices who make key decisions on women's rights in society will act to ensure continued progress for equality between men and women.

Now, we all agree that in rendering an individual decision, gender or ethnic backgrounds should not affect your judgment. There is an importance to diversity which I think we have all talked about. Each of us brings our life experiences to our job.

Your life experience at Princeton, I think, serves as an example. You attended the school that F. Scott Fitzgerald 90 years ago called "the pleasantist country club in America," with very restrictive policies as to who could attend Princeton University. By 1972, your freshman class, it was a different place, but still far from where it should be.

And I admire your efforts to change that at Princeton and you were actively involved in improving diversity at that school, and Princeton is a better place today because of your efforts.

I think of my own experiences at law school, University of Maryland Law School, which denied admission to Thurgood Marshall and, in my class, had very few women. Times have changed.

Justice Ginsberg said, referring to the importance of women on the bench, "I think the presence of women on the bench made it possible for the courts to appreciate earlier than they might otherwise that sexual harassment belongs under Title 7."

So on behalf of myself, on behalf of my daughter and two granddaughters, I want to hear from you the importance of different voices in our schools, in our Congress, and on the Supreme Court of the United States as to how having diversity, the importance of diversity, and your views as to what steps are appropriate for government to take in helping to improve diversity.

Judge SOTOMAYOR. Your comments about your daughter and granddaughter makes me remember a letter I received when I was being nominated to the circuit court. It was from a woman who said she had 19 daughters and grandchildren and how much pride she took in knowing that a woman could serve on a court like the second circuit.

And I realized then how important the diversity of the bench is to making people feel and understand the great opportunity American provides to all its citizens, and that has value. That's clear.

With respect to the issue of the question of what role diversity serves in the society, it harkens back almost directly to your previous question. I've been overusing that word "harkens," sorry. It almost comes around to your earlier question, which is that issue is one that starts with the legislative branches and the government, the executive bodies, and employers who look at their workforce, that look at the opportunities in society, and make policy decisions about what promotes that equal opportunity in the first instance.

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The court then looks at what they have done and determines whether that action is constitutional or not. And with respect at least to the education field, in a very recent set of cases, the Supreme Court looked at the role of diversity in educational decisions as to which students they would admit, and the court upheld the University of Michigan's law school admissions policy, which would—because the school believed that it needed to promote as wide a body and diverse a body of students to ensure that life perspectives, that the experience of students would be as fulsome as they wished.

And they used race there as one of many factors, but not one that compelled individual choices of the student. The court upheld that. And Justice O'Connor, in the opinion she wrote, authored, expressed the hope that in 25 years, race wouldn't even need to be considered.

In a separate case, the University of Michigan's undergraduate admissions policy, the court struck that down and it struck it down because it viewed the use of race as a form of impermissible quota, because it wasn't based on an individual assessment of the people applying, but as an impermissible violation of the equal protection clause and of the law.

These situations are always looked at individually and, as I said, in the context of the choices that Congress, the executive branch, an employer is making and the interest that it's asserting and the remedy that it's creating to address the interest it's trying to protect. All of that is an individual question for the courts.

Senator CARDIN. And you need to look at all the facts in reaching those decisions, which you have stressed over and over again. I want a justice who will continue to move the court forward in protecting those important civil rights.

I want a justice who will fight for people like Lawrence King, who, at the age of 15, was shot in school because he was openly gay. I want a justice who will fight for women like a 28-year-old Californian who was gang raped by four people because she was a lesbian. And I want a justice who will fight for people like James Byrd, who was beaten and dragged by a truck for two miles because he was black. So we need to continue that focus.

You talked about race and I think about the *Gant* case, where a 6-year-old black child was removed from school and was treated rather harshly with racial harassment. And in your dissent, you stated that the treatment this lone black child encountered during his brief time in Cook Hill's first grade to have been not merely arguable, unusual, indisputable discretion, but unprecedented and contrary to the school's established policy.

Justice Blackmun spoke, "In order to get beyond racism, we first must take an account of race." And if you ignore race completely, aren't you ignoring facts that are important in a particular case?

Judge SOTOMAYOR. Well, it depends on the context of the case that you're looking at. In the *Gant* case, for example, there were a variety of different challenges brought by the plaintiff to the conduct that was alleged the school had engaged in. I joined the majority in dismissing some of the claims as not consistent with law.

But in that case, there was a disparate treatment element and I pointed out to the set of facts that showed or presented evidence

of that disparate treatment. That's the quote that the quote that you were reading from, that this was a sole child who was treated completely different than other children of a different race in the services that he was provided with and in the opportunities he was given to remedy or to receive remedial help.

That is obviously different, because what you're looking at is the law as it exists and the promise that the law makes to every citizen of equal treatment in that situation.

Senator CARDIN. I agree. I think you need to take a look at all the facts and circumstances and to ignore race, you are ignoring an important fact.

Let me talk a little bit about privacy, if I might. Justice Brandeis describes privacy as the right to be left alone. In other words, if we must restrict this right, it must be minimal and protections must occur before any such action occurs.

The Supreme Court has advanced rights of privacy in the *Meyer* case and the *Loving* case, which established the fundamental rights of persons to raise families and to marry whom they please, regardless of race; the *Lawrence* case, which held that states cannot criminalize homosexual conduct; *Griswold*, which held that allowed for family planning as a fundamental right; and, of course, *Roe* v. *Wade*, which gave women the right to control their own bodies.

I just would like to get your assessment of the role the court faces on privacy issues in the 21st century, recognizing that our Constitution was written in the 18th century and the challenges today are far different than they were when the Constitution was written as it relates to privacy. The technologies are different today and the circumstances of life are different.

How do you see privacy challenges being confronted in the 21st century in our Constitution and in the courts?

Judge SOTOMAYOR. The right to privacy has been recognized, as you know, in a wide variety of circumstances for more than probably 90 years now, close to 100. That is a part of the court's precedence in applying the immutable principles of the Constitution, the liberty provision of the due process clause, and recognizing that that provides a right to privacy in a variety of different settings. You have mentioned that line of cases and there are many others in which the court has recognized that as a right.

In terms of the coming century, it's guided by those cases, because those cases provide the courts precedence and framework, and with other cases, to look at how we will consider a new challenge to a new law or to a new situation.

That's what precedent's do. They provide a framework. The Constitution remains the same. Society changes. The situations it brings before courts change, but the principles are the words of the Constitution guided by how precedence gives—or has applied those principles to each situation and then you take that and you look at the new situation.

Senator CARDIN. In the time that I have remaining, I would like to talk about pro bono. I enjoyed our conversation when you were in my office talking about your commitment to pro bono. I think, as attorneys, we all have a special responsibility to ensure equal justice and that requires equal access.

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The Legal Aid lawyers, per capita, are about 61 per 6,800. For private attorneys, it is one per 525. This is not equal justice under the law as promised by the etching on the entrance to the United States Supreme Court.

Now, it makes a difference if you have a lawyer. If you have a lawyer, you are more likely to be able to save your home, to get the health care that you need, to be able to deal with consumer problems.

I had the honor of chairing the Maryland Legal Services Corporation. I chaired a commission that looked into legal services in Maryland. I am proud of the fact that we helped establish, at the University of Maryland Law School and University of Baltimore Law School, required clinical experiences for our law students so they not only get the experience of handling the case, but understand the need to deal with people who otherwise could not afford an attorney.

Congress needs to do more in this area. There is no question about that, and I am hopeful that we will reauthorize the Legal Service Act and provide additional resources. But I would like to get your view as to what is the individual responsibility of a lawyer for equal justice under the law, including pro bono, and how you see the role of the courts in helping to establish the efforts among the legal community to carry out our responsibility.

Judge SOTOMAYOR. I know that there's been a lot of attention paid to one speech and its variants that I've given. If you look at the body of my speeches, public service and pro bono work is probably the main topic I speak at—I speak about.

Virtually every graduation speech I give to law students, speeches I've given to new immigrants being sworn in as citizens, to community groups of all types is the importance of participation in bettering the conditions of our society, active involvement in our communities.

It doesn't have to be active involvement in politics. I tell people that. Just get involved in your community, work on your school boards, work in your churches, work in your community to improve it.

The issue of public service is a requirement under the code of the American Bar Association. Virtually every state has a requirement that lawyers participate in public service in some way. I have given multiple speeches in which I've talked to law school bodies and said, "Make sure your students don't leave your school without understanding the critical importance of public service in what they do as lawyers."

In that, we are in full agreement, Senator. To me, that's a core responsibility of lawyering. Our founding fathers, they became what they became, our founding fathers, because of their fundamental belief of involvement in their society and public service, and it's, to me, a spirit that is the charge of the legal profession, because that's what we do, we help people; in a different way than doctors do, but helping people receive justice under the law is a critical importance of our work.

Senator CARDIN. Very, very well said. I look forward to working with Congress and the courts in advancing a strategy.

Thank you, Mr. Chairman.

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Chairman LEAHY. Thank you very much, Senator Cardin.

Senator Coburn.

Senator COBURN. Thank you, Mr. Chairman. I'd ask unanimous consent to put an article from the newspaper this morning, The Washington Times.

Chairman LEAHY. Without objection it will be placed in the record.

Senator COBURN. Welcome again. First of all, let me apologize to you because I was not able to hear, although I got to read some of your testimony yesterday. We have a schedule that says we must finish health care within a certain time whether we get it right or wrong, we've got to get it done in a certain time. And so I was involved with that and I apologize.

No. 2 is I apologize to you for the outbursts that have occurred in this committee. Anybody who values life like I do and who is pro-life recognizes that the way you change minds is not yell at people, you love them and you care about their concerns and you create to a level of understanding, not condemnation. So for that, I apologize. I admire your composure and I thank the Chairman and the Ranking Member for the way they handled that as well.

I want to spend a few moments with you, but I kind of want to change the tone here a little bit in terms of what we talk about. A lot of Americans are watching this hearing and when I get together with a couple of doctors, they don't understand half of what I say. When two lawyers talk, most of us who aren't lawyers, like I'm not, have trouble following. So I want us to use words that the American people can truly understand as I both ask you questions and as you answer them. I will try to do that and I hope that you will as well because I think it benefits our country to do that.

You have been asked a lot of questions about abortion and you have said that *Roe* v. *Wade* has set a law. Where are we today? What is the settle law in America about abortion?

Judge SOTOMAYOR. I can speak to what the court has said in its precedent. In *Planned Parenthood* v. *Casey*, the court reaffirmed the court holding of *Roe* v. *Wade* that a woman has a constitutional right to terminate her pregnancy in certain circumstances.

In *Casey*, the court announced that in reviewing state regulations that may apply to that right, that the court considers whether that regulation has an undue burden on the woman's constitutional right. That is my understanding of what the state of the law is.

Senator COBURN. Let me give you a couple of cases. Let's say I'm 38 weeks pregnant and we discover a small spina bifida sac on the lower sacrum, the lower part of the back on my baby and I feel like I just can't handle a child with that.

Would it be legal in this country to terminate that child's life?

Judge SOTOMAYOR. I can't answer that question in the abstract because I would have to look at what the state of the state's law was on that question and what the state said with respect to that issue.

I can say that the question of the number of weeks that a woman is pregnant has been approached to looking at a woman's act as was changed by *Casey*. The question is is the state regulation regulating what a woman does an undue burden. And so I can't answer

your hypothetical because I can't look at it as an abstract without knowing what state laws exist on this issue or not.

And even if I knew that, I probably couldn't opine because I'm sure that situation might well arise before the court.

Senator COBURN. Well, does technology in terms of the advancement of technology, should it have any bearing whatsoever on the way we look at *Roe* v. *Wade*? For example, published reports most recently of a 21-week, 21-week, that's 142 days, fetus alive and well now at 9 months of age with no apparent complications because the technology has advanced so far that we can now save children who are born prematurely at that level.

Should that have any bearing as we look at the law?

Judge SOTOMAYOR. The law has answered a different question. It has talked about the constitutional right of women.

Senator COBURN. I understand that.

Judge SOTOMAYOR. In certain circumstances. As I indicated, the issue becomes one of what is the state regulation in any particular circumstance.

Senator COBURN. I understand. But all I'm asking is should it have any bearing?

Judge SOTOMAYOR. I can't answer that in the abstract because the question as it would come before me wouldn't be in the way that you form it as a citizen. It would come to me as a judge in the context of some action that someone is taking, whether if it is the state, the state, if it is a private citizen being controlled by the state challenging that action. Those issues are——

Senator COBURN. But viability is a portion of a lot of that, and a lot of the decisions have been made based on liability. If we now have liability at 21 weeks, why would that not be something that should be considered as we look at the status of what can and cannot happen in terms of this right to privacy that has been granted in *Roe* v. *Wade*?

Judge SOTOMAYOR. All I can say to you is what the court has done.

Senator COBURN. Right.

Judge SOTOMAYOR. And the standard that the court has applied, what factors it may or may not look at within a particular factual situation can't be predicted in a way to say yes, absolutely, that's going to be considered. No, this won't be considered.

Senator COBURN. All I'm asking is whether it should. Should viability, should technology at any time be considered as we discuss these very delicate issues that have such an impact on so many people. Your answer is that you can't answer it.

Judge SOTOMAYOR. I can't because that's not a question that the court reaches out to answer. That is a question that gets created by a state regulation of some sort or an action by the state that may or may not according to some claimant, place an undue burden on her.

We don't make policy choices in the court. We look at the case before us with the interests that are argued by the parties, look at our precedent and try to apply its principles to the arguments parties are raising.

Senator COBURN. I'm reminded of one of your coats that says you do make policy and I won't continue that.

I'm concerned and I think many others are. Does a state legislature have the right under the Constitution to determine what is death? Have we statutorily defined, and we have in 50 states and most of the territories, what is the definition of death. You think that's within the realm of the Constitution that states can do that?

Judge SOTOMAYOR. It depends on what they are applying that definition to. So there are situations in which they might and situations where that definition would or would not have applicability to the dispute before the court.

All state action is looked at within the context of what the state is attempting to do and what liabilities it is imposing.

Senator COBURN. But you would not deny the fact that states do have the right to set up statutes that define, that give guidance to their citizen, what constitutes death.

Judge SOTOMAYOR. As I said, it depends on in what context they are attempting to do that.

Senator COBURN. They are doing it so they limit the liability of others with regard to that decision which would inherently be the right of a state legislature as I read the Constitution. You may have a different response to that.

Which brings me back to technology again. As recently as 6 months ago, we now record fetal heartbeats at 14 days post conception, we record fetal brain waves at 39 days post conception. I don't expect you to answer this, but I do expect you to pay attention to it as you contemplate these big issues.

We have this schizophrenic rule of the law as we have defined death as the absence of those, but we refuse to define life as the presence of those.

All of us are dependent at different levels on other people during all stages of our development from the very early in the womb, outside of the womb, to the very late. It concerns me that we are so inaccurate, or inaccurate is an improper term. Inconsistent in terms of our application of logic.

You said that *Roe* v. *Wade* did set a law yesterday and I believe it is settled under the basis of the right to privacy which has been there. So the question I'd like to turn to next is in your ruling, the Second Circuit ruling, and I'm trying to remember the name of the case, *Maloney*, the position was that there is not an individual fundamental right to bear arms in this country. Is that a correct understanding of that?

Judge SOTOMAYOR. No, sir.

Senator COBURN. Okay. Please educate me if you would.

Judge SOTOMAYOR. In the Supreme Court's decision in *Heller*, it recognized an individual rights to bear arms as a right guaranteed by the second amendment, an important right, and one that limited the actions the Federal Government could take with respect to the position of firearms. In that case we are talking about handguns.

The *Maloney* case presented a different question. That was whether that individual right would limit the activities that states could do to regulate the possession of firearms. That question is addressed by a legal doctrine.

That legal doctrine uses the word fundamental, but it doesn't have the same meaning that common people understand that word

to me. To most people the word by its dictionary term is critically important, central, fundamental, it is sort of rock basis.

Those meanings are not how the law uses that term when it comes to what the states can do or not do. The term has a very specific legal meaning which means is that amendment of the Constitution incorporated against the states.

Senator COBURN. Through the Fourteenth Amendment?

Judge SOTOMAYOR. And others. But generally, and I shouldn't say and others, through the 14th. The question becomes whether and how that amendment to the Constitution, that protection, applies or limits the states to act.

In *Maloney*, the issue for us was a very narrow one. We recognized that *Heller* held, and it is the law of the land right now in the sense of precedent that there is an individual right to bear arms as it applies to Federal Government regulation.

The question in *Maloney* was different for us. Was that right incorporated against the states. We determined that given Supreme Court precedent, a precedent that had addressed that precise question and said it is not, so it wasn't fundamental in that legal doctrine sense, that was the court's holding.

Senator COBURN. Did the Supreme Court say in *Heller* that it was not, or did they just fail to rule on it?

Judge SOTOMAYOR. Well, they failed to rule on it, you're right. But I——

Senator COBURN. There is a very big difference there.

Judge SOTOMAYOR. I agree.

Senator COBURN. Let me continue with that. So I sit in Oklahoma in my home, and what we have today as law on the land as you see it is I do not have a fundamental incorporated right to bear arms, as you see the law today.

Judge SOTOMAYOR. It is not how I see the law.

Senator COBURN. Well, as you see the interpretation of the law. In your opinion of what the law is today, is my statement a correct statement?

Judge SOTOMAYOR. No, it's not my interpretation. I was applying both Supreme Court precedent deciding that question and Second Circuit precedent that had directly answered that question and said it's not incorporated.

The issue of whether or not it should be is a different question, and that is the question that the Supreme Court may take up. In fact, in his opinion, Justice Scalia suggested it should, but it is not what I believe. It is what the law has said about it.

Senator COBURN. So what does the law say today about the statement? Where do we stand today about my statement that I have—I claim to have a fundamental, guaranteed, spelled out right under the Constitution that is individual and applies to me the right to own and bear arms. Am I right or am I wrong?

Judge SOTOMAYOR. I can't answer the question of incorporation other than to refer to precedent. Precedent says——

Senator COBURN. I understand.

Judge SOTOMAYOR [continuing]. As the Second Circuit interpreted the Supreme Court's precedent——

Senator COBURN. I understand.

Judge SOTOMAYOR [continuing]. That it is not incorporated. It is also important to understand that the individual issue of a person bearing arms is raised before the court in a particular setting.

Senator COBURN. Context, yes.

Judge SOTOMAYOR. And by that, I mean what the court will look at is a state regulation of your right and then determine can the state do that or not. So even once you recognize a right, you are always considering what the state is doing to limit or expand that right and then decide is that Okay constitutionally.

Senator COBURN. It is very interesting to me. I went back and read the history of the debate on the Fourteenth Amendment, and for many of you who don't know, what generated much of the Fourteenth Amendment was in reconstruction. Southern states were taking away the right to bear arms by freed men, recently freed slaves.

Much of the discussion in the Congress was to restore that right of the Second Amendment through the Fourteenth Amendment to restore an individual right that was guaranteed under the Constitution.

So one of the purposes for the Fourteenth Amendment, one of the reasons it came about is because those rights were bring abridged in the southern states post Civil War.

Let me move on. In the Constitution we have the right to bear arms. Whether it is incorporated or not, it is stated there. I'm having trouble understanding how we got to a point where a right to privacy which is not explicitly spelled out but it spelled out to some degree in the Fourth Amendment, which has set a law and is fixed, and something such as the Second Amendment which is spelled out in the Constitution has not set a law and fixed.

I don't want you to answer that specifically. What I would like to hear you say is how did we get there? How did we get to the point where something that is spelled out in our Constitution isn't guaranteed to us, but something that isn't spelled out specifically in our Constitution is?

Would you give me your philosophical answer? I don't want to tie you down on any future decisions, but how did we get there when we can read this book and it says certain things and those aren't guaranteed, but the things that it doesn't say are?

Judge SOTOMAYOR. One of the frustrations with judges and their decisions by citizens is that, and this was an earlier response to Senator Cornyn.

What we do is different than the conversation that the public has about what it wants the law to do. We don't, judges, make law. What we do is we get a particular set of facts presented to us, we look at what those facts are, what in the case of different constitutional amendments is, what states are deciding to do or not do, and then look at the Constitution and see what it says and attempt to take its words and the principles and the precedents that have described those principles and apply them to the facts before you.

In discussing the Second Amendment as it applied to the Federal Government, Justice Scalia noted that there had been long regulations by many states on a variety of different issues related to the possession of guns.

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He wasn't suggesting that all regulation was unconstitutional. He was holding in that case that DC's particular regulation was illegal.

As you know, there are many states that prohibit felons from possessing guns. So does the Federal Government. So it's not that we make a broad policy choice and say this is what we want, what judges do. What we look at is what other actors in the system are doing, what their interest in doing it is and how that fits to whatever situation they think they have to fix, what Congress or state legislature has to fix.

All of that is the court's function. So I can't explain it philosophically. I can only explain it by its setting and what the function of judging is about.

Senator COBURN. Thank you. Let me follow up with one other question.

As a citizen of this country, do you believe innately in my ability to have self-defense of myself? Personal self-defense. Do I have a right to personal self-defense?

Judge SOTOMAYOR. I'm trying to think if I remember a case where the Supreme Court has addressed that particular question. Is there a constitutional right to self-defense? I can't think of one. I could be wrong, but I can't think of one.

Generally, as I understand, most criminal law statutes are passed by states. I'm also trying to think if there is any Federal law that includes a self-defense provision or not. I just can't.

What I was attempting to explain is the issue of self-defense is usually defined in criminal statutes by the state's laws. I would think, although I haven't studied all of the state's laws. I'm intimately familiar with New York.

Senator COBURN. But do you have an opinion or can you give me your opinion of whether or not in this country I personally as an individual citizen have the right to self-defense?

Judge SOTOMAYOR. As I said, I don't know. I don't know if that legal question has been ever presented.

Senator COBURN. I wasn't asking about the legal question. I'm asking about your personal opinion.

Judge SOTOMAYOR. But that is sort of an abstract question with no particular meaning to me outside of——

Senator COBURN. Well, I think that's what American people want to hear, Your Honor. They want to know, do they have a right to personal self-defense. Could the Second Amendment mean something under the Fourteenth Amendment? Does what the Constitution, how they take the Constitution, not how our bright legal minds, but what they think is important.

Is it Okay to defend yourself in your home if you're under attack? In other words, the general theory is do I have that right? And I understand if you don't want to answer that because it might influence your position that you might have in a case, and that's a fine answer with me. Those are the kinds of things that people would like for us to answer and would like to know.

Not how you would rule or what you are going to rule, and specifically what you think about it, but just yes or no. Do we have that right?

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Judge SOTOMAYOR. I know it's difficult to deal with someone like a judge who is so sort of—whose thinking is so cornered by law.

Senator COBURN. I know.

Judge SOTOMAYOR. Could I——

Senator COBURN. Kind of like a doctor. I can't quit using doctor terms.

Judge SOTOMAYOR. That's exactly right. But let me try to address what you are saying in the context that I can, which is what I have experience with, which is New York criminal law because I was a former prosecutor.

I am talking in very broad terms, but under New York law, if you are being threatened with imminent death or very serious injury, you can use force to repel that. That would be legal.

The question that would come up and does come up before juries and judges is how imminent is the threat? If the threat was in this room, I'm going to come get you and you go home and get, or I go home, I don't want to suggest I am by the way. Please, I don't want anybody to misunderstand what I'm trying to say.

If I go home, get a gun, come back and shoot you, that may not be legal under New York law because you would have alternative ways to defend——

Senator COBURN. You will have lots of explaining to do.

Judge SOTOMAYOR. I'd be in a lot of trouble then. But I couldn't do that under a definition of self-defense. So that is what I was trying to explain in terms of why in looking at this as a judge, I'm thinking about how that question comes up and how the answer can differ so radically given the hypothetical facts before you.

Senator COBURN. The problem is we doctors think like doctors. It is hard to get out of the doctor's skin. Judges think like judges, lawyers think like lawyers.

What American people want to see is inside, what your gut says. Part of that is why we are having this hearing.

I want to move to one other area. You have been fairly critical of Justice Scalia's criticism of the use of foreign law in making decisions. I would like for you to cite for me either in the Constitution or in the oath that you took outside of treaties the authority that you can have to utilize foreign law in deciding cases in a court's law in this country.

Judge SOTOMAYOR. I have actually agreed with Justice Scalia and Thomas on the point that one has to be very cautious even in using foreign law with respect to the things American law permits you to. That is in treaty interpretation or in conflicts of law because it is a different system of law.

Senator COBURN. But I accepted that. I said outside of those. In other areas where you will sit in judgment, can you cite for me the authority either given in your oath or the Constitution that allows you to utilize laws outside of this country to make the decisions about laws inside this country?

Judge SOTOMAYOR. My speech and my record on this issue, because I have never used it to interpret the Constitution or to interpret American statute is that there is none. My speech has made that very clear.

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Senator COBURN. So you stand by it. There is no authority for a Supreme Court Justice to utilize foreign law in terms of making decisions based on the Constitution or statutes?

Judge SOTOMAYOR. Unless the statute requires you or directs you to look at foreign law, and some do by the way, the answer is no. Foreign law cannot be used as a holding or a precedent or to bind or to influence the outcome of a legal decision interpreting the Constitution or American law that doesn't direct you to that law.

Senator COBURN. Well, let me give you one of your quotes. 'To suggest to anyone that you can outlaw the use of foreign or international law is a sentiment that is based on a fundamental misunderstanding. What you would be asking American judges to do is to close their mind to good ideas. Nothing in the American legal system prevents us from considering those ideas.'

We don't want judges to have closed minds, just as much as we don't want judges to consider legislation and foreign law that is developed through bodies, elected bodies outside of this country to influence either rightly so or wrongly so, against what the elected representatives and Constitution of this country says.

So would you kindly explain the difference that I perceive in both this statement versus the way you just answered?

Judge SOTOMAYOR. There is none. If you look at my speech, you will see that repeatedly I pointed out both that the American legal system was structured not to use foreign law, it repeatedly underscored that foreign law could not be used as a holding as precedent or to interpret the Constitution of the statute.

What I pointed out to in that speech is that there is a public misunderstanding of the word use. What I was talking about, one doesn't use those things in the sense of coming to a legal conclusion in a case.

What judges do, and I cited Justice Ginsburg, is educate themselves. They build up a story of knowledge about legal thinking, about approaches that one might consider. But that is just thinking. It's an academic discussion when you're talking about thinking about ideas. Then it is how most people think about the citation of foreign law in a decision.

They assume that if there is a citation to foreign law, that is driving the conclusion. In my experience when I have seen other judges cite foreign law, they are not using it to drive the conclusion, they are using just to point something out about a comparison between American law or foreign law. But they are not using it in the sense of compelling a result.

Senator COBURN. I'm not sure I agree with that on certain Eighth Amendment and Fourteenth Amendment cases.

Let me go to another—I have just a short period of time. Do you feel—it has been said that we should worry about what other people think about us in terms of how we interpret our own law, and I'm paraphrasing not very well I believe.

Is it important that we look good to people outside of this country? Or is it more important that we have a jurisprudence that is defined correctly and followed correctly according to our Constitution? And whatever the results may be, it is our result rather than a politically correct result that might please other people in the world?

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Judge SOTOMAYOR. We don't render decisions to please the home crowd or any other crowd. I know that because I have heard speeches by a number of Justices, that in the past, Justices have indicated that the Supreme Court hasn't taken many treaty cases, that maybe it should think about doing that because we are not participating in the discussion among countries on treaty positions that are ambiguous.

That may be a consideration to some Justices. Some have expressed that as a consideration. My point is you don't rule to please any crowd. You rule to get the law right under its terms.

Senator COBURN. Thank you. Thank you, Mr. Chairman.

Chairman LEAHY. Senator Coburn.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Mr. Chairman, and welcome again, Your Honor. I have to say, before I get into the questions that I have for you, that I, like many, many, many Americans, feel enormous pride that you are here today. And I was talking with some friends in Providence when I was home about your nomination, and I said, "It actually gives me goose bumps to think about the path that has brought you here today and, more importantly, to think about"—because it is not about you—more important to think what that means about America, that path. And they said, "No, no. You can't say 'goose bumps.' You have to say 'piel de gachina.'" And so I promised them that I would, so I am keeping that promise right now.

But I want to tell you that I think in the way you have handled yourself in this Committee so far, you have done nothing but to vindicate and reinforce the pride that so many people feel in you. And I hope that as this process continues—I know these days are long, and it can be a bit of an order—I hope that you very much feel buoyed and sustained by that pride and that optimism and that confidence that people across this country feel for you and that so many people in this room feel for you. So I wanted to say that.

I also wanted to fulfill another promise, which is the one I made to you, that in my opening statement I said I would ask you to make a simple pledge, and that simple pledge is that you will decide cases on the law and the facts before you; that you will respect the role of Congress as representatives of the American people; that you will not prejudge any case, but will listen to every party that comes before you; and that you will respect precedent and limit yourself to the issues that the Court must decide.

May I ask you to make that pledge?

Judge SOTOMAYOR. I can. That's the pledge I would take if I was—that I took as a district court judge, as a circuit court judge, and if I am honored to be confirmed by this body, that I would take as a Supreme Court Justice, yes.

Senator WHITEHOUSE. Thank you.

Some of my colleagues have raised questions about your role at the Puerto Rican Legal Defense and Education Fund many years ago before you left that organization to become a Federal trial judge in 1992, I guess it was. I just want to clarify. That was clearly a part of your history and your package that came to the Senate at the time of those confirmations, when you were confirmed both

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in 1992 and 1997, so this is nothing new to the Senate. Is that correct?

Judge SOTOMAYOR. That's correct.

Senator WHITEHOUSE. And in terms of the way that the Puerto Rican Legal Defense and Education Fund operated, you were a member of the board. Is that correct?

Judge SOTOMAYOR. I was.

Senator WHITEHOUSE. Did the attorneys for the Puerto Rican Legal Defense and Education Fund make it a practice to vet their legal filings with the board first? Did the board approve individual briefs and arguments that were made by attorneys for the organization?

Judge SOTOMAYOR. No, because most of us on the board didn't have civil rights experience. I had actually—when I was a prosecutor in private practice, that wasn't my specialty of law. Even if they tried to show it to me, I don't know that I could have made a legal judgment even if I tried. That was not our function.

Senator WHITEHOUSE. And I think that is customary in charitable organizations for the board not to sign off specifically on briefs and other legal filings that the attorneys make. Certainly in the years I have spent on the boards of charitable organizations, it has never been something presented to me. So I appreciate that.

In 1992 and in 1997, when the Senate was, again, fully aware of all that, was there, to your recollection, the objection made in those confirmations?

Judge SOTOMAYOR. I don't believe any question was asked about my service on the Puerto Rican Legal Defense and Education Fund. The fund is an organization that has and has been considered in the mainstream of civil rights organizations like the NAACP and the Mexican American Legal Defense and Education Fund, promotes the civil rights of its community.

Senator WHITEHOUSE. Let me turn to some more general questions, if I may, and one has to do with the role of the jury—not just in trials. Obviously, you are eminently familiar with the role of juries in trials. I think you will be the only member of the United States Supreme Court, if you are confirmed, to actually have had Federal trial judge experience, which I think is a valuable attribute. But I am not thinking so much about the role of the jury in the courtroom as I am about the role of the jury in the American system of government.

When the Constitution was set up, as you know so well, the Founders made great efforts to disaggregate power, to create checks and balances, and the matrix of separated powers that they created has served us very, very well.

In the course of that, or as a part of that, the Founders also revealed some very strongly felt concerns about the hazards of both unchecked power and of the vulnerability of the legislative and executive branches to either corruption or to being consumed and overwhelmed by passing passions. And I would love to hear your thoughts on the importance of the jury in that American system of Government, and if you could, with particular reference to the concerns of the Founders about the vulnerabilities of the elected branches.

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Judge SOTOMAYOR. Like you, I am—and perhaps because I was a State prosecutor and I have been a trial judge, and so I've had very extensive experience with jury trials in the American criminal law context. I have had less in the civil law context as a private practitioner, but much more as a district court judge.

I can understand why our Founding Fathers believed in the system of juries. I have found in my experience with juries that virtually every juror I have ever dealt with, after having experienced the process, came away heartened, more deeply committed to the fundamental importance of their role as citizens in that process. Every juror I ever dealt with showed great attention to what was going on, took their responsibilities very seriously.

I had a juror who was in the middle of deliberations, on her way to my courtroom—not on her way to my courtroom—on her way home from court on the previous day broke her leg, was in the hospital the entire night, came back the next morning on time, in a wheelchair, with a cast that went up to her hip. What a testament both to that woman and to the importance of jury service to our citizens. I was very active in ensuring that her service was recognized by our court.

It has a central role. Its importance to remember is that it hasn't been fully incorporated against the States. Many States limit jury trials in different ways. And so the question of what cases require a jury trial and what don't is still somewhat within the discretion of States. But it is a very important part of a sense of protection for defendants accused in criminal cases, and one that I personally value from my experience with it.

Senator WHITEHOUSE. And does the Founders' concern about the potential vulnerabilities or liabilities about the elected branch illuminate the importance of the jury system?

Judge SOTOMAYOR. Senator, I—as I see the jury system, I don't know exactly—I don't actually—and I've read the Federalist Papers and I've read other historical accounts. The jury system was—I thought the basic premise of it was to ensure that a person subject to criminal liability would have a group of his or her peers pass judgment on whether that individual had violated the law or not.

To the extent that the Constitution looked to the courts to determine whether a particular act was or was not constitutional, it seems to me that that was a different function than what the jury was intended to serve. The jury, as I understood it, was to ensure that a person's guilt or innocence was determined by a group of peers. To the extent that that has a limit on the elected branches, it's to ensure that someone is prosecuted under the law and that the law is applied to them in the way that the law is written and intended.

Senator WHITEHOUSE. And where the jury requirement applies to civil trials, the argument would be the same. Correct?

Judge SOTOMAYOR. Yes.

Senator WHITEHOUSE. Again, on the question of the American system of Government, how would you characterize the Founders' view of any exercises of unilateral or unchecked power by any of the three branches of Government in the overall scheme?

Judge SOTOMAYOR. The Constitution by its terms sets forth the powers and limits of each branch of Government, and so to the ex-

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tent that are limits recognized in the Constitution, that is really what the Constitution intends. The Bill of Rights, the Amendments set forth there are often viewed as limits on Government action. And so it's a question always of looking at what the Constitution says and what kind of scope it is for a Government action at issue.

Senator WHITEHOUSE. Would you feel, in light of all of the attention—very, very careful and thoroughly thought out attention—that the Constitution gives to establishing and enforcing a whole variety of different checks and balances among the different powers of Government, that a judge who was presented with an argument that a particular branch of Government should exercise or have the authority to exercise unilateral unchecked power in a particular area should approach that argument with a degree of heightened caution or attention?

Judge SOTOMAYOR. The best framework that has been set out on this question of a unilateral act by one branch or another—but usually the challenge is raised when the Executive is doing something, because the Executive executes the law, takes the action, typically. The best description of how to approach those questions was done by Justice Jackson in his concurring opinion in the *Youngstown* case. And that opinion laid out a framework that generally is applied to all questions of Executive action, which is that you have to look at the powers of each branch together. You have to start with what has Congress said, express or implicitly. And if it's authorized to do something, to let the President do something, then the President's acting at the height of his powers. If Congress has implicitly prohibited—expressly or implicitly prohibited something, then the President's acting at the lowest ebb of his powers.

There is a zone of twilight, which is the zone in between, which is: Has Congress said something or not said something?

In all of the situations, once you've looked at what Congress has done or not done, you then are directed to look at what the President's powers may be under the Constitution minus whatever powers Congress has in that area. So the whole exercise is really, in terms of Congress and the Executive, an exercise of the two working together. And, in fact, that's the basic structure of our system of Government. That's why Congress makes the laws. The President can veto them, but he can't make them. He can regulate if the Congress gives him the authority to do so, and within other delegated authorities or—I shouldn't use the word "delegated" because it has a legal meaning. But the point is that that question is always looked at in light of what Congress has said on the issue and in light of Congress' power as specified in the Constitution.

Senator WHITEHOUSE. Let me change to a more law enforcement-oriented topic. I appreciate, first of all, very much your service in District Attorney Morgenthau's office. It is an office that prosecutors around the country look at with great pride and sense of its long tradition and of the very great capability of the prosecutors who serve in it. It is a very proud office, and I am delighted that you served there, and I think it says a great deal about you that, coming out of law school and college with the stellar academic record that you had and an entire world of opportunities open to you, you chose that rather poorly paid office. And since you have met 89 of us, I doubt you remember all of our conversations, but

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when you and I had the chance to meet, we compared who had the worst office as a new prosecutor, and I think you won.

[Laughter.]

Senator WHITEHOUSE. And so it was a very important moment for, at that point, a quite new lawyer to make a very significant statement about who you were and what your purpose was. And so I very much appreciate that you made that choice, and I think prosecutors like my colleagues Senator Klobuchar and many others around this country, our Chairman, Senator Leahy, made that choice over the years, and it is one that I think merits a salute.

One of the things that prosecutors have to deal with all the time is search and seizure and warrants, and my question has to do with the warrant requirement under the Constitution. I see the Constitution as being changeless, timeless, and immutable. What changes is society, as you pointed out in your testimony earlier, and technology. And so new questions arise, and I would be interested in your reaction to the difference between the experience of society and the technology of society when the Founders set up the warrant requirement originally, and today.

When the Founders set up the warrant requirement originally, when the sheriff or somebody went to seize property, to bring it in as evidence for a trial or to condemn it as contraband, that was sort of the end of it. If it was evidence, when it was done it was returned and went back; particularly papers were returned, and that was the end of it. Then came the Xerox machine, and now the Government could make copies of what they took, and it was returned, as always, just as the Founders had intended, but copies were sprinkled throughout Government files, very often ones that ended up in archives buildings in dusty boxes that would have taken enormous effort to locate. But, nevertheless, they remained available.

And nowadays, with electronic databases and electronic search functions, matters that once would have been returned to the individual and that envelope of privacy that was opened by the warrant would have been closed again are now potentially eternally available to Government, eternally searchable, and it raises some very interesting privacy questions that we will have to face in this Congress and in this Senate as we begin to take on issues particularly of cyber security, cyber attack, cyber terrorism, and take advantage of what technology can bring to bear in the continued struggle against terrorist extremists.

So I would be interested in your thoughts on how the Constitution, which is unchanged through all of that, what analysis you would go through to see whether the change from a quickly opening and closing privacy envelope to one that is now essentially open season forever, how would you go about analyzing that as a judge, given that the Constitution is a fixed document?

Judge SOTOMAYOR. I think, as I understand your question, Senator, that there are two issues—if not more, but the two that I note as more starkly for me in your question is the one of the search and seizure and the Fourth Amendment as it applies to taking evidence from an individual and use it against him or her in a current proceeding.

Senator WHITEHOUSE. Yes, which is a constant. That stayed the same.

Judge SOTOMAYOR. That is the structure.

Not so long ago, the Supreme Court dealt with a technologically new situation, which was whether an individual had a right to expect a warrant to be gotten before law enforcement flew over his or—I think it was a "his" in that case—his home and took readings of the thermal energy emanating from his home, and then going in to see if the person was growing marijuana.

Senator WHITEHOUSE. The *FLIR* case.

Judge SOTOMAYOR. Exactly. And in that case, the reason for that case is that apparently—I'm not an expert in marijuana growing, but apparently, when you're growing marijuana, there's certain heating lights that you need. At least that's what the case was describing. And it generates this enormous amount of heat that wouldn't generally come from a home unless you were doing something like this.

And what the Court did there—in an opinion by Justice Scalia, I believe it was—is it looked at the embedded questions of privacy in the home that underlied the unreasonable search and seizure, and the Court there, as I mentioned, determined that acts taken in the privacy of one's home would commonly not be expected to be intruded upon unless the police secured a warrant. And to the extent that the law had generally recognized that if you worked actively to keep people out of your home—you locked your windows, you locked your doors, you didn't let people walk by and peek through, you didn't stand at your front door and show people what you were doing—that you were exhibiting your expectation of privacy.

And to the extent that new technology had developed that you wouldn't expect to intrude on that privacy, then you were protected by the Warrant Clause, and the police had an obligation to go talk to a magistrate and explain to them what their evidence was and let the magistrate—I use "the magistrate" in that more global sense. It would be a judge, but you would let a judge decide whether there was probable cause to issue the warrant—reasonable suspicion, probable cause—probable cause to issue the warrant.

That's how the courts addressed the unreasonable—or have addressed, the Supreme Court has, the unreasonable search and seizure, and balance the new technology with the expectations of privacy that are recognized in the Fourth Amendment.

Yes, I thought a separate question which in my mind is different than the right to privacy with respect to personal information that could be otherwise available to the public as a byproduct of a criminal action or as a byproduct of your participation in some regulated activity of the Government. There are situations in which, if your industry is regulated, you are going to make disclosures to the Government, and then the question becomes how much and what circumstances can then Government make copies, put it in an electronic data base or use it in another situation.

So much of that gets controlled by the issues you are saying Congress is thinking about, which is, What are people's rights of privacy in their personal information? Should we as Congress as a matter of policy regulate that use?

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The Court itself had been commanded by Congress to look at certain privacy information of individuals and guard it from public disclosure in the data bases you are talking about. So we have been told, "Don't go using somebody's Social Security number and putting it in a data base." That is part of a public document, but we have been told, "Don't do that." And there is a reason for that: because there is not only the issues of identity theft but other harms that come to people from that situation.

So that broader question, as we many, is not one that one could talk about a philosophy about. As a judge, you have to look at the situation at issue, think about what Congress has said about that in the laws, and then consider what the Constitution may or may not say on that question, depending on the nature of the claim before the Court.

Senator WHITEHOUSE. Your Honor, I thank you. I wish you well.

Judge SOTOMAYOR. Thank you.

Senator WHITEHOUSE. And I congratulate you on your appearance before this Committee so far.

Judge SOTOMAYOR. Thank you, sir.

Chairman LEAHY. Senator Whitehouse, thank you. I appreciate the comments getting into the area of criminal law.

Of course, Senator Whitehouse has served as both a U.S. Attorney and as an Attorney General and brings a great depth of knowledge, as do several on both the Republican and Democratic side, to this Committee. And I also appreciate you taking less than your time. I hope maybe you will be setting a standard as we go forth.

[Laughter.]

Chairman LEAHY. We will take a 15-minute break.

[Recess at 11:35 a.m. to 11:53 a.m.]

Chairman LEAHY. There has been an interest expressed by—I was going to say by all the Senators, but most Senators have left the hearing room. Do not think that does not mean that there is not going to be more questions, Judge, because there will be this round and another round and if it is a case of all the questions having been asked, but not everybody has asked all the questions, some will come back and ask them again.

What we are going to do, we are going to have Senator Klobuchar and Senator Kaufman ask questions. We will then break for lunch. We will then have Senator Specter and Senator Franken ask questions. I am saying this for the purpose, also, of those who have to schedule and plan.

We will take a break for lunch after these two Senators. We will then go into the traditional closed door session, which will be held in the Senate Judiciary Committee room.

So, Senator Klobuchar, we seem to be heavy on prosecutors here. She is also a former prosecutor. I yield to you.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. Good afternoon, Judge. Thank you, again, for all of your patience and your thoughtful answers. Really, everyone has been focusing on you sitting there. I have been focusing on how patient your mother has been through this whole thing, because I ran into her in the restroom just now and, I can tell you, she has a lot she would like to say. She has plenty of stories that she would like to share about you. I thought I might miss my questioning opportunity.

Judge SOTOMAYOR. Senator, don't give her the chance.

Senator KLOBUCHAR. But I was thinking she is much more patient than my mother has been, who has been waiting for this moment, for me to ask these questions, and leaving messages, like, "How long do these guys have to go on?"

My favorite one, the recent one, was, "I watched Senator Feinstein and she was brilliant. What are you going to do?" So let us move on.

Judge SOTOMAYOR. We should introduce our mothers. Okay?

Senator KLOBUCHAR. Exactly. I have some quick questions here at the beginning just to follow-up on some of the issues raised by my colleagues. Senator Coburn was asking you about the *Heller* case and Second Amendment issues, and I personally agree with the *Heller* case. But I remember that yesterday that you said that in *Maloney*, your second circuit case, that you were bound by precedent in your circuit, but that you would keep an open mind if the Supreme Court takes up the question of whether the Second Amendment can be incorporated against the states. Is that right?

Judge SOTOMAYOR. Yes, Senator. I take every case case-by-case and my mind is always open and I make no prejudgments as to conclusions.

Senator KLOBUCHAR. Okay. Then a follow-up on a question that Senator Whitehouse was asking you about the Puerto Rican Legal Defense Fund. You were on that board. One just minor follow-up. But isn't it true that the ABA, that their code of conduct, the American Bar Association code of conduct bars board members from engaging in litigation because of a lack of an actual lawyer-client relationship?

Judge SOTOMAYOR. Yes.

Senator KLOBUCHAR. Then, finally, just one point. We have heard so much about your speech in which you used the phrase "wise Latina," and I am not going to go over that again. But I did want to note for the record that you made a similar comment in another speech that you gave back in 1994, which you have provided not only in this proceeding, but you also provided it when you came before the Senate for confirmation to the circuit court in 1997 and 1998.

No Senator at that time—do you remember them asking you about it or making any issue about it at the time?

Judge SOTOMAYOR. No.

Senator KLOBUCHAR. All right. Thank you. Now, we can move on to what I want to talk about, which is your work as a criminal prosecutor. Senator Whitehouse initially asked a few questions about that.

You were quoted in the New York Times a while back about your time there and you said, "The one thing I have found is that if you come into the criminal justice system on a prosecutorial or defense level thinking that you can change the ills of society, you are going to be sorely disappointed. This is not where those kinds of changes have to be made."

Do you want to elaborate on that a little bit?

Judge SOTOMAYOR. By the time a criminal defendant ends up in court, they've been shaped by their lives. If you want to give people the best opportunity of success at life, it's a message I deliver fre-

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quently to my community, it has to be through early childhood forward.

If you're waiting to do that once they're before a judge in court, your chances of success have diminished dramatically. And so one of my messages in many of my speeches to my community groups is pay attention to education.

It's the value mom taught me, but her lesson was not lost on me when I became a prosecutor and it's a lesson that I continue to promote, because I so fervently believe it.

The success of our communities depends on us improving the quality of our education of our children and parental participation in ensuring that that happens in our society.

Senator KLOBUCHAR. It also reminded me of that comment about some of the comments you have made about the limited roles, that a prosecutor has one role, and the limited role that a judge may have to respect that judicial role of not making the laws, but interpreting the laws. Would that be a correct summary?

Judge SOTOMAYOR. That is. In the statement I made to the newspaper article, I was focusing on a different part of that, but it is. As a prosecutor, my role was not to look at what I thought the punishment should have been, because that was set in law.

Sentences are set by Congress within statutory ranges, and my role was to prosecute on behalf of the people of the State of New York. And that role is different than one that I would do if I were a defense attorney, whose charge is to do something else to ensure that a defendant is given a fair trial and that the government has proven its case beyond a reasonable doubt.

But we cannot remedy the ills of society in a courtroom. We can only apply the law to the facts before us.

Senator KLOBUCHAR. I think Justice Ginsberg made a similar comment in an article this weekend, in an interview she did, as she was talking about—this was her exact quote, "The legislature can make the change, can facilitate the change, as laws like the Family Medical Leave Act do"—she was talking about family arrangements—"but it is not something a court can decree." "A court can't tell the man," she said, "'you've got to do more than carry out the garbage.'"

I thought that was another way of—you do not have to comment on that, but it was another way of making the same point.

The other thing that I wanted to focus on was just that role as a prosecutor, some of the difficult decisions you have to make about charging cases, for instance. Sometimes you have to make a difficult decision to charge a family member maybe in a drunk driving case where someone kills their own child because they were drunk or you have to make a decision when the court of public opinion has already decided someone is guilty, but you realize you do not have enough evidence to charge the case.

Do you want to talk about maybe a specific example of that in your own career as a prosecutor or what goes into your thinking on charging?

Judge SOTOMAYOR. I was influenced so greatly by a television show in igniting the passion that I had as being a prosecutor, and it was Perry Mason. For the young people behind all of you, they may not even know who Perry Mason was.

But Perry Mason was one of the first lawyers portrayed on television and his storyline is that in all of the cases he tried, except one, he proved his client innocent and got the actual murderer to confess.

In one of the episodes, at the end of the episode, Perry Mason, with the character who played the prosecutor in the case, were meeting up after the case and Perry said to the prosecutor, "It must cause you some pain having expended all that effort in your case to have the charges dismissed." And the prosecutor looked up and said, "No. My job as a prosecutor is do justice and justice is served when a guilty man is convicted and when an innocent man is not."

And I thought to myself that's quite amazing to be able to serve that role; to be given a job, as I was, by Mr. Morgenthal, a job I'm eternally grateful to him for, in which I could do what justice required in an individual case.

And it was not without bounds, because I served a role for society and that role was to ensure that the public safety and public interests were fully represented. But prosecutors, in each individual case, at least in my experience particularly under the tutelage of Mr. Morgenthal, was we did what the law required within the bounds of understanding that our job was not to play to the home crowd, not to look for public approval, but to look at each case, in some respects, like a judge does, individually.

And that meant, in some cases, bringing the tough charge, and I was actually known in my office for doing that often, but that's because I determined it was appropriate often. But periodically, I would look at the quality of evidence and say there's just not enough.

I had one case with an individual who was charged with committing a larceny from a woman and his defense attorney came to me and said, "I never ever do this, but this kid is innocent. Please look at his background. He's a kid with a disability. Talk to his teachers. Look at his life. Look at his record. Here it is," and he gave me the file.

Everything he said was absolutely true. This was a kid with not a blemish in his life. And he said, "Please look at this case more closely." And I went and talked to the victim and she—I had not spoken to her when the case was indicted. This was one of those cases that was transferred to me, and so it was my first time in talking to her, and I let her tell me the story and it turned out she had never seen who took her pocketbook.

In that case, she saw a young man that the police had stopped in a subway station with a black jacket and she thought she had seen a black jacket and identified the young man as the one who had stolen her property.

The young man, when he was stopped, didn't run away. He was just sitting there. Her property wasn't on him. And he had the background that he did. And I looked at that case and took it to my supervisor and said, "I don't think we can prove this case." And my supervisor agreed and we dismissed the charges.

And then there are others that I prosecuted, very close cases, where I thought a jury should decide if someone was guilty and I prosecuted those cases and, more often than not, got conviction.

My point is that that is such a wonderful part of being a prosecutor. That TV character said something that motivated my choices in life and something that holds true.

And that's not to say, by the way, and I firmly, firmly believe this, defense attorneys serve a noble role, as well. All participants in this process do, judges, juries, prosecutors and defense attorneys. We are all implementing the protections of the Constitution.

Senator KLOBUCHAR. Thank you. That was very well said. I want to take that pragmatic experience that you had not just as a civil litigator, but also as a prosecutor. A lot has been said about whether judges' biases or their gender or their race should enter into decision making.

I actually thought that Senator Schumer did a good job of asking you questions where, in fact, you might have been sympathetic to a particular victim or to a particular plaintiff, but you ruled against them. That actually gave me some answers to give to this baggage carrier that came up to me at the airport in Minneapolis.

It was about a month ago, after you had just been announced, and he came up and he said, "Are you going to vote for that woman?" At first, I did not even know what he was talking about. I said, "What?" He said, "Are you going to vote for that woman?" I said, "Well, I think so, but I want to ask her some questions."

He said, "Well, aren't you worried that her emotions get in front of the law?" I thought if anyone had heard the cases, the *TWA* case, where you decided against—had to make a decision from some very sympathetic victims, of families of people who had been killed in a plane crash, and a host of other cases where you put the law in front of where your sympathies lie, I think that would have been a very good answer to him.

But another piece of it, but it is a very different part of it, is the practical experiences that you have had, the pragmatic works that you have done. I just wanted to go through some of the cases that you have had, the criminal cases that you have handled as a judge and talk to you a little bit about how that pragmatic experience might be helpful on the courts; not leading you to always side with the prosecution, obviously, but helping you to maybe ferret through the facts, as you have been known to be someone that really focuses on the facts.

One of them is the *United States* v. *Falso* case and this is a case where child pornography was found in a guy's home and on his computer. You ruled that although the police officers did not have probable cause for the search warrant, that the evidence obtained in the search, the child pornography and the computer, should still be considered under the good faith exception to the inclusionary rule, because the judge had not been knowingly misled. In other words, it was a mistake.

Can you talk about that case and how perhaps having that kind of experience on the front line helps you to reach that decision, because there was someone, I believe, that dissented in that case?

Judge SOTOMAYOR. That case presented a very complicated question in second circuit law. There had been two cases addressing how much information a warrant has to contain and what kind in order for the police to search a defendant's home or—I shouldn't

say a home—a computer to see if the computer contained images of child pornography.

The two cases—I should say the two panels—I wasn't a member of either of those panels—had very extensive discussion about the implications of the cases because they involved the use of the Internet and how much information the police should or should not have before they looked to get a warrant to search someone's computer, because the computer does provide people with freedom of speech, at least with respect to accessing information and reading it and thinking about it.

In the case before me, I was looking at it in the backdrop of the conflict that it appeared to contain in our case law and what our case law said was important for a police officer to share with a judge and examined the facts before my case, looking at the information that the police had before them and considering whether, in light of existing second circuit law, as it addressed this issue, had the police actually violated the Constitution—I hope I can continue.

Chairman LEAHY. You can continue. That was not a comment from above. I have certain powers as Chairman, but not that much.

Senator KLOBUCHAR. Please go on.

Judge SOTOMAYOR. Whether they should get a warrant or not. And one member of the court said yes and they had violated the Constitution and I joined that part of the opinion because I determined, examining all of the facts of that case and the law, that that was the way the law—the result the law required.

But then I looked at what the principles underlying the unreasonable search and seizures are without a warrant and looked at the question of what was the doctrine that underlay there, and what doctrine it underlays is that you don't want the police violating your constitutional rights without a good faith basis, without probable case.

And that's why you have a judge make that determination. It's why you require them to go to a judge. And so what I had to look at was whether we should make the police responsible for what would have been otherwise a judge's error, not their error.

They gave everything they had to the judge and they said to the judge, "I don't know." Even if they thought they knew, that isn't what commands the warrant. It's the judge's review.

So I was the judge in the middle. One judge joined one part of my opinion. The other judge joined the other part of the opinion. And so I held that the act violated the Constitution, but that the evidence could still be used because the officers had—there was, in law, a good faith exception to the error in the warrant.

Senator KLOBUCHAR. I think you made a similar finding with different underlying facts in *United States* v. *Santa*, when that involved a clerical error, and then that was a case where the underlying arrest warrant—where someone had been arrested, they found cocaine, and you allowed that in on the basis that the underlying arrest warrant, even though it was false, there had not been a warrant out there, it had been removed, that that was a clerical error and they could still use the cocaine.

Judge SOTOMAYOR. Well, in fact, it's a holding the Supreme Court—an issue the Supreme Court addressed just this term.

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Senator KLOBUCHAR. Exactly.

Judge SOTOMAYOR. And came out—or I came out the way the Supreme Court did on that.

Senator KLOBUCHAR. The *Herring* case.

Judge SOTOMAYOR. Yes.

Senator KLOBUCHAR. Yes. Very good. The piece of that case in the Supreme Court that is most interesting to me in terms of that issue we have been talking about, the practical knowledge and how that plays into decisions, is the *Melendez-Diaz* case, which you were not involved in. It was a U.S. Supreme Court case.

But this is just from my own practical work as a prosecutor and it was a contested case with the Supreme Court. It did not divide ideologically. In fact, both Justice Breyer and Justice Roberts were in the dissent that Justice Kennedy wrote. It was a 5–4 decision.

In that case, the issue was whether or not, with the confrontation clause, whether or not lab workers, crime lab workers should be called in to have to testify for drugs and what the tests showed within the drugs and things like that.

I just wondered what your reaction was to that case, how you would have analyzed it. I agree with the dissent in that case. I think that this could really open up 90 years of precedent. I think it is unreasonable for what we should expect of the criminal justice system, and there has been some pretty strong language in the dissent of a fear that this will create some difficulty for prosecutors to follow through on their cases and get the evidence in.

Judge SOTOMAYOR. It's always difficult to deal with people's disappointments about cases, particularly when they have personal experiences and have their own sense of the impact of a case.

I was a former prosecutor, it's difficult proving cases as it is, calling more witnesses adds some burdens to the process. But at the end, that case is a decided case and so it's holding now. It is holding and that's what guides the court in the future on similar issues, to the extent there can be some.

As I said, I do recognize that there can be problems, as a former prosecutor, but that also can't compel a result. And all of those issues have to be looked at in the context of the court's evaluation of the case and the judge's view of what the law permits and doesn't permit.

Senator KLOBUCHAR. I will say there was an interesting story a few weeks ago about jokes that you have been tenacious about getting to the bottoms of facts when you have cases and there were actually some experts that criticized you for spending too much time trying to figure out the facts, which I thought was a pretty unique criticism in the halls of criticism.

In fact, you were defended by a former clerk to Clarence Thomas who said that you are extraordinarily thorough and a judge would ordinarily be praised for writing thorough opinions.

So when we were talking about *Melendez-Diaz* and some of those issues, it seems to me that when you have looked at cases involving criminal justice or really any issue, whether it is that *Vermont Ferry* case that you did or other ones, you really did delve into the facts.

Do you want to talk a little bit about why that is important?

Judge SOTOMAYOR. The facts are the basis for the legal decision. A judge deals with a particular factual setting and applying the law to those facts. To the extent that there's any criticism that I do that on the court of appeals, we're not fact-finders, but we have to ensure that we understand the facts of the case to know what legal principle we're applying it to.

A judge's job, whether it's on the trial level, the circuit court or even the Supreme Court, is not to create hypothetical cases and answer the hypothetical case. It's to answer the case that exists.

And so in my view, and I'm not suggesting any justice does this or doesn't do it, but I do think that my work as a state prosecutor and a trial judge sensitizes me to understanding and approaching cases starting from the facts and then applying the law to those facts as they exist.

And, again, I don't want to suggest that not all judges do that, but because I—because of my background, perhaps like Justice Souter, who also has the reputation of carefully looking at the facts and applying the law to the facts, it's maybe that background that people are noticing and noticing where we picked up that habit.

Senator KLOBUCHAR. Very good. In a report issued last week, The Transactional Record Access Clearinghouse, I did not know there was such a thing, found that you sent more convicts to prison and handed out longer sentences than your colleagues did when you were a district court judge.

One statistic found that you handed out sentences of greater than 6 months to 48 percent of convicted criminals in white collar cases, while your colleagues gave out sentences of 6 months or more to just 36 percent.

You were also twice as likely as your colleagues to send white collar criminals to 2 years or more in prison. I have found the white collar cases to be some of the most challenging cases that we had in our office when I was a prosecutor. They were challenging because there was oftentimes sympathy.

Maybe this is dating myself, 10 years ago, there used to be more sympathy, but there was sympathy to people who were pilots. We had tax evasion cases with pilots or we had a judge that we prosecuted who had a half-day of his friends come and testify that he should not go to jail, including the former Miss America.

So I have found those cases to be difficult. Could you talk a little bit about your view of sentencing, in general, and sentencing of white collar defendants, in particular?

Judge SOTOMAYOR. It should be remembered that when I was a district court judge, the sentencing laws were different than they have become during my 12 years on the court of appeals. That—and it makes me sound ancient, but back in the days when I was a district court judge, the sentencing guidelines were focused on the amount of a fraud and didn't consider the number of victims or the consequences on the number of victims of a crime.

Perhaps because of my prosecutorial background, perhaps because I considered the perspective of prosecutors who came before me, that the guidelines—and their arguments—that the guidelines didn't adequately consider the number of victims and that that should be a factor, because someone who commits 100,000 $1—not $1—$1,000 crimes may be as culpable as the person who does a

one-time act of $100,000, and depending on the victims and the impact on the victims.

Those are factors that one should consider. And so many of the white collar sentences that you are talking about were focused on looking at the guidelines and what the guideline were addressing and ensuring that I was considering, as the sentencing statutes require the court to do, at all of the circumstances of the crime.

I suspect that may drive one of the reasons why I may have given higher white collar crime sentences than some of my colleagues; not to suggest they didn't listen to the argument, but they may have had a different perspective on it.

I should tell you that my circuit endorsed that factor as a consideration under the guidelines, somewhat after I had started imposing sentences on this view, but they also agreed that this was a factor that courts could consider in fashioning a sentence.

Crime is crime and to the extent that you're protecting the interests of society, you take your cues from the statute Congress gives and the sentencing range that Congress sets. And so to the extent that in all my cases I balanced the individual sentence with, as I was directed to, the interests that society sought to protect, then I applied that evenhandedly to all cases.

So it's important to remember the guidelines were mandatory. And so I took my charge as a district court judge seriously at the time to only deviate in the very unusual case, which was permitted by the guidelines.

Senator KLOBUCHAR. What do you think about the change now that they are guidelines, suggested guidelines, and not mandatory?

Judge SOTOMAYOR. As you know, there's been a great number of cases in the Supreme Court, the *Booker*/*Fanfan* line of case. The *Booker*/*Fanfan* case determined they were guidelines.

My own personal experience as an appellate judge is that because the Supreme Court has told the district courts to give serious consideration to the guidelines, there's been a little bit—not a little bit—there's been discretion given to district courts, but they are basically still staying within the guidelines and I think that's because the guidelines prove useful as a starting point to consider what an appropriate sentence may be.

Senator KLOBUCHAR. Just one last question, Mr. Chairman. All these guys have been asking about your baseball case and they have been talking about umpires and judges as umpires.

Did you have a chance to watch the all-star game last night? Because most of America did not watch the replay of your hearing, they might have been watching it.

Judge SOTOMAYOR. I haven't seen television for a very long time. But I will admit that I turned it on for a little while last night.

Senator KLOBUCHAR. Because I will say—and maybe you did not turn it on on this moment, but your Yankee, Derek Jeter, tied it up, but you must know that he scored only because there was a hit by Joe Mauer of the Minnesota Twins. I just want to point that out.

All right. Thank you very much, Judge.

Judge SOTOMAYOR. That's what teamwork helps you with.

Senator KLOBUCHAR. Okay. Thank you.

Chairman LEAHY. I am resisting any Red Sox comment.

Judge SOTOMAYOR. I should beg you all not to hold that against me.

Chairman LEAHY. I am not going to use that against you. I did see a photograph of the president throwing out the ball. I know the photographer well, and he did a very good shot of two pictures.

Senator Kaufman is probably as knowledgeable as anybody on this Committee, having run it for years before becoming a Senator. I have said before, Judge, that Senators are merely constitutional requirements or impediments to the staff. We know who really runs the place.

Senator Kaufman, it is over to you, sir.

Senator KAUFMAN. Thank you, Mr. Chairman.

Chairman LEAHY. And I should make one announcement. You have been hearing some banging going on here. Apparently the air conditioning went out which will probably come as welcome news to some of the press who are freezing in the sky boxes up here.

But it is not welcome news here with the crowd going on and they are working on it, but we are going to keep going as long as we can. Senator Kaufman?

Senator KAUFMAN. Thank you, Mr. Chairman. One of the toughest assignments—I have been here long enough to know the toughest assignment is to stand between the audience and lunch, so I am going to try to gear up under that. Good afternoon, Judge.

Judge SOTOMAYOR. Good afternoon, Senator. It is good talking to you again.

Senator KAUFMAN. It is good to see you. And I want to kind of take a different track. I think Senator Whitehouse and Senator Klobuchar talked a lot about your time as a prosecutor. I would like to move on to kind of your time as a commercial litigator. You were a prosecutor for 5 years, then you decided to go into commercial practice.

What were the thoughts behind you deciding when you left the DA's office to go into commercial practice?

Judge SOTOMAYOR. Well, actually it is a continuation of what I explained to Senator Klobuchar. I had in the DA's office realized that in the criminal law system, we could not affect changes of opportunity for people. We were dealing with a discreet issue and applying the law to the situation at hand.

But if there was going to be an increase of opportunity for all people, that that had to involve an increase in economic opportunity and in economic development for different communities.

So that in combination with my desire to broaden my own personal understanding of as many aspects of law as I could, I decided that I should change my focus and concentrate on commercial matters rather than criminal matters.

It also guided much of the pro bono work I did thereafter which also involved questions of finances and economic opportunities. And so I served on the New York State Mortgage Board and the New York State Mortgage Office was involved in giving individuals affordable housing or loans for affordable housing.

I was a board member of the New York City Campaign Finance Board. Those were activities that motivated in large measure because of my growing belief that economic opportunities for people were the way to address many of the growth needs of communities.

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Senator KAUFMAN. Can you tell us a little bit about your commercial practice? What actually were you dealing with as a litigator?

Judge SOTOMAYOR. It was a wonderful practice because unlike some of my law school friends, I very much wanted to go into a small law firm where I could have hands on practice. Having been a prosecutor and having made all of the decisions, individual decisions I made, I thought to myself as I was leaving the DA's office, I do not think I can go to those firms where I would be the fifth guy on the totem pole, that I wanted to have more hands on experience. So I went to a smaller firm where I actually until I became a partner tended to work directly with the partner and would often counsel businesses. I did a wide variety of commercial issues.

I was involved in grain commodity trading, people buying home grown grains of all kinds, you can name them all, including orange peels as feed for animals, and the contracts that they were involved in in doing those trades.

Our firm represented a very impressive list of client, including Ferrari the car manufacturer. I did a great deal of their work as it related to their dealer relationships and to their customer relationships. So I involved myself in those commercial transactions which were different focus, different emphasis.

I also represented—not me, but the firm, but I counseled the client on many of its dealer relations issue of Pirelli Tire Corporation. These are names I suspect many people know.

Senator KAUFMAN. Yes.

Judge SOTOMAYOR. And from the fashion designer, and I think there are many people who know how famous that fashion house design is, had trademark questions. I participated with the partner who founded that practice within the law firm and she had a very untimely death.

Actually she came from her home ill to vote on my partnership at the firm and I became a partner and a couple of months later, she passed away. But she had worked with me and introduced me to the intellectual property area of law.

I worked on real estate matters, I worked on contract matters of all kinds, licensing agreements, financing agreements, banking questions. There was such a wide berth of issues that I dealt with.

Senator KAUFMAN. And how did that practice help you on the District Court and then on the Circuit Court of Appeals?

Judge SOTOMAYOR. Actually, one of the lessons I learned from my commercial practice, I learned in the context first of my grain commodity trading, but in the work as it related to all commercial disputes, one main lesson.

In business, the predictability of law may be the most necessary in the sense that people organize their business relationships by how they understand the court's interpret their contracts.

I remember being involved in any number of litigations where at the end of the litigation as part of a settlement, I would draft up a settlement agreement between the parties. Quite often it involved creating an ongoing new business relationship or a temporary continuation of a business relationship until they could wind down.

I would draft up the agreement like a litigator, like the judge I try to be. Say it in simple works. I would give it to my corporate

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partners, and I should not say it this way. I would get back stuff that sometimes I would look at and say, what does this gobbly goop mean? They would laugh at me and say, it has meaning. This is how the courts have interpreted it. It is very important to the relationship of the parties that they know what the expectations are in law about their relationship.

Then I understood why it was important to phrase things in certain ways. It made me very respectful about the importance of predictability in terms of court interpretation of business terms because that was very, very critical to organizing business relationships in our country.

Senator KAUFMAN. The other basic job as a District Court judge is to kind of avoid trial, kind of get people settled before they get to trial. How did your commercial experience help you deal with that?

Judge SOTOMAYOR. It is interesting because I remember one case, and I cannot give you details because I would be breaching confidentiality.

But I remember a client coming in to me with a fairly substantial litigation and I looked at the client and I said, "I evaluated the case." I said, "There are some novel theories here. I really think you can win, but there is a serious question about the cost to get there because these are all the things that we would have to do to get there and it is going to cost you," it was millions of dollars that I estimated.

The client went to another lawyer who gave them a different evaluation. They went with that other lawyer. My firm lost all that income. But the client came back afterwards. The figure I put on the litigation was exactly what they spent and more.

Settlements are generally in the business world economic decisions, balancing both the cost of litigation and the right of the issue. But business has a different function than courts. Business function is to do business, to do their work, to sell products,—relationships and litigation are different.

As a judge when I was a District Court judge, most of my focus was on doing what I used to do as a lawyer, to talk to parties not about the merits of their case, but about the consideration of thinking about creative and new ways to approach a legal dispute so they could avoid the cost of litigation.

As a Circuit Court judge, I am very cognizant of the cost of litigation and look at what parties are doing in the courts below, bearing that in mind.

Senator KAUFMAN. You talked about your experience as Circuit Court judge. How did your being a District Court judge help you when you became a Circuit Court judge?

Judge SOTOMAYOR. Well, no question that it made me more sensitive to the importance of facts and looking at the facts the court has found and the facts that the parties are arguing and looking at the record to understand what went on.

I often point to this example. When I sit on panels, and our court is blessed by having judges with a wide variety of circumstances. I know for me because I was a trial judge, I would read all the briefs in a case, I would read the District Court decision.

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If parties were arguing something and the District Court didn't address it, my first question to my law clerks were, go back to the record and tell me why not. Most judges address arguments that people are raising and I would get to oral argument and if I was the only judge with a trial experience, I would look at the parties and say, did you argue this before the District Court?

I could see some of the antennas going up for those colleagues who hadn't had that experience. They said, I never even thought of that. Look in fact if that was the case.

There are all sorts of doctrines that do not permit parties to argue new things on appeal. And so that is how the experience comes in, both the sensitivity to facts and the sensitivity to ensure that you're applying law to those facts.

Senator KAUFMAN. I know you have this commercial experience because as I said in my opening statement, I am concerned about business cases. I think they are really important and I am also concerned that the current courts, being in court too often, seems to disregard law and congressional policy choices when it comes to business cases.

I think in light of economic crisis, Congress probably, not probably, will definitely pass a financial regulatory reform package.

I would just like to make sure that the system is not undermined by the court because they have a different view of what government regulation's all about.

Do you believe that Congress has the constitutional authority to regulate financial markets?

Judge SOTOMAYOR. You have just raised the very first question that will come up when Congress passes an Act.

I can assure you, knowing every time that Congress passes an Act, there is a challenge by somebody. As soon as it is applied to someone in a way that they do not like, they are going to come into court. So I cannot answer that question.

Senator KAUFMAN. I am sympathetic to that and I really should have phrased it—just in general. Not with regard to any case, anything at all about Congress' constitutional authority to regulate financial markets.

Judge SOTOMAYOR. Well, I cannot answer that question because it invites an answer to the potential challenge.

What I can say to you is that Congress has certain constitutional powers. One of them is to pass laws affecting interstate commerce. So the question will be the nature of whatever statute Congress passes, what facts it relies upon and the remedy that it institutes.

So the question would depend on the nature of the statute and what it is doing.

Senator KAUFMAN. But Congress does basically have the ability to regulate markets.

Judge SOTOMAYOR. Well, it has the ability to—the constitutional terms are to make laws that involve commerce between the states. Those are the words and generally that has been interpreted to mean pass laws that affect commercial interstate transaction.

Senator KAUFMAN. To get to a more broader question about laws enacted by Congress, what should a judge's role be in viewing the wisdom of the statute, in interpreting it?

When Congress passes a law, what is needed to whether the judge thinks it is a good law or bad law, the wisdom in passing it. What role does that play in the law?

Judge SOTOMAYOR. I am trying to think if there is any situation in which a judge would have occasion to judge in that way. Policymaking, making of laws is up to Congress. A judge's personal views as to whether that policy choice is good or bad has no role in evaluating Congress' choice.

The question for us is always a different one, which is what has Congress done? Is it constitutional in the manner in which it has done it. But policy choices are Congress' choices. In all areas, deference has to be given to that choice.

Senator KAUFMAN. How about regulation adopted by regulatory agencies?

Judge SOTOMAYOR. Deference has been given in that area by the courts as well. Generally one looks at what Congress has said about that question because executive agencies have to apply and talk about regulations in light of what Congress has commanded. But those are also entitled to deference in different factual situations.

Senator KAUFMAN. We've been talking for a few minutes about securities law.

What characterizes the securities law docket in the southern district of New York in the Second Circuit?

Judge SOTOMAYOR. Everything. We are the home of New York City. Our jurisdiction is, and I am sure that another state is going to complain, but we are the business capital of the world. That is how it has been described by others.

So we deal with every variant of securities law as one could imagine, from investment questions to misleading statements to investors to whatever Congress has regulated, our circuit will have a case on it. Or I should say it usually starts with the District Courts and it will perk up to the Circuit Court. But if you have a securities law, we will likely eventually hear the argument.

Senator KAUFMAN. And this will be valuable if you are confirmed.

Judge SOTOMAYOR. I presume so because it has been a part of my work both as a District Court and a Circuit Court judge.

Senator KAUFMAN. You had a case with a suit against the New York Stock Exchange where the plaintiff sued the New York Stock Exchange for failure to effectively regulate the market.

You ruled to give the New York Stock Exchange immunity from the suit even though you noted that the alleged misconduct appeared egregious.

To reach that sort of decision, how do you reconcile the rationale for immunity with the fact that it deprives the plaintiffs of a remedy in situations where they have been wronged? As you said, egregiously wronged.

Judge SOTOMAYOR. It is somewhat important to recognize the limited role that courts serve and the issue of remedy also is one where one has to talk about remedy against whom and for what.

In the ways that these individuals were injured, they were injured by third parties who had done allegedly illegal acts against them. The court's ruling did not affect their ability to take action

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against those individuals and clearly that is always difficult in some situations when the individual has been arrested, et cetera. But they are still remedies that law provides in terms of whatever assets those individuals have, whatever criminal actions the government may take, often funds are created to reimburse victims.

The question here was whether an agency that in case law was seen to have a quasi governmental function, whether you could sue that agency for conduct that—for not regulating the other individuals adequately in helping to prevent the activity.

But regulation comes in different forms by the quasi governmental agencies and what they can do depends on the exercise of discretion under the laws as they exist at the time.

So the immunity doctrine wasn't looking at the issue of how to recompense the individuals, it was looking at the quasi functions of government. So there is a different perspective that was given to the judges in that case.

Senator KAUFMAN. In another securities case that interests me, *Press* v. *Quake & Riley*, in that case you and your fellow panel members deferred to the SEC's interpretation of its own regulation even though you seemed somewhat skeptical of the interpretation.

Tell us about how you came to the conclusion you did in that case.

Judge SOTOMAYOR. Well, there is a doctrine of Chevron deference and it goes to the issue of who makes the decisions and that goes to policy questions.

To the extent that an agency interpretation is not inconsistent with congressional commands, express commercial commands, a judge cannot substitute their own judgment of what policies should be or regulations should be, but is commended to give deference.

There are obviously in every situation a set of exceptions to when you do not, but you have to then apply a consideration of each of those exceptions in the particular circumstance before you.

There have been other situations in which I have ruled and said no, the agency is not interpreting the statute in accordance with what the panel viewed was Congress' intent. Yesterday I believe one of the other Senators asked me about the *Riverkeeper* case.

Senator KAUFMAN. Yes.

Judge SOTOMAYOR. The Supreme Court came to a different view of what the words Congress used meant. But the point is that the role of course is not to substitute their own judgments. It is to apply the principles of law in accordance with the acts that agencies are doing.

Senator KAUFMAN. And one more securities question. In recent years it seems like regulators were often too lax when it came to ferreting out securities fraud.

What role do the private rights of action, that is cases brought by investors rather than government have in enforcing our securities laws?

Judge SOTOMAYOR. It is a right Congress has given presumably because Congress has made a policy choice that it is a way to ensure that individual's injuries are remedied.

That is a part of many of our securities laws and our anti-trust laws. Government doesn't have unlimited resources to pursue all individual injuries. And so in some situations, Congress makes a

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choice to grant a private cause of action and in some it doesn't. That is a legislative choice.

Senator KAUFMAN. Turning to the anti-trust law, what was your experience in the anti-trust law?

Judge SOTOMAYOR. As a——

Senator KAUFMAN. Both in practice and a judge, both of them.

Judge SOTOMAYOR. I am trying to think—I do not remember having direct experience in anti-trust law when I was in private practice. I do not think I did. So I had very little.

I am trying to think of any of my cases on the District Court and major league baseball strike was one of them. It is the one that I can think of.

I had anti-trust cases there as well. Often the cases settled actually, and so managing those cases was the prime function I had as a District Court judge.

If you will give me a chance to look at my District Court decisions again to see if—and what other cases in the anti-trust area I may have ruled upon in District Court, I can get back to you, Senator, either at the next round or in a written question. I just do not——

On the Circuit Court it is different. I have participated directly in writing opinions and joining panels on opinions. So I've had at least two if not three or four or five of those cases.

Senator KAUFMAN. Yesterday Senator Kohl asked about the *Leegin* case which is striking and it overturned 96 years of precedent that effectively legalized private agreements to prevent discount retailing.

You said that both the majority and the—case had reason to question the economic theory underlining the original precedent. I do not want you to comment on *Leegin* in particular, but what is the role of the court in using economic theory to interpret acts of Congress?

Judge SOTOMAYOR. Well, you do not use economic theory to determine the constitutionality of congressional action. That is a different question I think than the one that *Leegin* addressed. What *Leegin* addressed was how the court would apply congressional act, the anti-trust laws to a factual question before it. That's a different issue because that doesn't do with questioning the economic choices of Congress. That goes to whether or not in reviewing the action of a particular defendant what view the court is going to apply to that activity.

In the *Leegin* case, the court's decision was look, we have prior case law that says that this type of activity is always anti-competitive. The court in reconsidering that issue in the *Leegin* case said well, there has been enough presented in the courts below to show that maybe it is not in some activity as anti-competitive. So we are not going to subject it to an absolute bar, we are going to subject it to a review under rule of reason.

That is why I said it is not a question of questioning Congress' economic choices or the economic theories that underlay its decisions in a legislation. They weren't striking down the anti-trust laws.

What the court was trying to do was figure out how it would apply that law to a particular set of facts before it.

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Senator KAUFMAN. In Illinois Brick, a Supreme Court case dealing with anti-trust law, one of the classic cases, Justice White wrote, "You can say whether to overturn precedent, we must bear in mind the considerations of Stare Decisis weigh heavily in the area of statutory construction, where Congress is free to change this court's interpretation of its legislation."

Do you agree with Justice White?

Judge SOTOMAYOR. I think that that—as you may know, the doctrine of Stare Decisis is not dependent on one factor.

Senator KAUFMAN. Right.

Judge SOTOMAYOR. The court considers a variety of different factors, including the administrative workability of a law, the reliance factor that society has put into that rule, that precedent, the cost to change it, whether the underlying doctrines in related areas, the underlying framework of related areas would lead a court to question whether the prior precedent really has a framework that's consistent with an understanding in this area that has been developed in other cases. And finally, has there been a change in society that shows that the factual findings upon which the older case was premised may be wrong.

There is always the question as part of that analysis and other factors the courts may think about as to whether the older rule has been affirmed by the court and how often, over what period of time.

To the extent that Justice White is talking about a factor that the court should put into that mix, the court has recognized in its Stare Decisis jurisprudence that all of the factors weigh into the decision. You think about why and under what circumstances you should alter the course of the court's interpretation as set forth in prior precedent.

Senator KAUFMAN. I am concerned because recently there has been erosion in anti-trust, both in the courts and the enforcement. It has made it much easier for financial institutions to become so massive, they are in effect too big to fail.

Should a court sitting on anti-trust consider the systemic risk to the marketplace as injected by a financial institution being too big to fail?

Judge SOTOMAYOR. Well, the purposes of the anti-trust theory is premised on ensuring competition in the marketplace. The question, like the one you pose, is one that would come to the court in a particular context and a challenge to some approach the court has used in this area.

I obviously cannot say absolutely yes in a hypothetical, but obviously the court is always looking at what activity is claimed to be illegal under the anti-trust laws and what effect is has on anti-competitive behavior.

The question frequently in anti-trust is is a particular area subject to per se barring or is it subject to the rule of reason, and the two have different approaches to the question.

Senator KAUFMAN. Thank you, Judge. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much, Senator Kaufman. I mentioned before, it is almost 1. We will take a break until 2. At 2, we will recognize first Senator Specter and then Senator Franken.

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When their questions are finished, we will go into the traditional closed door session which will be held not in this room, but in the Senate Judiciary Committee room. Following that, we will come back in here and if there are Senators that have further questions, they will be recognized not to exceed 20 minutes each.

I would hope that if the question has already been asked and answered, they may want to resist the temptation to do it again, but they have that right to take the full 20 minutes if they do.

I realize a lot of the questions have been asked, but not everybody has asked the same question and so they may want to. But they have that right. That's what we will do. We will stand recessed until then.

[Whereupon, at 1 p.m., the meeting recessed for lunch.]

After Recess [2:03 p.m.]

Chairman LEAHY. Judge, what did you do with your mother?

[Laughter.]

Judge SOTOMAYOR. She needed a short break, but it wasn't because of Senators Specter or Franken.

Chairman LEAHY. Like Amy Klobuchar, I had a nice chat with her this morning, and she was talking about when she first became a nurse and compared notes with my wife, and they both agreed that that is when nurses truly had to be nurses. Now they are nurses-plus, with the advances in medicine.

I just discussed this again with Senator Sessions. We will go first to Senator Specter, then to Senator Franken, and then we will recess and go into the other room for the closed session.

Senator Specter, of course, is a former Chairman of this Committee, one of the most senior Members of the Senate, and one of the most experienced. Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Welcome back, Judge Sotomayor. You have held up very well. Of all of the proceedings in the Senate, this is the most exacting on the witness. Years ago, as you know, in the case of *Ashcraft* v. *Tennessee*, they said it was unconstitutional to subject a suspect to relay grilling, but that doesn't apply to nominees. And your family has been here. My wife, Joan Specter, who has been a soldier in her own right, says it is a lot harder to listen to me than it is to make a speech herself. And you are engaged.

I think beyond doing very well on stamina, you have shown intellect and humor and charm and pride and also modesty. So it has been a very good hearing. Notwithstanding all of those qualities, the Constitution says we have to decide whether to consent, and that requires the hearing process and the questions.

Before going into a long list of issues which I have on the agenda—separation of power and warrantless wiretaps and secret CIA programs and voting rights and the Americans with Disabilities Act and a woman's right to choose and the Environmental Protection Agency and the Clean Water Act and television and the Second Amendment—I would like to make an observation or two.

There has been a lot of talk about a wise Latina woman, and I think that this proceeding has tended to make a mountain out of a molehill. We have had a consistent line of people who are nominees who make references to their own backgrounds. We all have our perspective. Justice O'Connor talked about her life experience.

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Justice Alito talked about his family suffering from ethnic slurs. Justice Thomas from Pin Point, Georgia, emphasized, talked about putting himself in the shoes of other people. And Justice Scalia talked about being in a racial minority.

The expectation would be that a woman would want to say something to assert her competency in a country which denied women the right to vote for decades, when the glass ceiling has limited people, where there is still disparagement of people on ethnic background.

Just this month in a suburb of Philadelphia, Hispanic children were denied access to a pool for whites only, as were African American children, so I can see how someone would take pride in being a Latina woman and assert herself.

A lot has been made of the issue of empathy, but that characteristic is not exactly out of place in judicial determinations. We have come a long way on the expansion of constitutional rights. Oliver Wendell Holmes' famous statement that the life of the law is experience, not logic; Justice Cardozo in *Palko* v. *Connecticut* talked about changing values; and the Warren Court changed the Constitution practically every day, which I saw, being at the district attorney's office—the changes in search and seizure, confessions, Miranda, right to counsel. Who could have thought that it would take until 1963 to have the right to counsel in *Gideon* v. *Wainwright*?

We have heard a lot of talk about the nomination proceeding of Judge Bork, and they have tried to make "Bork" into a verb, somebody being Bork'd. Well, anybody who looks at that record will see that it is very, very different. We had a situation where Judge Bork was an advocate of original intent from his days writing a law review article in the Indiana Law Review. And how can you have original intent when the 18th Amendment was written by a Senate on equal protection with the Senate galleries which were segregated, or where you have Judge Bork who believed that equal protection applied only to race and ethnicity, didn't even apply to women?

But it was a very, very thorough hearing. I spent, beyond the hearing, days in three long sessions, 5 hours with Judge Bork, so it was his own approach to the law which resulted there. But you had an evolution of constitutional law which I think puts empathy in an Okay status, in an Okay category.

Now on to the issues.

I begin with an area of cases which the Court has decided not to decide, and those cases can be even more important than many of the cases which the Court decides. The docket of the Court at the present time is very different from what it was a century ago. In 1886, the docket had 1,396 cases, decided 451. A hundred years later, there were only 161 signed opinions in 1985; in 2007, only 67 signed opinions.

During his confirmation hearings, Chief Justice Roberts said the Court "could contribute more to the clarity and uniformity of the law by taking more cases."

Judge Sotomayor, do you agree with that statement by Chief Justice Roberts?

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Judge SOTOMAYOR. I know, Senator Specter, that there is questions by many people, including Senators and yourself, of Justice Roberts and other nominees about this issue. Can the Court take on more? To the extent that there is concern about it, not that public opinion should drive the Justices to take more cases just to take them, but I think what Justice Roberts was saying is the Court needs to think about its processes to ensure that it's fulfilling its——

Senator SPECTER. Judge Sotomayor, how about more cases?

Judge SOTOMAYOR. Well, perhaps I need to explain to you that I don't like making statements about what I think the Court can do until I've experienced the process.

Senator SPECTER. Then let me move on to another question.

One case that the Court did not take involved the Terrorist Surveillance Program, which I think, arguably, posed the greatest conflict between congressional powers under Article I in enacting the Foreign Intelligence Surveillance Act, which provided for the exclusive way to get wiretaps. The President disregarded that in a secret program called the Terrorist Surveillance Program, didn't even tell the Chairman of the Judiciary Committee, which is the required practice or accepted practice; didn't tell the Intelligence Committees where the law mandates that they be told about such programs. It was only disclosed by the New York Times. Those practices confront us to this day with reports about many other secret cases not disclosed.

The Federal District Court in Detroit found the Terrorist Surveillance Program unconstitutional. The Sixth Circuit in a 2–1 opinion said there was no standing. The dissent I think pretty conclusively had the much better of it on asserting standing. The Supreme Court of the United States denied certiorari, didn't even take up the case to the extent of deciding whether it shouldn't take it because of lack of standing.

I wrote you a letter about this, wrote a series of letters, and gave you advance notice that I would ask you about this case. I am not asking you how you would decide the case, but wouldn't you agree that the Supreme Court should have taken that kind of a major conflict on separation of powers?

Judge SOTOMAYOR. I know it must be very frustrating to you to——

Senator SPECTER. It sure is. I was the Chairman who wasn't notified.

Judge SOTOMAYOR. No. I am sure——

Senator SPECTER. And he was the Ranking Member who wasn't notified.

Judge SOTOMAYOR. I can understand not only Congress' or your personal frustration, and sometimes of citizens, when there are important issues that they would like the Court to consider. The question becomes what do I do if you give me the honor to serve on the Court. If I say something today, is that going to make a statement about how I am going to prejudge someone else's——

Senator SPECTER. I am not asking you to prejudge. I would like to know your standards for taking the case. If you have that kind of a monumental, historic conflict, and the Court is supposed to de-

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cide conflicts between the executive and the legislative branches, how can it possibly be justified not to take that case?

Judge SOTOMAYOR. There are often, from what I understand—and that's from my review of Supreme Court actions and cases of situations in which they have or have not taken cases, and I've read some of their reasoning as to this. I know that with some important issues they want to make sure that there isn't a procedural bar to the case of some type that would take away from whether they're, in fact, doing what they would want to do, which is to——

Senator SPECTER. Well, was there a procedural bar? You had weeks to mull that over because I gave you notice.

Judge SOTOMAYOR. Senator, I'm sorry. I did mull this over. My problem is that without looking at a particular issue and considering the cert. brief style, the discussion of potential colleagues as to the reasons why a particular issue should or should not be considered, the question about——

Senator SPECTER. Well, I can tell you are not going to answer. Let me move on.

On a woman's right to choose, Circuit Judge Luttig in the case of *Richmond Medical Center* said that v. *Planned Parenthood* v. *Casey* was "super-*stare decisis*." Do you agree with Judge Luttig?

Judge SOTOMAYOR. I don't use the word "super." I don't know how to take that word. All precedent of the Court is entitled to the respect of the doctrine of stare decisis.

Senator SPECTER. Do you think that *Roe* v. *Wade* has added weight on stare decisis to protect a woman's right to choose by virtue of *Planned Parenthood* v. *Casey*, as Judge Luttig said?

Judge SOTOMAYOR. That is one of the factors that I believe courts have used to consider the issue of whether or not a new direction should be taken in the law. There is a variety of different factors the Court uses, not just one.

Senator SPECTER. But that is one which would give it extra weight. How about the fact that the Supreme Court of the United States has had 38 cases after *Roe* v. *Wade* where it could have reversed *Roe* v. *Wade*? Would that add weight to the impact of *Roe* v. *Wade* on stare decisis to guarantee a woman's right to choose?

Judge SOTOMAYOR. The history of a particular holding of the Court and how the Court has dealt with it in subsequent cases would be among one of the factors as many that a Court would likely consider. Each situation, however, is considered in a variety of different viewpoints and arguments but, most importantly, factors that the Court applies to this question of should precedent be altered in a way.

Senator SPECTER. Well, wouldn't 38 cases lend a little extra support to the impact of *Roe* and *Casey* where the Court had the issue before it, could have overruled it?

Judge SOTOMAYOR. In *Casey* itself——

Senator SPECTER. Just a little impact?

Judge SOTOMAYOR. *Casey* itself applied—or an opinion authored by Justice Souter talked about the factors that a Court thinks about in whether to change precedent, and among them were issues of whether or not or how much reliance society has placed in the prior precedent; what are the costs that would be occasioned by changing it; was the rule workable or not; have either factual

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or doctrinal basis of the prior precedent altered, either from developments in related areas of law or not, to counsel a re-examination of a question, and——

Senator SPECTER. I am going to move on—go ahead.

Judge SOTOMAYOR. And the Court has considered in other cases the number of times the issue has arisen and what actions the Court has or not taken with respect to that.

Roe is—*Casey* did reaffirm the core holding of Roe, and so my understanding would be that the issue would be addressed in light of *Casey* on the stare decisis——

Senator SPECTER. Do I hear you saying there would be at least a little bit of—let me move on. Let me move on to another separation of powers argument, and, that is, between Congress and the Court.

In 1997, in the case called *Boerne*, suddenly the Supreme Court of the United States found a new test called "congruence and proportionality." Up to that time, Judge Harlan's judgment on a rational basis for what Congress would decide would be sufficient. And here for the benefit of our television audience, we are talking about a record that the Congress maintains.

Take the Americans with Disabilities Act, for example, where there was a task force of field hearings in every State attended by more than 30,000 people, including thousands who had experienced discrimination with roughly 300 examples of discrimination by State governments. Notwithstanding that vast record, the Supreme Court of the United States in *Alabama* v. *Garrett* found Title I of the Americans with Disabilities Act unconstitutional.

The other title, Title II, of the Americans with Disabilities Act in *Tennessee* v. *Lane*, the Court found it constitutional on the same record.

Justice Scalia in dissent said that it was a "flabby test," that it was an "invitation to judicial arbitrariness and policy-driven decision making."

In a second round, if we have time, I will ask you—to give you some advance notice, although I wrote you about these cases—if you can find a distinction on the Supreme Court's determination. But my question to you is: Looking at this brand-new standard of proportionality and congruence, for whatever those words mean—and if we have time in the second round, I will ask you to define them, but there are other questions I want to come to. Do you agree with Justice Scalia that it is a flabby test and that, with having such a vague standard, the Court can do anything it wants and really engages in policy-driven decision making? Which means the Court, in effect, legislates.

Judge SOTOMAYOR. Senator, the question of whether I agree with a view of a particular Justice or not is not something that I can say in terms of the next case. In the next case that the Court will look at and a challenge to a particular congressional statute——

Senator SPECTER. Well, not the next case. This case. You have these two cases. They have the same factual record. And the Supreme Court, in effect, legislates, tells us what is right and what is wrong on this standard that nobody can understand.

Judge SOTOMAYOR. As I understand the congruence and proportionality test, it is the Supreme Court's holding on that test, as I

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understand it, that there is an obligation on the Court to ensure that Congress is working—working—is legislating within its legislative powers.

The issue is not—and these are Section 5 cases, essentially, which are the clause of the Constitution under the 14th Amendment that permits Congress to legislate issues involving violations of the 14th amendment. The Court in those cases has not said that Congress can't legislate. What it has looked at is the form of remedy Congress can order and what it——

Senator SPECTER. But it doesn't tell us how to—let me move on to a Voting Rights Act case, and just pose the case, and I will ask you about it in the next round.

When Chief Justice Roberts testified at his confirmation hearings, he was very deferential to the Congress—not so, I might add, when he heard arguments in the voting rights case, but when he appeared here 3 years ago. He said this, and it is worth reading: "I appreciate very much the differences in institutional competence between the judiciary and the Congress when it comes to basic questions of fact finding, development of a record, and also the authority to make the policy decisions about how to act on the basis of a particular record. It's not just disagreement over a record. It's a question of whose job it is to make a determination based on the record. . . . As a judge . . . you may have the beginning to transgress into the area of making a law is when you are in a position of re-evaluating legislative findings because that doesn't look like a judicial function."

Now, that is about as deferential as you can be when you are nominee. But when Chief Justice Roberts presided over the voting rights case, he sound very, very different.

My question to you is: Do you agree with what Chief Justice Roberts said when he was just Judge Roberts that it is an area of making laws to transgress into what Congress has done by way of finding the facts?

Judge SOTOMAYOR. I would find it difficult to agree with someone else's words. I can tell you how much I understand the deference that Congress is owed, and I can point you at least to two cases—and there are many, many more—that shows how much I value the fact that we are courts that must give deference to Congress in the fields that are within its constitutional power.

Senator SPECTER. Well, do you agree with Chief Justice Roberts—I sent you that quotation a long time ago and told you I would ask you about it. Do you agree with him or not?

Judge SOTOMAYOR. I agree to the extent that one's talking about the deference that Congress is owed. I can't speak for what he intended to say by that. I can speak to what I——

Senator SPECTER. Well, not what he intended to say. What he did say.

Judge SOTOMAYOR. I heard what he said, sir, but I don't know what he intended in that description. I do know what I can say, which is that I do understand the importance to Congress' factual findings, that my cases and my approach in my cases reflect that. I've had any number of cases where the question was deference to congressional findings, and I have upheld statutes because of that deference.

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Senator SPECTER. Is there anything the Senate or Congress can do if a nominee says one thing seated at that table and does something exactly the opposite once they walk across the street?

Judge SOTOMAYOR. That, in fact, is one of the beauties of our constitutional system, which is we do have a separation of——

Senator SPECTER. Beauty is in the eyes of the beholder. It is only Constitution Avenue there.

[Laughter.]

Judge SOTOMAYOR. Well, the only advantage you have in my case is that I have a 17-year record that I think demonstrates how I approach the law and the deference with which—or the deference I give to the other branches of Government.

Senator SPECTER. I think your record is exemplary, Judge Sotomayor. Exemplary. I am not commenting about your answers, but your record is exemplary.

[Laughter.]

Senator SPECTER. And you will be judged more on your record than on your answers, Judge Sotomayor.

For those who are uninitiated, your preparation appropriately is very careful. They call them "murder boards" at the White House. I don't know what you did and I am not asking. We have had a lot of commentary. And you studied the questions, and you have studied the record, and your qualification as a witness is terrific in accordance with the precedents there. You are following the precedents there very closely.

Let me move to television and the courts, and it is a question that many of us are interested in. I always ask it. I have introduced legislation twice, come out of Committee twice, to require the Court to televise. The Court does not have to listen to Congress. The Court can say separation of powers precludes our saying anything. But the Congress does have administrative procedural jurisdiction. We decide the Court convenes the first Monday in October. We decide there are nine Justices. We tried to make it 15 once in the Court-packing era, six Justices for a quorum, *et cetera*; the Speedy Trial Act telling the courts how they have to move at a certain speed, habeas corpus on time limits.

Justice Stevens has said that it is worth a try. Justice Ginsburg at one time said that if it was gavel to gavel, it would be fine. Justice Kennedy said it was inevitable.

The record of the Justices appearing on television is extensive. Chief Justice Roberts and Justice Stevens were on Prime time ABC, Justice Ginsburg on CBS, Justice Breyer on Fox News and so forth down the line.

We all know that the Senate and the House are televised, and we all know the tremendous, tremendous interest in your nominating process, and it happens all the time. There is a lot of public interest. But the Court is the least accountable. In fact, you might say the Court is unaccountable.

When *Bush* v. *Gore* was decided, then-Senator Biden and I wrote to Chief Justice Rehnquist asking that television be permitted and got back a prompt answer: "No." And that was quite a scene across the street. The television trucks were just enormous, all over the place. You had to be the Chairman of the Committee to get a seat inside the chamber.

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The Supreme Court decides all the cutting-edge questions of the day: the right of a woman to choose abortion, the death penalty, organized crime—every cutting-edge question. And *Bush* v. *Gore* was one of the biggest cases—arguably, the biggest case. More than 100 million people voted in that election, and the Presidency was decided by one vote.

And Justice Scalia had this to say about irreparable harm: "The counting of votes that are of questionable legality does in my view threaten irreparable harm to"—referring to President Bush, or Candidate Bush—"and to the country, by casting a cloud upon what he claims to be the legitimacy of the election. . . .[P]ermitting the Court to proceed on that erroneous basis will prevent an accurate recount from being conducted on a proper basis later."

It is hard to understand what recount there was going to be later. I wrote about it at the time saying that I thought it was an atrocious accounting of irreparable harm, hard to calculate that. And my question, Judge Sotomayor: Shouldn't the American people have access to what is happening in the Supreme Court to try to understand it, to have access to what the judges do by way of their workload, by way of their activities when they adjourn in June and reconvene in October, this year in September? Wouldn't it be more appropriate in a democracy to let the people take a look inside the Court through television?

The Supreme Court said in the *Richmond Newspapers* case decades ago that it wasn't just the accused that had a right to a public trial; it was the press and the public as well. And now it is more than newspapers. Television is really paramount. Why not televise the Court?

Judge SOTOMAYOR. As you know, when there have been options for me to participate in cameras in the courtroom, I have. And as I said to you when we met, Senator, I will certainly relay those positive experiences, if I become fortunate enough to be there to discuss it with my colleagues. And that question is an important one, obviously. There is legislation being considered both by—or has been considered by Congress at various times, and there is much discussion between the branches on that issue.

It is an ongoing dialog. It is important to remember that the Court because of this issue has over time made public the transcripts of its hearing quicker and quicker, if I am accurate, now. It used to take a long time for them to make those transcripts available, and now they do it before the end of the day.

It is an ongoing process of discussion.

Senator SPECTER. Thank you, Judge Sotomayor.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much, Senator Specter.

And last in this round of questioning will be Senator Franken, the newest member of the Committee. Senator, I didn't officially welcome you the other day as I should have when we have new members, but welcome to the Committee. I offer you congratulations and condolences at the same time to come in on one of the——

Senator FRANKEN. I will take the congratulations.

Chairman LEAHY. Okay. Well, then was most heartfelt. I am glad you are here. Please go ahead.

Senator FRANKEN. Thank you, Mr. Chairman, and thank you, Judge Sotomayor, for sitting here so patiently and for all your thoughtful answers throughout the hearing.

Before lunch, our senior Senator from Minnesota, Amy Klobuchar, asked you why you became a prosecutor, and you mentioned "Perry Mason." I was a big fan of "Perry Mason." I watched "Perry Mason" every week with my dad and my mom and my brother. And we would watch the clock, and we knew when it was 2 minutes to the half-hour that the real murderer would stand up and confess.

[Laughter.]

Senator FRANKEN. It was a great show. And it amazes me that you want to become a prosecutor based on that show, because in "Perry Mason," the prosecutor—Burger—lost every week.

[Laughter.]

Senator FRANKEN. With one exception, which we will get to later. But I think that says something about your determination to defy the odds. And while you were watching "Perry Mason" in the South Bronx with your mom and your brother, I was watching "Perry Mason" in suburban Minneapolis with my folks and my brother, and here we are today. And I am asking you questions because you have been nominated to a Justice of the United States Supreme Court. I think that is pretty cool.

As I said in my opening statement, I see these proceedings both as a way to take a judgment of you and of any nominee's suitability for the high Court, but also as a way for Americans to learn about the Court and its impact on their lives. Right now, people are getting more and more of their information on the Internet, getting newspapers and television and blogs and radio. Americans are getting all of it online, and it plays a central role in our democracy by allowing anyone with a computer connected to the Internet to publish their ideas, their thoughts, their opinions, and reach a worldwide audience of hundreds of millions of people in seconds. This is free speech, and this is essential to our democracy, and to democracy, we saw this in Iran not long ago.

Now, Judge, you are familiar with the Supreme Court's 2005 *Brand X* decision, are you?

Judge SOTOMAYOR. I am.

Senator FRANKEN. Okay. Well, then you know that Brand X deregulated Internet access services, allowing service providers to act as gatekeepers to the Internet, even though the Internet was originally Government funded and built on the notion of common carriage and openness. In fact, we have already seen examples of these companies blocking access to the Web and discriminating on certain uses of the Internet. This trend threatens to undermine the greatest engine of free speech and commerce since the printing press.

Let's say you are living in Duluth, Minnesota, and you only have one Internet service provider. It is a big mega corporation, and not only are they the only Internet service provider, but they are also a content provider. They own newspapers. They own TV networks or a network. They have a movie studio.

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They decide to speed up their own content and slow down other content. The *Brand X* decision by the Supreme Court allows them to do this. And this is not just Duluth. It is Moorhead, Minnesota; it is Rochester, Minnesota; it is Youngstown, Ohio. It is Denver, it is San Francisco, and, yes, it is New York. This is frightening—frightening to me and to millions of my constituents or lots of my constituents.

Internet connections use public resources, the public airways, the public rights of way. Doesn't the American public have a compelling First Amendment interest in ensuring that this can't happen and that the Internet stays open and accessible—in other words, that the Internet stays the Internet?

Judge SOTOMAYOR. Many describe the telephone as a revolutionary invention, that changed our country dramatically. So did television. And its regulation of television and the rules that would apply to it were considered by Congress, and those regulations have—because Congress is the policy chooser on how items related to interstate commerce and communications operate. And that issue was reviewed by the courts in the context of the policy choices Congress made.

There is no question in my mind as a citizen that the Internet has revolutionized communications in the United States, and there is no question that access to that is a question that society—that our citizens as well as yourself are concerned about.

But the role of the court is never to make the policy. It is to wait until Congress acts and then determine what Congress has done and its constitutionality in light of that ruling.

Brand X, as I understood it, was a question of which Government agency would regulate those providers, and the Court, looking at Congress' legislation in these two areas, determined that it thought it fit in one box, not the other, one agency instead of another.

Senator FRANKEN. Is this Title I and Title II? Or as I understand it, Title II is subject to regulation and Title I isn't.

Judge SOTOMAYOR. Exactly, but the question was not so much stronger regulation or not stronger regulation. It was which set of regulations, given Congress' choice, controlled.

Obviously, Congress may think that the regulations the Court has in its holding interpreted Congress' intent and that Congress thinks the Court got it wrong. We are talking about statutory interpretation and Congress' ability to alter the Court's understanding by amending the statute if it chooses.

This is not to say that I minimize the concerns you express. Access to Internet, given its importance in everything today—most businesses depend on it. Most individuals find their information. The children in my life virtually live on it now. And so its importance implicates a lot of different questions—freedom of speech, freedom with respect to property rights, Government regulation. There's just so many issues that get implicated by the Internet that what the Court can do is not choose the policy. It just has to go by interpreting each statute and trying to figure out what Congress intends.

Senator FRANKEN. I understand that, but isn't there a compelling First Amendment right here for people? No matter what Congress does—and I would urge my colleagues to take this up and write

legislation that I would like. But isn't there a compelling, overriding First Amendment right here for Americans to have access to the Internet?

Judge SOTOMAYOR. Rights by a court are not looked at as overriding in the sense that I think a citizen—or a citizen would think about it, should this go first or should a competing right go second. Rights are rights, and what the Court looks at is how Congress balanced those rights in a particular situation and then judges whether that balance is within constitutional boundaries.

Calling one more compelling than the other suggests that they're sort of—you know, property interests are less important than First Amendment interests. That's not the comparison a court makes. The comparison the court makes starts with what balance does Congress choose first, and that we'll look at that if it—and see if it's constitutional.

Senator FRANKEN. Okay. So we have got some work to do on this.

Let me get into judicial activism. I brought this up in my opening statement. As I see it, there is kind of an impoverishment of our political discourse when it comes to the judiciary. I am talking in politics. When candidates or office holders talk about what kind of judge they want, it is very often just reduced to, "I don't want an activist judge. I don't want a judge that is going to legislate." And that is sort of it. That is it. It is a 30-second sound bite.

As I and a couple other Senators mentioned during our opening statements, judicial activism has become a codeword for judges that you just do not agree with.

Judge, what is your definition of "judicial activism"?

Judge SOTOMAYOR. It's not a term I use. I don't use the term because I don't describe the work that judges do in that way. I assume the good faith of judges in their approach to the law, which is that each one of us is attempting to interpret the law according to principles of statutory construction and other guiding legal principles, and to come in good faith to an outcome that we believe is directed by law. When I say "we believe," hopefully we all go through the process of reasoning it out and coming to a conclusion in accordance with the principles of law.

I think you are right that one of the problems with this process is that people think of activism as the wrong conclusion in light of policy. But hopefully judges—and I know that I don't approach judging in this way at all—are not imposing policy choices or their views of the world or their views of how things should be done. That would be judicial activism in my sense if a judge was doing something improper like that.

But I don't use that word because that's something different than what I consider to be the process of judging, which is each judge coming to each situation trying to figure out what the law means, applying it to the particular fact before that judge.

Senator FRANKEN. Okay. You don't use that word or that phrase. But in political discourse about the role of the judiciary, that is almost the only phrase that is ever used. And I think that there has been an ominous increase in what I consider judicial activism of late, and I want to ask you about a few cases and see if you can shed some light on this for us and for the people watching at home or in the office.

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I want to talk about *Northwest Austin Utility District Number One* v. *Holder*, the recent Voting Rights Act, and Senator Cardin mentioned it, but he did not get out his pocket Constitution, as I am.

The 15th Amendment was passed after the Civil War and specifically gave Congress the authority to pass laws to protect all citizens' right to vote, and it said, Section 1—Amendment XV, Section 1, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

Section 2, and this one is important: "The Congress shall have power to enforce this article by appropriate legislation." The Congress.

Well, Congress used that power, the power vested in it under Section 2, when it passed the Voting Rights Act of 1965. Now, the Voting Rights Act has a specially strong provision, Section 5, that requires States with a history of discrimination to get preapproval from the Justice Department on any changes that they make in their voting regulations. Congress has reauthorized this four times, as recently as—the last time was 2006, and the Senate supported it by a vote of 98–0. Every single Senator from a State covered by Section 5 voted to reauthorize it.

So now it is 2009, and we have this case, the Northwest Austin Utility District Number One, and Justice Thomas votes to hold Section 5 unconstitutional. He said it went beyond the mandate of the 15th Amendment because it wasn't necessary anymore. That is what he said.

Now, when I read the 15th Amendment, it does not contain any limits on Congress' power. It just says that we have it. It does not say, "If necessary, the Congress shall have power to enforce this article." It just says that we have the power.

So it is my understanding that the 15th Amendment contains a very strong, very explicit and unambiguous grant of power to the Congress, and because of that the courts should pay greater deference to it. And my question is: Is that your view?

Judge SOTOMAYOR. As you know, some of the Justices in that recent decision expressed the view that the Court should take up the constitutionality of the Voting Rights Act and review its continuing necessity. Justice Thomas expressed his view. That very question, given the decision and the fact that it left that issue open, is a very clear indication that that's a question that the courts are going to be addressing, if not immediately the Supreme Court, certainly the lower courts. And so expressing a view, agreeing with one person in that decision or another, would suggest that I have made a prejudgment on this question. I consider——

Senator FRANKEN. So that means you are not going to tell us.

[Laughter.]

Senator FRANKEN. I didn't mean to finish your sentence. I think that is where you are going.

Judge SOTOMAYOR. All I can say to you is—I have one decision among many, but one decision on the Voting Rights Act, and not the recent reauthorization by Congress, but a prior amendment where I suggested that these issues needed—issues of changes in

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the Voting Rights Act should be left to Congress in the first instance.

My jurisprudence shows the degree to which I give deference to Congress' findings. Whether in a particular situation that compels or doesn't or leads to a particular result is not something that I can opine on, because particularly the issue you are addressing right now is likely to be considered by the courts. The ABA rule says no judge should make comments on the merits of any pending or impending case, and this clearly would be an impending case.

Senator FRANKEN. Okay. It is fair to say, though, in your own decisions you gave deference to Congress, just like you answered my neutrality saying it is up to Congress, it feels like this is very explicitly up to Congress.

Judge SOTOMAYOR. I gave deference to the exact language that Congress had used in the Voting Rights Act and how it applied to a challenge in that case.

Senator FRANKEN. Okay. Now, voting to overturn Federal legislation, to me at least, seems to be one definition of what people understand as judicial activism. But I want to talk about some cases that I have seen that I think show judicial activism functioning on a more pernicious level.

First, let's take a look at a case called *Gross* v. *FBL Financial Services* that the Supreme Court issued last month. Are you familiar with that?

Judge SOTOMAYOR. I am.

Senator FRANKEN. Now, Gross involved the Age Discrimination in Employment Act, or ADEA. Before Gross, you could bring an age discrimination suit whenever you could show that age was one of the factors an employer considered in choosing to fire you. When the Supreme Court agreed to hear the case, it said it would consider just one question: whether you needed direct evidence of age discrimination to bring this kind of lawsuit or whether indirect evidence would suffice. That is the issue that they said that they would consider when they took the case.

But when the Supreme Court handed down its decision, it ruled on a much larger matter: whether a worker could bring a suit under ADEA if age was only one of several reasons for being demoted or fired. The Supreme Court barred these suits saying that only suits alleging that age was the determinative factor for the firing, only those could be brought under the ADEA.

This change has significantly eroded workers' rights by making it much harder for workers to defend themselves from age discrimination, including getting fired just before they were to have seen a large increase in their pension. You were not fired because you are too old; you are fired because your pension is going to increase soon. So this is a big deal.

When you go to court to defend your rights, you have to know what rights you are defending. The parties in the *Gross* case thought they were talking about what kind of evidence was necessary in a decision suit. Then the Court said, "No, we are banning that kind of suit altogether."

I think that is unfair to everyone involved. It is especially unfair to the man who is trying to bring the discrimination suit. So let me ask you a couple of questions on this.

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First, as an appellate court judge, how often have you decided a case on an argument or a question that the parties have not briefed?

Judge SOTOMAYOR. I don't think I have, because to the extent that the parties have not raised an issue and the circuit court for some reason the panel has thought that it was pertinent—most often that happens on questions of jurisdiction. Can the Court hear this case at all? Then you issue—or we have issued a direction to the parties to brief that question, so it is briefed and part of the argument that is raised.

There are issues that the parties brief that the briefing itself raises the issue for the Court to consider. So it is generally the practice, at least on the Second Circuit, to give a party an opportunity to be heard on a question. And we also have a procedure on the circuit that would give a party to be heard because they can also file the petition for rehearing, which is the panel enters a decision that the party disagrees with and thinks the court has not given it an adequate opportunity to present its arguments. Then it can file that at the circuit.

I don't have—I am familiar with the *Northwest* case. I am familiar with the holding of that case. I am a little less familiar and didn't pay as much attention——

Senator FRANKEN. With Gross.

Judge SOTOMAYOR [continuing]. To the briefing issue. I do know there that, like the *Brand X* case, what the Court says it was attempting to do is to discern what Congress' intent was under the ADEA, whether it intended to consider mixed motive or not as a factor in applying the statute. And the majority holding, as I understood it, was, look, Congress amended Title VII to set forth the mixed motive framework and directed the courts to apply that framework in the future. But having amended that, it didn't apply that amendment to the age discrimination statute. And so that would end up in a similar situation to the *Brand X* case, which is to the extent that that Congress determines that it does want mixed motive to be a part of that analysis, that it would have the opportunity and does have the opportunity to do what it did in Title VII, which is to amend the act.

Senator FRANKEN. In Title VII, they amended the act because they had to, they were forced to. Right? Congress was compelled to, in a sense, but not on ADEA.

Judge SOTOMAYOR. I don't like characterizing the reasons for why Congress acts or doesn't act.

Senator FRANKEN. Okay. Let me jump ahead to something. Yesterday a member of this Committee asked you a few times whether the word "abortion" appears in the Constitution, and you agreed that, no, the word "abortion" is not in the Constitution. Are the words "birth control" in the Constitution?

Judge SOTOMAYOR. No, sir.

Senator FRANKEN. Are you sure?

Judge SOTOMAYOR. Yes.

[Laughter.]

Senator FRANKEN. Okay. Are the words "privacy" in the Constitution? Or the word.

Judge SOTOMAYOR. The word "privacy" is not.

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Senator FRANKEN. Senators Kohl, Feinstein, and Cardin all raised the issue of privacy, but I want to hit this head on. Do you believe that the Constitution contains a fundamental right to privacy?

Judge SOTOMAYOR. It contains, as has been recognized by the courts for over 90 years, certain rights under the liberty provision of the Due Process Clause, that extend to the right to privacy in certain situations. This line of cases started with a recognition that parents have a right to direct the education of their children and that the State could not force parents to send their children to public schools or to bar their children from being educated in ways a State found objectionable. Obviously, States do regulate the content of education, at least in terms of requiring certain things with respect to education that I don't think the Supreme Court has considered. But that basic right to privacy has been recognized and was recognized. And there have been other decisions.

Senator FRANKEN. So the issue of whether the word actually appears in the Constitution is not really relevant, is it?

Judge SOTOMAYOR. Certainly there are some very specific words in the Constitution that have to be given direct application. There are some direct commands by the Constitution. You know, Senators have to be a certain age to be Senators, and so you got to do what those words say. But the Constitution is written in broad terms, and what a court does is then look at how those terms apply to a particular factual setting before it.

Senator FRANKEN. Okay. In *Roe* v. *Wade*, the Supreme Court found that the fundamental right to privacy included the right to decide whether or not to have an abortion. And as Senator Specter said, that has been upheld or ruled on many times.

Do you believe that this right to privacy includes the right to have an abortion?

Judge SOTOMAYOR. The Court has said in many cases—and as I think has been repeated in the Court's jurisprudence in *Casey*—that there is a right to privacy that women have with respect to the termination of their pregnancies in certain situations.

Senator FRANKEN. Okay. We are going to have a round two, so I will ask you some more questions there.

What was the one case in "Perry Mason" that Burger won?

[Laughter.]

Judge SOTOMAYOR. I wish I remember the name of the episode, but I don't. I just was always struck that there was only one case where his client was actually guilty and——

Senator FRANKEN. And you don't remember that case?

Judge SOTOMAYOR. I know that I should remember the name of it, but I haven't looked at the episode——

Senator FRANKEN. Didn't the White House prepare you for——

[Laughter.]

Judge SOTOMAYOR. You're right, but I was spending a lot of time on reviewing cases. But I do have that stark memory because, like you, I watched it all of the time, every week as well. I just couldn't interest my mother the nurse and my brother the doctor to do it with me.

Senator FRANKEN. Oh, Okay. Well, our whole family watched it, and because there was no Internet at the time, you and I were

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watching at the same time. And I thank you, and I guess I will talk to you in the follow-up.

Judge SOTOMAYOR. Thank you.

Chairman LEAHY. Is the Senator from Minnesota going to tell us which episode that was?

Senator FRANKEN. I don't know. That is why I was asking.

[Laughter.]

Senator FRANKEN. If I knew, I wouldn't have asked her.

Chairman LEAHY. All right. So because of that, Judge, we will not hold your inability to answer the question against you.

I just discussed this with Senator Sessions, but I will make the formal request. Is there any objection that the Committee now proceed to a closed session, which is a routine practice we have followed for every nominee since back when Senator Biden was Chairman of this Committee?

Senator SESSIONS. Mr. Chairman, thank you. I think that is the right thing to do, and there will be no objection that I know of.

Chairman LEAHY. Thank you very much. I appreciate the comment, and so hearing none, the Committee will proceed to a closed session, and we will resume public hearings later this afternoon. And for the sake of those who have to handle all electronic kinds of things, we will try to give you enough of a heads-up.

We will stand in recess.

[Whereupon, at 3:07 p.m., the hearing was recessed for a closed session.]

After Recess [3:37 p.m.]

Chairman LEAHY. Judge, why don't we try it again? We'll use—all right. This is not working either?

Senator SESSIONS. You've got a chance to be on history here.

Chairman LEAHY. Back to what is——

Senator SESSIONS. That's the quickest ride of any Senator in history.

[Laughter.]

Chairman LEAHY. Back to what it——

Senator FRANKEN. I shouldn't do this.

[Laughter.]

Chairman LEAHY. No, no. Stay right there.

Back to what Dr. Branda said. He wrote about Judge Sotomayor, that "she reflects, via her career on the bench, the type of tempered restraint and moderation necessary for appropriate application of the rule of law, and without a doubt, Judge Sotomayor serves with a moderate voice without displays of bias toward any party based on affiliation, background, sex, color, or religion." The letter concludes, "Even moderate and conservative evangelicals within our ranks find no reason to conclude that the nomination and confirmation of Judge Sonia Sotomayor would diminish the collective application of constitutional rights and freedoms to a religious community committed to life, liberty, and the pursuit of happiness", and goes on to urge us to confirm you.

Second, the Committee has received a joint letter of support for Judge Sotomayor's nomination from more than 1,200 law professors from all States—all 50 States and the District of Columbia, as well as from the Society of American Law Teachers.

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And they write, "Her opinions reflect careful attention to the facts of each case and a reading of the law that demonstrates fidelity to the types of statutes and the Constitution. She plays close attention to precedent. She has proper respect for the role of courts and other branches of government in our society." And the Society of American Law Teachers writes, "Far from being an activist judge," you, Judge Sotomayor, "decide cases on the basis of her understanding of the law and applicable legal principles."

I'm going to put that—those letters in the record.

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

Chairman LEAHY. And now I will try one more time to see if the microphone will work before my friends in the press get too——

Senator SESSIONS. Well, Mr. Chairman, could I—I believe you were not on the clock then, is that right? So I would like to offer a few documents for the record, if that would be all right.

Chairman LEAHY. Go ahead.

Senator SESSIONS. I'd offer a letter from Club for Growth, raising serious concern about the *Didden* v. *Village of Port Chester* condemnation case where the Judge approved the taking of a property that was going to have one drugstore built on it and so another company could build on it. The Family Research Council, the letter raising serious concerns, and without more, they must stand in opposition to the nomination. The Concerned Women of America write in opposition to this nomination. I'd offer that into the record.

The American Center for Law and Justice, expressing concerns about the nomination. The Americans United For Life have written about the nomination, as well as the Gun Owners of America. I would just offer those for the record at this time, Mr. Chairman.

Chairman LEAHY. Without objection, they will be included in the record. That time will not count against either Senator Sessions or myself.

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

Chairman LEAHY. Now, on the clock.

Judge, one need look no further than the *Lilly Ledbetter* case or the *Diana Levine* case, a woman from Vermont, to understand the impact each Supreme Court case has on the lives and freedoms of countless Americans. In *Lilly Ledbetter's* case, five Justices on the Supreme Court struck a severe blow to the rights of working families across our country and required the Congress to pass legislation basically overruling the Supreme Court case to say, yes, women should be paid the same as men.

Justice Ginsburg's dissent in that case criticized the narrow majority for making a cramped interpretation of our civil rights law.

In a different context, you sat on a three-judge panel in a case involving strip searches of girls in a juvenile detention center. The parents of two girls challenged a policy of strip searching all those admitted to juvenile detention centers as a violation of the Fourth Amendment's prohibition against unreasonable searches; two of your male colleagues upheld that search.

In a dissent, you said a controlling Circuit precedent described what is involved in strip searches of these girls without individual suspicion, who'd never been charged with a crime, and warned that courts should be especially wary of strip searches of children, since youth is a time and condition of life when a person may be most

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susceptible to influence and to psychological damage. As a parent and a grandparent, I agree with you.

You also emphasized that many of these girls had been victims of abuse and neglect and may be more vulnerable mentally and emotionally than other youths their age.

The Supreme Court recently considered a similar case involving an intrusive strip search of young Savanna Redding because of school officials looking for ibuprofen tablets. During oral argument in that case, one of the male Justices compared the girl's strip search to changing for gym class. Several of the other Justices' reaction was simply laughter.

Justice Ginsburg, the sole female Justice on the court, described the search as humiliating, something that most parents realize. Justice Souter, writing for the court, concluded that school officials violated the Fourth Amendment rights of Savanna Redding, adopted Justice Ginsburg's position and reasoning.

I believe these cases underscore the need for diversity. They underscore having judges with different life experiences on the Federal bench, including the Supreme Court. It's been said several times here, citing cases doesn't just take a computer, otherwise we don't need real people. It does need real-life experiences. You are a role model and a mentor to many young people. We've heard that in all kinds of letters and statements.

How do you think it affects these young people to see only one woman on the Supreme Court today? How would it affect the confidence in the judicial system of litigants like young Savanna Redding?

Judge SOTOMAYOR. Senator, I think that it's one of the reasons that every President in the last two—or say 20 years, 25 years, has attempted to promote diversity on a basic understanding that our society is enriched by its confidence that our legal system is—includes all members of society. I know that Justice Ginsburg has spoken about the fact of how much she misses Justice O'Connor, and not because she does not have a good relationship with her colleagues.

I understand that she and Justice Scalia have a very, very close friendship and attend the opera together and travel together, so it's not a question, I don't think, of whether there's any question about the importance of the confidence that Americans have in our system because they see that everyone's represented as a part of our legal system, both as judges, as lawyers, as participants on every level of our work.

Chairman LEAHY. When John Roberts, now Chief Justice Roberts, was before the Committee I asked him about a precedent that moved me a great deal: *Gideon* v. *Wainwright.* I thought about it later when I was a young lawyer being assigned to defend cases, and later when I was a prosecutor, prosecuting cases. As a young law student, I had an opportunity—in fact, my wife and I had an opportunity. I was at Georgetown Law School. We had lunch with Hugo Black shortly after getting reversed in *Wainwright*. It's one of the most memorable times I had in my law school career.

Now, Hugo Black went on there as a former Senator and he recognized the Constitution's guarantee to counsel in a criminal case was a fundamental right to a fair trial. He called it an "obvious

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truth in an adversary system of criminal justice. Any person hauled into court who is too poor to hire a lawyer can't have a fair trial unless counsel is provided for them."

There's a wonderful book, Gideon's Trumpet, that Anthony Lewis wrote. I still have that book. I still have it. I can almost recite, word for word, that book.

So I'm going to ask you exactly the same question I asked then-Judge Roberts: doesn't Gideon stand for the principle that to be meaningful, such a fundamental right as the right to counsel requires assurances that can be exercised?

Judge SOTOMAYOR. That is a part of the holding of Gideon. It has been reaffirmed in terms of the right to counsel, not only the right to counsel and the representation of criminal issues, but the court has recognized that right with respect to a competent counsel, the question of whether incompetent counsel has caused the defendant damage as assessed under a legal standard. But the question is, the right to counsel was the core holding of Gideon.

Chairman LEAHY. If the Constitution guarantees a person the ability to exercise a certain fundamental constitutional right, whatever it might be, and if they say—the court says they're guaranteed that right, these rights are only meaningful if an American can then enforce those rights in a court. Is that not correct?

Judge SOTOMAYOR. Their rights are meaningful and they are rights that we work at ensuring are given meaning in the courts. I know for a fact that one of the activities—I know for a fact. I know, because I lived it. When I became a judge on the Second Circuit I was given responsibility for the Second Circuit's Committee on the Criminal Judge Act and Pro Bono Service. Generally, that—the chair of the committee is the most recent addition to the court, and immediately upon the confirmation of another judge, that judge takes over the chairpersonship.

I, because of my belief in the meaningfulness of representation and its importance to the justice system, have held that position probably for the longest judge in the Second Circuit. With the agreement of judges who came after me, I served as the chair of that committee. I don't know—remember exactly the number of years, but it was certainly a very long period of time, and I worked very hard to improve both the processes of selection of Criminal Justice Act attorneys—those are the attorneys that represent indigent defendants in criminal actions—and to ensure that there was adequate review of their qualifications and regular review of their performance.

Chairman LEAHY. I don't want to put words in your mouth, but is it safe to say that if you have a constitutional right, as a practical effect, that only works if you can enforce that constitutional right?

Judge SOTOMAYOR. Clearly, that's—in terms of the—it's given meaning through actions, and actions by the legislature, who have provided funds for the retention of qualified counsel, and the court's obligation to ensure that that right is meaningful in practice.

Chairman LEAHY. Thank you. I've used just barely over half my time. I'll reserve time.

Senator SESSIONS. And hope that sets an example.

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Senator SESSIONS. I'm impressed, Mr. Chairman. Thank you.

You know, we talked a little earlier about judicial activism. Senator—our new Senator raised that. We have a good definition. Our former chairman, Senator Hatch. He's given us a definition for a number of years, and that is when a judge allows their personal, political, or other biases to overcome their commitment to the rule of law. That's not as well as he said it, but that's pretty close.

Senator HATCH. That's better than I said it.

Senator SESSIONS. But I think that's—and you can have, Senator Franken, a liberal or conservative activist judge, and judges need to be watched, as we all do, to make sure that they stay faithful to the law.

I really believe in this legal system. I think it's so fabulous. I've traveled the world with the Armed Services Committee and I see these countries and it just breaks your heart. You think you can go in and write a code of law and they can make it work, and it's just—you can write them all day, but it—making it actually be real in every village, hamlet, and farm, and city in these countries is so, so hard. We are so blessed.

So I just want to say, Judge, I appreciate you and look forward to questioning. But I—I just—my approach is to try to do the best thing we can for America in this fabulous system we've got.

We've—I think our side is committed to being fair throughout this hearing, and trying to be thoughtful in our questions. Nobody's perfect, but I think everybody's done a pretty good job at that.

Now, I've listened to your testimony carefully, looked at some transcripts, and I have to say, I'm still concerned about some of the issues that have been raised. You're seeking a lifetime appointment. This is the one chance we have to ask those questions and we must do that.

With regard to the "wise Latina" quote where you said that they—they should make decisions that are better than a white male, you—and the question of Senator—Justice O'Connor's comment about a, wise old woman and a wise old man should—would reach the same conclusion.

I would just say there's a difference. Both may well be a rhetorical flourish or rhetorical approach to stating a truth, but I think Justice O'Connor's approach, in truth, was that judges, under the American ideal, should reach the same decision if—if they can put aside all their biases and prejudices. And you seem to say in your approach, and throughout that speech, that backgrounds, sympathies and prejudices can impact how you rule, and you could expect a different outcome.

How would you respond to that?

Judge SOTOMAYOR. Senator, I want to give you complete assurance that I agree with Senator Hatch on his decision—his definition of activism. If that's his definition, that judges should not be using their personal biases, their personal experiences, their personal prejudices in reaching decision and that's how he defines activism, then I'm in full agreement with him.

To the extent that my words have led some to believe that I think a particular group has—has—is better than another in reaching a decision based on their experiences, my rhetorical device failed. It failed because it left an impression that I believe some-

thing that I don't. And as I have indicated, it was a bad choice of words by me in—because it left an impression that has offended people and has left an impression that I didn't intend. As I indicated earlier, I——

Senator SESSIONS. But did it not—could I just briefly interrupt? Did it not suggest that your approach to the question of objectivity and commitment to it was different than Justice O'Connor's? Didn't you cite it in—in opposition to her view?

Judge SOTOMAYOR. As I—I can explain it, is I didn't understand her to mean that she thought that if two judges reached a different conclusion, that one of them was unwise because judges disagree as to conclusions. And I know that there's an aspiration that the law would be so certain that that would never happen, but it's not that certain. Laws are not written clearly, on occasion, by Congress. Courts apply principles of construction that suggest an approach to a particular set of facts that might differ. All of that doesn't make one or the other judge wise. So——

Senator SESSIONS. I would agree with that. And I—I think one judge—you can have honest disagreements. I think that she was expressing the ideal that if everybody were perfectly wise, they may reach the same decision.

With regard to the Second Amendment, this is a hugely important issue. Isn't it true, Judge, that the decision that you and your panel rendered, if it were to be the law of the United States and if it is not reversed by the U.S. Supreme Court, would say that the Second Amendment is subject to—is not—the Second Amendment does not protect the right of the people to keep and bear arms in any city, county, and State in America. That is that New York, or Atlanta, or Philadelphia, or Houston, Los Angeles, or any State in between could pass a law that barred firearms within those States, and isn't this a really big issue right now for the United States Supreme Court coming up soon?

Judge SOTOMAYOR. It may well come up. And I'm not familiar enough with the regulations in all 50 States to know whether there's an absolute prohibition in any one city or State against the possession of firearms. All I can speak about is that, as in the case the panel looked at, the question for the court would not be whether the government action in isolation is constitutional or not. The question—in isolation. It would be, what's the nature of the government interest in the statute it's passing? And depending on the——

Senator SESSIONS. That's the rational basis test?

Judge SOTOMAYOR. Exactly. And so——

Senator SESSIONS. Well, but the rational basis test could very well be fairly interpreted to say that since guns kill people, it's rational for a city to vote to eliminate all guns.

I would just say to you, isn't it true that if a city could pass that very low test they could ban firearms if your decision is not reversed by the Supreme Court?

Judge SOTOMAYOR. Because that question of incorporation before the court will arise, I don't feel that I can comment on the merits of the hypothetical. All I can say is, regardless of what standard of review the court uses, it has struck down regulations under every standard of review used, whether it's rational basis, or in

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some instances strict scrutiny, et cetera. There is the constitutional——

Senator SESSIONS. Judge, I would just say that you held, following some law in the 1800's—you held, though, that the Second Amendment does not apply to the States, even though it uses the words "the right of the people to keep and bear arms shall not be infringed". So I'm—I think we have a—this is a big issue and I—in your opinion, you said it was settled law.

You used some very strong language. You said it was not "a fundamental right", and you said that in your testimony earlier, that "in Supreme Court parlance, the right is not fundamental." You said that, I believe, to Senator Leahy in this hearing. So I guess my question is, have you made up your mind such that if you were on the Supreme Court and it was not your case that came up—and it could be your case—don't you feel that you should recuse yourself since you've already opined on this fundamental issue?

Judge SOTOMAYOR. I have not prejudged the question that the Supreme Court left open in *Heller*, and the question the court left open itself was, should it reexamine the issue of whether this right should be incorporated against the States or not? It didn't, in large measure, because the issue before the court at that moment was the right with respect to Federal Government regulation.

I have not made up my mind. I didn't say that I believed it wasn't fundamental or that I hold a view that it's not. I don't hold a view about whether it should be incorporated or not. The issue before me and the panel in *Maloney* was whether the Supreme Court had said that and what Second Circuit had said about that issue.

Senator SESSIONS. Has any other Circuit said it was not a fundamental right, other than your—your panel's decision?

Judge SOTOMAYOR. There is one Circuit, the Seventh Circuit, in a decision written by Judge Easterbrook, who came to the same conclusion.

Senator SESSIONS. Did he say—did he say it was not a fundamental right, though, in that opinion? I don't believe they did.

Judge SOTOMAYOR. He may not have because——

Senator SESSIONS. And that was a question—my question I was asking. So it's a problem for people. We ask about abortion. It's not explicitly referred to in the Constitution, but you say that's a fundamental right. And we have in the Constitution language that says "the right of the people to keep and bear arms shall not be infringed", and there's a question about that, that it's not a fundamental right. So I think that's what makes people worry about our courts and our legal system today and whether agendas are being promoted through the law rather than just strictly following what the law says.

Judge SOTOMAYOR. Senator, may I——

Senator SESSIONS. Yes.

Judge SOTOMAYOR.—address my use of the word "fundamental"? Fundamental is a legal term that I didn't make up, it was the Supreme Court's term. And it used it in the context—and uses it in the context—of whether a particular constitutional provision binds the States or not. And so I wasn't using the word—I. The panel

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wasn't using the word in *Maloney* in the sense of its ordinary meaning.

Senator SESSIONS. I know you were using the constitutional legal meaning, but that's hugely important because if it's not a fundamental right, it's not incorporated. Isn't that correct?

Judge SOTOMAYOR. Well——

Senator SESSIONS. And it will not apply to the States fundamentally. Isn't that the bottom line?

Judge SOTOMAYOR. Well, when the court looks at that issue it will decide, is it incorporated or not, and it will determine, by applying the test that it has subsequent to its old precedent, whether or not it is fundamental, and hence, incorporated. But the *Maloney* decision was not addressing the merits of that question, it was addressing what precedent said on that issue.

Senator SESSIONS. All right. Well, we'll review that.

On the question of foreign law, you, yesterday, said that—said this: "Unless the statute requires or directs you to look at foreign law," and some do—some statutes do, by the way. You go on to say, "The answer is no. Foreign law cannot be used as a holding, or a precedent, or to bind or influence the outcome of a legal decision interpreting the Constitution or American law." That's a pretty good statement, I think. But this is what you said before in your speech to the American Civil Liberties Union, actually in April, just two or 3 months ago in Puerto Rico.

You said this: "International law and foreign law will be very important in the discussion of how we think about unsettled issues in our own legal system. It is my hope that judges everywhere will continue to do this, because within the American legal system we're commanded to interpret our law in the best way we can, and that means looking to what other—anyone else has said to see if it has persuasive value." So that's troubling.

Now, you also said, yesterday, that you agreed with Justice Scalia and Justice Thomas on the point that one has to be very cautious, even in using foreign law with respect to things American law permits you to do. I don't think that's exactly correct or a fair summary of the import of your speech.

This is what you said before the ACLU group a month or two ago: "And that misunderstanding", about using foreign law, "is, unfortunately, endorsed by some of our Supreme Court Justices." Both—"unfortunately endorsed". Both Justice Scalia and Justice Thomas have written extensively, criticizing the use of foreign and international law in Supreme Court decisions. They have somewhat a valid point, and you point that out.

But then you go on to say, "But I think I share more the ideas of Justice Ginsburg and her thinking in believing that unless American courts are more open to discussing the ideas raised in foreign cases and by international cases, that we're going to lose influence in the world."

So everybody knows. There's been a fairly robust, roaring debate over this question. There are basically two sides, one led by Justice Ginsburg and one led by Justices Scalia and Thomas. Don't you think a fair reading of this statement is that you came down on the side of Justice Ginsburg?

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Judge SOTOMAYOR. No, sir. Because these conversations were in the context—and discussions were in the context of my pointing out, just as she had, that foreign law can't be a holding, it can't be precedent, it can't be used in that way. She is talking about the way I was to—and what I said in my speech at the beginning and the end, ideas. What are you thinking about? Judges use Law Review articles, they use statements by other courts. The New York Court of Appeals, in a recent case, looked to foreign law to address an issue that it was considering, not in terms of a holding for the court, but a way of thinking about it that it would consider.

My point is that I wasn't advocating that it should ever serve as precedent or ever serve as a holding. I was talking about the dialog of ideas and——

Senator SESSIONS. Well, you know, we go—I just think that you laid out positions and you came down on one side, and I think that's a fair summary of that speech which other people—others can read and make up their own mind.

You ask about the PRLDF, the Legal Defense Fund of which you were a member and a member of the board for 12 years. And in response to Senator Graham's question, you say you've never seen any briefs and that the main focus of your work at the organization was fund raising. Is that accurate?

Judge SOTOMAYOR. When I was responding to the Senator I was talking about the board in general. I belonged to many committees, and so I did other things besides fund raising. But I was beginning to explain what the structure of the board was and what the primary responsibility of board members is. But clearly, board members serve other functions in an organization.

Senator SESSIONS. You did serve on the Litigation Committee, and boards are supposed to, I would think—and legally are required—to superintend the activities of the organization that they're a member of. And then you have committees of the board who do various things. I'm looking at a June 1987 document, reported minutes of the board, the Litigation Committee: "Sonia Sotomayor reported that the committee, in addition to reviewing and recommending a litigation program, had identified three initiatives."

In October 1987—I'm just looking at some of the documents we were given—litigation report. "Chairman Sotomayor summarized the activities of the committee over the last several months, which included the review of the litigation efforts of the past and present, and initial exploration of potential areas of emphasis. Member Sotomayor advised that a preliminary report would be provided at January meeting." And then at the January meeting, there's about a 50-page document summarizing 30 or more cases that the board had undertaken.

A number of them are pretty significant and very consistent with the kind of case that we had in the *Firefighters* case, where the board had filed litigation to really basically insist that you have perfect harmony between the applicants for a job and those who are selected for promotions.

Isn't that true that you were more active than you may have suggested to Senator Graham yesterday?

Judge SOTOMAYOR. No, because, as I said, I was—I started to describe the role of the board generally and we were not addressing the question of what I did or how I participated. That memo has to be examined in context. The memo was a moment in our 12-year history where the board was planning a retreat to think about what directions, if any, we should consider moving into or not. We were not reviewing the individual cases to see if the individual cases—what positions were taken, the type of strategies that we——

Senator SESSIONS. Didn't you know the cases that—that you—the position—the organization was—well my time was running out.

Chairman LEAHY. Your time has run out. I was wondering if you'd like to finish your answer.

Senator SESSIONS. I'll let you answer. But I'm just want to——

Judge SOTOMAYOR. The end of my answer was, the Fund had been involved in a series of areas, employment, public health, education, and others. And so the broader question for the Fund was, should we be considering some other areas of interest to the community? We held a retreat in which speakers from a variety of different civil rights organizations, academics, a number of people came and just talked to us. I don't actually remember there being a firm decision that followed that, but it was a part of a conversation, the sort of retreats that even my court has engaged in: what are we doing; what are we thinking about? But it wasn't a review of each individual case to judge its merits.

Senator SESSIONS. Thank you.

Chairman LEAHY. Judge, there's been a lot of talk about the *Maloney* case. I should note, it's not what you said. It's what Justice Scalia's opinion for the Supreme Court said in his decision, left in place the 123-year-old Supreme Court precedent on guns, did it not?

Judge SOTOMAYOR. Justice Scalia, in a footnote in the *Heller* decision, noted the court's holding that the Second Amendment wasn't incorporated against the States.

Chairman LEAHY. The only reason I mention that, I've been a gun owner since I was probably 13 years old. I've seen nothing done by the Supreme Court, by the Second Circuit Court of Appeals, by the Congress, or by our State legislature that is going to change, one way or the other, the ownership that I have of the guns I now have.

Senator Kohl.

Senator KOHL. Thank you very much, Senator Leahy.

Judge Sotomayor, you've told us that you will follow the law and follow precedent, and you've made a very big point of this and that is all well and good.

But some of the court's most important landmark hearings—landmark rulings overruled longstanding precedent, like *Brown* v. *Board of Education*, which ended legal segregation. Now, as an appellate judge, as we know, you're required to always follow precedent. But as a Supreme Court Justice, you will have the freedom to depart from precedent.

So tell us how you will decide when it is appropriate to alter, amend, or even overrule, precedent.

Judge SOTOMAYOR. The doctrine of stare decisis is a doctrine that looks to the value in the stability, consistency, predictability of precedent and it starts from the principles that precedent are important values to the society because it helps those goals. It also guides judges in recognizing that those who have become before them, the judges who have looked at these issues, have applied careful thought to the question and view things in a certain way, and a court should—a judge should exercise some humility and caution in disregarding the thoughts and conclusions of others who came—who came in that position before them.

But that's not to suggest that the doctrine says that precedence is immutable. And, in fact, I believe that England had an experiment with that question and—and it was not horribly successful. Precedents are precedents. They're not immutable, they have to change in certain circumstances. And those circumstances generally have been described by Justice Souter in the *Casey* case, are probably the best articulation people have come to in sort of talking about the factors that courts think about.

And it starts with, well, how much reliance has the society put into the precedent? What are the costs of changing it? I shouldn't say "start". He put them in a different order. There's no real importance to the order because all are factors that you put into the weighing as a judge looks at an existing precedent. It looks to whether the—whatever the court has said. Is it providing enough guidance to the court's below and to—and for people to determine what they can or can't do? Is the precedent administratively workable?

Number three—and as I said, there's no ordering to this—are the facts that the court assumed in its older precedents. Have those changed so that it would raise a question about the court revisiting a precedent? Also, has—are the—there are developments in related fields to precedents and approaches that are developed in those cases that may bring into question the foundation of an older precedent.

Brown v. *Board of Education* has often been described as a radical change by some, and the public perceives it as a radical change. When you actually look at its history, you realize there had been jurisprudence for over 20 years by the court striking down certain—certain schemes that provided "separate but equal", but in fact didn't achieve their stated goal.

And so there was underpinnings in *Brown* v. *Board of Education* that, in those precedents that came before Brown that obviously gave the court some cause, some reason to re-think this issue of "separate but equal". They also had before them the—probably one of the most famous dissents in American history, which was the dissent by Justice Harlan in Plessy.

And Justice Harlan so carefully laid out what the Constitution said, what the principles of the Constitution were that motivated the—the Congress to pass those amendments. He laid out the court's precedents in that area and he said, separate but equal is just not consistent with the Constitution.

Now, this isn't an opinion where he described another group of people as different, and so it wasn't that he was being motivated

by his personal views. He was being motivated by a view of the law that the court, in Brown, made a change about.

One final factor the court obviously looks at is the number of times a precedent has been reaffirmed by the court, but all of these things are decided on the basis of judgment of a particular case and the arguments that are raised before a judge, and recognizing as a judge that precedent is deserving of deference, precedent, and changing it should be done cautiously by a court, but precedent can't stand if other things counsel that it not.

Senator KOHL. Good.

Judge, I'd like to return to the topic of antitrust. Two years ago in the *Twombly* case, Justice Souter wrote an opinion that sharply departed from precedent when it held that a plaintiff must show extensive evidence to support an antitrust case before the opportunity for any discovery, otherwise the case would be dismissed. This decision makes it very difficult for any plaintiff to bring an antitrust action, particularly a consumer or small business without the resources to develop extensive economic evidence.

What is your assessment of this decision? Do you share the concern of many that this does serious damage to enforcement of antitrust law?

Judge SOTOMAYOR. As with all issues of statutory construction, my charge as a judge would be, how do I apply a court's holding in a particular case in the next situation before me? The concern that you express is one that I have heard about that expressed by some, but as a judge I don't make policy. I don't make the policy choices for Congress. I'm charged with looking at a particular situation that comes before me, looking at the court's precedent and applying it to that situation.

With respect to that case, I—I—that case, as I understand the case, had to do with how much had to be pled. I didn't understand it to mean that there had to be the presentation of evidence at the pleading stage, just what had to be pled to withstand a motion to dismiss in the case.

Senator KOHL. Well, my understanding of his decision is that, in the future, plaintiffs must show extensive evidence to support an antitrust case before the opportunity for any discovery or else the case will be dismissed. Now, assuming that's correct—and I'm not telling I'm positive, but assuming that's correct—does that cause you concern?

Judge SOTOMAYOR. As I said, the issue of concern is not how I look at the court's precedents, because what I'm doing in looking at the court's precedent is thinking about how it applies to another case. The question of how to do that and whether that's right by the court would be a question that Congress, who has passed the antitrust laws, would have to, in the first instance, think about changing.

Senator KOHL. So then are you saying in a case that would follow you would necessarily be bound by Justice Souter's decision in *Twombly*?

Judge SOTOMAYOR. The court considers its various precedents in the context of a new situation. In the cases decided by the courts, they're applied to the facts of the particular case. *Twombly* is con-

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sidered, as are all the court's precedent in a new case, that examines the issue of what a complaint must allege or not allege.

Senator KOHL. So you would not be bound by the Twombly precedent, is that what you're saying?

Judge SOTOMAYOR. No. It's precedent.

Senator KOHL. So you would be bound?

Judge SOTOMAYOR. It must be applied, as is all the court's existing precedents that have not been rejected by the court. It has to be considered and has to be weighed in the situation presented.

Senator KOHL. All right. I think maybe we can talk about that subsequently to understand your meaning and what I'm saying, my reading of *Twombly* versus your reading of *Twombly*, as it will affect future antitrust cases. My understanding is that it will have a very negative effect on—a negative impact on the average person or small business' ability to bring an antitrust case that might otherwise have merit, because of the requirement that they present enormous amounts of evidence even before they can go to discovery or the case is dismissed.

Now, if I'm speaking accurately, then I think that that's a precedent that needs to be thought about very carefully, and that's why I asked the question.

Judge SOTOMAYOR. And Senator, the one thing I do know as a judge is that every argument gets made to the courts not on one occasion, but many. The question that will arise is: what's the extent of the court's application in the next case?

Senator KOHL. All right. Finally, Judge, the Supreme Court not only has the power, as you know, to decide cases and to construe the Constitution, but it also has the sole and absolute power to decide which cases it hears. If you are confirmed, only you and three other Justices can decide whether a case will be heard to begin with by the Supreme Court. In recent times, the Supreme Court has received appeals in nearly 7,000 cases each year and it only hears about 70 or 80 cases, as you know. In other words, the Justices choose to hear only about 1 percent of the appeals that they receive. This is obviously a very, very crucial power that Justices have.

Now, I recognize that one of the criteria for choosing cases is to resolve disagreement among the Circuit Courts about a particular aspect of the law, but many of the most important and prominent cases in the history of the Supreme Court did not involve splits into Circuit Courts, but were instead cases of national importance.

So how will you determine which cases are so important as to warrant review by the Supreme Court? In other words, which 1 percent of those appeals will you consider?

Judge SOTOMAYOR. What I know, and you did accurately describe one aspect of the Supreme Court's local rules that suggest just that Justices will consider a variety of factors in whether to grant cert or not, and one of those listed factors is disagreement among the Circuits, disagreements among the Circuits and Circuits and State courts and issues that have not been adequately addressed but require being addressed for a variety of different reasons.

It is very difficult to talk in the abstract about when cert should be granted because each situation presents a different set of facts and each question about whether a case is in the right posture to

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look at an issue—as I said yesterday, sometimes there—yesterday I said—I may have explained earlier in a response to Senator Specter, and I know that you had stepped away, there are procedural—there are cases that present other arguments than the one that the Circuit split exists on, and those other arguments might dispose of the case in the way the Circuit Court did and not necessitate the reaching of an issue.

There's a question, at least as some Justices have defined it, of whether there's been enough percolation among the Circuit Courts so that all of the views of a particular issue have been fully explored. The circumstances and the issues that each Justice uses depends on the facts and the posture of what comes before it. I would obviously consider the court's local rules. I would give consideration to the point that some have raised, that the court is not doing enough.

But that can't counsel taking cases. That could only be—look at my—look at the workload and see, can the case—can the court do this if it meets all the other criteria that goes into the mixture of whether to grant cert or not? You don't, like Congress, think about policy, we're going to decide 150 cases this year. You look at the cases that come before you and you figure out which ones are in a place to be reviewed.

Senator KOHL. Thank you.

Chairman LEAHY. Thank you very much.

Senator Hatch, we'll turn to you and then we will—and then we will take a break after you're finished.

[Recess at 4:55 p.m. to 5:08 p.m.]

Chairman LEAHY. Welcome back, Judge. We will skip over one and go to Senator Feingold. You are recognized for up to 20 minutes. I keep adding the "up to" hoping somebody will follow my example.

Senator FEINGOLD. Well, I——

Chairman LEAHY. But I do mean nobody will be cut off before 20 minutes.

Senator FEINGOLD. Thank you, Mr. Chairman. I understand, and I'd like to begin using my time by asking that a letter from former members of PRLDEF's Board describing the role of board members, which does not include choosing or controlling litigation—I'd ask unanimous consent.

Chairman LEAHY. Without objection it will be part of the record.

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

Senator FEINGOLD. Thank you, Mr. Chairman.

Judge, again, thanks for your tremendous patience. I'd like to start by talking for a moment about the recent Supreme Court decision in *Caperton* v. *Massey*. I consider this a significant case that bears upon the flood of special interest money that threatens to undermine public confidence in our justice system. The facts of this case are notorious: John Grisham used them as an inspiration for his novel, *The Appeal*.

A jury in West Virginia returned a $50 million verdict for a large coal company, and pending the appeal, the company's CEO spent $3 million to elect an attorney named Brent Benjamin to the state supreme court. That was a huge amount of money, relatively speaking—more than the amount spent by all of Benjamin's other

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financial supporters combined. Benjamin won the election, became a West Virginia Supreme Court Justice, and lo and behold, he voted to overturn that $50 million verdict against his main campaign contributor. Twice, he refused to recuse himself in the case, despite his obvious conflict of interest.

Last month, the Supreme Court held that Benjamin's failure to recuse himself was intolerable under our Constitution's guarantee of due process of law. The court also noted approvingly that most states have adopted codes of judicial conduct that prevent this kind of conflict, and to that end, I commend the Wisconsin Supreme Court's plan to revise its recusal rules to provide additional safeguards that protect judicial impartiality.

You've been a judge for many years and you may have seen examples when you thought a judge should have withdrawn, although hopefully none were as egregious as this case. In your opinion, what additional steps should judges and legislators take to ensure that the judiciary is held to the highest ethical standards and that litigants can be confident that their cases will be handled impartially?

Judge SOTOMAYOR. Senator, I would find it inappropriate to make suggestions to Congress about what standards it should hold judges to or litigants to. That's a policy choice that Congress will consider.

I note that the American Bar Association has a Code of Conduct that applies to litigants. The Judicial Code has a Code of Conduct for judges. And as you noted in—in the State system where judges are elected, many States are doing what I just spoke about, making and passing regulations.

Caperton was a case that was taken under the local rules of the Supreme Court, presumably, that exercises supervisory powers over the functioning of the courts and it presented, obviously, a significant issue because the court took it and decided the case.

At issue fundamentally is that judges, lawyers, all professionals must, on their own, abide by the highest standards of conduct. And I have given a speech on this topic to students at Yale at one point where I said the law is only the minimum one must do. Personally, one must act in a way in cases to ensure that you're acting consistent with your sense of meeting the highest standards of the profession.

Senator FEINGOLD. Thank you, Judge.

As I'm sure you know, on the last day of the term, the Supreme Court ordered that a pending case involving federal election law called *Citizens United* v. *FEC* be re-argued in September. It's quite possible that you will be a member of the court by then. I do not intend to ask you how you would rule in that case, but I do want to express my very deep concern about where the Supreme Court may be heading, and then pose a general question to you.

In 2003, the court, in a 5–4 ruling, upheld the McCain-Feingold bill against constitutional challenge. I believe that ruling accurately applied the court's previous precedents and recognized that Congress must have the power to regulate campaign finance to address serious problems of corruption and the appearance of corruption.

Since the arrival on the court of its two newest members, the court seems to have started in another direction on these issues, striking down or significantly narrowing two provisions of the law: the Millionaire's Amendment in the *Davis* case and the issue ad provision in *Wisconsin Right to Life*. Several Justices have even argued that corporations and living persons should have the same constitutional rights to support their chosen candidates and that *Austin* v. *Michigan Chamber of Commerce*, a case rejecting that idea, should be overruled.

Austin is premised on what I believe is an absolutely reasonable conclusion that the political activities of corporations may be subjected to greater regulation because of the legal advantages given to them by the states that allow them to amass great wealth. In scheduling re-argument in the *Citizens United* case, the court specifically asked the parties to address whether *Austin* should be overruled. If the court does that, and depending on how exactly it rules, Judge, it may usher in an era of unlimited corporate spending on elections that the nation has not seen since the 19th century.

Without addressing the specifics of the *Citizens United* case, I'd like to ask you what the Constitution and the Supreme Court's precedents generally provide about the rights of corporations, and what the current state of the law is as far as corporate participation in elections, as you understand it.

Judge SOTOMAYOR. Senator, I have attempted to answer every question that's been posed to me. You have noted that Citizens United is on the court's docket for September. I think it's September 9th. If I were confirmed for the—to the court, it would be the first case that I would participate in.

Given that existence of that case, the very first one, I think it would be inappropriate for me to do anything to speak about that area of the law because it would suggest that I'm going into that process with some prejudgment about what precedent says and what it doesn't say, and how to apply it in the open question the court is considering. I appreciate what you have said to me, but this is a special circumstance given the pendency of that particular case.

Senator FEINGOLD. And frankly, Judge, I probably would say the same thing if I were in your shoes, given——

[Laughter.]

Senator FEINGOLD.—given the facts as they are. I appreciate the opportunity to express what I wanted to say about that.

And with that, Mr. Chairman, I'm going to use up less than half of my time.

Chairman LEAHY. All right. Thank you. I think you've set a fantastic example.

[Laughter.]

Chairman LEAHY. I commend you. I say that in a totally nonpartisan fashion.

Senator Grassley.

Senator GRASSLEY. I assume that I get the time that he didn't use?

Chairman LEAHY. No.

[Laughter.]

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Chairman LEAHY. No. After your demonstrator, was it yesterday—your demonstrator, that you tend to turn people on, we don't need any more.

[Laughter.]

Senator GRASSLEY. Okay.

Chairman LEAHY. We don't need any more excitement, Senator Grassley.

Senator GRASSLEY. Yeah.

Chairman LEAHY. We want it as low-key as possible. But you—you do have up to 20 minutes. The opportunity is up to 20 minutes.

Senator GRASSLEY. Now, I believe that I'm going to ask you something you've never been asked before during this hearing, I hope. I'd like to be original on something.

I want to say to you that there's a Supreme Court decision called *Baker* v. *Nelson*, 1972. It says that the Federal courts lack jurisdiction to hear due process and equal protection challenges to State marriage laws "for want of substantial Federal question", which obviously is an issue the courts deal with quite regularly, I mean, the issue of is it a Federal question or not a Federal question.

So do you agree that marriage is a question reserved for the States to decide based on *Baker* v. *Nelson*?

Judge SOTOMAYOR. That also——

Senator GRASSLEY. I thought I'd ask a very easy——

Judge SOTOMAYOR.—is a question that's pending and impending in many courts. As you know, the issue of marriage and what constitutes it is a subject of much public discussion, and there's a number of cases in State courts addressing the issue of what—who regulates it, under what terms.

Senator GRASSLEY. Can I please interrupt you?

Judge SOTOMAYOR. Uh-huh.

Senator GRASSLEY. I thought I was asking a very simple question based upon a precedent that *Baker* v. *Nelson* is, based on the proposition that yesterday, in so many cases, whether it was Griswold, whether it was *Roe* v. *Wade*, whether it was Chevron, whether it's a whole bunch of other cases that you made reference to, the *Casey* case, the *Gonzalez* case, the *Leegan Creative Leather Products* case, the *Kelo* case. You made that case to me. You said these are precedents. Now, are you saying to me that *Baker* v. *Nelson* is not a precedent?

Judge SOTOMAYOR. No, sir. I just haven't reviewed Baker in a while, and so I actually don't know what the status is. If it is the court's precedent, as I've indicated in all of my answers, I will apply that precedent to the facts of any new situation that implicates it.

Senator GRASSLEY. Well——

Judge SOTOMAYOR. Always the first question for a judge.

Senator GRASSLEY. Well, then tell me—tell me what sort of a process you might go through if a case, a marriage case, came to the Supreme Court of whether *Baker* v. *Nelson* is precedent or not, because I assume if it is precedent, based on everything you told us yesterday, you're going to follow it.

Judge SOTOMAYOR. The question on a marriage issue will be, two sides will come in. One will say Baker applies, another will say this court's precedent applies to this factual situation, whatever the fac-

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tual situation is before the court. They'll argue about what the meaning of that precedent is, how it applies to the regulation that's at issue, and then the court will look at whatever it is that the State has done, what law it has passed on this issue of marriage, and decide, Okay, which precedent controls this outcome? It's not that I'm attempting not to answer your question, Senator Grassley. I'm trying to explain the process that would be used Again, this question of how, and what is constitutional or not, or how a court will approach a case and what precedent to apply to it, is going to depend on what's at issue before the court. Could the State do what it did?

Senator GRASSLEY. Can I interrupt you again? Following what you said yesterday, that certain things are precedent, I assume that you've answered a lot of questions before this Committee about—even after you said that certain things are precedent, of things that are going to come before the court down the road when—if you're on the Supreme Court. You didn't seem to compromise or hedge on those things being precedent. Why are you hedging on this?

Judge SOTOMAYOR. I'm not on this because the holding of *Baker* v. *Nelson* is it's holding. As a holding, it would control any similar issue that came up. It's been a while since I've looked at that case so I can't——

Senator GRASSLEY. Okay

Judge SOTOMAYOR.—as I could with some of the more recent precedent of the court or the more core holdings of the court on a variety of different issues, answer exactly what the holding was and what the situation that it applied to. I would be happy, Senator, as a follow-up to a written letter, or to give me the opportunity to come back tomorrow and just address that issue. I'd have to look at Baker again.

Senator GRASSLEY. I would appreciate it.

Judge SOTOMAYOR. It's been too long since I've looked at it.

Senator GRASSLEY. Yeah. You——

Judge SOTOMAYOR. So it may have been, sir, as far back as law school, which was 30 years ago.

Senator GRASSLEY. Oh, were you probably in grade school, you were at that time.

Judge SOTOMAYOR. Yeah. It was—I know that I looked at it, sir.

Senator GRASSLEY. Okay. Okay.

I want to go on, but I would like to have you do that, what you'd suggested you'd answer me further after you've studied it.

I have a question that kind of relates to the first question. In 1996, Congress passed, and President Clinton signed into law, the Defense of Marriage Act which defined marriage for the purpose of Federal law as between one man and one woman. It also prevents a State or territory from giving effect to another State that recognizes same-sex marriages. Both provisions have been challenged as unconstitutional and Federal courts have upheld both cases, one is the *Wilson* case, one is the *Bishops* case, in District Court.

Do you agree with Federal courts which have held that the Defense of Marriage Act does not violate the full faith and credit clause and is an appropriate exercise of Congress' power to regulate conflicts between laws in different States?

Judge SOTOMAYOR. That's very similar to the Austin situation, but the ABA rules would not permit me to comment on the merits of a case that's pending or impending before the Supreme Court. The Supreme Court has not addressed the constitutionality of that statute, and to the extent that lower courts have addressed it and made holdings, it is an impending case that could come before the Supreme Court. So, I can't comment on the merits of that case.

Senator GRASSLEY. Okay. Have you ever made any rulings on the full faith and credit clause?

Judge SOTOMAYOR. I may have. But if your specific question is, have I done it with respect to a marriage-related issue——

Senator GRASSLEY. Well, I'm not——

Judge SOTOMAYOR. No.

Senator GRASSLEY. On any—on anything in the full faith and credit clause.

Judge SOTOMAYOR. I actually have no memory of doing so.

Senator GRASSLEY. Okay. That's Okay. No, you can stop there. That's Okay.

Now, I'm going to go to a place where Senator Hatch left off, but I'm not going to repeat any of the questions that he asked. But there's one that I want to ask, and I feel a little bit guilty on this. My dad used to have a saying to us kids when we were harping on something. He says, "When are you going to quit beating a dead horse?" But I want to ask you anyway. You—you also wrote, "I wonder whether achieving that goal is possible in all, or even in most, cases, and I wonder whether, by ignoring our differences as women and men of color, we do a disservice both to the law and to society."

So the concern I have about the statement is it's indicating that you believe judges should, and must, take into account gender, ethnic background, or other personal preferences in their decision making process. Is that what you meant? And I want to follow it up so I don't have to ask two questions: how is being impartial a disservice to the law and society? Isn't justice supposed to be blind?

Judge SOTOMAYOR. No, I do not believe that judges should use their personal feelings, beliefs, or value systems or make their—to influence their outcomes, and neither do I believe that they should consider the gender, race, or ethnicity of any group that's before them. I absolutely do not believe that.

With respect to, yes, is the—is the goal of justice to be impartial, that is the central role of a judge. It—the judge is the impartial decision maker between parties who come before them. My speech was on something else, but I have no quarrel with the basic principles that you have asked me to recognize.

Senator GRASSLEY. Okay.

Judge SOTOMAYOR. Now, no quarrel sounds equivocal. They—I do believe in those things absolutely, and that's what I have proven I do as a judge.

Senator GRASSLEY. Okay.

Then the last one on this point of another remark you made. You also stated that you "further accept that our experiences as women and people of color affect our decisions". And then, further, "that personal experiences affect the facts that judges choose to see," and

that, further, "there will be some (differences in my judging) based on my gender and Latina heritage."

Do you believe that it is ever appropriate for judges to allow their own identity/politics to influence their judging?

Judge SOTOMAYOR. No, sir. Absolutely not.

Senator GRASSLEY. Okay.

Then I want to move on to another area. This question comes from your 1992 Senate questionnaire. You wrote in response to a question about judicial activism that "intrusions by a judge upon the functions of other branches of government should only be done as a last resort and limitedly". Is this still your position? And let me follow up: when would such an intrusion be justified? For example, what is an example of last resort? What is an example of limited—"limitedly"?

Judge SOTOMAYOR. The answer is, judges and—and the manner in which that question was responded to was, to the extent that there has been a violation of the Constitution in whatever manner of court identifies in a particular case, it has to try to remedy that situation in the most narrow way in order not to intrude on the functions of other branches or actors in the process.

The case that I—was discussed in my history has been the *Doe* case, in which I joined the panel decision where the District Court had invalidated a statute that found unconstitutional a statute that the legislator—legislature had passed on national security letters. Our panel reviewed that situation and attempted to discern, and did discern, Congress' intent to be that despite a—isolation provisions that might have to be narrowly construed to survive constitutional review, it held that the other provisions of the Act were constitutional.

So the vast majority, contrary to what the District Court did—and I'm not suggesting it was intending to violate what I'm describing, but the court took a different view than the Circuit did—we upheld the statute in large measure. To the extent that we thought there were, and found that there were two provisions that were unconstitutional, we narrowly construed them in order to assist in effecting Congress' intent. That's what I talked about "limitedly" in that answer.

Senator GRASSLEY. Okay.

A little bit along the same line, in your Law Review articles you wrote that, "Our society would be straitjacketed were not the courts, with the able assistance of the lawyers, constantly overhauling"—and I don't know whether that's your emphasis or mine, but I've got it underlined—"the law and adapt"—maybe I'd better start over again.

"Our society would be straitjacketed were it not—were not the courts, with the able assistance of the lawyers, constantly overhauling the law and adapting it to the realities of ever-changing social, industrial, and political changes."

The explanation of the statement from you. I think you're saying that judges can twist the law regardless of what the legislature, the elected branch of government, has enacted into law. It's kind of my interpretation of that. Obviously I think you're going to tell me you don't mean that, but at least you know where I'm coming from.

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Judge SOTOMAYOR. No. That interpretation was clearly not my intent, and if—I don't actually remember those particular words, but I do remember the speech. I'm assuming you're talking about returning majesty to the law. And there I was talking about a broader set of questions, which was how to bring the public's respect back to the function of judges.

And I was talking about—that judges—that lawyers have an obligation to explain to the public the reasons why what seems unpredictable in the law has reasons, and I mentioned in that speech that one of the big reasons is that Congress makes new laws. That was the very first reason I discussed. And also that there's new technology, there's new developments in society, and what lawyers do is come in and talk to you about, okay, we've got these laws, how do you apply them to this new situation?

And what judges do—and that's why I was talking about the assistance of judges of lawyers—is what you do, is you look at the court's precedent, you look at what a statute says and you try to understand the principles that are at issue and apply them to what the society is doing, and that was the focus of my speech, which was, talk to the public about the process. Don't feed into their cynicism that judges are activists, that judges are making law. Work at explaining to the—to the public what the process is. I also talk to—part of my speech is what judges can do to help improve respect of the public in the legal process.

Senator GRASSLEY. So the use of the word "overhaul" does not in any way—"overhaul the law"——

Judge SOTOMAYOR. Right.

Senator GRASSLEY.—does not in any way imply usurpation of legislative power by the courts?

Judge SOTOMAYOR. No. And if you look at what I was talking about, it was, the society develops.

Senator GRASSLEY. Yeah.

Judge SOTOMAYOR. We are not, today, what we were 100 years ago in terms of technology, medicine, so many different areas. There are new situations that arise and new facts that courts look at. You apply the law to those situations, but that is the process of judging which is sort of trying to figure out, what does the law say about a set of facts that may not have been imagined at the time of the founding of the Constitution, but it's what the judge is facing then: how do you apply it to that?

Senator GRASSLEY. Yeah.

I want to go back to *Didden* based upon my opportunity to reflect on some things you said yesterday. The time limit to file a case in *Didden* was 3 years. Mr. Didden was approached for what he classified as extortion in November 2003. Two months later, in January of 2004, he filed his lawsuit. But under your ruling, Mr. Didden was required to file his lawsuit in July 2002, close to a year and a half before he was actually extorted. So that doesn't make sense to require someone to file a lawsuit on a perceived chance that an order might occur.

You also testified that the Supreme Court's *Kelo* decision was not relevant to the *Didden* holding, but your opinion, in cursory fashion, which is a problem that we addressed yesterday, states that

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if there was no Statute of Limitations issue, *Kelo* would have permitted Mr. Didden's property to be taken.

It's hard to believe that an individual's property can be seized when he refuses to be extorted without any constitutional violation taking place. It's even harder to believe that, under these circumstances, Mr. Didden—Mr. Didden did not deserve his day in court or at least some additional legal analysis.

Could you please explain how Mr. Didden could have filed his lawsuit July 2002 before he was extorted in November 2003? And also please explain why a July 2002 filing would not have been dismissed because there was no proof that Mr. Didden had suffered an injury, only an allegation that he might be injured in the future.

Judge SOTOMAYOR. The basis of Mr. Didden's lawsuit was, the State can't take my property and give it to a private developer, and—because that is not consistent with the Takings Clause of the Constitution.

To the extent he knew the State—and there's no dispute about this—that the State had found a public use for his property, that it had a public purpose, that it had an agreement with a private developer to let that developer take the property, he knew that he was injured because his basic argument was, the State can't do this. It can't take my property and give it to a private developer.

The Supreme Court, in *Kelo*, addressed that question and said under certain circumstances the State can do that if it's for a public use and a public purpose. And so his lawsuit essentially addressing that question came 5 years after he knew what the State was doing. The issue of extortion was a question of whether the private developer, in setting a lawsuit with them, was engaging in extortion, and extortion is an unlawful asking of money with no basis. But the private developer had a basis. He had an agreement with the State. And so that is a different issue than the timeliness of Mr. Didden's complaint.

Chairman LEAHY. Thank you.

Chairman LEAHY. Senator Cardin? We'll recognize Senator Cardin. And then for those who have to plan, we will then recess until 9:30 tomorrow morning.

Senator Cardin.

Senator CARDIN. Well, Judge, let me first say that since this will be my last time in this hearing to address you, to say this has been my first confirmation hearing for a—Supreme Court Justice. You have set a very high standard for me and for those I might have to consider, because there's always a possibility of future vacancies on the Supreme Court. As for responding to our questions, being very open with us, and I think really demonstrating the type of respect for the process that has really shown dignity to you and to our committee, I thank you for that.

I thanked you in the beginning for your willingness to serve the public as a prosecutor and as a judge, and now willing to take on this really incredible responsibility. I just really want to emphasize that again. I don't know if you thought when you were being considered for this what you would have to go through as far as the appearance before the Judiciary Committee, but it gets better after our hearings, I believe.

So let me ask you one or two questions, if I might. I want to follow up on Senator Kohl's question on the selection of cases under certiorari. As has been pointed out earlier, maybe 1 percent of the cases that are petitioned to the Supreme Court actually recieve an opinion.

Now, Senator Kohl asked you what standards you would use in choosing cases and one factor I believe is important to look at is the impact that a Supreme Court case can have on society. I'm going to refer to one of your cases, the *Boykin* case, which was the housing case where you allowed that borrower to go forward, African-American, on a discrimination issue. And we've seen throughout history discrimination against minorities in housing, with redlining and predatory lending. It led to the Fair Housing Act enacted by Congress.

The Supreme Court has long recognized Title 7 and 8 of the Federal Housing Act as part of the coordinated scheme of the Federal civil rights laws enacted to end discrimination. But there are still major challenges that are out there. Predatory lending still takes place. It's happened during this housing crisis with the subprime mortgage market targeted toward minority communities.

I say that in relationship to the *Boykin* case, which I agreed with your conclusion that it not only could affect the litigants that were before you, but could have an impact on industry practice if, in fact, there was discrimination and the case was decided by your court.

And the same thing is true in the Supreme Court, more so in the Supreme Court. It is the highest judgment of our land. And yes, you have to be mindful when you take a case on cert as to the impact it will have on the litigants. Certainly you have to take into consideration if there's been different, inconsistent rulings in the different Circuits.

But it seems to me that one of the standards I would hope you would use in choosing cases is the importance of deciding that particular case for the impact it can have on a broader group of people in our Nation, whether it's a housing case that could affect communities' ability to get fair access to mortgages for home ownership, or whether it's a case that could have an impact on a class of people, on environmental or economic issues. And I just would like to ask you whether this, in fact, is a reasonable request as you consider certiorari requests, that one of the factors that is considered is the impact it has on the community at large.

Judge SOTOMAYOR. As I indicated earlier, we don't make policy choices. That means that I would think it inappropriate for a court to choose a case because—or a court—a judge to choose a case based on some sense of, I want this result on society. A judge takes a case to decide a legal issue, understanding its importance to an area of law and to arguments that parties are making about why it's important.

The question of—of impact is different than what a judge looks at, which is what's the state of the law and this question, and how—and what clarity is needed, and other factors. But as I said, there's a subtle but important difference in separating out and making choices based on policy and how you would like an issue

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to come out than a question that a judge looks at in terms of assessing the time at which a legal argument should be addressed.

Senator CARDIN. And I respect that difference and I don't want you to be taking a case to try to make policy. But I do think the—need for clarity for the community as to what is appropriate conduct well beyond the litigants of a particular case is a factor where clarification is needed and should weigh heavily on whether the court takes that type of case or not.

Judge SOTOMAYOR. There's just no one factor that controls the choice where you say, I'm going to look at every case this way. As I said, judges in—in—well, I shouldn't talk because I haven't—I'm not there.

Senator CARDIN. All right.

Judge SOTOMAYOR. But my understanding of the process is that it's not based on those policy implications of an outcome.

Senator CARDIN. Uh-huh.

Judge SOTOMAYOR. It's based on a different question than that.

Senator CARDIN. Well, let me conclude on one other case that you ruled on where I also agree with your decision, and that's in *Ford* v. *McGinnis*, where you wrote a unanimous panel opinion overturning a District Court summary judgment, finding in favor of the Muslim inmate who was denied, by prison officials, access to his religious meals marking the end of Ramadan. You held that the inmate's fundamental rights were violated and that the opinions of the Department of Corrections and religious authorities cannot trump the plaintiff's sincere and religious beliefs.

Religious Freedom is one of the basic principles in our Constitution. As I said in my opening comments, it was one of the reasons my grandparents came to America. The freedom of religion expression is truly a fundamental American right. Please share with us your philosophy as to—maybe that's the wrong use of terms, but the importance of that provision in that Constitution and how you would go about dealing with cases that could affect this fundamental right in our Constitution.

Judge SOTOMAYOR. I—I don't mean to be funny, but the court has held that it's fundamental in the sense of incorporation against the States.

[Laughter.]

Judge SOTOMAYOR. But it is a very important and central part of our democratic society that we do give freedom of religion, of practice of religion, that the Constitution restricts the—the State from establishing a religion, and that we have freedom of expression and speech as well.

Those freedoms are central to our Constitution. The four cases, others that I have rendered in this area, recognize the importance of that in terms of one's consideration of actions that are being taken to restrict it in a particular circumstance. Speaking further is difficult to do, again, because of the role of a judge. To say it's important, that it's fundamental, that it's legal in common meaning, is always looked at in the context of a particular case. What's the State doing?

In the *Ford* case that you just mentioned, the question there before the court was, did the District Court err in considering whether or not the religious belief that this prisoner had was consistent

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with the established traditional interpretation of a meal at issue? Okay.

And what I was doing was applying very important Supreme Court precedent that said it's the subjective belief of the individual. Is it really motivated by a religious belief? That's one of the reasons we recognize conscientious objectors, because we're asking a court not to look at whether this is orthodox or not, but to look at the sincerity of the individual's religious belief and then look at what the State is doing in light of that. So that was what the issue was in Ford.

Senator CARDIN. Well, thank you for that answer. Again, thank you very much for the manner in which you have responded to our questions.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you. Thank you very much, Senator Cardin.

As I noted earlier, we will now recess until 9:30 tomorrow morning. I wish you all a pleasant evening. Thank you.

[Whereupon, at 5:50 p.m. the Committee was recessed.]

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CONTINUATION OF THE NOMINATION OF HON. SONIA SOTOMAYOR, TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

THURSDAY, JULY 16, 2009

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 9:33 a.m., in room SH–216, Hart Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Kohl, Feinstein, Feingold, Schumer, Durbin, Cardin, Whitehouse, Klobuchar, Kaufman, Specter, Franken, Sessions, Hatch, Grassley, Kyl, Graham, Cornyn, and Coburn.

Chairman LEAHY. Judge, thank you. Judge Sotomayor, welcome back to the Committee for a fourth day. If this seems long, it is a day more than either Chief Justice Roberts or Justice Alito was called upon to testify. But you seem to have weathered it well, and I hope the Senators have, too.

Yesterday we completed the extended first round of questions, and an additional eight Senators got approximately halfway through a follow-up round. This morning we can continue and hopefully conclude.

Senator Kyl is recognized next for 20 minutes, or as I say with hope springing eternal—I keep saying "up to 20 minutes." Nobody is required to use the full 20 minutes, but I would hasten to add, everybody is certainly entitled to.

Senator Kyl.

Senator KYL. Mr. Chairman, before I begin, for those who are watching this on television, I would just note that I don't think we put Judge Sotomayor on the hot seat with our questions, but we certainly did with the temperature in this room yesterday, and for that I apologize. And I note that it could get a little steamy this morning, too. I know it is cold back there, but it is not at all cool where we are.

Chairman LEAHY. If I could respond——

Senator KYL. If there is ever a question about Judge Sotomayor's stamina in a very hot room, that question has been dispelled without any doubt whatsoever.

Chairman LEAHY. If I might—and I will ask them to set the clock back to the 20 minutes so this does not go into your time—it is really an interesting thing, because anybody who has gone up

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where the press are, it is like an icebox up there. And I am hoping we can get this—but at least the microphone is working. I want to thank Senator Sessions for offering me his microphone yesterday, but that did not work. And I want to thank Senator Franken for letting me use his.

So if we start the clock back over so I do not take this out of Senator Kyl's time, Senator Kyl, please go ahead, sir.

Senator KYL. Thank you, and good morning, Judge.

Judge SOTOMAYOR. Good morning.

Senator KYL. In response to one of Senator Sessions' questions on Tuesday about the *Ricci* case, you stated that your actions in the case were controlled by established Supreme Court precedent. You also said that a variety of different judges on the appellate court were looking at the case in light of established Supreme Court and Second Circuit precedent. And you said that the Supreme Court was the only body that had the discretion and the power to decide how these tough issues should be decided. Those are all quotations from you.

Now, I have carefully reviewed the decision, and I think the reality is different. No Supreme Court case had decided whether rejecting an employment test because of its racial results would violate the civil rights laws. Neither the Supreme Court's majority in *Ricci* nor the four dissenting judges discussed or even cited any cases that addressed the question. In fact, the Court in its opinion even noted—and I am quoting here—that "this action presents two provisions of Title VII to be interpreted and reconciled with few, if any, precedents in the court of appeals discussing the issue."

In other words, not only did the Supreme Court not identify any Supreme Court cases that were on point; it found few, if any, lower court opinions that even addressed the issue.

Isn't it true that you were incorrect in your earlier statement that you were bound by established Supreme Court and Second Circuit precedent when you voted each time to reject the firefighters' civil rights complaint?

STATEMENT OF HON. SONIA SOTOMAYOR, TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

Judge SOTOMAYOR. Senator, I was—let me place the *Ricci* decision back in context. The issue was whether or not employees who were a member of a disparately impacted group had a right under existing precedent to bring a lawsuit. Did they have a right to bring a lawsuit on the basis of *prima facie* case and what would that consist of?

That was established Second Circuit precedent and had been, at least up to that point, concluded from Supreme Court precedents describing the initial burden that employees had. That was——

Senator KYL. Well, are you speaking here—you said had the right to bring the lawsuit. It is not a question of standing. There was a question of summary judgment.

Judge SOTOMAYOR. Exactly. Exactly, which is, when you speak about a right to bring a lawsuit, I mean what's the minimum amount of good-faith evidence do they have to actually file the complaint. And established precedent said you can make out, an em-

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ployee, a *prima facie* case of a violation of Title VII under just merely by—not "merely." That's denigrating it. By showing a disparate impact.

Then the city was faced with the choice of, OK, we're now facing two claims, one——

Senator KYL. If I could just interrupt, we only have 20 minutes here, and I am aware of the facts of the case. I know what the claims were. The question I asked was very simple. You said that you were bound by Supreme Court and Second Circuit precedent. What was it? There is no Supreme Court precedent, and as the Court itself noted, they could find few, if any, Second Circuit precedents.

Judge SOTOMAYOR. The question was the precedent that existed and whether, viewing it, one would view this as the city discriminating on the basis of race or the city concluding that because it was unsure that its test actually avoided disparate impact but still tested for necessary qualifications, was it discriminating on the basis of race by not certifying the test?

Senator KYL. So you disagree with the Supreme Court's characterization of the precedents available to decide the case?

Judge SOTOMAYOR. It's not that I disagree. The question was a more focused one that the Court was looking at, which was saying—not more focused. It was a different look. It was saying, OK, you have got these precedents. It says employees can sue the city. The city is now facing liability. It is unsure whether it can defeat that liability. And so it decides not to certify the test and see if it could come up with one that would still measure the necessary qualifications——

Senator KYL. Let me interrupt again because you are not getting to the point of my question, and I know as a good judge, if I were arguing a case before you, you would say, "That is all fine and dandy, counsel, but answer my question."

Isn't it true that—two things—first, the result of your decision was to grant summary judgment against these parties? In other words, it wasn't just a question of whether they had the right to sue. You actually granted a summary judgment against the parties. And, second, that there was no Supreme Court precedent that required that result? And I am not sure what the Second Circuit precedent is. The Supreme Court said "few, if any." And I don't know what the precedent would be. I am not necessarily going to ask you to cite the case, but was there a case? And if so, what is it?

Judge SOTOMAYOR. It was the ones that we discussed yesterday, the *Bushey* line of cases that talked about the *prima facie* case and the obligations of the city in terms of defending lawsuits claiming disparate impact. And so the question then became: How do you view the city's action? Was it—and that's what the district court had done in its 78-page opinion to say you have got a city facing liability——

Senator KYL. All right. So you contend that there was Second Circuit precedent. Now, on the en banc review, of course, the question there is different because you are not bound by any three-judge panel decision in your circuit. So what precedent would have bound—and yet you took the same position in the en banc review.

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For those who are not familiar, a three-judge court decides the case in the first instance. In some situations, if the case is important enough, the other judges on the circuit—there may be 9 or 10 or 20; I think in the Ninth Circuit there are 28 judges in the circuit. And you can request an en banc review. The entire circuit would sit. And in that case, of course, they are not bound by a three-judge decision because it is the entire circuit sitting of 10 or 12 or 20 judges.

So what precedent then would have bound the court in the en banc review?

Judge SOTOMAYOR. The panel acted in accordance with its views by setting forth and incorporating the district court's analysis of the case. Those who disagreed with the opinion made their arguments. Those who agreed that en banc certification wasn't necessary voted their way, and the majority of the court decided not to hear the case en banc.

I can't speak for why the others did or did not take the positions they did. Some of them issued opinions. Others joined opinions.

Senator KYL. But you felt you were bound by precedent?

Judge SOTOMAYOR. That was what we did in terms of the decision, which was to accept the—not accept but incorporate the district court's decision analyzing the case and saying we agreed with it.

Senator KYL. Understood. But the district court decision is not binding on the circuit court, and the en banc review means that the court should look at it in light of precedents that are stronger than a three-judge decision. So I am still baffled as to what precedent you are speaking of?

Judge SOTOMAYOR. Perhaps it is just one bit of background needs to be explained. When a court incorporates, as we did in a per curiam, a district court decision below, it does become the court's precedent. And, in fact, when I——

Senator KYL. The three judges?

Judge SOTOMAYOR. Yes, but when I was on the district court, I issued also a lengthy decision on an issue, a constitutional issue, a direct constitutional issue, that the circuit had not addressed and very few other courts had addressed on the question of whether AEDPA's statute of limitations on habeas were——

Senator KYL. Okay. Excuse me. I apologize for interrupting, but I have now used half of my time, and you will not acknowledge that even though the Supreme Court said there was no precedent, even though the district court judgment and a three-judge panel judgment cannot be considered precedent binding the en banc panel of the court, you still insist that somehow there was precedent there that you were bound by.

Judge SOTOMAYOR. As I explained, when the circuit court incorporated the district court's opinion, that became the court's holding.

Senator KYL. Of course.

Judge SOTOMAYOR. So it did become circuit holding. With respect to——

Senator KYL. By three judges.

Judge SOTOMAYOR. With respect—yes. I'm sorry. With respect to the question of precedent, it must be remembered that what the Supreme Court did in *Ricci* was say: There isn't much law on how

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to approach this. Should we adopt a standard different than the circuit did? Because it is a question that we must decide, how to approach this issue to ensure that two provisions of Title VII are consistent with each other.

That argument of adopting a different test was not the one that was raised before us, but that was raised clearly before the Supreme Court. And so that approach is different than saying that the outcome that we came to was not based on our understanding of what it made out a *prima facie* case.

Senator KYL. Well, if it is a matter of first impression, do judges on the Second Circuit typically dispose of important cases of first impression by a summary, one-paragraph order, per curiam opinion?

Judge SOTOMAYOR. Actually, they did in one case I handled when I was a district court judge.

Senator KYL. Would that be typical?

Judge SOTOMAYOR. I don't know how you define "typical," but if the district court opinion in the judgment of the panel is adequate and fulsome and persuasive, they do. In my *Rodriguez* v. *Artuz* case, when I was at district court, on the constitutionality of an act by Congress with respect to the Suspension Clause of the habeas provision, the court did it in less than a paragraph. They just incorporated my decision as the law of the circuit or the holding of the circuit.

Senator KYL. Well, let me quote from Judge Cabranes' dissent. He said, "The use of per curiam opinions of this sort, adopting in full the reasoning of a district court without further elaboration, is normally reserved for cases that present straightforward questions that do not require exploration or elaboration by the court of appeals. The questions raised in this appeal cannot be classified as such as they are indisputably complex and far from well settled."

I guess legal analysts are simply going to have to research and debate the question of whether or not the cases of first impression or complex, important cases are ordinarily dispensed of that way.

Let me just say that the implications—the reason I address this is the implications of the decision are far-reaching. I think we would all agree with that. It is an important decision, and it can have far-reaching implications. Let me tell you what three writers, in effect, said about it and get your reaction to it.

Here is what the Supreme Court said in *Ricci* about the decision, about the rule that your court endorsed. It said that the rule that you endorsed—and I am quoting now—"allowing employers to violate the disparate treatment prohibition based on a mere good-faith fear of disparate impact liability would encourage race-based action at the slightest hint of disparate impact." This is the Supreme Court.

"Such a rule," it said, "would amount to a de facto quota system in which a focus on statistics could put undue pressure on employers to make hiring decisions on the basis of race. Even worse, an employer could discard test results or other employment practices with the intent of obtaining the employer's preferred racial balance."

Your colleague on the Second Circuit Judge Cabranes said that under the logic of your decision—and I quote again—"municipal

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employers could reject the results of an employment examination whenever those results failed to yield a desirable racial outcome"—in other words, "failed to satisfy a racial quota."

That is why the case is so important. I would imagine you would hope that that result would not pertain. I guess I can just ask you that, that you would not have rendered this decision if you felt that that would be the result.

Judge SOTOMAYOR. As I argued—argued. As I stated earlier, the issue for us, no, we weren't endorsing that result. We were just talking about what the Supreme Court recognized, which was that there was a good-faith basis for the city to act. It set a standard that was new, not argued before us below, and that set forth how to balance those considerations. That is part of what the Court does in the absence of a case previously decided that sets forth the test. And what the Court there said is good faith is not enough.

Senator KYL. Understood.

Judge SOTOMAYOR. Substantial evidence is what the city has to rely on. Those are different types of questions.

Senator KYL. Of course. And the point is you don't endorse the result that either Judge Cabranes or the Supreme Court predicted would occur had your decision remained in effect. I am sure that you would hope that result would not pertain.

Judge SOTOMAYOR. Yes. But I didn't—that wasn't the question we were looking at. We were looking at a more narrow question, which was: Could a city in good faith say we're trying to comply with the law, we don't know what standard to use, we have good faith for believing that we should not certify?

Now the Supreme Court has made clear what standard they should apply. Those are different issues.

Senator KYL. Well, I am just quoting from the Supreme Court about the rule that you endorsed in your decision. And, again, it said, the Supreme Court said about your rule that, "Such a rule would amount to a de facto quota system in which a focus on statistics could put undue pressure on employers to make hiring decisions on the basis of race. Even worse, an employer could disregard test results or other employment practices with the intent of obtaining an employer's preferred racial balance."

I guess we both agree that that is not a good result.

Let me ask you about a comment you made about the dissent in the case. A lot of legal commentators have noted that while the basic decision was 5–4, all nine of the Justices disagreed with your panel's decision to grant summary judgment, that all nine of the judges believed that the court should have been—that the district court should have found the facts in the case that would allow it to apply a test. Your panel had one test. The Supreme Court had a different test. The dissent had yet a different test. But, in any case, whatever the test was, all nine of the Justices believed that the lower court should have heard the facts of the case before summary judgment was granted.

I heard you to say that you disagreed with that assessment. Do you agree that the way I stated it is essentially correct?

Judge SOTOMAYOR. It's difficult because there were a lot of opinions in that case, but the engagement among the judges was varied on different levels. And the first engagement that the dissent did

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with the majority was saying if you are going to apply this new test, this new standard, then you should give the circuit court an opportunity to evaluate the evidence——

Senator KYL. Well, Judge, I have to interrupt you there. The Court didn't say if you are going to apply a new standard you need to send it back. All nine Justices said that summary judgment was inappropriate, that the case should have been decided on the facts. There were three different tests: the test from your court, the test of the majority of the Supreme Court, and the test of the dissent.

Irrespective of what test it was, they said that the case should not have been decided on summary judgment. All nine Justices agreed with that, did they not?

Judge SOTOMAYOR. I don't believe that's how I read the dissent. It may have to speak for itself, but I—Justice Ginsburg took the position that the Second Circuit's panel opinion should be affirmed, and she took it by saying that no matter how you looked at this case, it should be affirmed. And so I don't believe that—that was my conclusion reading the dissent, but obviously it will speak for itself.

Senator KYL. Well, it will, and I guess commentators can opine on it. I could read commentary from people like Stuart Taylor, for example, who have an opinion different from yours, but let me ask you one final question in the minute and a half that I have remaining.

I was struck by your response to a question that Senator Hatch asked you about yet another speech that you gave in which you made a distinction between the justice of a district court and the justice of a circuit court, saying that the district court provides justice for the parties, the circuit court provides justice for society.

Now, for a couple of days here, you have testified to us that you believe that not only do district and circuit courts have to follow precedent but that the Supreme Court should follow precedent. So it is striking to me that you would suggest—and this goes back to another comment you made, perhaps flippantly, about courts of appeals making law. But it would lead one to believe that you think that the circuit court has some higher calling to create precedent for society.

In all of my experience—you have *Smith* v. *Jones* in the district court. The court says the way we read the law, Smith wins. It goes to the court of appeals. The court has only one job to decide: Does Smith win or does Jones win? It doesn't matter what the effect of the case is on society. That is for legislators to decide. You have one job. Who wins, Smith or Jones, based on the law? And you decide, yes, the lower court was right; Smith wins.

You are applying precedent and you are deciding the case between those parties. You are not creating justice for society except in the most indirect sense that any court that follows precedent and follows the rule of law helps to build on this country's reliance on the rule of law.

Judge SOTOMAYOR. I think we are in full agreement. When precedent is set, it is set—it follows the rule of law. And in all of the speeches where I have discussed this issue, I have described the differences between the two courts as one where precedents are set,

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that the precedents have policy ramifications, but not in the meaning that the legislature gives to it.

The legislature gives it a meaning in terms of making law. When I am using that term, it is very clear that I am talking about having a holding, it becomes precedent, and it binds other courts. You are following the rule of law when you are doing that.

Senator KYL. Mr. Chairman, I am over the time, but just a final follow-up question, if I could.

You yourself noted that you have created precedent as a district court judge. Both district courts and circuit courts created precedent simply by deciding a case, but they are both required to follow precedent. Isn't that correct?

Judge SOTOMAYOR. Yes.

Chairman LEAHY. Only because the Senator went over, I would note the district court in that case did cite the *Reeves* case, which is a year 2000 Supreme Court case, as precedent, and a binding Second Circuit case, the *Hayden* case, as precedent. And as the judge has noted, the per curiam decision incorporated the district court decision.

Senator Feinstein.

Senator FEINSTEIN. Thank you very much, Mr. Chairman. I have great respect for Senator Kyl. I have worked with him, I guess, for about 12 years now on a subcommittee of this committee.

But I think there is a fundamental misreading of the Supreme Court decision if I understand it. It is my understanding that the court was 5–4, is that correct?

Judge SOTOMAYOR. It was.

Senator FEINSTEIN. And that the four dissenters indicated that they would have reached the same conclusion as the Second Circuit did, is that correct?

Judge SOTOMAYOR. That was my understanding.

Senator FEINSTEIN. Thank you. Let me clear one thing up. I am not a lawyer and I have had a lot of people ask me, particularly from the west coast who are watching this. What is per curiam? Would you please in common, everyday English explain what through the court means?

Judge SOTOMAYOR. It is essentially a unanimous opinion where the court is taking an Act where it is not saying more than either incorporating a decision by the court below, because it is not adding anything to it.

Senator FEINSTEIN. Right.

Judge SOTOMAYOR. In some cases, it is when there is—Judge Cabranes in his dissent pointed out in some cases it is simply used to denote that an issue is so clear and unambiguous that we are just going to—the law.

It can be used in a variety of different ways, but it is generally where you are doing something fairly—in a very cursory fashion either because a District Court judge has done a thorough job——

Senator FEINSTEIN. Which was the case in this case with a very voluminous opinion that I believe was over 50 pages. Is that correct?

Judge SOTOMAYOR. I keep saying 78 because that is what I——

Senator FEINSTEIN. Over 50.

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Judge SOTOMAYOR. And as I said, my circuit did that in a case where I addressed as a District Court judge a case of first impression on a direct constitutional issue, the suspension clause. Or it can have—one of the meanings can be that given by Judge Cabranes.

Senator FEINSTEIN. Right. Now, my understanding also is that there is precedent in other courts. I am looking at a decision, *Oakley* v. *City of Memphis* written by the Circuit Court. Essentially what it does is uphold the lower court that did exactly the same thing. Are you familiar with that case?

Judge SOTOMAYOR. I am.

Senator FEINSTEIN. It is an unpublished opinion, I believe. Is that correct?

Judge SOTOMAYOR. Yes.

Senator FEINSTEIN. And it was a racially mixed group of male and female lieutenants. They took the test, the results came in, the test was canceled and the court upheld the cancellation.

Judge SOTOMAYOR. Yes.

Senator FEINSTEIN. So your case is not starkly out of the mainstream. The reason I say this is going back to my days as mayor, particularly in the 1980's when there were many courts and many decisions involving both our police and fire departments. It was a very controversial area of the law.

But the point I wanted to make is there is precedent and this is certainly one of them.

Judge SOTOMAYOR. I would agree that it was precedent. I will not choose to quarrel with the Supreme Court's description of the situation.

Senator FEINSTEIN. Right. I am not asking you to. Now, many have made comments regarding your wise Latina comment. I would just like to take a minute to put your comments in the context of the experiences of women.

This country is built on very great accomplishments. We forged a new country, we broke away from the British, we wrote documents that have stood the test of time, the Declaration of Independence, the Constitution, the Bill of Rights. But we also have a history of slavery, of segregated schools, of employment discrimination, of hate crimes and unspoken prejudices that can make it very hard for individuals to be treated fairly or even to believe that they can do well in this society.

So I understand empowerment and the role that it plays. Everything has been hard fought. We as women did not have the right to vote until 1920 and that was after a tremendous battle waged by a group of very brave women called suffragettes.

We graduated law school in 1979. There had never been women on the Supreme Court. Today, women represent 50.7 percent of the population, 48 percent of law school graduates and 30 percent of American lawyers. But there are only 17 women Senators and only one woman currently serving on the Supreme Court and we still make only $.78 on the dollar that a man makes.

So we are making progress, but we are not there yet and we should not lose sight of that.

My question is, as you have seen this, and you must have seen how widely broadcast this is, that you become an instant role

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model for women. How do you look at this, your appointment to the court affecting empowerment for women?

And I'd be very interested in any comments you might make, and this has nothing to do with the law.

Judge SOTOMAYOR. I chose the law because it is more suited to that part of me that has never sought the kind of attention that other public figures get.

When I was in law school, some of my friends thought I would go into the political arena not knowing that what I sought was more the life of a judge, the thinking involved in that and the process of the rule of law.

My career as a judge has shown me that regardless of what my desires were, that my life, what I have accomplished, does serve as an inspiration for others. It is a sort of awesome sense of responsibility. It is one of the reasons that I do so many activities with people in the community. Not just Latinas, but all groups because I understand that it is women, it is Latinas, it is immigrants.

It is all kinds and all backgrounds. Each one of us faces challenges in their life. Whether you were born rich or poor, of any color or background, life's challenges place hurdles every day.

One of the wonderful parts of the courage of America is that we overcome them. I think that people have taken that sense that on some levels I have done some of that at various stages in my life.

So for me, I understand my responsibility. That is why I understand and have tried as much as I can to reach out to all different kinds of groups and to make myself available as much as I can. Often I have to say no, otherwise I'd never work. But I meet my responsibilities and work very hard at my job, but I also know I have a responsibility to reach out.

Senator FEINSTEIN. Well, for whatever it is worth, I think that you are a walking, talking example of the best part of the United States of America.

I just want to say how very proud I am that you are here today and it is my belief that you are going to be a great Supreme Court Justice. I just wanted to say that to you directly and publicly. Thank you. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you. Senator Graham.

Chairman LEAHY. Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman. Something I would like to say to you directly and publicly and with admiration for your life story is that a lot of the wrongs that have been mentioned, some have been righted, some have yet to come. Judge, I hope you understand the difference between petitioning one's government and having a say in the electoral process and voting for people that, if you do not like, you can get rid of and the difference of society being changed by nine unelected people who have a lifetime appointment.

Do you understand the difference in how those two systems work?

Judge SOTOMAYOR. Absolutely, sir. I understand the Constitution.

Senator GRAHAM. The one thing I can tell you—and this will probably be the last time we get to talk in this fashion. I hope to

have a chance to get to know you better and we will see what your future holds, but I think it is going to be pretty bright.

The bottom line is one of the problems the court has now is that Mr. Ricci has a story to tell, too. There are all kinds of stories to tell in this country and the court has, in the opinion of many of us, gone into the business of societal change, not based on the plain language of the Constitution, but based on motivations that can never be checked at the ballot box.

Brown v. *Board of Education* is instructive in the sense that the court pushed the country to do something politicians were not brave enough to do. Certainly, we are not brave enough in my state. And if I had been elected as a Senator from South Carolina in 1955, the year I was born, I would be amazed if I would have had the courage of a Judge Johnson in the political arena.

But the court went through an analysis that separate was not equal. It had a basis in the Constitution, after fact-finding, to reach a reasoned conclusion in the law and the courage to implement that decision, and the society had the wisdom to accept the court's opinion, even though it was contentious and, literally, people died.

We are going to talk about some very difficult societal changes that are percolating in America today, like who should get married and what boundaries there are on the definition of marriage, and who is best able or the most capable of making those fundamental decisions.

The full faith and credit clause, in essence, says that when a valid enactment of one state is entered into, the sister states have to accept it. But there is a public policy exception in the full faith and credit clause. Are you aware of that?

Judge SOTOMAYOR. I am, applied in different situations.

Senator GRAHAM. Some states have different age limits for marriage. Some states treat marriage differently than others, and the courts deferred based on public policy.

The reason these speeches matter and the reasons elections matter is because people now understand the role of the court in modern society when it comes to social change. That is why we fight so hard to put on the court people who see the world like us. That is true from the left and that is true from the right.

Let me give you an example of why that is important. We have talked a lot about the Second Amendment, whether or not it is a fundamental right. We all now agree it is an individual right. Is that correct?

Judge SOTOMAYOR. Correct.

Senator GRAHAM. Well, that is groundbreaking precedent in the sense that just until a few months ago or last year, I guess, that was not the case. But it is today. It is the law of the land, by the Supreme Court, the Second Amendment is an individual right, and you acknowledge that. That is correct? The *Heller* case.

Judge SOTOMAYOR. That was the decision and it is what the court has held, and so it is unquestionably an individual right.

Senator GRAHAM. But here is the next step for the court. You will have to, if you get on the court, with your fellow justices, sit down and discuss whether or not it is a fundamental right to the point that it is incorporated through the due process clause of the 14th Amendment and applied to every state.

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Is it not fair to say, Judge, that when you do that, not only will you listen to your colleagues, you will read whatever case law is available, you are going to come down based on what you think America is all about?

Judge SOTOMAYOR. No, sir.

Senator GRAHAM. So what binds you when it comes to a fundamental right?

Judge SOTOMAYOR. The rule of law.

Senator GRAHAM. Is not the rule of law, when it comes to what you consider to be a fundamental right, your opinion as to what is fundamental among all of us?

Judge SOTOMAYOR. No. In fact, the question that you raise, is it fundamental in the sense of the law.

Senator GRAHAM. Right.

Judge SOTOMAYOR. That is a legal term. It's very different and it is important to remember that the Supreme Court's precedent on the Second Amendment predated its more closely developed——

Senator GRAHAM. I hate to interrupt, but is there sort of a legal cookbook that you can go to and say this is a fundamental right, A, and B is not?

Judge SOTOMAYOR. Well, there's not a cookbook, but there's precedent that was established after the older precedent that has talked and described that doctrine of incorporation. That's a set of precedents that——

Senator GRAHAM. Are you talking about the 1890 case?

Judge SOTOMAYOR. Yes. Well, no. The 1890 case was the Supreme Court's holding on this issue. But since that time, there has been a number of number of decisions discussing the incorporation doctrine, applying it to different provisions of the Constitution.

Senator GRAHAM. Is there any personal judgment to be relied upon by a Supreme Court justice in deciding whether or not the Second Amendment is a fundamental right?

Judge SOTOMAYOR. Well, you hire judges for their judgment, not their personal views or what their sense of what the outcome should be. You hire your point judges for the purpose of understanding whether they respect law, whether they respect precedent and apply it in a——

Senator GRAHAM. I do not doubt that you respect the law, but you are going to be asked, along with eight other colleagues, if you get on the court, to render a decision as to whether or not the Second Amendment is a fundamental right shared by the American people. There is no subjective judgment there?

Judge SOTOMAYOR. The issue will be controlled by the court's analysis of that question in the case, fundamental as defined by incorporation, in—likely will be looked at by the court in a case that challenges a state regulation.

At that point, I would presume that the court will look at its older precedent in the way it did in Heller, consider whether it controls the issue or not. It will decide, even if it controls it, whether it should be revisited under the doctrine of stare decisis.

It could decide it doesn't control and that would be its decision. It could decide it does control, but it should revisit it. In revisiting it, it will look at a variety of different factors, among them, have

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there been changes in related areas of law that would counsel questioning this.

As I've indicated, there was a lot of law after the older cases on incorporation. I suspect, but I don't know, because I can't prejudge the issue, that the court will consider that with all of the other arguments that the parties will make.

Senator GRAHAM. Well, maybe I have got it wrong then. Maybe I am off base here. Maybe you have got the seven the circuit talking about the Heller case did not decide the issue of whether it should be incorporated to the states, because it has only dealt with the District of Columbia.

You have got the ninth circuit—and I never thought I would live to hear myself say this—look at the ninth circuit. They have a pretty good rationale as to why the Second Amendment should be considered a fundamental right and they talked about the longstanding relationship of the English man, and they should have put woman, at least in South Carolina that would have applied, to gun ownership.

They talked about it was this right to bear arms that led to our independence. It was this right to bear arms that put down a rebellion in this country. And they talked about who we are as a people and our history as a people.

And, Judge, that is why the Supreme Court matters. I do believe, at the end of the day, you are not going to find a law book that tells you whether or not a fundamental right exists vis-a-vis the Second Amendment, that you are going to have to rely upon your view of America, who we are, how far we have come and where we are going to go, and our relationship to gun ownership. That is why these choices are so important.

And here is what I will say about you and you may not agree with that, but I believe that is what you are going to do and I believe that is what every other justice is going to do.

And here is what I will say about you. I do not know how you are going to come out on that case, because I think, fundamentally, Judge, you are able, after all these years of being a judge, to embrace a right that you may not want for yourself, to allow others to do things that are not comfortable to you, but for the group, they are necessary.

That is my hope for you. That is what makes you, to me, more acceptable as a judge and not an activist, because an activist would be a judge who would be chomping at the bit to use this wonderful opportunity to change America through the Supreme Court by taking their view of life and imposing it on the rest of us.

I think and believe, based on what I know about you so far, that you are broad-minded enough to understand that America is bigger than the Bronx, is bigger than South Carolina.

Now, during your time as an advocate, do you understand identity politics? What is identity politics?

Judge SOTOMAYOR. Politics based simply on a person's characteristics, generally referred to either race or ethnicity or gender, religion. It is politics based on——

Senator GRAHAM. Do you embrace identity politics personally?

Judge SOTOMAYOR. Personally, I don't, as a judge, in any way embrace it with respect to judging. As a person, I do believe that

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certain groups have and should express their views on whatever social issues may be out there.

But as I understand the word "identity politics," it's usually denigrated because it suggests that individuals are not considering what's best for America, and that I don't believe in.

I think that whatever a group advocates, obviously, it advocates on behalf of its interests and what the group thinks it needs, but I would never endorse a group advocating something that was contrary to some basic constitutional right as it was known at the time, although people advocate changes in the law all the time.

Senator GRAHAM. Do you believe that your speeches, properly read, embrace identity politics?

Judge SOTOMAYOR. I think my speeches embrace the concept that I just described, which is, groups, you have interests that you should seek to promote; what you're doing is important in helping the community develop; participate, participate in the process of your community; participate in the process of helping to change the conditions you live in.

I don't describe it as identity politics, because it's not that I'm advocating that groups do something illegal.

Senator GRAHAM. Well, Judge, to be honest with you, your record as a judge has not been radical, by any means. It is, to me, left of center. But your speeches are disturbing, particularly to conservatives, quite frankly, because they do not talk about get involved, go to the ballot box, make sure you understand that American can be whatever you would like it to be, there is a place for all of us.

Those speeches, to me, suggested gender and racial affiliations in a way that a lot of us wonder will you take that line of thinking to the Supreme Court in these cases of first precedent.

You have been very reassuring here today and throughout this hearing that you are going to try to understand the difference between judging and whatever political feelings you have about groups or gender.

Now, when you were a lawyer, what was the mission statement of the Puerto Rican Legal Defense Fund?

Judge SOTOMAYOR. To promote the civil rights and equal opportunity of Hispanics in the United States.

Senator GRAHAM. During your time on the board, and you had about every job a board member could have, is it a fair statement to say that all of the cases embraced by this group on abortion advocated the woman's right to choose and argued against restrictions by state and Federal Government on abortion rights?

Judge SOTOMAYOR. I can't answer that question, because I didn't review the briefs. I did know that the fund had a health care——

Senator GRAHAM. Judge?

Judge SOTOMAYOR [continuing]. Docket that included challenges to certain limitations on a woman's right to terminate her pregnancy under certain circumstances.

Senator GRAHAM. Judge, I may be wrong, but every case I have seen by the Puerto Rican Legal Defense Fund advocated against restrictions on abortion, advocated Federal taxpayer funding of abortion for low income women.

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Across the board, when it came to the death penalty, it advocates against the death penalty. When it came to employment law, it advocates against testing and for quotas.

That is just the record of this organization. The point I am trying to make is that whether or not you advocate those positions and how you will judge can be two different things. I have not seen, in your judging, this advocate that I saw or this board member.

But when it came to the death penalty, you filed a memorandum with the Puerto Rican Legal Defense Fund in 1981, and I would like to submit this to the record, where you signed this memorandum and you basically said that the death penalty should not be allowed in America because it created a racial bias and it was undue burden on the perpetrator and their family.

What led you to that conclusion in 1981?

Judge SOTOMAYOR. The question in 1991——

Senator GRAHAM. 1981.

Judge SOTOMAYOR. 1981, I misspoke about the year, was an advocacy by the fund, taking a position on whether legislation by the State of New York outlawing or permitting the death penalty should be adopted by the State.

I thank you for recognizing that my decisions have not shown me to be an advocate on behalf of any group. That is a different, dramatically different question than whether I follow the law. And in the one case I had as a district court judge, I followed the law completely.

Senator GRAHAM. The only reason I mention this is when Alito and Roberts were before this panel, they were asked about memos they wrote in the Reagan administration, clients they represented, a lot to try to suggest that if you wrote a memo about this area of the law to your boss, Ronald Reagan, you must not be fit to judge.

Well, they were able to explain the difference between being a lawyer in the Reagan administration and being a judge and, to the credit of many of my Democratic colleagues, they understood that.

I am just trying to make the point that when you are an advocate, when you were on this board, the board took positions that I think are left of center and you have every right to do it.

Have you ever known a low income Latina woman who was devoutly pro life?

Judge SOTOMAYOR. Yes.

Senator GRAHAM. Have you ever known a low income Latino family who supported the death penalty?

Judge SOTOMAYOR. Yes.

Senator GRAHAM. So the point is there are many points of view within groups based on income. You have, I think, consistently, as an advocate, took a point of view that was left of center. You have, as a judge, been generally in the mainstream.

The *Ricci* case, you missed one of the biggest issues in the country or you took a pass. I do not know what it is. But I am going to say this, that as Senator Feinstein said, you have come a long way. You have worked very hard. You have earned the respect of Ken Starr, and I would like to put his statement in the record, and you have said some things that just bugged the hell out of me.

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The last question on the wise Latina woman comment. To those who may be bothered by that, what do you say?

Judge SOTOMAYOR. I regret that I have offended some people. I believe that my life demonstrates that that was not my intent to leave the impression that some have taken from my words.

Senator GRAHAM. You know what, Judge? I agree with you. Good luck.

Chairman LEAHY. Thank you. Senator Durbin has actually responded to my so far vain request that Senators may want to pass on the basis that all questions may have been asked, not everybody has asked them.

But Senator Klobuchar, yesterday, had some very serious and succinct areas that she was asking. I know time ran out and I would like to yield to Senator Klobuchar, because she may want to follow on those.

Senator KLOBUCHAR. Thank you very much, Mr. Chair, and thank you again, Judge. I think they have turned the air conditioning on, so this is good. I just have two quick follow-ups following Senator Graham's question.

The first is that the only death penalty case that I know of—there may be another one that you ruled on—the *Heatley* case, you, in fact, sustained the death penalty in that case. Is that correct?

Judge SOTOMAYOR. I sustained—well, I rejected the challenges of the defendant that the application of the death penalty to him was based on race, yes.

Senator KLOBUCHAR. Okay. Thank you. And then, just the second one, Senator Graham mentioned the issues of Justice Roberts and the difference between an advocate and a judge. And I just came across the quote that Justice Roberts gave about his work during the Reagan administration, and he said, "I can give the commitment that I appreciate that my role as a judge is different than my role as a staff lawyer for an administration. As a judge, I have no agenda. I have a guide in the Constitution and the laws and the precedents of the Court, and those are what I would apply with an open mind after fully and fairly considering the arguments and assessing the considered views of my colleagues on the bench."

Would you agree with that statement?

Judge SOTOMAYOR. Wholeheartedly.

Senator KLOBUCHAR. All right. Thank you.

There were some letters that have not yet been put on the record, and they are quite a collection of letters. I considered reading them all on the record but thought better of that. So I thought I would ask the Chair if I could put these letters on the record, and these are letters of support for you from, first of all, the National Fraternal Order of Police in support of your nomination, the Police Executive Research Forum, the National Association of Black Law Enforcement Executives, the National Latino Peace Officers Association, the New York State Law Enforcement Council, the National District Attorneys Association, the Association of Prosecuting Attorneys, the National Association of Police Organizations, the National Sheriffs Association, the Major City Chiefs Association, the Detectives Endowment Association, and then also a letter from 40 of your past colleagues in the Manhattan D.A.'s Office, former

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district attorney colleagues. And all of these groups have given you their support.

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

Senator KLOBUCHAR. And I did want to note just two very brief portions from the letter. The one from the Police Executive Research Forum reads, "Sonia Sotomayor went out of her way to stand shoulder to shoulder with those of us in public safety at a time when New York City needed strong, tough, and fair prosecutors."

And then also, the letter from your colleagues I found very enlightening. It was much more personal. It said that, "She began as a rookie in 1979, working long hours, prosecuting an enormous caseload of misdemeanors before judges managing overwhelming dockets. Sonia so distinguished herself in this challenging assignment that she was among the very first in her starting class to be selected to handle felonies. She prosecuted a wide variety of felony cases, including serving as co-counsel at a notorious murder trial. She developed a specialty in the investigation and prosecution of child pornography cases. Throughout all of this, she impressed us as one who was singularly determined in fighting crime and violence, for Sonia's service as a prosecutor was a way to bring order to the streets of a city she dearly loves. We are proud to have served with Sonia Sotomayor. She solemnly adheres to the rule of law and believes that it should be applied equally and fairly to all Americans."

"As a group," your former colleagues say, "we have different worldviews and political affiliations, but our support for Sonia is entirely nonpartisan. And the fact that so many of us have remained friends with Sonia over three decades speaks well, we think, of her warmth and collegiality."

A pretty nice letter.

In reading these letters from these law enforcement groups, there was just one follow-up case that you had that I wanted to allow you to enlighten the country about, and this is one that former New York Police Detective Chris Montanino spoke about recently in an article, and he spoke about a case you worked on as district attorney. He talked about—it was a child pornography case—how he had gone to various prosecutors to try to get them interested in the case, and he could not get them interested. And I have some guesses. Some of these cases, as you know, can be very involved with a lot of evidence and sometimes computer forensics and things like that. But he was not able to interest them in taking on the case. But you were the one that was willing to take on the case, and it led to the prosecution of two perpetrators.

Could you talk a little bit about that case, why you think others didn't and why you decided to take on the case?

Judge SOTOMAYOR. Well, I can't speak to why others decided to pass on the case. I can talk to you about my views at the time.

The New York Court of Appeals had invalidated the New York statute on child pornography on the ground of a constitutional violation, Federal constitutional violation, that the statute did not comport with the Federal Constitution.

The Supreme Court took that case directly from the court of appeals, as is its right to review all issues of Federal constitutional

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law, and reversed the New York Court of Appeals and reinstated the statute.

My sense is because there were still so many open questions about both the legality of the statute and the question of the difficulty in proving the particular crime at issue that involved two men who worked in a change of—chain of adult bookstores in the then-Times Square area. Times Square has changed dramatically since that time.

It was mostly circumstantial. We had some tapes, but their knowledge of what those tapes contained, their intent to sell and distribute child pornography involving children below a certain age—it was a difficult, difficult legal and factual case. But it was clear that it was a serious case. We're talking about the distribution of films that show children who were anywhere from 8 years old to 12 years old being explicitly sexually abused. And it seemed to me that, regardless of the outcome of the case, whether I secured the convictions or not, whether it was held up on appeal or not, that the issues it raised had to be presented in court because of the importance of the crime.

And so I brought the prosecution. I had a co-counsel in that case who was second-seating me in that case, meaning she was assisting me. And the case took a while at trial because, as I said, it was circumstantial.

The jury returned a verdict against both defendants. They were sentenced quite severely, and the cases held up on appeal. It was an enormously complicated case. I assisted in the appeal because it was so complicated that one of the heads of the Appeals Division of the New York County District Attorney's Office had to become involved in it. But the convictions were sustained.

And so the effort resulted in a conviction of two men who were distributing films that had the vilest of sexual acts portrayed against children.

Senator KLOBUCHAR. And one last case I wanted to ask you about, which the Chairman had briefly mentioned in his opening, and it was a troubling case because it involved an elected official. It was *U.S.* v. *Giordano*, and this case—it happened when you were a judge, and it involved very troubling facts with the mayor of Waterbury, Connecticut, in a variety of crimes stemming from his repeated sexual abuse of a minor daughter and a niece of a prostitute. And you wrote for the majority in that case. There was actually a dissent from one of your fellow judges on the Second Circuit, and you held in part that the mayor could, in fact, be charged with the crime of violating the young girl's civil rights under color of State law. And I think—and I do not want to put words in your mouth, but the reason you were able to use that theory is that you noted how frequently the mayor reiterated to his young victims that they would be trouble with law enforcement if they didn't submit to what he wanted them to do.

Could you talk about how that case fits into your overall approach to judging?

Judge SOTOMAYOR. As I have indicated, the role of a judge is to look at Congress' words in a statute and discern its intent. And in cases that present new facts, you must take existing precedents and apply the teachings of those precedents to those new facts.

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In the *Giordano* case, there had not been another situation quite like this one. This was a mayor who, working through a woman, secured sexual acts by very young girls that were taking place in his office. And through the woman he was working with and also through his own exhortations, "Don't tell anybody, you'll get into trouble," and the woman's exhortations to the child, the person he was conspiring with, that they would get in trouble with the police because the police wouldn't believe them, they would believe him because he was a mayor, the question for the court became: Is that acting under color of State law? Is he using his office to promote this illegal activity against these young girls?

The majority, viewing these facts, said yes, that's the principles we discern from precedent about what the use of State law means—of acting under State law means.

The dissent disagreed and it disagreed using its own rationale about why the law should not be read that way. But these are cases that rely upon an understanding both of what the words say and how precedent has interpreted them, and that's what the majority of the panel did in that case.

Senator KLOBUCHAR. Thank you very much, and I think it has been enlightening for people to hear about some of your views on these criminal cases. And I would just like to ask one last question, and it is the exact question that my friend and colleague Senator Graham asked Chief Justice Roberts at his confirmation hearing. And he said, "What would you like history to say about you when all is said and done?"

Judge SOTOMAYOR. I can't live my life to write history's story. That will be the job of historians long after I'm gone. Some of them start now, but long after I'm gone.

In the end, I hope it will say I'm a fair judge, that I was a caring person, and that I lived my life serving my country.

Senator KLOBUCHAR. I think you can't say much more than that. Thank you very much, Judge.

Chairman LEAHY. Thank you, Judge. I appreciate that. Thank you, Senator Klobuchar.

Senator Cornyn, who, as I mentioned yesterday, is a former Supreme Court Justice of Texas as well as former Attorney General, valued member of this Committee, Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman. Good morning, Judge.

Judge SOTOMAYOR. Good morning, Senator.

Senator CORNYN. Judge, when we met the first time, as I believe I recounted earlier, I made a pledge to you that I would do my best to make sure that you were treated respectfully and this would be a fair process.

I just want to ask you up front, do you feel like you have been given a chance to explain your record and your judicial philosophy to the American people?

Judge SOTOMAYOR. I have, sir, and every Senator on both sides of the aisle that have made that promise to me have kept it fully.

Senator CORNYN. And Judge, you know the test is not whether Judge Sonia Sotomayor is intelligent. You are. The test is not whether we like you. I think speaking personally, I think we all do.

The test is not even whether we admire you or respect you, although we do admire you and respect what you have accomplished.

The test is really what kind of Justice will you be if confirmed to the Supreme Court of the United States? Will you be one that adheres to a written Constitution and written laws and respect the right of the people to make their laws to their elected representatives, or will you pursue some other agenda? Personal, political, ideological, that is something other than enforcing the law? I think that is really the question.

Of course the purpose of these hearings as you have gone through these tedious rounds of questioning is to allow us to clear up any confusion about your record and about your judicial philosophy. Yet so far I find there is still some confusion.

For example, in 1996, you said the idea of a stable 'Law' was a public myth. This week you said that fidelity to the law is your only concern. In 1996, you argued that indefiniteness in the law was a good thing because it allowed judges to change the law. Today you characterize that argument as being only that ambiguity can exist and that it is Congress' job to change the law.

In 2001, you said that innate physiological differences of judges would or could impact their decisions. Yesterday you characterized that argument as being only that innate physiological differences of litigants to change decisions.

In 2001, you disagreed explicitly with Justice O'Connor's view of whether a wise man and a wise woman would reach the same decision. Yet during these hearings you characterize your argument as being that you agreed with her.

A few weeks ago in your speech on foreign law to the American Civil Liberties Union, you rejected the approach of Justices Alito and Thomas with regard to foreign law, and yet it seems to me that during these hearings you have agreed with them.

So Judge, what should I tell my constituents who are watching these hearings and saying to themselves, in Berkeley and in other places around the country she says one thing, but at these hearings you are saying something which sounds contradictory if not diametrically opposed to some of the things you have said in speeches around the country?

Judge SOTOMAYOR. I would tell them to look at my decisions for 17 years and note that in every one of them, I have done what I say that I so firmly believe in. I prove my fidelity to the law, the fact that I do not permit personal views, sympathies or prejudices to influence the outcome of cases, rejecting the challenges of numerous plaintiffs with undisputably sympathetic claims, but ruling the way I have on the basis of law, rejecting those claims.

I would ask them to look at the speeches completely, to read what their context was and to understand the background of those issues that are being discussed.

I didn't disagree with what I understood was the basic premise that Justice O'Connor was making, which was that being a man or a woman doesn't affect the capacity of someone to judge fairly or wisely. What I disagreed was with the literal meaning of her words because neither of us meant the literal meaning of our words.

My use of her words was pretty bad in terms of leaving a bad impression, but both of us were talking about the value of experience and the fact that it gives you equal capacity.

In the end, I would tell your constituents, Senators, look at my record and understand that my record talks about who I am as a person, what I believe in, and my judgment and my opinion, that following the rule of law is the foundation of our system of justice.

Senator CORNYN. Thank you for your answer. Judge, I actually agree that your judicial record strikes me as pretty much in the main stream of judicial decision making by District Court judges and by Court of Appeals judges on the Federal bench.

While I think what is creating this cognitive dissonance for many of us and for many of my constituents who I have been hearing from is that you appear to be a different person almost in your speeches and in some of the comments that you made.

So I guess part of what we need to do is to try to reconcile those, as I said earlier.

I want to pivot to a slightly different subject and go back to your statement that the courts should not make law. You have also said that the Supreme Court decisions that a lot of us believe made law actually were an interpretation of the law. So I would like for you to clarify that.

If the Supreme Court in the next few years holds that there is a constitutional right to same sex marriage, would that be making the law? Or would that interpreting the law?

I'm not asking you to prejudge that case or the merits of the arguments, but just to characterize whether that would be interpreting the law or whether that would be making the law.

Judge SOTOMAYOR. Senator, that question is so embedded with its answer, isn't it? Meaning if the court rules one way and I say that is making law, then it forecasts that I have a particular view of whatever arguments may be made on this issue suggesting that it is interpreting the Constitution.

I understand the seriousness of this question. I understand the seriousness of same sex marriage. But I also know as I think all America knows, that this issue is being hotly debated on every level of our three branches of government. It is being debated in Congress and Congress has passed an Act relating to same sex marriage. It is being debated on various courts on the state level, certain higher courts have made rulings.

This is the type of situation where even the characterizing of whatever the court may do as one way or another suggests that I have both prejudged an issue and that I come to that issue with my own personal views suggesting an outcome. Neither is true. I would look at that issue in the context of a case that came before me with a completely open mind.

Senator CORNYN. Forget the same sex marriage hypothetical. Is there a difference in your mind between making the law and interpreting the law? Or is that a distinction without a difference?

Judge SOTOMAYOR. Oh, no. It is a very important distinction. The laws are written by Congress. It makes factual findings, it determines in its judgment what the fit is between the law it is passing and the remedy that it is giving as a right.

The courts when they are interpreting always has to start with what does the Constitution say? What is the words of the Constitution? How has precedent interpreted those? What are the principles that it has discussed govern a particular situation?

Senator CORNYN. How do you reconcile that answer with your statement that Courts of Appeals make policy?

Judge SOTOMAYOR. In both cases in which I have used that word in two different speeches, one was a speech, one was a remark to students. This is almost like the discussion about fundamental, what does it mean to a non- lawyer and fundamental what it means in the context of Supreme Court legal theory.

Senator CORNYN. Are you saying it is only a discussion that lawyers could love?

Judge SOTOMAYOR. Not love, but in the context in both contexts. It is very, very clear that I am talking about completely the difference between the two judgings and that Circuit Courts when they issue a holding, it becomes precedent on all similar cases.

In both comments, that statement was made absolutely expressly that that was the context of the policy I was talking about which is the ramifications of a precedent on all similar cases.

When Congress talks about policy, it is talking about something totally different. It is talking about making law, what are the choices that I am going to make in making the law. Those are two different things.

I was not talking about courts making law. In fact, in the Duke speech, I used making policy in terms of its ramifications on existing cases. I never said in either speech we make law in the sense that Congress would.

Senator CORNYN. Let me turn to another topic. In 1996 after you had been on the Federal bench for 4 years, you wrote a law review article in the Suffolk University Law Review that pertains to campaign financing.

You said, 'Our system of election financing permits extensive private, including corporate financing of candidate's campaigns, raising again and again the question of what the difference is between contributions and bribes and how legislators or other officials can operate objectively on behalf of the electorate.'

You said, 'Can elected officials say with credibility that they are carrying out the mandate of a democratic society representing only the general public good when private money plays such a large role in their campaigns'?

Judge Sotomayor, what is the difference in your mind between a political contribution and a bribe?

Judge SOTOMAYOR. The context of that statement was a question about what was perking through the legal system at the time it has been, as you know, before the Supreme Court since *Buckley* v. *Valeo*.

Senator CORNYN. I agree, Your Honor. But my question is what in your mind is the difference between a political contribution and a bribe?

Judge SOTOMAYOR. The question is a contributor seeking to influence or to buy someone's vote, and there are situations in which elected officials have been convicted of taking a bribe because they

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have agreed in exchange for a sum of money to vote on a particular legislation in a particular way.

That violates the Federal law. The question that was discussed there was a much broader question as to where do you draw that line as a society? What choices do you think about in terms of what Congress will do, what politicians will do.

I have often spoken about the difference between what the law permits and what individuals should use to guide their conduct.

The fact that the law says that you can do this doesn't always mean that you as a person should choose to do this. In fact, we operate within the law, we should not be a law breaker, but you should act in situations according to that sense of what is right or wrong.

We have the recent case that the Supreme Court considered of the judge who was given an extraordinary amount of money by a campaign contributor dwarfing everything else in his campaign in terms of contributions, funding a very expensive campaign.

Senator CORNYN. In fact, that was not a direct contribution to the judge, was it?

Judge SOTOMAYOR. Well, it was not a direct contribution, but it was a question there where the Supreme Court said the appearance of impropriety in this case would have counseled the judge the get off.

Senator CORNYN. Let us get back to my question, if I can. Let me ask you this.

Last year, President Obama set a record in fund raising from private sources, raising an unprecedented amount of campaign contributions. Do you think, given your law review article, that President Obama can say with credibility that he is carrying out the mandate of a democratic society?

Judge SOTOMAYOR. That was not what I was talking about in that speech.

Senator CORNYN. Well, he was not elected in 1996. But what I am getting at is whether you are basically painting with such a broad brush when it comes to people's rights under the First Amendment to participate in the political process, either to volunteer their time, make in kind contributions, make financial contributions. Do you consider that a form of bribery or in any way improper?

Judge SOTOMAYOR. No, sir. No, sir.

Senator CORNYN. Okay. Thank you for your answer. In the short time we have remaining, let me return to the *New Haven firefighter* case briefly.

As you know, two witnesses I believe will testify after you are through, and I am sure you will welcome being finished with this period of questioning. A lot of attention has been given to the lead plaintiff, Frank Ricci, who is dyslexic, and the hardship he has endured in order to prepare for this competitive examination only to see the competitive examination results thrown out.

But I was struck on July 3rd in the New York Times when they featured another firefighter who will testify here today, and that was Benjamin Vargas.

Benjamin Vargas is the son of Puerto Rican parents, as you probably know, and he found himself in the odd position to say the

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least of being discriminated against based on his race, based on the decision by the Circuit Court panel that you sat on.

At the closing of the article, Lieutenant Vargas—who hopes to be Captain Vargas as a result of the Supreme Court decision because he scored sixth on the competitive examination—at the very last paragraph in this article it says, "Gesturing toward his three sons, Lieutenant Vargas explained why he had no regrets. He said, 'I want to give them a fair shake. To get a job on the merits, not because they are Hispanic or to fill a quota.' He said, 'What a lousy way to live.'" That is his testimony.

So I want to ask you in conclusion, do you agree with Chief Justice John Roberts when he says the best way to stop discriminating based on race is to stop discriminating based on race?

Judge SOTOMAYOR. The best way to live in our society is to follow the command of the Constitution, provide equal opportunity for all. I follow what the Constitution says, that is how the law should be structured and how it should be applied to whatever individual circumstances come before the court.

Senator CORNYN. With respect, Judge, my question was do you agree with Chief Justice John Roberts' statement, or do you disagree?

Judge SOTOMAYOR. The question of agreeing or disagreeing suggests an opinion on what the ruling was in the case that he used it in. I accept the court's ruling in that case. That was a very recent case.

There is no quarrel that I have, no disagreement. I do not accept that in that situation that statement the court found applied. I just said the issue is a constitutional one, equal opportunity for all under the law.

Senator CORNYN. I understand that you might not want to comment on what Chief Justice John Roberts wrote in an opinion even though I don't think he was speaking of a specific case but rather an approach to the law which would treat us all as individuals with equal dignity and equal rights.

But let me ask you whether you agree with Martin Luther King when he said he dreamed of a day when his children would be judged not by the color of their skin but by the content of their character. Do you agree with that?

Judge SOTOMAYOR. I think every American agrees with that.

Senator CORNYN. Amen. Mr. Chairman?

Chairman LEAHY. Thank you, Senator Cornyn. Just so we will know for the schedule, we are going to go to Senator Specter, who is a long-time member of this committee and one of the most senior members here.

Once Senator Specter's questions are finished, we will take a very short break. Does that work for you, Judge?

Judge SOTOMAYOR. It most certainly does.

Chairman LEAHY. Okay. So Senator Specter is recognized for up to 20 minutes.

Senator SPECTER. Thank you, Mr. Chairman. Judge Sotomayor, you have been characterized as running a hot courtroom, asking tough questions. We see popping out of the Supreme Court opinions from time to time, statements about pretty tough ideological battles in their conference room.

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Justice Scalia was quoted as saying, "The court must be living in another world. Day-by-day, case-by-case, it is busy designing a Constitution for a country I do not recognize."

Referring to a woman's right to choose, in *Roe* v. *Wade*, he said this, "Justice O'Connor's assertion that a fundamental rule of judicial restraint requires us to avoid reconsidering Roe cannot be taken seriously."

Do you think it possible that, if confirmed, you will be a litigator in that conference room, take on the ideological battles which pop out from time to time, from what we read in their opinions?

Judge SOTOMAYOR. I don't judge on the basis of ideology. I judge on the basis of the law and my reasoning. That's how I have comported myself in the circuit court. When my colleagues and I, in many cases, have initially come to disagreeing positions, we've discussed them and either persuaded each other, changed each other's minds, and worked from the starting point of arguing, discussing, exchanging perspectives on what the law commands.

Senator SPECTER. Well, perhaps you will be tempted to be a tough litigator in the court. Time will tell, if you are confirmed, if you have some of those provocative statements.

Let me move on to a case which you have decided. You have been reluctant to make comments about what other people have said, but I want to ask you about your view as to what you have said.

In the case of *Entergy* v. *Riverkeeper*, which involved the question which is very important to matters now being considered by Congress on climate control and global warming, you ruled in the second circuit that the best technology should be employed, not the cost-benefit. The Supreme Court reversed 5–4, saying it was cost-benefit.

Could we expect you to stand by your interpretation of the Clean Water Act when, if confirmed, you get to the Supreme Court and can make that kind of a judgment because you are not bound by precedent?

Judge SOTOMAYOR. Well, I am bound by precedent to the extent that all precedence is entitled to the respect it—to respect under the doctrine of stare decisis. And to the extent that the Supreme Court has addressed this issue of cost-benefit and its permissibility under the Clean Water Act, that's the holding I would apply to any new case that came and the framework—it establishes the framework I would employ to new cases.

Senator SPECTER. Let me return to a subject I raised yesterday, but from a different perspective, and that is the issue of the Supreme Court taking on more cases.

In 1886, there were 451 cases decided by the Supreme Court; 1985, 161 signed opinions; and, in 2007, only 67 signed opinions. The court has not undertaken cases involving circuit splits.

In the letter I wrote to you, which will be made a part of the record, listing a great many circuit splits and the problems that that brings when one circuit decides one way and another circuit another and the other circuits are undecided, and the Supreme Court declines to take cases.

Do you agree with what Justice Scalia said dissenting in Sorich, where the court refused to take a key circuit split; that when the

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court decides not to, "It seems to me quite irresponsible to let the current chaos prevail with other courts not knowing what to do?"

Stated differently, do you think the Supreme Court has time to and should take up more circuit splits?

Judge SOTOMAYOR. It does appear that the Supreme Court's docket has lessened over time, its decisions that it's addressing. Because of that, it certainly does appear that it has the capacity to accept more cases.

And the issue of circuit splits is one of the factors that the court's own local rules set out as a consideration for justices to think about in the cert process.

So in answer to your question, the direct answer is, yes, it does appear that it has the capacity.

Senator SPECTER. The current rule in the Supreme Court is that petitions for certiorari are applied and there is a so-called cert pool where seven of the nine justices, excluding only Justice Stevens and Justice Alito, do not participate in the cert pool. So that the people applying for a cert don't have the independent judgments.

When Chief Justice Roberts, before he became Chief Justice, he said the cert pool's powers are a little disquieting.

Would you join the cert pool or would you maintain an independent status, as Justice Stevens and Justice Alito do, in having their own clerks and their own individual review as to whether a cert ought to be granted?

Judge SOTOMAYOR. I would probably do what Justice Alito did, although I haven't decided, if I'm given the honor of becoming a member of the Supreme Court, I haven't decided anything. I'm not even sure where I would live in New York if this were to happen—in Washington.

But putting that aside, Senator, my approach would probably be similar to Justice Alito, which is experience the process, take, for a period of time, consider its costs and benefits, and then whether to try the alternative or not and figure out what I think works best in terms of the functioning of my chambers and the court.

I can't give a definitive answer, because I generally try to keep an open mind until I experience something and can then speak from knowledge about whether to change it or not.

Senator SPECTER. Judge Sotomayor, you have had some experience on the pilot program conducted by Federal Judicial Conference. These were the conclusions reached by the pilot program.

They said, "Attitudes of judges toward electronic media coverage of civil proceedings are initially neutral and became more favorable after experience under the pilot program."

"Judges and attorneys who had experience with electronic media coverage under the program generally reported observing a small or no effects of the camera presence on participants in the proceedings, courtroom decorum, or the administration of justice."

Would you agree with that, based on your own personal experience having television in your courtroom?

Judge SOTOMAYOR. My experience was limited. So I can't speak to the more broad conclusion of that report. I can say that, as we discussed when I met with you, Senator, mine was positive.

In the two cases—I believe I only had two cases where the media asked to record a proceeding. I may not remember others, but I do

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remember two. And on the circuit court, we do provide tapes upon request and some media has asked to record our oral arguments.

But my experience has generally been positive and I would certainly be able to recount that.

Senator SPECTER. C–SPAN has conducted a survey which shows that 61 percent of the American people would like to see the Supreme Court televised. In the survey, it disclosed how little the American public knows about the Supreme Court.

Mr. Chairman, I would ask consent this be included in the record.

Chairman LEAHY. Without objection, it will be included in the record.

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

Senator SPECTER. The interest that has been generated by this confirmation proceeding, encouraged by the television, shows the enormous interest that people have in what the court does.

There has been a fair amount of coverage by the justices on television. As I cited yesterday, many have appeared on television. Justice Kennedy says he believes that television is inevitable.

Everybody has said who has testified that there is a grave concern about the collegiality and people do not want to make a judgment before talking to their colleagues, and the sense has been derived that if anybody really has a strong objection—and Justice Souter has expressed that view, as noted on his widespread comment that if TV cameras were to come to the court, they would have to come in over his dead body; and, if confirmed, Justice Souter's body won't be there at all.

Would you tell your colleagues the favorable experience that you have had with television in your courtroom and perhaps take a role in encouraging your colleagues to follow that experience for the Supreme Court?

Judge SOTOMAYOR. I would certainly relay my experiences. To the extent some of them may not know about the pilot study in many courts, I would share that with them, although I suspect they do know, and will participate in discussions with them on this issue. Those things I would do, Senator.

Senator SPECTER. Some of my colleagues have questioned whether, as you stated, your panel in the *Maloney* case was really bound by Supreme Court precedent. The seventh circuit reached the same decision your panel did and in that opinion, written by a highly respected Republican judge, Frank Easterbrook, the seventh circuit pointed out that Heller specifically declined to reconsider older Supreme Court cases which have held that the Second Amendment applies only to the Federal Government.

Judge Easterbrook wrote, "That does not license the inferior courts to go their own ways; it just notes that [the older precedent] is open to reexamination by the Justices themselves when the time comes."

That was your court's conclusion, also, wasn't it?

Judge SOTOMAYOR. It was and I understand, having reviewed Justice Easterbrook's opinion, that he agreed with the reasoning of *Maloney* on that point.

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Senator SPECTER. I want to return to the issue of the basic authority and responsibility of the Supreme Court to decide the major cases on separation of power.

There was a case which the Supreme Court decided certiorari just a couple of weeks ago involving claims for damages brought by survivors and victims of September 11 against certain individuals in Saudi Arabia, and this case posed a classic conflict between executive and legislative responsibilities.

Congress had legislated under sovereign immunity in 1976 that tort claims, like flying an airplane into the World Trade Center, were an exception to sovereign immunity and the executive branch interposed objections to having that case decided because of the sensitivity of matters with Saudi Arabia.

The case involved circuit splits and very, very important matters in that tragedy, which, you have commented, reached you, being very close to the incident. Do you not think that that is the kind of a case the Supreme Court should have heard to decide that kind of a very basic conflict between Article 1 powers of the Congress and Article 2 powers of the executive?

Judge SOTOMAYOR. Senator, obviously, issues related to September 11 and national security are very important issues to the country as a whole. For the reasons I mentioned earlier, I lived through September 11, so I understand its great tragedy and effect on America.

The question you asked me, though, is one that asks me to make judgment about an act the Supreme Court has done and I didn't participate in their discussions. I didn't review the cert petitions. I didn't talk about with them their reasons.

It would seem and is inappropriate to me to comment on a question that I wasn't a party to in making the decision.

Senator SPECTER. Well, would you not at least agree with a proposition that conflicts between the Congress and the executive branch are of the highest duty for the Supreme Court to consider and to decide?

Judge SOTOMAYOR. All conflicts under the Constitution, all issues arising from the Constitution are important.

Senator SPECTER. Well, I know that, but that is a pretty easy question to answer. I am not asking you to agree with Justice Roberts that the court ought to take more cases, which would seem, to me, to be pretty easy, or the question about Justice Scalia saying that there is turmoil when the circuits split and you do not have the Supreme Court taking cert.

But is that not of the highest magnitude? Our discussions here have involved a great many issues, but I would suggest to you that on separation of powers and when you undertake the role of the Congress contrasted with the role of the President, Congress is Article 1. It was placed with primacy because we are closest to the food bowl.

And when you have a question, which you would not comment on yesterday, like the terror surveillance program, which flatly contradicts the congressional enactment of the Foreign Intelligence Surveillance Act, that the only way you get a wiretap is with court approval, and the cases declared unconstitutional in the Detroit district court and the sixth circuit dodges the case on standing or

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very questionable grounds and the Supreme Court will not even hear it and you have a case involving September 11 and a very blatant conflict between Congress' powers expressed under Article 1 with the Sovereign Immunities Act and the President stepping in under foreign powers, is that not a category of the highest magnitude?

Judge SOTOMAYOR. It is so difficult to answer that question in the abstract. For the reason I've just explained, the issue is much, much more complicated than an absolute that says if a case presents this question, I'm always going to take it.

That's not how a judge looks at the issue of granting or not granting certiorari, I assume, because the court is weighing so many different factors at the time that decision is made.

Senator SPECTER. Judge, I do not want to interrupt you, but I have got a minute and a half left and there are a couple of comments I want to make in conclusion.

I would ask you to rethink that and I would also ask you to rethink the issues you did not want to answer yesterday about conflict between the Congress and the court. Even though the Constitution made Congress Article 1 and the President Article 2, the Supreme Court has really reversed the order. The judiciary is now really in Article 1, if the powers were to be redefined.

But I would ask you to take a look. You have said repeatedly that the job of the court is to apply the law, not to make the law. Take a look again at the standard of proportional and congruent and see if you do not agree with Justice Scalia that that is another way for the court to make law.

Take a look, too, at what Justice Roberts said here in the confirmation hearings, that there would be deference and respect to congressional fact-finding and how that is not done in the *Garrett* case and in the voting rights case.

Out of consideration for the people who are going to appear here later, I am not prepared yet to announce my own vote, but it is my hope that the conventional wisdom is very strong for your confirmation, that you will use some of those characteristics of your litigation experience to battle out the ideas that you believe in, because I have a strong hunch that they are closer to the ones that I would like to see adopted by the court.

And do not let the issues of separation of powers skip by. The Congress is entitled to deference on these big issues and at least they ought to be decided by the court.

Thank you very much, Judge Sotomayor. You have done quite an outstanding job as a witness. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, Senator Specter. Judge, we are going to take a short break. Thank you for all of this. When we come back, I will recognize Senator Coburn, who is next. Thank you.

[Whereupon, the hearing was recessed at 11:22 a.m.]

After Recess [11:35 a.m.]

Chairman LEAHY. Judge, thank you, and I do want to thank the press for cooperating. We have tried to make it possible for TV and print and photographers, and you have been very gracious in that regard. We are coming close to the end of this round. Whether it will be the last round or not will be up to the Republican side. But

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I would yield now to Senator Coburn who has been waiting patiently. Senator Coburn.

Senator COBURN. Thank you, Mr. Chairman.

Judge Sotomayor, good morning again.

Judge SOTOMAYOR. Good morning.

Senator COBURN. Yesterday, when I was asking you about foreign law, you said I should read your speech, so I did. I read your speech. So I want to come back to that for a minute because I want to ask you the same question I have asked the only other two Supreme Court nominees that have come before the Committee while I have sat on this Committee. And I want to ask you the same question. My first statement yesterday was asking you about whether you disagreed with Alito and Thomas, and you said basically you agreed.

So on the basis of that agreement, will you affirm to this Committee and the American public that, outside of where you are directed to do so through statute or through treaty, refrain from using foreign law in making the decisions that you make that affect this country and the opinions that you write?

Judge SOTOMAYOR. I will not use foreign law to interpret the Constitution or American statutes. I will use American law, constitutional law to interpret those laws, except in the situations where American law directs a court.

Senator COBURN. Thank you. I want to ask you also—another question that I asked both Justice Alito and Justice Thomas—and it is a problem I have with my colleagues here in the Senate. You have written extensively about some of the ambiguity that is in law. Would it be your opinion that we could do a much better job by being much clearer about what our intent is when we write statutes? Feel free to offend us, because we sorely need it.

[Laughter.]

Chairman LEAHY. Senator Coburn, speak for yourself.

Senator COBURN. I am speaking for the vast majority of the American people. We do not do a thorough job in making clear our intent or the background of our intent when we—and I will give you an example. Two hundred and twenty times in the bill that just came out of the HELP Committee we gave full shrift to the Secretary of HHS to write all the regulations, without our intent, none of our intent.

So as you sit, if you sit, on the Supreme Court, I am sure many of those are going to come before you without our intent but with a bureaucracy's intent or an executive branch intent.

So the question I am asking you: In your experience, since you have noted the ambiguity that is in the law, would you make it a recommendation to your friends you have now established, all 19 of us here on the Judiciary Committee, that we might do a better job of being much more clear in what we intend?

Judge SOTOMAYOR. It would be presumptuous of me to tell you how to do your job, but I do know in my conversations virtually with all 89 Senators—perhaps not all of them, but the vast majority of them, somewhere in the conversation there was reference to their feelings, like yours, that a better job could be done by Congress in making its intent clearer. I think that that's a question that Senators think about, at least the ones that I've spoken to.

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And I think that the process is always better for a court when Congress' intent is more clearly stated.

Senator COBURN. And there is no doubt in your mind that if we were much more clear, guidance would be better given to the Supreme Court as conflicts over the statutes and laws come forward?

Judge SOTOMAYOR. When Congress' intent is clear, the Court applies that clear intent.

Senator COBURN. Thank you. I want to go back to a couple other areas that we talked about. One is some answers to questions that you gave to—questions from Senator Hatch.

Senator Hatch asked you to describe your understanding of the test or standard that the Supreme Court uses to determine whether a right should be considered fundamental. Specifically, he noted that when determining whether a right is fundamental, the Supreme Court determined whether the right is deeply rooted in our Nation's history and tradition, that it is necessarily to an Anglo-American regime of ordered liberty, or that it is an enduring American tradition.

You refused to answer him, asserting that you responded that you haven't examined that framework in a while to know if that language is precise or not. "I'm not suggesting it's not," you said, "Senator, I just can't affirm that description."

Similarly, you refused to describe to me the test the Court used to determine whether a right is a fundamental right.

But, in contrast to that, when Senator Kaufman asked you to give a very detailed description of the fact the Court's considering when determining the doctrine of stare decisis, you stated and went through a long litany of the items with which the Court uses with which to determine stare decisis. And you gave a fairly detailed analysis of that process and the doctrine of stare decisis.

And so I ask you again: Why can't you give us your description of what you think the parameters are that the Court uses to determine a fundamental right in light of the 14th Amendment, incorporation right?

Judge SOTOMAYOR. All right. That language has been used in certain cases respecting the question of the incorporation of certain amendments. The question of—and the general framework will be used with respect to any consideration of incorporation. That wasn't, I thought, the question that was being asked of me. I don't remember that being the specific question. All I'm saying to you is that the framework has been discussed by the Court in jurisprudence that's developed over the last hundred years, subsequent to its established precedents on the Second Circuit.

One of the questions that the Court will address if it decides to address the incorporation of the Second Amendment is whether in those related areas it will use or not use the doctrines or framework of that precedent. There may be arguments on one side why, on another side why not. What I'm trying to do is not prejudge an issue that is so pending before the——

Senator COBURN. Well, I am not asking you to prejudge the issue. I am asking you under what basis, what is the—what are the steps and the considerations, not the details of the case. In other words, you can describe that for us in terms of stare decisis, but you can't describe that for us in terms of a fundamental right.

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And to me that is concerning because we should understand—that should be transparent to the people in this country how that works.

Judge SOTOMAYOR. Because that's the very issue the Court's going to look at. The question of stare decisis is a general framework that one uses not in a particular context of a case, I am going to choose always to look at the outcome of the case in this way. It's——

Senator COBURN. Your Honor, I understand that. If I can't get you to go there, I want to quit and go on to something else, if I can.

I also asked you yesterday—I want you to understand. You were raised in the Bronx. I was born in Wyoming and raised in Oklahoma. They are really different, both geographically and culturally, different areas. And so I want you to understand why I am spending so much time talking with you about the Second Amendment.

My constituents in Oklahoma understand, as do most Americans, that the right to own guns hangs in the balance, may very well hang in the balance with your ascendancy to the Supreme Court. For us, one wrong vote on what we consider—regardless of what you consider, but what we consider a fundamental right, could gut the holding of *Heller*. And I have some serious concerns on that issue, and I want to ask you a few more questions.

Yesterday you said that clearly a constitutional right only works if you can enforce it. And I agree. Tell me how American citizens would be able to enforce their individual constitutional right to bear arms if you are holding that it does not apply to the States in your previous case at the appellate level becomes the law of the land.

Judge SOTOMAYOR. The only statement I can start with is *Maloney* was decided on the basis of precedent. It was decided on precedent. The Supreme Court in *Heller* recognized that it's precedent. It was based on Second Circuit precedent that had interpreted the constitutional—the Supreme Court's prior precedent.

It may well be—may not be—that Senator Hatch was right that the old precedent should be distinguished in a certain way. Others may be right that it shouldn't. That issue was not the one that the *Maloney* court decided *Maloney* on. It decided it on the rule of law. It was a rule of law that led Judge Easterbrook in the Seventh Circuit decision to say it is not what we should be doing; it is what the Supreme Court should do, is to re-examine a precedent that's directly on point.

I can assure your constituents that I have a completely open mind on this question. I do not close my mind to the fact and the understanding that there were developments after the Supreme Court's rulings on incorporation that will apply to this question or be considered. I have a completely open mind.

Senator COBURN. Do you not consider it ironic that the majority of the debate about the 14th Amendment in this country was about the taking of guns from freed slaves? Is that not ironic that we now have some kind of conflict that we are going to say that the whole reason and the debate about the 14th Amendment originated from States taking away the rights of people's fundamental right to defend themselves? Is that not an irony to you?

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Judge SOTOMAYOR. Senator, would you want a judge or a nominee who came in here and said, "I agree with you. This is unconstitutional" before I had a case before me, before I had both sides discussing the issue with me, before I spent the time that the Supreme Court spent on the *Heller* decision? And that decision was mighty long, went through 2 years of history, did a very thorough analysis and discussion back and forth on the prior opinions of the Committee. I don't know that that's a Justice that I can be. I can only come to this process——

Senator COBURN. I agree with you, Your Honor. I don't want you to tell us how you're going to rule. But I asked you: Isn't it ironic that in this country where our law comes from Blackstone forward, comes from English law, which our founding was perpetrated and carried out under this fundamental right, and that we have a 14th Amendment right, and that we have through legal, what I would consider as a physician, schizophrenia have decided that we can't decide whether this is a fundamental right?

I will finish with that point other than to note the pressure reference was to privilege and immunity, not due process.

Judge SOTOMAYOR. I understand the importance of the right. It was recognized in *Heller*, and all I can continue to say, Senator, is I keep an open mind on the incorporation doctrine.

Senator COBURN. I appreciate that, Your Honor. Thank you very much.

Let me go back to an area that I know not everybody wants to hear about, but I think it is important. I asked you about where we were in terms of settled law on *Roe* and *Doe*, and today I only want to focus on *Roe* and *Doe*, not *Casey*.

What was the state of the law, say, in 1974, 1 year after *Roe*? Where did we stand in that issue?

Judge SOTOMAYOR. That women have the right to terminate their pregnancy in some situations, without Government regulation, and in others, there would be permissible Government regulation.

Senator COBURN. Did any of the——

Judge SOTOMAYOR. That's generally, because the Court did look at other questions in terms of Government regulation.

Senator COBURN. Then let me ask you this: Did any of the laws of the 50 States regulating abortion survive the decision in *Roe*?

Judge SOTOMAYOR. I don't know that I could answer that question because I don't——

Senator COBURN. Okay. That's fair. They didn't.

Was there any limit to the right to abortion either in the age of the child in the womb or the reasons for electing that surgery? And if so, what are those limits, according to *Roe* and *Doe*?

Judge SOTOMAYOR. Senator, I don't actually remember the Court addressing that because my studies have been on the undue burden test established in *Casey*. So my experience in this area or my knowledge really has been most particularly concentrated on the *Casey* standard, which is——

Senator COBURN. I understand that.

Judge SOTOMAYOR [continuing]. What *Casey* did was change the *Roe* standard.

Senator COBURN. Which goes back to why I asked you those two hypothetical, not abstract but hypothetical cases yesterday, of the

28-week and a 38-week infant. The truth is ever since January 22, 1973, you can have an abortion for any reason you want in this country. And even though *Carhart II* has now been ruled, that is, a procedure that will eliminate that pregnancy is still legal and viable everywhere in this country.

And so what I was trying to draw out to you is where do we stand in this country when 80 percent of the rest of the world allows abortion only before 12 weeks—only before 12 weeks—and yet we allow it for any reason at any time for any inconvenience under the "health of the woman" aspect.

And that is the other reason why I raised the viability because technology and the States' interest under the Supreme Court ruling starts with viability. That is when a State can have interest. It is guaranteed, and there is limited ability States can have to control that after that.

Is the *Casey* ruling, the undue burden ruling test, is that a policy choice? I know it is the supreme law of the land today, but in your mind, would that represent a policy choice?

Judge SOTOMAYOR. I understood that that was the Court's framework for addressing both the woman's right to terminate her pregnancy under the Constitution and the State's rights to legislate and regulate in areas within its jurisdiction. So it was the Court's way of attempting to address those two interests.

Senator COBURN. And Justice Ginsburg is not real happy with those tests, and neither was—neither are several other members on the Court.

I want to end up, our conversation when we had a private conversation, I approached you about the importance of the cases that you would decide to take if you are on the Court. Let me ask you a few questions, and I just want your opinion. And this is not to put you in any box, and if you think it is, please say so, "You're trying to put me in a box."

Do you believe that the Court's abortion rulings have ended the national controversy over this issue?

Judge SOTOMAYOR. No.

Senator COBURN. Okay. You don't have to name them, but do you think there are other similarly divisive issues that could be decided by the Court in the future?

Judge SOTOMAYOR. That I can't answer. I——

Senator COBURN. I don't want you to name any. I am just saying as you think through your mind, do you think there are other similarly divisive issues that we could have that would divide the country so remarkably—you know, assisted suicide, euthanasia?

Judge SOTOMAYOR. I can only answer what exists. People are very passionate about the issues they believe in, and so almost any issue could find an audience or a part of our population that's fervent about it.

Senator COBURN. Which is a great answer, because on these divisive issues, is it better that the Court decides them or elected representatives? If you had a preference, if you were King tomorrow and you said we are going to decide this either in the Supreme Court or force Congress to make the decision, which would you think would be better for us?

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Judge SOTOMAYOR. In the first instance, it's always Congress or State passing regulation that the Court is reviewing and determining whether it complies with constitutional limits. It's not a choice of either/or. It's always Congress' first instance or the State legislators' first interest with the non-veto of a——

Senator COBURN. I have got 30 seconds left. I want to ask you another question. You said just a minute ago people are passionate about what they believe in. And I have read your speeches and your publications and your—and I believe you are passionate. And I believe your speeches reflect your passions.

I look at myself when I give a speech. You know, I let it all go, what I really believe. I am more measured—some people wouldn't believe that up here, but I am more measured when I am here. But when I give a speech—and the problem I am having is I really see a dissonance about what you said outside of your jurisprudence. And the only ability we have to judge is what that passion has relayed in the past and your statements here in combination with your judicial practice.

And so you are an admirable judge, an admirable woman. You have very high esteem in my eyes for both your accomplishments and your intellect. I have yet to decide where I am going on this because I am still deeply troubled because of the answers that I could not get in the 50 minutes that I have been able to ask, and also deeply troubled because I believe what you have spoken to the law students, what you have spoken in your writings truly reflect your real passions, which I sometimes find run in conflict with what I think the Constitution has to say.

But I thank you for giving us such a cordial response, and I am mightily impressed.

Thank you, Mr. Chairman.

Judge SOTOMAYOR. Thank you, Senator.

Chairman LEAHY. Thank you. Senator Coburn, the Republican side has asked for a third round of those who want another 10 minutes, and so you will have a chance for more questions if you wish, because I am trying to be fair to both sides, and I will allow that.

Before we go to Senator Franken, though, and while you are still here, Senator Coburn, I had reserved about 10 minutes of my time, and I will use just a minute or so of it. You spoke about the Second Amendment, which is a significant issue, and it is one people care about. And you spoke about gun owners out West and your life in both Wyoming and then Oklahoma. I look at that, of course, because both Wyoming and Oklahoma have more restrictive gun laws than my own State of Vermont. I could say that virtually every State has more restrictive gun laws than we do in Vermont.

I have been a gun owner since my early teens. I target-shoot at my home in Vermont as a way of relaxation all the time. I own numerous weapons, hand guns and long guns. I have not heard anything or read anything in the judge's writings or speeches that would indicate to me that in any way I have to worry that Vermont gun owners—and many Vermonters are gun owners; it is a way of life—that that is going to change. It is not going to change for me. It is not going to change what weapons my two sons, one a former Marine, own. If Judge Sotomayor is on the Supreme Court, I expect

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I will still be back in my home—and you are welcome any time you would like to come and go target shooting with me there.

Senator SESSIONS. Mr. Chairman, I would just say briefly but it is a real pivotal time we are in. If the decision by Judge Sotomayor becomes law, any city—maybe not Vermont, but any city or State in America could virtually, I believe, fully ban all firearms. And that is just where we are, and we can discuss how much precedent had to bound you to reach that conclusion. But this is not a little bitty issue. It is very important.

Chairman LEAHY. But States made laws as they have gone along. Vermont has decided not to have the restrictive laws that you have in Alabama. But States have made up their mind.

Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman. I have a letter here from several former U.S. attorneys from the Southern District of New York. Some of them Republican appointed and supporting the judge's confirmation. I will read a little bit from it.

It says they each had personal experience including appearing before Judge Sotomayor. She came to our cases without any apparent bias, probed counsel actively with insightful and at times tough questions and demonstrated time and again that she not only listens, but is often persuaded by counsel.

In our matters, Judge Sotomayor's opinions reflect clear—it is great. It is a great letter. I would ask that it be entered into the record. Sir? Can I enter it into the record? Thank you.

Thank you, Judge Sotomayor, for your patience and your terrific answers.

We have heard a lot about your thoughts on specific cases and on principles of jurisprudence. I would like to ask a much more general question and one that I think is a really good question at job interviews.

That is why do you want to be a Supreme Court Justice?

Judge SOTOMAYOR. You are going to hate me for taking a few minutes, but can I tell you a story?

Senator FRANKEN. I would love it.

Judge SOTOMAYOR. Because it will explain who I am and why. When Senator Moynihan first told me that he would consider sending my name to Senator D'Amato for consideration as a District Court judge, he asked me to keep it quiet for a little bit of time and I asked permission to tell my mom, Omar. This is short.

So they were visiting and I told them and mom was very, very excited. She then said how much more money are you going to earn? I stopped and I said I'm going to take a big pay cut. Then she stopped and she stopped and she said, are you going to do as much foreign travel as you do now? I was flying all over the U.S. and abroad as part of my private practice work.

I said probably not because I am going to live in a courthouse in lower Manhattan near where I used to work as a Manhattan DA. Now the pause was a little longer. She said, Okay. Then she said, now all the fascinating clients that you work with, as you may have heard yesterday, I had some fairly well known clients, you are going to be able to go traveling with them with the new people you meet, right?

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I said, no. Most of them are going to come before me as litigants to the cases I am hearing and I cannot become friends with them. Now the pause is really long. She finally looked up and she said, why do you want this job?

And Omar, who was sitting next to her said, Selena, you know your daughter. This is in Spanish. You know your daughter and her stuff with public service. It really has always been the answer.

Given who I am, my love of the law, my sense of importance about the rule of law, how central it is to the functioning of our society, how it sets us apart as many Senators have noted, from the rest of the world, have always created a passion in me.

That passion led me to want to be a lawyer first and now to be a judge because I can't think of any greater service that I can give to the country than to be permitted the privilege of being a Justice of the Supreme Court.

Senator FRANKEN. Thank you. Well, I for one have been very impressed with you, Judge, and I certainly intend to support your confirmation for the court.

I guess there is another round. I thought I was going to be the only thing between you and the door. So I planned to just yield all the rest of my time. But since I am not I would like to ask you—no. I am going to yield the rest of my time if that is okay.

Chairman LEAHY. Thank you very much, Senator Franken. I will reserve my time. We will have—Senator Sessions has asked us. Ten minute rounds. I think they will be primarily on the Republican side. I may speak again when they finish. We will begin with you, Senator Sessions.

Senator SESSIONS. Thank you. Thank you, Chairman Leahy. I believe we have tried to meet our goal. I had a goal at the beginning and people would say this is one of the most fair and effective hearings we have ever had. I hope that has been the case.

It is a great issue, the choice of putting someone on the United States Supreme Court. Our nominee has a wonderful group of friends and a long and distinguished record, but a number of questions arose that are important.

American people rightly are concerned that on important social issues that are not clearly stated in the Constitution on important legal issues not clearly stated in our law seem to be decided by unelected lifetime appointed courts. Those are big, big issues that we have discussed here today I hope in a way that is healthy and positive.

Judge, one thing I will ask you, I asked Justice Roberts and I am not sure how much good it did because he came back asking for a pay raise the next week, I think. But can you live on that salary that you are paid? We are having the largest deficit in the history of the Republic. A lot of people are going to have to tighten their belts. Are you prepared to do so also?

Judge SOTOMAYOR. I have been living on the salary for 17 years, so I will suffer through more of it. It is difficult for many judges. The pay question is a significant one for judges who haven't received pay raises I think it is more than 20 years now if I am not mistaken.

Senator SESSIONS. Well, you are saying pay raises based on—they are getting pay raises almost every year really, the cost of liv-

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ing and that kind of thing. But there was a big pay raise about 20 years ago.

I think that it is about four times the average family income in America. I hope that you can live on it. If not, you probably shouldn't take the job.

All judges, whether they are activists or not, if asked are going to say they follow the law. They just have a different view of the law. They just have a more looser interpretation of the law. So that is why we press some of these issues.

We want to determine as best we can just how tightly you believe you are bound by the law and how much flexibility you might think that you have as a judge to expand the law to suit perhaps a—in some policy area or another.

Attorney General Holder recently said that he thought we lacked courage in discussing the race issue. I think that is something that we should take seriously. That was a valid comment.

In my opinion, we had a higher level of discussion of that issue since I have been in this committee and I hope we have done it in a way that's correct. This is so sensitive and it is so important and we need to get it right and we must be fair to everybody.

We know that there are cases when people have been discriminated against. They are entitled to a remedy and the Supreme Court has been quite clear that when you can show a history of discrimination, and we have had not just in the south, but in the south, the jurisprudence has developed that it is appropriate for a judge to have a remedy that would encourage a move forward to a better opportunity those who have been held back. So that is good.

But the Supreme Court has also said that this is a dangerous philosophy because when you do that, you have identified one racial group and you have given them a preference over another. So it can be done in a legitimate way that is remedial.

We still have vestiges of discrimination still in our society and there will still be needs for remedial remedies. But I do think, as Justice Roberts said, the best way to end discrimination is quit doing it. A lot of our orders and court decisions are such that they benefit one race over another solely because of their race. It has to be tied to a remedy. The Supreme Court has made clear that when you do that, it must meet the highest scrutiny as the courts are supposed to review that very carefully and the language they use is strict scrutiny.

You don't favor one group over another without meeting that high standard. I am glad we began to discuss that and we will have the firefighters and they will be able to express their view on it in a little bit.

Judge, let me just say before I go forward that you have done a good job. You have a good humor, you have been direct in your answers and we appreciate that.

I will not support, and I do not think any member of this side will support a filibuster or any attempt to block a vote on your nomination. It is a very important vote. We all need to take our time and think it through and cast it honestly as the occasion demands.

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But I look forward to you getting that vote before we recess in August.

Let me discuss, Judge, I will just express this as we go forward. In your handling of the *Ricci* case, I think it is fair to say that it was not handled in the regular order.

You said in your opening statement that, 'The process of judging is enhanced when the arguments and concerns of the parties through litigation are understood and acknowledged and that is why I generally structure my opinions by setting out what the law requires and then by explaining why a contrary position, sympathetic or not, is accepted or rejected. That is how I seek to strengthen both the rule of law and faith in the impartiality of our justice system.'

I think that is a good statement. But I think what the panel did in this case did not meet that standard.

I think it was action I would conclude fairly, I think, contrary to the rule to the Second Circuit, Rule 32–1 says that summary orders are only appropriate where 'a decision is unanimous and each judge of the panel believes no jurisprudential purpose would be served by an opinion.'

Your clerk of your court there to the New York Times said this order 'Ordinarily issues when the termination of the case revolves around well settled principles of law.'

I would note that it was not a pro curium opinion at first. It was a summary order which is even less of an impactful decision than the other. But I think the Supreme Court made clear and I think most Americans understand that the *firefighters* case was more than that. It had tremendous jurisprudential impact and I think you were wrong to attempt to use the summary order which because it was objected to within your circuit which resulted in a pretty roaring debate and discussion and that you went forward, you then did it in a pro curium way, which at least gave it a little higher credence, but you did not write an in-depth opinion at all. In fact, it was still a pro curium and short opinion.

I understand according to some of the writers that Judge Sack, New York Times, I believe, quoted—National Journal that he was most reluctant to join the opinion. Judge Pooler was in the middle, and I guess it didn't reference the third judge, but apparently you were the third judge that was pushing for this kind of result.

Did you fail to show the courage that Attorney General Holder has asked us to show and discuss this issue openly with an in-depth opinion and wouldn't we have been better off if the case hand been handled in that fashion?

Judge SOTOMAYOR. Sir, no. I didn't show a lack of courage. The court's decision was clear in both instances on the basis for the decision. It was a thorough, complete discussion of the issues as presented to the District Court. The Circuit Court's ruling was clear in both instances. No, I did not lack courage.

Senator SESSIONS. Well, I don't think it was a great District Court opinion, so I would disagree on that. Mr. Chairman, you have been fair to us throughout. I do not know that every member of our side would use the time that they are allotted, but I am glad that you are allowing them the opportunity to do so.

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Chairman LEAHY. Thank you for that compliment, Senator. I should compliment Senator Specter here when he was Chairman I was Ranking Member and we had two Supreme Court nominations. We tried to work out a time to be fair to everybody and we did and we were told by both Republicans and Democrats that nobody had to complain about the amount of time.

I have tried to do the same thing. It is a lifetime appointment. I have been very impressed of course with our nominee and that has been obvious. Incidentally, she was originally nominated by President H. W. Bush and then by President Bill Clinton and now by President Barack Obama.

President Clinton nominated her to the Second Circuit and I have a letter addressed to the members of the committee, well, actually to you and I, Senator Sessions, from former President Clinton. He speaks of her being able to make a unique contribution to the bench through her experience as a prosecutor and trial judge and hopes that we will have a speedy confirmation of her. I will put that in the record.

One of the things in also trying to make sure everybody gets a balanced time, but we have had a lot of us that have served as either Chairman or Ranking Member of this committee and we know how important that is. I use that to yield to Senator Hatch who has had also the problem of having to schedule how things go. I yield to you. But thank you, Jeff, I appreciate that.

Senator HATCH. Well, thank you, Mr. Chairman. I echo Jeff's statement here.

Judge, you have been great throughout this process and I appreciate it, but I have some questions that I'd like to ask that I think you can answer yes or no, of course you can qualify if you feel like it. But I would like to get through these because they are important questions to me and millions of other people that I represent.

Judge, from 1980 from 1992 you were actively involved with the Puerto Rican Legal Defense and Educational Fund. It is a well known Civil rights organization in our country.

Among many other activities, this group files briefs in Supreme Court cases. You served in nearly a dozen different leadership positions there, including serving on and chairing a litigation committee.

The New York Times has described you as a 'tough policymaker' with the group and said that you would meet frequently with the legal staff, review the status of cases and played an active role in the fund's litigation.

Lawyers of the fund described you as, 'An involved and ardent supporter of their various legal efforts during your time with the group.' The Associated Press looked at documents from your service with the fund that showed that you were, 'involved in making sure that the cases handled were in keeping with its mission statement and were having an impact.'

When Senator Gillibrand introduced you to this committee on Monday, she compared your leadership role at the fund to Justice Ruth Bader Ginsburg's participation in the ACLU Women's Rights Project or Justice Thurgood Marshall's participation on behalf of the NAACP Legal Defense and Education Fund.

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So let me ask you just about a few abortion cases in which the Fund filed briefs. I do believe you can answer these yes or no, but again, certainly qualify if you feel like it.

I am not asking for your present views, either personal or legal, let's get that straight, on these issues, nor am I asking you how you might rule on these issues in the future. I just want to make that clear.

I might say that these are important issues. In one case, *Wemus* v. *Lavars* and *Harris* v. *McCray*, the Fund joined an Amicus brief asking the Supreme Court to overturn restrictions on taxpayer funding for abortion.

The brief compared refusing to use Medicaid Funds to pay for abortions to the *Dred Scott* case, the *Dred Scott* v. *Sanford* decision that refused citizenship to black people in our society and treated them terribly.

At the time, did you know that the Fund was filing this brief? At the time did you know—well, let me just ask each one. At the time, did you know the fund was filing this brief?

Judge SOTOMAYOR. No, sir.

Senator HATCH. At the time, did you know that the brief made this argument?

Judge SOTOMAYOR. No, sir.

Senator HATCH. At the time did you support the Fund filing this brief that made this argument?

Judge SOTOMAYOR. No.

Senator HATCH. At the time did you voice any concern, objection, disagreement or doubt about the Fund filing this brief or making this argument?

Judge SOTOMAYOR. I was not like Justice Ginsburg or Justice Marshall. I was not a lawyer on the Fund as they were with respect to the organizations they belong to. I was a board member and it was not my practice and not that I know of any board member, although maybe one with Civil Rights experience would have. I didn't have any in this area, so I never reviewed the briefs.

Senator HATCH. All right. In another case, *Ohio* v. *Aquin Center for Reproductive Health*, the Fund argued that the First Amendment right to freely exercise religion undermines laws requiring parental notification for minors getting abortion.

Now, at the time did you know that the Fund was filing this brief?

Judge SOTOMAYOR. No. No specific brief. Obviously it was involved in litigation, so I knew generally they were filing briefs. But I wouldn't know until after the fact that the brief was actually filed. But I wouldn't review it.

Senator HATCH. The same questions on this. At the time did you know that the brief made this argument? At this time did you support the Fund filing this brief that made this argument? And at the time did you voice any concern, objection, disagreement or doubt about the Fund filing this brief or making this argument?

Judge SOTOMAYOR. No because I never reviewed the brief.

Senator HATCH. That's fine. I'm just going to establish this.

In another case, *Planned Parenthood* v. *Casey*, the Fund argued against a 24-hour waiting period for obtaining an abortion. So again, those questions. At the time did you know that the Fund

was filing this brief? Did you know that the brief made this argument? Did you support the Fund filing this brief that made this argument? And did you voice any concern, objection, disagreement or doubt about the Fund filing this brief or making this argument?

Judge SOTOMAYOR. For the same reason, no.

Senator HATCH. Now, Judge, I am going to be very easy on you now because I invited constituents in Utah to submit questions and got an overwhelming response. Many of them submitted questions about the Second Amendment and other issues that have already been discussed.

One constituent asked whether you see the courts, especially the Supreme Court as an institution for resolving perceived social injustices and equities and disadvantages.

Now, please address this both in terms of a Justice's intention and the effect of their decisions. That was the question and I thought it was an interesting question.

Judge SOTOMAYOR. No, that's not the role of the courts. The role of the courts is to interpret the law as Congress writes it. It may be the effect in a particular situation that in the court doing that and giving effect to Congress' intent, it has that outcome.

But it is not the role of the judge to create that outcome. It is to interpret what Congress is doing and do what Congress wants.

Senator HATCH. Great. One final question, Judge. Describe your judicial philosophy in terms of the phrase 'Fidelity to the Law.'

Would you agree with me that both majority and descending Justices in last year's gun rights decision in *District of Columbia* v. *Heller* were doing their best to be faithful to the text and history of the Second Amendment?

Judge SOTOMAYOR. Text and history, how to analyze, yes.

Senator HATCH. In other words, do you believe that they were exhibiting fidelity to the law as they understood it?

Judge SOTOMAYOR. Yes.

Senator HATCH. Then I take it that you would agree that the Justices in the majority were not engaging in some kind of right wing judicial activists in the—characterized the decision. Is that fair to say?

Judge SOTOMAYOR. It is fair to me to say that I do not view what a court does as activism. I view it as each judge principally interpreting the issue before them on the basis of the law.

Senator HATCH. Great. Let me just ask you one other constituent question. It is a short one.

Another constituent asked, which is more important or deserves more weight? The constitution as it was originally intended or newer legal precedent?

Judge SOTOMAYOR. What governs always is the Constitution.

Senator HATCH. Which is more important or deserves more weight? The actual wording of the Constitution as it was originally intended or newer legal precedent?

Judge SOTOMAYOR. The intent of the founders were set forth in the Constitution. They created the words, they created the document. It is their words that is the most important aspect of judging.

You follow what they said in their words and you apply it to the facts you are looking at.

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Senator HATCH. Thank you, Judge. I will give back the remainder of my time, Mr. Chairman.

Chairman LEAHY. I just would note we do have this letter in the record from the Puerto Rican Legal Defense and Education Fund in which they say neither the board as a whole nor any individual member selects litigation to be undertaken or controls ongoing litigation.

I just think that we should be very, very clear here. It is probably why they get support from the United Way and a number of other organizations.

Senator Grassley.

Senator GRASSLEY. Good morning, Justice—Judge Sotomayor. Yesterday you said you would take a look at *Baker* v. *Nelson*, so I will ask this question. You said you hadn't read Baker in a long time and would report back. You added that if Baker was precedent, you would uphold it based upon stare decisis consistent with your stance in cases like *Kato*, *Roe* v. *Wade*, *Griswold*, and many others that you mentioned this week.

Baker involved an appeal from the Minnesota Supreme Court which held that a Minnesota law prohibiting same sex marriage did not violate the First, the Eighth, the Ninth, or the 14th amendment to the Constitution. The Supreme Court in a very short ruling concluded on its merits that, "The appeal is dismissed for want of substantial Federal question." Baker remains on the books as precedent. Will you respect the Court's decision in *Baker* based upon stare decisis? And if not, why not?

Judge SOTOMAYOR. As I indicated yesterday, I didn't remember Baker, and if I had studied it, it would have been in law school. You raised a question, and I did go back to look at Baker. In fact, I don't think I ever read it, even in law school.

Baker was decided at the time where jurisdiction over Federal questions was mandatory before the Supreme Court, and the disposition by the Supreme Court, I believe was what you related, Senator, which is a dismissal of the appeal raised on the Minnesota statute.

What I have learned is the question of—it's what the meaning of that dismissal is, is actually an issue that's being debated in existing litigation. As I indicated yesterday, I will follow precedent according to the doctrine of stare decisis. I can't prejudge what that precedent means until the issue comes before—what a prior decision of the Court means and its applicability to a particular issue is until that question is before me as a judge—or a Justice, if that should happen.

So, at bottom, because the question is pending before a number of courts, the ABA would not permit me to comment on the merits of that. But as I indicated, I affirm that with each holding of the Court, to the extent it is pertinent to the issues before the Court, it has to be given the effects of stare decisis.

Senator GRASSLEY. Am I supposed to interpret what you just said as anything different than what you said over the last 3 days in regard to *Kato* or *Roe* or *Griswold* or any other precedent you said, or precedents? Or would it be exactly in the same tone as you mentioned in previous days with previous precedents under stare decisis?

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Judge SOTOMAYOR. Well, those cases have holdings that are not open to dispute. The holdings are what they are. Their application to a particular situation will differ on what facts those situations present. The same thing with the *Nelson* case, which is what does the holding mean, and that's what I understand is being litigated, because it was a one-line decision by the Supreme Court, and how it applies to a new situation is what also would come before a court.

Senator GRASSLEY. Okay. My last question for your appearance before our Committee involves a word I don't think that showed up here yet—"vacuums"—and it is a question that I asked Judge Roberts and Justice Alito, and it comes from a conversation I had, a dialog I had at a similar hearing when Judge Souter was before us, now Justice Souter, involving the term "vacuums in law." And I think the term "vacuums in law" comes from Souter himself, as I will read to you in just a moment.

I probed Judge Souter about how he would interpret the Constitution and statutory law. In his response, Justice Souter talked about the Court filling vacuums left by Congress, and there are several quotes that I can give you from 19—I guess it was 1990, but I will just read four or five lines of Judge Souter speaking to this Committee:

"Because if, in fact, the Congress will face the responsibility that goes with its 14th Amendment powers, then by definition, there is, to that extent, not going to be a kind of vacuum of responsibility created, in which the courts are going to be forced to take on problems which sometimes, in the first instance, might be better addressed by the political branches of Government."

Both prior to that and after that, Judge Souter talked a lot about maybe the courts needed to fill vacuums.

Do you agree with Justice Souter, is it appropriate for the courts to fill vacuums in the law? And let me quickly follow it up. Do you expect that you will fill in vacuums in the law left by Congress if you are confirmed to be an Associate Justice?

Judge SOTOMAYOR. Senator Grassley, one of the things I say to my students when I'm teaching brief writing, I start by saying to them, "It's very dangerous to use analogies because they're always imperfect." I wouldn't ever use Justice Souter's words because they're his words, not mine.

I try always to use—and this is what I tell my students to do, is use simple words. Explain what you're doing without analogy. Just tell them what you're doing. And what I do is not described in the way—or I wouldn't describe it in the way Justice Souter did.

Judges apply the law, they apply the holdings of precedent, and they look at how that fits into the new facts before them. But you're not creating law. If that was an intent that Justice Souter was expressing—and I doubt it—that's not what judges do. Judges do what I've just described, and that's not in my mind acting for Congress. It is interpreting Congress' intent as expressed in a statute and applying it to the new situation.

Senator GRASSLEY. Thank you.

I am done, Mr. Chairman.

Chairman LEAHY. Thank you very much, Senator Grassley.

Senator Kyl, did you want another round?

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Senator KYL. Yes, thank you, Mr. Chairman. I am not sure how long this will take, but, Judge, I think maybe we are—to use the President's analogy that we talked about in my very first question to you, we may be in about the 25th mile of the marathon, and I might even be persuaded to have a little empathy for this last mile here. I think you are just about done.

I wanted to go over three quick things, if I could. The first is the exchange that we had this morning regarding the decision in *Ricci* in which you insisted that you were bound by Supreme Court and Second Circuit precedent. I quoted from the Supreme Court decision to the effect that I believe that that contradicted your answer.

If you have anything different to say than what you said this morning, I wanted to give you another opportunity to say it. We don't need to re-plow the same ground. But is there anything different that you would like to offer on that?

Judge SOTOMAYOR. Senator, after each round, I go to the next moment. Without actually looking at the transcript, I couldn't answer that question. It is just impossible to right now. I'm glad you're giving me the opportunity, but I would need a specific question as to something I said and what I meant before I could respond.

Senator KYL. All right. Since we will probably have a few questions as follow-up in writing and you will be providing us answers to those, maybe the best thing is just to ask a general question, or if there is something specific that I can related it to, and then you can respond in that way.

Judge SOTOMAYOR. Thank you, sir.

Senator KYL. You are very welcome.

Now, the second question has to do with the Second Amendment. In the *Maloney* case, you held that it was not incorporated into the 14th Amendment, and what—well, maybe I should ask you what that means. Let me ask then two separate situations as a practical matter.

If the Supreme Court does not review that issue, then is it the case that at least in the Second Circuit and the Seventh Circuit, the States that are in the Seventh and Second Circuit, those States could pass laws that restrict or even prohibit people from owning firearms?

Judge SOTOMAYOR. I did not hold it was not incorporated. I was on a panel that——

Senator KYL. Fair enough.

Judge SOTOMAYOR.—viewed Supreme Court precedent and Second Circuit precedent as holding that fact.

Senator KYL. Right.

Judge SOTOMAYOR. You can't talk in an absolute. There always has to be a reason for why a State acts, and there also has to be a reason for the extent of the regulation the State passes. And so the question in *Maloney* for us was a very narrow question, which was: Are these nunchuk sticks—and I have described them previously as these martial arts sticks tied together by a belt that when you swing them, if somebody comes by, there could be, if not serious, deadly force in some situations—whether the State had a reason recognized in law for determining that it was illegal to own those sticks.

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The next issue that would come up by someone who challenged the regulation would be, What's the nature of the regulation and how does it comport with the reason the State gives for the actions it did?

So absolute regulation is not what I would answer. I would answer what this——

Senator KYL. Let me—excuse me.

Judge SOTOMAYOR.—regulation is.

Senator KYL. I appreciate your answer. What would be the test that would be applied by a court in the event that a State said because of the danger that firearms present to others, we are going to require that only law enforcement personnel can own firearms in our State? And someone challenged that as an affront to their rights, they would say the Federal Government can't take that right away from us because of the Second Amendment. What would the test be that the Court would apply to analyze the regulation of the State?

Judge SOTOMAYOR. Well, that's very similar, although not exactly, if I understood it, to *Heller*, the facts in *Heller*. And the Court there said that the regulation in D.C. was broader than the interest asserted.

That question in a different State would depend on the circumstances of its barring——

Senator KYL. Well, excuse me for interrupting. Is there no standard—I mean, we are familiar with strict scrutiny, the reasonable basis test and so on. Is there a standard of which you are aware that the Court would use to examine the State's right to impose such a restriction given that the Second Amendment would be deemed not incorporated?

Judge SOTOMAYOR. In *Maloney*, the Court addressed whether there was a violation of the equal protection statute—equal protection of the 14th Amendment, and determined that rational basis review—now that I understand that you are asking about——

Senator KYL. Sure. I am sorry. I didn't——

Judge SOTOMAYOR.—a standard of review that's——

Senator KYL. Now, of the tests that the Court applies traditionally, the rational basis is the least difficult of States to meet in justifying a regulation, is it not?

Judge SOTOMAYOR. I'm not going to be difficult with you. It's the one where you don't need an exact fit between the exact injury that you are seeking to remedy in the legislation.

Senator KYL. Could I——

Judge SOTOMAYOR. So it does have more——

Senator KYL. Flexibility for the state?

Judge SOTOMAYOR. Well, "flexibility" is the wrong—more deference to congressional findings about what——

Senator KYL. Or State law.

Judge SOTOMAYOR. Exactly.

Senator KYL. Right. You know the general rule that the rational basis test is the least intrusive on a State's ability to regulate, whereas strict scrutiny is the most intrusive on the State's ability. Is that a fair characterization?

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Judge SOTOMAYOR. It's a fair characterization that when you have strict scrutiny, the Government's legislation must be very narrowly tailored.

Senator KYL. Right. So——

Judge SOTOMAYOR. In rational basis there is a broader breadth for the States to act.

Senator KYL. So wouldn't it be correct to say that as between the application of the Second Amendment to the District of Columbia, for example, compared to a situation in which a State or a city imposed a regulation on the control of firearms, that it would be much more likely that the Court would uphold the State's ability or the city's ability to regulate that than it would—in the abstract I am talking about here—than it would a Federal attempt to regulate it under the Second Amendment?

Judge SOTOMAYOR. That's the problem within the abstract, because what the Court would look at is whatever legislature—State legislative findings there are in the fit between those findings and the legislation.

Senator KYL. Right, and I appreciate that you are not going to—without knowing the facts of every case, you can't opine. But just as a general proposition, obviously if the amendment is incorporated, it will be much more difficult for a government to impose a standard than if it is not incorporated.

Judge SOTOMAYOR. Well, the standard of review, even under the incorporation doctrine, was actually not decided in *Heller*, and that issue wasn't resolved. So what that answer will be is actually an open question that I couldn't even discuss in a broad term other than to just explain——

Senator KYL. All right. Again, to interrupt, because we are less than 2 minutes now. If Senator Leahy says, gee, in Vermont, he is not worried about the fact that the Second Amendment isn't incorporated, maybe if I lived in New York or Massachusetts or some other State I would be worried. The question I guess I would ask here is: Can you understand why someone who would like to own a gun would be concerned that if the amendment is not deemed incorporated into the 14th Amendment as a fundamental right, that it would be much more likely that the State or city in which that individual lived could regulate his right to own a firearm?

Judge SOTOMAYOR. Very clear to me from the public discussions on this issue that that is a concern for many people.

Senator KYL. Final question. You are familiar—this goes to the foreign law issue. You are familiar with the difference in the treatment of foreign law by the U.S. Supreme Court in *Kennedy* v. *Louisiana* on the one hand and in *Roper* v. *Simmons* on the other hand. In *Roper*, the Court ruled it was cruel and unusual to apply the death penalty and drew substantially on foreign law. In *Kennedy* v. *Louisiana*, an adult was convicted of raping an 8-year-old child. And the same five Justices who wrote the opinion in Roper ruled that it was cruel and unusual to sentence the individual to death, but cited no foreign law whatsoever.

Some have said that a discussion of foreign law was left out of the *Kennedy* case because it actually cut against the majority's opinion. What do you think?

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Judge SOTOMAYOR. I can't speak for what they did. I can only do what you did, which is to describe what the courts did and what they said. It's impossible for me to speak about why a particular court acted in a particular way or why a particular Justice analyzed an issue outside of what the opinion says.

Senator KYL. I will just tell you my view is it kind of tells me that if a court can find some foreign law that supports its opinion, it might use it. If the opinion is on the other side, then it doesn't. In my view, that is one of the problems with using foreign law, and I gather from what you said earlier you don't think the Court should use foreign law either except in cases of treaty and other similarly appropriate cases.

Judge SOTOMAYOR. I do not believe that foreign law should be used to determine the result under constitutional law or American law, except where American law directs.

Senator KYL. Thank you very much. Thank you, Judge.

Chairman LEAHY. Thank you.

Senator Graham.

Senator GRAHAM. Thank you, Judge, I guess we do get to talk again. When you look at the fundamental right aspect of the Second Amendment, you will be looking at precedent, you will be looking at our history, you will be looking at a lot of things. Hopefully, you talk to your godchild, who is an NRA member.

You can assimilate your view of what America is all about when it comes to the Second Amendment. But one thing I want you to know is that Russ Feingold and Lindsey Graham have reached the same conclusion. So that speaks strong of the Second Amendment, because we do not reach the same conclusion a lot.

So I just want you to realize that this fundamental right issue of the Second Amendment is very important to people throughout the country, whether you own a gun or not, and it is one of those things that I think, when you look at it, you will find that America, unlike other countries, has a unique relationship with the Second Amendment.

Today, Khalid Sheikh Mohammed is appearing in a military tribunal in Guantanamo Bay, Cuba. He will be appearing before a military judge and he will be represented by military lawyers and there will be a military prosecutor.

The one thing I want to say here is that I have been a judge advocate, a member of the military legal community, for well over 25 years and to America and the world who may be watching this, I have nothing but great admiration and respect for those men and women who serve in our judge advocate corps who will be given the obligation by our nation to render justice against people like Khalid Sheikh Mohammed.

I just want to say this, also, on this historic day. To those who wonder why we do this, why do we give him a trial? Why are we so concerned about him having his day in court? Why do we give him a lawyer when we know what he would do to our people in his hands?

I would just like to say that it makes us better than him. It makes us stronger for us to give the mastermind of 9/11 his day in court, represented by counsel, and any verdict that comes his

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way will not be based on prejudice or passion or religious bigotry. It will be based on facts.

Now, let us talk about what this nation is facing. This Congress, Judge, is trying to reauthorize the Military Commission Act, trying to find a way to bring justice to the enemies of this country in a way that will make us better in the eyes of the world and, also, make us safer here at home.

Have you had an opportunity to look at the *Boumediene*, *Hamdan*, *Hamdi*, *Rasul* cases?

Judge SOTOMAYOR. I have.

Senator GRAHAM. You will be called upon in the future, if you get on the court, to pass some judgment over the enactments of Congress. When it comes to civilian criminal law, do you know of any concept in civilian law that would allow someone to be held, in criminal law, indefinitely without trial?

Judge SOTOMAYOR. When you're talking about civilian criminal law, you're talking about——

Senator GRAHAM. Domestic criminal law.

Judge SOTOMAYOR.—domestic criminal prosecution.

Senator GRAHAM. Right.

Judge SOTOMAYOR. After conviction, defendants are often sentenced——

Senator GRAHAM. I am talking about you are held in jail without a trial.

Judge SOTOMAYOR. The Speedy Trial Act and there are constitutional principles that require a speedy trial. So in answer, no, there is no——

Senator GRAHAM. That is a correct statement of the law, Judge, in my opinion. You cannot hold someone in domestic criminal settings indefinitely without trial.

Under military law, the law of armed conflict, is there any requirement to try, in a court of law, every enemy prisoner?

Judge SOTOMAYOR. There, you have an advantage on me, because I—I'm sorry.

Senator GRAHAM. Fair enough. The point I am trying to make, and check if I am wrong, you will have some time to do this, as I understand military law, if we, as a nation, one of our airman is downed on a foreign land, held by an adversary, it is my understanding we cannot demand, under the Geneva Convention, that that airman or American soldier go to a civilian court.

That is not the law. If we have a pilot in the hands of the enemy, there is no requirement of the detaining force to take that airman before a civilian judge. I think that is the law.

There is no requirement under military or the law of armed conflict to have civilian judges review the status of our prisoners. That is a right that we do not possess.

The question for the country and the world, if people operate outside the law of armed conflict that do not wear uniforms, are they going to get a better deal than people that play by the rules?

As we discuss these matters, I hope you take into account that there is no requirement to try everyone held as an enemy prisoner. Do you believe that there is a requirement in the law that at a certain point in time, that a prisoner has to be released, an enemy prisoner, just through the passage of time?

Judge SOTOMAYOR. I can only answer that question narrowly, and narrowly because the court's holdings have been narrow in this area. First, military commissions and proceedings under them have been a part of the country's history. And so there's no question that they are appropriate in certain circumstances.

Senator GRAHAM. And, Judge, they will have to render justice. They will have to meet the standards of who we are. My point to some critics on the right who have objected to my view that we ought to provide more capacity is that wherever the flag flies, in whatever courtroom, there is something attached to that flag.

So we are going to work hard to create a military commission consistent with the values of this country. But I just want to let you know that under traditional military law, it is not required to let someone go who is properly detained as part of the enemy force because of the passage of time.

Judge, it would be crazy for us to capture someone, give them adequate due process, independent judicial review, and the judges agree with the military, "You're part of al Qaeda, you represent a danger," and say, at a magic point in time, "Good luck, you can go now."

The people that we are fighting, if some of them are let go, they are going to try to kill us all and it does not make us a better nation to put a burden upon ourselves that no one else has ever accepted.

So my goal, working with my colleagues, is to have a rational system of justice that will make sure that every detainee has a chance to make the argument, "I am being improperly held," have a day in court, have a review by an independent judiciary, but we do not take it so far that we can not keep an al Qaeda member in jail until they die, because some of them deserve to be in jail until they die.

I want the world to understand that America is not a bad place because we will hold al Qaeda members under a process that is fair, transparent, until they die. My message to those who want to join this organization or thinking about joining it is that you can get killed if you join and you may wind up dying in jail.

As this country and this Congress comes to grips with how to deal with an enemy that does not wear a uniform, that does not follow any rules, that would kill everybody they could get their hands on in the name of religion, that not only we focus, Senator Whitehouse, on upholding our values, that we focus on the threat that this country faces in an unprecedented manner.

So, Judge, my last words to you will be if you get on this court and you look at the Military Commission Act that the Congress is about pass, when you look at whether or not habeas should be applied to a wartime battlefield prison, please remember, Judge, that we are not talking about domestic criminals who robbed a liquor store.

We are talking about people who have signed up for a cause every bit as dangerous as any enemy this country has ever faced and that this Congress, the voice of the American people who stand for reelection has a very difficult assignment on its hands.

There are lanes for the executive branch, the judicial branch and the congressional branch, even in a time of war. Please, Judge, un-

derstand that 535 Members of Congress cannot be the commander in chief and that unelected judges cannot run the war. Thank you and Godspeed.

Judge SOTOMAYOR. Thank you, Senator.

Chairman LEAHY. Senator Cornyn.

Senator CORNYN. You are almost through, Judge. I just want to ask three relatively quick items that I was not able to get to earlier, just for your brief comment.

You wrote in 2001 that neutrality and objectivity in the law are a myth. You said that you agreed that "there is no objective stance, but only a series of perspectives, no neutrality, no escape from choice in judging." Would you explain what that means?

Judge SOTOMAYOR. In every single case, and Senator Graham gave the example in his opening statement, there are two parties arguing different perspectives on what the law means. That's what litigation is about.

And what the judge has to do is choose the perspective that's going to apply to that outcome. So there is a choice. You're going to rule in someone's favor. You're going to rule against someone's favor.

That's the perspective of the lack of neutrality. It's that you can't just throw up your hands and say I'm not going to rule. Judges have to choose the answer to the question presented to the court. And so that's what that part of my talking was about, that there is choice in judging. You have to rule.

Senator CORNYN. You characterized, in your opening statement, that your judicial philosophy is one of fidelity to the law. Would you agree that both the majority and the dissenting justices in last year's landmark gun rights case, the *D.C.* v. *Heller* case, were each doing their best to be faithful to the text and the history of the Second Amendment?

In other words, do you believe that they were exhibiting fidelity to the law?

Judge SOTOMAYOR. I think both were looking at the legal issue before them, looking at the text of the Second Amendment, looking at its history, looking at the court's precedent over time and trying to answer the question that was before them.

Senator CORNYN. Do you think it is fair to characterize the five justices who affirmed the right to keep and bear arms as engaged in right-wing judicial activism?

Judge SOTOMAYOR. I don't use that word for judging. I eschew labels of any kind. That's why I don't like analogies and why I prefer, in brief-writing, to talk about judges interpreting the law.

Senator CORNYN. What about the 10 Democratic Senators, including Senator Feingold, who has been mentioned earlier, who joined the brief, the amicus brief to the U.S. Supreme Court urging the court to recognize the individual right to keep and bear arms? Do you think, by encouraging an individual right to keep and bear arms, that somehow these Senators were encouraging the court to engage in right-wing judicial activism?

Judge SOTOMAYOR. I don't describe people's actions with those labels.

Senator CORNYN. I appreciate that. You testified earlier today that you would not use foreign law in interpreting the Constitution

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and statutes. I would like to contrast that statement with an earlier statement that you made back in April, and I quote, "International law and foreign law will be very important in the discussion of how to think about unsettled issues in our legal system. It is my hope that judges everywhere will continue to do this."

Let me repeat the words that you used 3 months ago. You said "very important" and you said "judges everywhere." This suggests to me that you consider the use of foreign law to be broader than you indicated in your testimony earlier today.

Do you stand by the testimony you gave earlier today, do you stand by the speech you gave 3 months ago, or can you reconcile those for us?

Judge SOTOMAYOR. Stand by both, because the speech made very clear, in any number of places, where I said you can't use it to interpret the Constitution or American law. I went through—not a lengthy, because it was a shorter speech, but I described the situations in which American law looks to foreign law by its terms, meaning it's counseled by American law.

My part of the speech said people misunderstand what the word "use" means and I noted that "use" appears to people to mean if you cite a foreign decision, that means it's controlling an outcome or that you are using it to control an outcome, and I said no.

You think about foreign law as a—and I believe my words said this. You think about foreign law the way judges think about all sources of information, ideas, and you think about them as ideas both from law review articles and from state court decisions and from all the sources, including Wikipedia, that people think about ideas. Okay.

They don't control the outcome of the case. The law compels that outcome and you have to follow the law. But judges think. We engage in academic discussions. We talk about ideas.

Sometimes you will see judges who choose—I haven't, it's not my style, but there are judges who will drop a footnote and talk about an idea. I'm not thinking that they're using that idea to compel a result. It's an engagement of thought.

But the outcome—you could always find an exception, I assume, if I looked hard enough, but in my review, judges are applying American law.

Senator CORNYN. Your Honor, why would a judge cite foreign law unless it somehow had an impact on their decision or their decision-making process?

Judge SOTOMAYOR. I don't know why other judges do it. As I explained, I haven't. But I look at the structure of what the judge has done and explains and go by what that judge tells me. There are situations—that's as far as I can go.

Senator CORNYN. You said, at another occasion, that you find foreign law useful because it "gets the creative juices flowing." What does that mean?

Judge SOTOMAYOR. To me, I am a part academic. Please don't forget that I taught at two law schools. I do speak more than I should and I think about ideas all the time. And so for me, it's fun to think about ideas.

You sit in a lunchroom among judges and you'll often hear them say, "Did you see what that law school professor said" or "did you

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see what some other judge wrote and what do you think about it," but it's just talking. It's sharing ideas.

What you're doing in each case, and that's what my speech said, is you can't use foreign law to determine the American Constitution. It can't be used either as a holding or precedent.

Senator CORNYN. Do you agree with me that if the American people want to change the Constitution, that is a right reserved to them under the Constitution to amend it and change it rather than to have judges, under the guise of interpreting the law, in effect, change the Constitution by judicial fiat?

Judge SOTOMAYOR. In that regard, the Constitution is abundantly clear. There is an amendment process set forth. It controls how you change the Constitution.

Senator CORNYN. I would just say if academics or legislators or anybody else who has got creative juices flowing from the invocation of foreign law, if they want to change the Constitution, my contention is the most appropriate way to do that is for the American people to do it through the amendment process rather than for judges to do it by relying on foreign law.

Judge SOTOMAYOR. We have no disagreement.

Senator CORNYN. Thank you very much, Your Honor.

Chairman LEAHY. Thank you. Senator Coburn.

Senator COBURN. Thank you, Mr. Chairman. I am going to go into an area that we have not covered, no one has covered yet. I am reminded of Senator Sessions talking to you about pay.

I would predict to you, in about 15 or 18 years, judicial pay, we will not be able to pay your salary. Nine years from now, we are going to have $1 trillion worth of interest on the national debt. It is not very funny.

What it does is it undermines the freedom and security of our children and our grandchildren. I want to go to Madison. Madison is the father of our Constitution.

I want to get your take on three issues; one, the commerce clause; two, the general welfare clause; and, No. 3, the 10th Amendment. I don't know if you have read the Federalist Papers, but I find them very interesting to give insight into what our founders meant, what they said when they wrote our Constitution.

In Federalist 51, Madison expressed the importance of a restrained government by stating, "In framing a government which is to be administered by men over men, the great difficulty lies in this, you must first enable the government to control the governed, and, in the next place, oblige to control itself."

Do you believe that our Federal courts enable the Federal Government to exceed its intended boundaries by interpreting Article I's commerce clause and necessary and proper clause to delegate virtual unlimited authority to the Federal Government?

Judge SOTOMAYOR. The Supreme Court, in these two rulings or one, has said there are limits to all powers set forth in the Constitution and the question for the court in any particular situation is to determine whether whatever branch of government or state is acting within the limits of the Constitution.

Senator COBURN. Let me read you another Madison quote, again, the father of our Constitution. "If Congress can employ money indefinitely to the general welfare and are the sole and supreme

judges of general welfare, they may take the care of religion into their own hands; they may appoint teachers in every state, county and parish and pay them out of the public treasury; they may take into their own hands the education of our children, establishing in like manner schools throughout the union; they may assume the provision for the poor; they may undertake the regulation of all roads other than post roads."

"In short, everything from the highest object of state legislation down to the most minute object of police would be thrown under the power of Congress. Were the power of Congress to be established and the latitude contended for, it would subvert the very foundations and transmute the very nature of the limited government established by this Constitution and the American people."

I guess my question to you is do you have any concerns, as we now have a $3.6 trillion budget, $11.4 trillion worth of debt, $90 trillion worth of unfunded obligations that are going to be placed on the backs of our children, that maybe some reining in of Congress in terms of the general welfare clause, the commerce clause, and reinforcement of the 10th Amendment under its intended purposes by our founders, which said that everything that was not specifically listed in the enumerated powers was left to the states and the people, do you have any concerns about where we are heading in this nation and the obligations of the Supreme Court maybe to relook at what Madison and our founders intended as they wrote these clauses into our Constitution?

Judge SOTOMAYOR. One of the beauties of our Constitution is the very question that you ask me, is the dialog that's left in the first instance to this body and to the House of Representatives.

The answer to that question is not mine in the abstract. The answer to that question is a discussion that this legislative body will come to an answer about as reflected in laws it will pass. And once it passes those laws, there may be individuals who have rights to challenge those laws and will come to us and ask us to examine what the Constitution says about what Congress did.

But it is the great beauty of this nation that we do leave the lawmaking to our elected branches and that we expect our courts to understand its limited role, but important role in ensuring that the Constitution is upheld in every situation that's presented to it.

Senator COBURN. I believe our founders thought that the Supreme Court would be the check and balance on the commerce clause, the general welfare clause, and the insurance of the 10th Amendment, and that is the reason I raised those issues with you.

I wonder if you think we have honored the plain language of the Constitution and the intent of the founders with regard to the limited power granted to the Federal Government.

Judge SOTOMAYOR. That's almost a judgment call. I don't know how to answer your question, because it would seem like it would lead to the natural question, did the courts do this in this case, and that would be opining on a particular view of the case. And that case would have a holding and I would have to look at that holding in the context of another case.

I'm attempting to answer your question, Senator, but our roles and the ones we choose to serve, your job is wonderful. It is so, so

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important. But I love that you're doing your job and I love that I'm doing my job as a judge. I like mine better.

Senator COBURN. I think I would like yours better, as well, although I doubt that I could ever get to the stage of a confirmation process.

Well, let me just end up with this. People call me simple because I really believe this document is the genesis of our success as a country and I believe these words are plainly written and I believe we ignore them at our peril.

My hope is that the Supreme Court will relook at the intent of our founders and the 10th Amendment, where they guaranteed that everything that wasn't spelled out specifically for the Congress to do was explicitly reserved to the states and to the people.

To do less than that undermines our future and all we have to do is take a little snapshot of where we are today economically, financially and leadership-wise, to understand we ignored their plain words and we find ourselves near bankruptcy because of it.

I thank you, Mr. Chairman.

Chairman LEAHY. Thank you. It is almost over. There is one question that I withheld the balance of my time before and I want to make sure I ask this question, because I asked it of Chief Justice Roberts and Justice Alito when they were before this Committee.

As you know, in death penalty cases, it takes five justices to stay an execution, but only four to grant certiorari to hear a case. You could grant certiorari to hear a case, but if the execution is not stayed, it could become a moot point. The person can be executed in between.

So usually if there are four justices willing to hear a case, somebody agrees to the fifth vote to stay an execution just as a matter of courtesy, so the cert does not become moot. So the person is not executed in the few weeks that might be in between granting of cert and the hearing of the case.

Now, both Chief Justice Roberts and Justice Alito agreed that this rule was sensible, the rule of five or the courtesy fifth. It appears, according to a study done by the New York Times, that very reasonable rule and the rule that both Chief Justice Roberts and Justice Alito said was very reasonable, and I think the majority of us on the Committee thought it was reasonable, they suggest that that rule has not been adhered to, the rule of four, because there have been a number of cases where four justices voted for cert and wanted to stay the execution, but the fifth would not and the person was executed before the case was heard.

If you were on the Supreme Court, and this is basically the same thing I asked Justice Roberts and Justice Alito, if you were on the Supreme Court, four of your fellow justices said they would like to consider a death penalty case and they asked you to be a fifth vote to stay the execution, even though you did not necessarily plan to vote for cert, how would you approach that issue?

Judge SOTOMAYOR. I answer the way that those two justices did, which is I would consider the rule of the fifth vote in the way it has been practiced by the court. It has a sensible basis, which is that if you don't grant the stay, an execution can happen before you reach the question of whether to grant certiorari or not.

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Chairman LEAHY. Well, I thank you. I have applauded both Chief Justice Roberts and Justice Alito for their answers. It appears that perhaps somewhere between the hearing room and the Supreme Court, their minds changed.

Now, in 2007, Christopher Scott Emmett was executed even though four justices had voted for a stay of execution. Justice Stevens wrote a statement, joined by Justice Ginsberg, calling for a routine practice of staying executions scheduled in advance of our review of the denial of a capital defendant's first application—first application—for a Federal writ of habeas corpus.

I am not asking for a commitment on what Justices Stevens and Ginsberg said, but is that something that ought to at least be considered?

Judge SOTOMAYOR. Unquestionably. As I said, there is an underlying reason for that practice.

Chairman LEAHY. And there is an understanding that when the case is reviewed, the sentence may well be upheld and the execution will go forward. But this is on the various steps for that hearing.

Judge SOTOMAYOR. Yes, sir.

Chairman LEAHY. Thank you. Senator Sessions.

Senator SESSIONS. Just briefly, I thank you again for your testimony. I know judges come before these committees and they make promises and they mean those things and then, if they are lucky, they get a lifetime appointment and I think, most likely, their judicial philosophy will take over as the years go by, 10, 20, 30 years on the bench.

So this is an important decision for us to reach and to consider and we will all do our best. I hope you felt that it has been a fairly conducted hearing. That has been my goal.

Judge SOTOMAYOR. Thank you, Senators, to all Senators. I have received all the graciousness and fair hearing that I could have asked for and I thank you, Senator, for your participation in this process and in ensuring that.

Senator SESSIONS. Thank you. You are very courteous. I think, for the record, a number of significant articles should be in the record.

Chairman LEAHY. Without objection.

Senator SESSIONS. One from the Washington Post on July 9, "Uncommon Detail." Wall Street Journal, "Defining Activism Down," July 15. New York Times, "New Scrutiny on Judge's Most Controversial Case" by Adam Liptak. New York Times, "Nominee Rulings are Exhaustive, But Often Narrow." The Ninth Justice, "How Ricci Almost Disappeared." The Ninth Justice, "Justices Reject Sotomayor Position 9–0." And the Wall Street Journal, "The Wise Latina" article of June 15, which is an important analysis.

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

Senator SESSIONS. Mr. Chairman, for the record, I would also offer a letter from Sandra Froman, former president of National Rifle Association, and a series of other people who cosigned that letter, making this point. I think it is important, Sandra Froman, herself a lawyer.

"Surprisingly, *Heller* was a 5:4 decision, with some justices arguing that the Second Amendment does not apply to private citizens

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or, if it does, even a total gun ban could be upheld if a legitimate government interest could be found. The dissenting justices also found D.C.'s absolute ban on handguns within the home to be a reasonable restriction. If this had been the majority view, then any gun ban could be upheld and the Second Amendment would be meaningless."

It goes on to say, "The Second Amendment survives today by a single vote in the Supreme Court. Both its application to the states and whether there will be a meaningful strict standard of review remain to be decided. Justice Sotomayor has revealed her views on these issues and we believe they are contrary to the intent and purposes of the Second Amendment and the Bill of Rights. As the Second Amendment leaders, we are deeply concerned about preserving all fundamental rights for current and future generations. We strongly oppose this nominee."

I offer that and a letter from the Americans United for Life, a 60-plus association, North Carolina Property Association.

[The information appear in the index.]

Chairman LEAHY. We will hold the record open until 5 tonight for any other material people wish to submit to the record.

Senator SESSIONS. Thank you, Mr. Chairman. And thank you for your courtesy throughout.

Chairman LEAHY. Thank you. We will also hold the record open until 5 tomorrow for additional questions that Senators wish to ask.

Now, Judge Sotomayor, this hearing has extended over 4 days. On the first day, you listened to our opening statements rather extensively. You shared with us a very concise statement about your own fidelity to the law and I suspect it will be in law school texts in years to come.

Over the last 3 days, you have answered our questions from Senators on both sides of the aisle. I hope I speak for all the Senators, both Republican and Democratic, on this Committee when I thank you for answering with such intelligence, grace and patience.

I also thank the members of your family for sitting here, also, with such intelligence, grace, and especially patience.

During the course of this week, almost 2,000 people have attended this hearing in person, 2,000. Millions more have seen it, heard it or read about it thanks to newspapers and blogs, television, cable, Webcasting. I think through these proceedings, the American people have gotten to know you.

Even though I sat on two different confirmation hearings for you over the past 17 years, I feel I have gotten to know you even better. The President told the American people in his Internet address back in May, as a justice of the Supreme Court, you would "bring knowledge and experience acquired over the course of a brilliant legal career, with the wisdom accumulated over the course of an extraordinary journey, a journey defined by hard work, fierce intelligence, and enduring faith in America, all things are possible."

We bore witness to that this week. Experience and wisdom will benefit all Americans. When you walk under that piece of Vermont marble over the door of the Supreme Court, speaking of equal justice under law, I know that will guide you.

Judge Sotomayor, thank you, Godspeed.

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Judge SOTOMAYOR. Thank you all.

Chairman LEAHY. We stand in recess for 10 minutes.

[Whereupon, the Committee was recessed at 1:24 p.m.]

AFTER RECESS

[1:42 p.m.]

Senator WHITEHOUSE. Good afternoon, everyone. The Ranking Member has joined us, and the hearing will now come to order.

We have a considerable number of witnesses to get through today, so I would ask Ms. Askew and Ms. Boies and the witnesses who will follow them to please be scrupulous about keeping your oral statements to 5 minutes or under. Your full written statement will be put in the record, and Senators will each have 5 minutes to ask questions of each panel. Along with Ranking Member Sessions, I am very glad to welcome ABA witnesses Kim Askew and Mary Boies.

Kim Askew is the Chair of the ABA Standing Committee on the Federal Judiciary, and Mary Boies is the ABA Standing Committee's lead evaluator on its investigation into Judge Sotomayor's qualifications to be an Associate Justice on the Supreme Court of the United States. The Ranking Member and I both look forward to their testimony, and if I could ask them please to stand and be sworn, we will begin.

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?

Ms. ASKEW. I do.

Ms. BOIES. I do.

Senator WHITEHOUSE. Please be seated. You may proceed with your statements.

STATEMENT OF KIM J. ASKEW, ESQ., CHAIR, STANDING COMMITTEE ON THE FEDERAL JUDICIARY, AMERICAN BAR ASSOCIATION, ACCOMPANIED BY MARY M. BOIES, MEMBER, STANDING COMMITTEE ON THE FEDERAL JUDICIARY, AMERICAN BAR ASSOCIATION

Ms. ASKEW. Thank you. Good afternoon and thank you for having us. I am Kim Askew of Dallas, Texas, Chair of the Standing Committee on the Federal Judiciary. This is Mary Boies. Mary Boies is our Second Circuit representative, and as you mentioned, she was the lead evaluator on the investigation of Judge Sonia Sotomayor. We are honored to appear here today to explain the Standing Committee's evaluation of this nominee. The Standing gave her its highest rating and unanimously found that she was "Well Qualified."

For 60 years, the Standing Committee has conducted a thorough, non-partisan peer review in which we do not consider the ideology of the nominee, and we have done that with every Federal judicial nominee. We evaluate the integrity, the professional competence, and the judicial temperament of the nominee. The Standing Committee does not propose, endorse, or recommend nominees. Our sole function is to evaluate the professional qualifications of a nominee and then rate the nominee either "Well Qualified," "Qualified," or "Not Qualified."

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A nominee to the Supreme Court of the United States must possess exceptional professional qualifications—that is, a high degree of scholarship, academic talent, analytical and writing ability, and overall excellence. And because of that, our investigations of Supreme Court nominees is more extensive than the nominations to the lower Federal courts and are procedurally different in two ways.

First, all circuit members participate in the evaluations. An investigation is conducted in every circuit, not just the circuit in which the nominee resides.

Second, in addition to the Standing Committee reading the writings of the nominee, we commission three reading groups of distinguished scholars and practitioners who also review the nominee's legal writings and advise the Standing Committee. Georgetown University Law Center and Syracuse University School of Law formed reading groups this year, and these groups were comprised of professors who are all recognized experts in their substantive areas of law. Our practitioners reading group was also formed, and that group was also comprised of nationally recognized lawyers with substantial trial and appellate practices. All of them are familiar with Supreme Court practices, and many have clerked for Justices on the U.S. Supreme Court.

In connection with Judge Sotomayor's evaluation, we initially contacted some 2,600 persons who were likely to have relevant knowledge of her professional qualifications. This included every United States Federal judge, State judges, lawyers, law professors and deans, and, of course, members of the community and bar representatives. We received 850 responses to our contacts, and we personally interviewed or received detailed letters or emails from over 500 judges, lawyers, and others in the community who knew Judge Sotomayor or who had appeared before her. We also analyzed transcripts, speeches, other materials, and, of course, Ms. Boies and I interviewed her, and it is on that basis that we reached the unanimous conclusion as a Standing Committee that she was well qualified.

Her record is known to this distinguished Committee. She has been successful as a prosecutor, a lawyer in private practice, a judge, a legal lecturer. She has served with distinction for almost 17 years on the Federal bench, both as a trial court judge and an appellate judge. She has taught in two of the Nation's leading law schools, and her work in the community is well known.

She has a reputation for integrity and outstanding character. She is universally praised for her diligence and industry. She has an outstanding intellect, strong analytical abilities, sound judgment, an exceptional work ethic, and is known for her courtroom preparation. Her judicial temperament meets the high standards for appointment to the Court.

The Standing Committee fully addressed the concerns raised regarding her writings and some aspects of her judicial temperament. Those are set forth in detail in our correspondence to this Committee, and we ask that they be made a part of the record.

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

Ms. ASKEW. In determining that these concerns did not detract from the highest rating of "Well Qualified" for the judge, the Stand-

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ing Committee was persuaded by the overwhelming responses of lawyers and judges who praised her writings and overall temperament.

On behalf of the Standing Committee, Ms. Boies and I thank you for the opportunity to be present today and present these remarks, and we are certainly available to answer any questions you may have.

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

Senator WHITEHOUSE. Thank you so much.

Ms. Boies, do you have a separate statement you wish to make?

Ms. BOIES. I do not, Senator. We are happy to answer your questions.

Senator WHITEHOUSE. Very good. I appreciate it.

I just want to summarize a few conclusions from the report and then ask you a little bit about the scope of the effort that went into it in terms of the numbers of people who were interviewed and the duration and nonpartisan nature of the effort, if you would.

On page 6, you conclude that Judge Sotomayor "has earned and enjoys an excellent reputation for integrity and outstanding character. Lawyers and judges uniformly praised the nominee's integrity."

On page 11, you report that Judge Sotomayor's opinions show "an adherence to precedent and an absence of attempts to set policy based on the judge's personal views. Her opinions are narrow in scope, address only the issues presented, do not revisit settled areas of law, and are devoid of broad or sweeping pronouncements."

On page 13, you report that "the overwhelming weight of opinion shared by judges, lawyers, courtroom observers, and former law clerks is that Judge Sotomayor's style on the bench is: A, consistent with the active questioning style that is well known on the Second Circuit"—and which, as a personal aside, I will say I liked as a practitioner; "B, directed at the weak points in the arguments of parties to the case even though it may not always seem that way to the lawyer then being questioned; C, designed to ferret out relative strengths and shortcomings of the arguments presented; and, D, within the appropriate bounds of judging."

And, finally, the Committee unanimously found an absence of any bias in the nominee's extensive work. Lawyers and judges overwhelmingly agree—this is your quote—that "she is an absolutely fair judge. None, including those many lawyers who lost cases before her, reported to the Standing Committee that they have ever discerned any racial, gender, cultural, or other bias in her opinions, or in any aspect of her judicial performance. Lawyers and judges commented that she is open-minded, thoroughly examines a record in far more detail than many circuit judges, and listens to all sides of the argument."

Could you tell us a little bit about the scope of the review that took place that enabled you to reach those firm conclusions?

Ms. BOIES. Unlike with most Federal judicial nominees, in the case of a Supreme Court nominee, the entire 15-member Committee writes letters to the entire judiciary throughout the country and also to lawyers throughout the country. We go through her

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opinions, and we look to see what lawyers appeared in front of her, and we write many letters to those people. In addition, we write to, as Chair Askew said, to law school deans and law professors. And as she mentioned, we commissioned three reading groups of professors and practitioners. There were 25 law professors from Syracuse Law School and from Georgetown Law Center who read her opinions, as did 11 practitioners, many of whom themselves were former Supreme Court law clerks. And the standards that we look at and the only standards are the professional competence, judicial temperament, and integrity.

And each circuit member interviews all the judges and lawyers who respond to our letters or whom they identify as someone who knows or has worked with Judge Sotomayor. Those interviews are then collected. I review them. The Chair and I had a personal interview with Judge Sotomayor in her chambers in New York. We met for over 3 hours, and we discussed with her in detail every criticism that we had heard of her judging and the factors that we look at.

And following that, we received the reading group reports which were, each one, hundreds and hundreds of pages that went through her opinions one by one. They didn't merely give an overall summary. We read those. In addition, I read every opinion that she wrote on the Second Circuit and many that she wrote on the district court.

In addition, we took many of her—we, the Standing Committee, took many of her opinions, and we divided them among themselves so that we, too, read those opinions, not merely the reading groups. And I think that is a snapshot of the scope of our review, but I will give you one example, if I may, of how we operate, and that is, we received a critical review from a lawyer about her conduct at a particular oral argument. We identified the date of that argument and the case. We then went through the court records and the opinions that were written, and we identified all of the lawyers who were involved in that case. We identified the docket sheet from the Second Circuit for that date so that we could identify any other lawyers who might have been present in the courtroom even though they were not there for that particular case. And we identified all of the lawyers who had any argument that day, because maybe they would have a view of the panel. And then, finally, we talked to the other members of the panel to ask what their view was on her judicial temperament because we had received a fairly important criticism. And so we not only reviewed that criticism, but we looked to see how others viewed the same conduct.

Now, you may say that this is stacking the deck against her, because we know we have a critical comment, and maybe she was having a very bad day, and maybe she wasn't up to her—the way she normally would be on the bench. But we talked to at least ten other lawyers and another member of the panel.

Ms. ASKEW. And that is what the peer review process is. Much of what you will read anecdotally, if you talk to, you know, the legal press, you may not have personal knowledge necessarily of what the judge does, or you may not have been the lawyer who actually participated in that argument. The reason we talk to lawyers is because we examine whether you have personal knowledge of

what you are telling us. We will ask you about the case that you were in because then we can go forward and investigate.

So we talked to all the lawyers. We talked to the judges. In some instances, we even had the pleasure of listening to the transcript because one of the allegations here was a lack of temperament. That cannot always be picked up from the written record. Luckily, we were able to find out there so we could hear the tone and the tenor of the "hot courtroom" that has been described before this Committee.

And so when we come to this distinguished Committee and say that this was in keeping with the practice of the Second Circuit, we have looked at it in every way that we possibly can to ensure what took place.

Senator WHITEHOUSE. Well, let me conclude by thanking you for the thoroughness of your evaluation, and as I understand it, the ultimate conclusion was to evaluate her as "Well Qualified," which is the highest available ranking, which was unanimous, and you considered her conduct as a judge over 17 years to be, and I quote, "exemplary."

Ms. BOIES. That is correct.

Senator WHITEHOUSE. Thank you very much.

The Ranking Member, Senator Sessions.

Senator SESSIONS. Thank you, Mr. New Chairman. It is good to be with you.

Senator WHITEHOUSE. And you, sir.

Senator SESSIONS. The American Bar Association was critical of former President Bush—well, former former President Bush—for not asking for evaluations before the nomination was made. President Obama followed that same process. Since that time, have you changed your view about the viability or the advisability of conducting the—asking the President to give the names—a name or names before a final decision is made?

Ms. ASKEW. As Chair of the Committee, let me answer that. The Committee does not take a stand on that. The ABA may take a stand on whether it thinks it is a better idea for a President to nominate or to pre- or post-nomination basis, but the Standing Committee is divorced of the policy side of the ABA. It is our position, and always has been, that we will conduct a neutral, nonpartisan peer review whenever the President gives us that information.

Senator SESSIONS. With regard to the temperament question, there were some questions you asked about that, and I guess the Almanac or whatever that Judge Sotomayor turned out, they have quite a—much more negative feedback from the lawyers: "a terror on the bench," "a bit of a bully," a lot of statements like that. And yet you still gave her the highest rating. So you talked to those people, and you are Okay with that?

Ms. ASKEW. We absolutely are. And just to give you a sense, we talked to over 500 lawyers, and not to minimize any comment, because sometimes one criticism can be the most important comment that we get on a nominee. But of the 500 lawyers that we spoke to, we received comments on the temperament issue from less than 10 lawyers. They were mostly lawyers and judges who were outside

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of the Second Circuit and were not as familiar with Second Circuit precedent.

Senator SESSIONS. Well, you know, I hope the Second Circuit doesn't approve of beating up lawyers too much.

Ms. ASKEW. Well, they do not——

Senator SESSIONS. But, anyway——

Senator WHITEHOUSE. Just enough.

Senator SESSIONS. Let me ask you, did you—I was troubled by the handling of the *Ricci* case. That was a summary order at first until other judges on the panel objected, and then was a per curiam opinion. But I think the process of making that a summary opinion was—to me, pretty much takes you back. How did you conclude—did you look at that precisely?

Ms. BOIES. We did look at that case, Senator. We do not take a position on whether an opinion is right or is wrong. That is not what our function is. However, we did look at the procedure that was followed in the *Ricci* case, and that is a case in which the Second Circuit panel heard full briefing and oral argument, and following which the panel—which was not presided over by Judge Sotomayor, but the panel decided to adopt, in effect, the district court ruling because they affirmed the ruling and they agreed with its reasoning, and they did not——

Senator SESSIONS. Well, that is basically true. However, one judge was quite reluctant, another one moderated, and the judge apparently wanted to do it this way and prevailed. But the only thing I was asking about—and if you are prepared to make an expression of opinion—is the decision to decide it as a summary matter, not even a per curiam opinion. Did you deal with that issue and specifics?

Ms. ASKEW. We are aware of how the Second Circuit handles summary opinions. We did not talk to her about that. We did not believe that was within the criteria that we evaluate with judges. We did read the opinion in great detail. Members of the reading groups, all three reading groups—indeed, we were very lucky to receive the Supreme Court opinion on this before our report was finalized, so we got a complete briefing on that case. And we——

Senator SESSIONS. One more thing. A recent group of political scientists did a study of the ABA nomination process from 1985 to 2008 and found that the ABA must take affirmative steps to change its system for rating nominees to avoid favor and—bias in favor of liberal nominees. Do you take that seriously? Are you willing to look at how you handle these things?

Ms. ASKEW. We take any critique of our process seriously. I can tell you that we judge every nominee based on the record that is presented to us and the background and experience of the nominee.

Senator SESSIONS. Well, let me just say this: I think it is a valuable contribution to the process.

Ms. ASKEW. Thank you.

Senator SESSIONS. When you talk to lawyers and sometimes—most people are very—tend very much to be supportive of any nominee, especially if—you know, they just tend to be supportive and minimize problems. But sometimes I think you could pick up things that other people wouldn't that could be valuable to this process, and I thank you.

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Ms. ASKEW. Thank you.

Ms. BOIES. Senator, if I may, I would like just to go back briefly to the *Ricci* decision. One thing that I did look at is that in calendar year 2008, the Second Circuit issued 1,482 opinions, not counting the non-argued asylum cases. And of those 1,482, 1,081 were decided by summary order. Only 401 full opinions were issued.

And as I read the record, one of the reasons the panel believed it could proceed by summary order is because it believed that there was controlling Second Circuit precedent which a panel is not in a position to change.

So I don't mean to open the issue, but I would like to put it into some context as to how the Second Circuit normally operates.

Senator SESSIONS. Well, that is a nice way to say it. But this was a—the rule said if it has jurisprudential importance, you should have an opinion. I think it was in violation of the rule. I don't know why they did it, but it was in violation of the rule, in my judgment as a practicing lawyer. I would have thought you would have agreed, Ms. Boies.

Senator WHITEHOUSE. We will hear next from the distinguished Senator from Pennsylvania, Senator Specter.

Senator SPECTER. Well, thank you, Mr. Chairman. No questions, just a comment to thank you for your service. There have been occasions when the American Bar Association was not consulted, and I think that the ABA has a special status. The Judiciary Committee is hearing from all interested parties. It is not possible to invite all interested parties to appear in person, but we welcome comments from anyone in a free society to tell us what they think of the nominee.

But the ABA performs this function regularly with all Federal judges, and you interview a lot of people who are knowledgeable and have had contact, and I think it is very, very useful. So thank you for your service.

I have no questions, Mr. Chairman, on the substance.

Senator WHITEHOUSE. Then we will turn to Senator Cardin of Maryland.

Senator CARDIN. I also do not have any questions, but I do want to make an observation, because I very much respect the opinions of the American Bar Association and fellow lawyers.

I think it is the highest compliment when your peers give you the highest rating. They are your toughest critics. I know that lawyers who are selecting a jury will almost always strike lawyers from that jury list because they are the toughest audience that you have. So this, I think, speaks to the nominee.

And as I understand it, the manner in which you go about rating a judge is not only her experience but also the way that she has gone about reaching her decisions from the point of view of the appropriate role of a judge, her judicial temperament, and the absence of bias in rendering those decisions. And they are exactly what we are looking for from the next Justice on the Supreme Court.

So I just really want to thank you for giving us this information and participating in the process.

Ms. ASKEW. Thank you, Senator.

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Senator WHITEHOUSE. Senator Cornyn.

Senator CORNYN. Thank you, Mr. Chairman. I just want to welcome our two witnesses, and thank you for your assistance to the Committee, and particularly to say how good it is to see Kim Askew, my constituent from Dallas, Texas. She does great work as Chair of the Committee, and welcome. Thank you for your assistance to the Committee in performing its constitutional function.

Ms. ASKEW. Thank you.

Senator WHITEHOUSE. There being no further questions, the panel is excused with our gratitude for a commendable and very diligent effort.

Senator SESSIONS. Thank you very much.

Senator WHITEHOUSE. We will take a 5-minute recess while the next panel assembles.

[Whereupon, at 2:08 p.m., the Committee was recessed.]

After Recess [2:12 p.m.]

Senator WHITEHOUSE. The hearing of the Judiciary Committee will come back to order.

We are awaiting the arrival of Mayor Bloomberg and District Attorney Morgenthau, who are coming down from New York. I'm told that they are 5 minutes away, but the 5 minutes that people are away can be a longer 5 minutes than a regular 5 minutes. So in the interest of the time of the proceeding and of the other witnesses, we will proceed and come to them when they arrive and have a chance to take their seats.

Senator SESSIONS. Well, in the Mayor's defense, he probably thought we would be operating under Senate time and we would certainly be late and he could have a little extra time.

Senator WHITEHOUSE. That is our custom.

Senator SESSIONS. But we're moving along well. Thank you, Mr. Chairman.

Senator WHITEHOUSE. Our first witness then will be Dustin McDaniel. He is the Attorney General for the State of Arkansas and the Southern Chair of the National Association of Attorneys General. Previous to his election as Attorney General, he worked in private practice in Jonesboro, Arkansas. Prior to taking office, Mr. McDaniel also served as a uniformed patrol officer in his hometown of Jonesboro, Arkansas. He is a graduate of the University of Arkansas Little Rock Law School.

Attorney General McDaniel, will you please stand to be sworn?

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?

Mr. MCDANIEL. I do.

Senator WHITEHOUSE. Please be seated.

Attorney Morgenthau, please be seated.

Attorney General McDaniel, please proceed with your statement.

STATEMENT OF DUSTIN MCDANIEL, ATTORNEY GENERAL, STATE OF ARKANSAS

Mr. MCDANIEL. Thank you, Mr. Chairman and Ranking Member Sessions. My name is Dustin McDaniel and I'm the Attorney General of the State of Arkansas. I am here today to speak in support

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of the nomination of Judge Sonia Sotomayor to the Supreme Court of the United States.

We've all heard all week about her compelling life story and impressive accomplishments. I have the highest respect and admiration for her and I'm proud to testify on behalf of this person who was first appointed by President George H.W. Bush, and then by my most famous predecessor in the Arkansas Attorney General's Office, President Bill Clinton.

More specifically, I'm here to rebut any assertion that her participation in the matter of *Ricci* v. *DeStefano* in any way reflects upon her qualifications or abilities to serve as a Justice on the United States Supreme Court.

When the Supreme Court granted certiorari in the *Ricci* case, I, on behalf of the State of Arkansas, joined with five other attorneys general in support of the Second Circuit. Before I address the case and the brief, let me address the parties and their issues.

I entered the world of public service long before I became an elected official. After college, I turned down my admission into law school and took a civil service exam in my hometown of Jonesboro, Arkansas. I became a police officer and I saw firsthand the heroism and dedication of the men and women who protect and serve our communities very day. Firefighters like Frank Ricci and his colleagues run into homes and buildings when everyone else is running out. I have the highest respect and gratitude for all who serve our communities, States, and Nation. They are heroes among us and they deserve to be treated fairly by our system.

My personal experience with the civil service exam was a favorable one, but not all are so lucky. I understand the frustration that the firefighters felt with this process. I also understand the city's fear of litigation and unfair results. I am for a process that is fair. No one should be given an unfair advantage, but no one should be subject to an unfair disadvantage either.

As Attorney General, I represent hundreds of State agencies, boards and commissions in matters of employment law. My job is to allow my clients to do their job without fear of unreasonable litigation. The law had, until recently, allowed for flexibility, necessary for public employers. The Supreme Court's ruling in this case will likely increase costly litigation and the taxpayers will ultimately pay the bill.

All who have commented on the nomination process in recent years have been critical of those who have been labeled an "activist" judge. It's important to note that the Second Circuit's ruling in this case was not judicial activism at work; to the contrary, they followed existing law.

In Ricci, the panel adopted the lengthy analysis of the District Court, which they called "thorough, thoughtful and well-reasoned". The District Court cited cases dating back some 28 years. The ruling was consistent with the law and the doctrine of stare decisis. Granted, the Supreme Court, in a closely divided opinion, ruled differently, but in doing so it set new precedent.

It is also important to note that the Second Circuit's ruling was supported by many prestigious groups, including the EEOC, the Department of Justice, the National League of Cities, the National Association of Counties, International Municipal Lawyers Associa-

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tion, and the Republican and Democratic Attorneys General of Alaska, Iowa, Arkansas, Maryland, Nevada, and Utah. There's a large body of research available on Judge Sotomayor's record.

No allegation that she rules based on anything other than the law can stand when cast in the light of her actual record. The Congressional Research Service concluded, "Perhaps the most consistent characteristic of her approach as an appellate judge could be described as an adherence to the doctrine of stare decisis", that is, upholding past judicial precedents.

One only has to look so far as to her own words. In *Hayden* v. *Pataki*, she wrote in a dissent, "It is the duty of a judge to follow the law, no question its plain terms." She concluded by saying, "Congress would prefer to make any needed changes itself rather than have courts do so for it. In my opinion, Judge Sotomayor is abundantly qualified and is an excellent nominee. I believe that the people of the United States would be well served by her presence on the courts.

It is my great honor and privilege to be here at this Committee, and I thank you ever so much for the opportunity to appear here today. Thank you.

Senator WHITEHOUSE. Thank you very much, Attorney General McDaniel.

We will do a round of questions for the Attorney General and then once the—since the panel is completely assembled, I will have all the witnesses sworn and then we will proceed to Mayor Bloomberg, to District Attorney Morgenthau, and on across the panel, with one brief interruption to allow the distinguished Senator from the State of New York, Senator Schumer, to introduce Mayor Bloomberg.

Attorney General McDaniel, as a—as an experienced lawyer, is—let me ask you, is it not the case that it's the Supreme Court's task very frequently to resolve conflicts between the Circuit Court of Appeal?

Mr. MCDANIEL. Yes, of course it is, Senator.

Senator WHITEHOUSE. And if a Circuit Court is bound by its own prior precedent and therefore the doctrine of stare decisis controls a particular decision, that does not in any way inhibit the Supreme Court from reviewing that second decision against conflicting decisions from other circuits in its task in resolving those conflicts, correct?

Mr. MCDANIEL. That's—that is correct.

Senator WHITEHOUSE. Is it your sense that that is what occurred in this case, that the Second Circuit, in *Ricci*, felt itself bound by stare decisis as a result of its prior precedent, but that the Supreme Court took the case to resolve issues of conflict with other circuits?

Mr. MCDANIEL. Well, it certainly seems clear that the—the binding law from the Supreme Court, which dated back up to 28 years, made it clear that remedial actions, although race-conscious, race-neutral, were permissible. I think that that is precisely what the case demonstrated and how the court ruled, and why the States that—that participated, Arkansas included, thought that it was important to preserve for our clients the ability to try to avoid litigation if they think they cannot defend an existing practice. If they

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cannot defend it, no lawyer would tell their client, oh, go do it anyway. But clearly the Supreme Court thought that it was ripe for review, and they also thought that it was ripe to change the law, which is their purview, and that's what they did.

Senator WHITEHOUSE. That's an interesting point. And many observers, including prominent observers who have had their views expressed in the public media about this, have indicated that that decision changed the landscape of civil rights law. If a judge is a cautious and conservative jurist on a Circuit Court, do you believe it's appropriate for the Circuit Court to change the landscape of civil rights law?

Mr. MCDANIEL. Absolutely not. I don't think that the Second Circuit did anything short of what it had to do, which was to apply the existing law. The fact that the majority—a bare majority—in the United States Supreme Court decided to change existing law, frankly, that would have been inappropriate for the Second Circuit to take that responsibility on itself.

Senator WHITEHOUSE. Thank you, Attorney General.

Senator SESSIONS. Thank you, Mr. McDaniel. I was a 2-year Attorney General, and it was a great honor.

With regard to the *Ricci* case, are you aware that the panel attempted to decide this case on a summary order, writing no opinion, not even a pro curium opinion?

Mr. MCDANIEL. I am aware of that, sir.

Senator SESSIONS. And are you aware that by chance one of the other members of the Circuit found out about that and an uproar of sorts occurred because the people—the other members—other members of the Circuit were very concerned about the opinion and thought it was an important opinion. Are you aware of that?

Mr. MCDANIEL. I know that the—I know that the panel, or at least the body of judges, chose to review the matter and they voted not to meet en banc, and that there was——

Senator SESSIONS. That's correct.

Mr. MCDANIEL.—a pro curium that was issued.

Senator SESSIONS. That's correct. Now, by you—now, you say that there was Second Circuit opinion and authority to uphold this case. But—but on re-hearing, the slate is wiped clean and the panel can develop or formulate new authority or determine clearly whether or not that previous case may have applied. And are you aware that when they voted, the vote was 6:6 and Judge Sotomayor was the key vote in deciding not to re-hear the case? Therefore, we can conclude that not only did she decide this case, but it's really not accurate to say she was just following authority since it was her vote that didn't allow that authority to be reevaluated.

Mr. MCDANIEL. Well, Senator, she was in the majority, so it's fair to say that any one of those judges could be the deciding vote that——

Senator SESSIONS. That is correct. But it's not fair, I think, to say that she didn't have an opportunity to reevaluate it. She was simply applying a law that she was bound to follow when she could have—if she felt differently, she could have called—she could have allowed it to have been re-discussed.

Mr. MCDANIEL. Well, I also think that there were Supreme Court cases, not just Second Circuit cases.

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Senator SESSIONS. Well, are you aware that the Supreme Court says there were not? Are you aware the Supreme Court, in their opinion, said there was no Supreme Court authority on this matter?

Mr. MCDANIEL. I have read their opinion and I tend to agree with the minority, that this was, in fact, squarely within the——

Senator SESSIONS. Okay. Now, you filed—which I give you credit for. I did some of these things when I was Attorney General. You—you joined with 32 other State attorneys general in submitting an amicus brief to the U.S. Supreme Court on the *Heller* case. You took the provision—the brief argues that "the right to keep and bear arms is among the most fundamental of rights because it is essential to securing all other liberties". I see the Mayor not happily listening to that.

[Laughter.]

Senator SESSIONS. You—but—so you believe that the Second Amendment is a fundamental right. Are you aware that Sandy Froman, the former president of NRA—you're probably not familiar with this letter. But she's a lawyer, and—and pointed out that *Heller* was just a 5:4 opinion, with some Justices arguing that the Second Amendment does not apply to private citizens, or that if it does, even a total gun ban would be upheld if a legitimate government interest could be found. The dissenting Justices also found that DC's absolute gun ban on handguns within the home a reasonable restriction. That wouldn't play too well in Alabama, and probably not Arkansas, Oklahoma, or Texas. But most places.

So I guess I'm saying, are you concerned that—and are you aware, of course, of the *Maloney* case in which Judge Sotomayor—and I think she can contend there was authority in that case that justified her concluding the Second Amendment does not apply to the States, but I was disappointed in the breadth, and the way she wrote it gave me concern.

So are you aware that one vote on the Supreme Court can make the difference on the question of whether or not the right to keep and bear arms is protected against mayors or legislatures of States who disagree?

Mr. MCDANIEL. Well, I was proud to join Arkansas into the brief on *Heller* v. *District of Columbia*. I intend to join again in the *NRA* v. Chicago in the attempt to have the Supreme Court review and take up the question, which I believe is ripe, as to whether or not the Second Amendment is applied to the States as incorporated by the Fourteenth Amendment. I do believe that the Second Amendment is a fundamental right, and I do believe that it is an individual right, not one tied to participation in a militia.

The Attorney General, the current Attorney General in Texas, Senator Cornyn's successor, and I have spent some time on that issue, even recently. And I am not, nonetheless, concerned with Judge Sotomayor's position. I am confident that her answers that she's provided to this Committee and her record are consistent with one another, and I do not believe that the right to keep and bear arms is at risk with this nominee, or frankly I wouldn't testify for her.

Senator SESSIONS. Well, thank you. I think it is.

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Senator WHITEHOUSE. Now that the panel is assembled, I will swear the entire panel in. We will return to regular order. You can all give your opening statements, and then questioning will begin at the conclusion of those opening statements.

Would you please stand to be sworn? You may sit.

Do you affirm that 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?

Mayor BLOOMBERG. I do.

Mr. MORGENTHAU. I do.

Mr. HENDERSON. I do.

Mr. RICCI. I do.

Mr. VARGAS. I do.

Mr. KIRSANOW. I do.

Ms. CHAVEZ. I do.

Senator WHITEHOUSE. Please be seated.

I will recognize Senator Schumer for a moment to welcome his constituent and the mayor of New York City, Michael Bloomberg.

Senator SCHUMER. Well, it's my honor to welcome two very distinguished constituents here. I want to thank every witness for coming, but particularly extend a welcome to two of New York's greatest public servants, Mayor Bloomberg and District Attorney Morgenthau. As you know, this nomination is the source of enormous pride to all New Yorkers, and your support for Judge Sotomayor has been extremely helpful to this Committee, to the Senate as a whole, and to the Nation in understanding what kind of Justice she will be, and very much appreciate your being here.

Thank you, Mr. Chairman.

Senator CARDIN. Welcome.

Mayor Bloomberg is the mayor of New York City. He is currently serving in his third term as mayor. He founded Bloomberg, LP, a New York City company that now has employees in more than 100 cities. Mayor Bloomberg is a graduate of Johns Hopkins University located in Baltimore, Maryland and Harvard Business School.

We look forward to your testimony.

STATEMENT OF HON. MICHAEL BLOOMBERG, MAYOR, CITY OF NEW YORK

Mayor BLOOMBERG. Mr. Chairman, thank you. Ranking Member Sessions, thank you very much. Senator, Senator, Senator. Senator Sessions, I must say, as a former gun owner, a former member of the NRA, and also a staunch defender of the Second Amendment, we probably don't disagree very much if we really had a chance to talk.

In any case, I wanted to thank everyone for the opportunity to testify before you today. I'm Mike Bloomberg and I'm here not only as the mayor of New York City, the city where Judge Sonia Sotomayor has spent her entire career, but also as someone who has appointed or reappointed more than 140 judges to New York City's criminal and family courts. So, I do appreciate the job before you.

About 3 months ago when President Obama invited Governor Schwarzenegger, Ed Rendell, and me to the White House to discuss infrastructure policy, I did find an opportunity to tell him what

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many of the best legal minds in New York were telling me: Judge Sonia Sotomayor would be a superb Supreme Court Justice. I strongly believe that she should be supported by Republicans, Democrats and independents, and I should know because I've been all three.

[Laughter.]

Mayor BLOOMBERG. Judge Sotomayor has all the key qualities that I look for when I appoint a judge. First, she is someone with a sharp and agile mind, as her distinguished record and her testimony, I think, made clear. And as a former prosecutor, commercial litigator, District Court judge and appellate judge, she certainly brings a wealth of unique experience.

Second, she is an independent jurist who does not fit squarely into an ideological box. A review of her rulings by New York University's Brennan Center found that judges on the Second Circuit court who were appointed by Republicans agreed with her more than 90 percent of the time when overruling a lower court decision, and when ruling a governmental action unconstitutional. So this is clearly someone whose decisions have cut across party lines, which is something I think the Supreme Court could use more of.

And third, whether you agree or disagree with her on particular cases, she has a record of sound reasoning. In interviewing judicial candidates, I like to ask questions that have no easy answers and then listen to how they develop their responses. I want to know that they are open-minded enough to change their views if they hear compelling evidence and to see if they can provide a strong rationale for their legal conclusions, even if I disagree with it.

The fact is, you're never going to agree with a judicial candidate on every issue. I've appointed plenty of judges whose answers I don't agree with at all, and I should point out that includes times when Judge Sotomayor has ruled against New York City, as she has done in a number of cases. So I'm not here as someone who agrees with the outcome of her decisions 100 percent of the time, and I don't think that that should be the standard.

Now, I'm not a lawyer or a constitutional scholar, but I think the standard should be: does she apply the law based on rational legal reasoning and is she within the bounds of mainstream thinking on issues of basic civil rights? And on both questions, I think the answer is, unequivocally, yes. It's impossible to know how she will rule on cases in the future, or even what those cases might be.

Given that a Supreme Court judge is likely to serve for decades, focusing on the issues de jour rather than intellectual capacity, analytical ability, and just plain common sense would miss what this country clearly needs: someone who has the ability to provide us with the legal reasoning and guidance that will be necessary to navigate the uncharted waters of tomorrow's great debates. And I'm very confident that Judge Sotomayor has that ability.

Finally, as the mayor of her hometown I would just like to make two brief points. First, on the issue of diversity; The Supreme Court currently includes one member who grew up in Brooklyn and one who grew up in Queens, and so there's no doubt that adding someone who comes from the Bronx would improve the diversity of this court.

[Laughter.]

Mayor BLOOMBERG. And if you disagree with me, you haven't been to Brooklyn, Queens, or the Bronx.

[Laughter.]

Mayor BLOOMBERG. But seriously, Sonia Sotomayor is the quintessential New York success story. She has beaten all the odds and rose to the top. If that's not the American dream, I don't know what is. However, I don't believe she should be confirmed on the strength of her biography, but I do think that her life's story tells you an awful lot about her character and ability.

And second, I just want to add a caution against those who would suggest that Judge Sotomayor's service to the Puerto Rican Legal Defense and Education Fund is somehow a negative. That's an organization that is well-respected for its civil rights work in New York City, and although I certainly have not always seen eye-to-eye on every issue with them, there's no question that they have made countless contributions to our city, and Judge Sotomayor should be based solely on her record and not on the record of others in the group.

So, thank you very much for the opportunity to testify, and I urge you to confirm Sonia Sotomayor as a Justice of the United States Supreme Court.

Senator CARDIN. Mayor Bloomberg, thank you very much for your testimony.

We'll now hear from Robert Morgenthau. Mr. Morgenthau has been the District Attorney of New York County since 1975 and is the longest-serving incumbent of that position. During his nine terms in office, his staff has conducted about 3.5 million criminal prosecutions in homicides in Manhattan, and has a rate of 90 percent success. A graduate of Yale Law School, District Attorney Morgenthau served aboard a Naval destroyer through World War II.

It's a real pleasure to have you before our Committee.

STATEMENT OF ROBERT MORGENTHAU, DISTRICT ATTORNEY, NEW YORK COUNTY, NEW YORK

Mr. MORGENTHAU. Thank you, Mr. Chairman. I appreciate the opportunity of testifying today, and I'm pleased to join those who endorse the nomination of Judge Sotomayor to the United States Supreme Court.

I first came to know Judge Sotomayor when I was on a recruiting trip to the Yale Law School. At that time, José Cabranes was Yale's general counsel. He also tought at the law school. I asked him if there was anyone special I should speak with and he said, yes. He said a remarkable student named Sonia Sotomayor was deciding where to work, and while he did not know whether she'd given any thought to being a prosecutor, it would be well worth my while to meet her. He was decidedly correct.

I'm happy to be able to say that the Judge joined my office and remained with us for 5 years. In my conversations with her, I learned about the compelling story of her life with which you are now familiar. In a nutshell, she was raised by her mother in a working-class home in South Bronx, and as a teenager worked the evening shift in a garment factory to help make ends meet. She went on through hard work and force of will to overcome her initial

difficulties with English composition to win Princeton University's highest undergraduate honor, the Pyne Prize, and to graduate with Honors from the Yale Law School.

In the District Attorney's Office, the Judge was immediately recognized by trial judges—and supervisors as someone "a step ahead of her colleagues", "one of the brightest and most mature, hard-working, stand-out", "was marked for rapid advancement. Ultimately, she took on every kind of criminal case that comes into an urban courthouse, from turnstile jumping to homicide.

One of those cases, the "Tarzan" murder case, involved an addicted burglar named Richard Maddicks, who had terrorized the neighborhood during crime sprees that left three dead and involved his swinging into apartment windows from rooftops, shooting anyone in his way. He is now serving a 137 years to life sentence.

Another case prosecuted by Assistant D.A. Sotomayor in 1983 involved a Times Square child pornography operation. That was the first child prosecution in New York after a landmark 1982 Supreme Court decision, *People* v. *Furman*, upholding New York's new child pornography laws.

Assistant D.A. Sotomayor left the jurors in tears over what the defendants had done to child victims. These cases happened to grab the public attention, but Judge Sotomayor—Assistant D.A. Sotomayor—understood that every case is important to the victim and appropriately gave undivided attention to the proper disposition of all of them.

Assistant District Attorney Sotomayor soon developed a reputation. Unlike many beginning prosecutors, she simply would not be pushed around, by judges or by attorneys. Some judges were eager to dispose of cases cheaply to clear their calendars. ADA Sotomayor, instead, fought for the right conclusion in each case. Maybe that experience in the criminal court in New York City helped her prepare for these hearings.

After leaving my office, Judge Sotomayor joined a prominent law firm and also accepted a part-time appointment of the New York City Campaign Finance—there she continued to earn a reputation for being tough, fair, nonpolitical in an arena where those characteristics were sorely needed, and she has taken those characteristics with her to the Federal bench, where they are equally important.

Judge Sotomayor's career in the law has spanned three decades and she has worked in almost every level of our judicial system: prosecutor, private litigator, trial court judge, and an appellate court judge in what I think is the second-most important court in the world. She has been an able champion of the law and her depth of experience will be invaluable on our highest court.

Judge Sotomayor is highly qualified for any position in which a first-rate intellect, common sense, collegiality, and good character would be assets. I might add that the Judge will be the only member of the Supreme Court with experience trying criminal cases in the State courts. The overwhelming majority of American prosecutions occur in State courts.

Judge Sotomayor will bring to the court a full understanding of problems faced by prosecutors in those cases, as well as a first-hand knowledge of the trauma faced by victims and of the legiti-

mate needs of police officials that work in the State law enforcement system. She will also understand the impact of Federal judicial decisions on State prosecutions.

In short, the Judge is uniquely qualified, by intellect, experience, and commitment to the rule of law to be an outstanding—and I repeat, outstanding—member of the court. President Obama, and for that matter the United States, should be proud to see once more the realization of that simple American credo, that in this country a hardworking person with talent can rise from humble beginnings to one of the highest positions in the land.

Thank you, Mr. Chairman, for the opportunity to testify today.

Senator CARDIN. Thank you very much for your testimony.

We'll now hear from Wade Henderson, a familiar person to this Committee. Wade Henderson is the president and CEO of the Leadership Conference on Civil Rights and counsel to the Leadership Conference Education Fund. He is a professor of public interest law at the University of the District of Columbia. Prior to his role with the Leadership Conference, Mr. Henderson was the Washington Bureau Director of the NAACP. Mr. Henderson is a graduate from Rutgers University School of Law.

Mr. Henderson.

STATEMENT OF WADE HENDERSON, PRESIDENT AND CEO, LEADERSHIP CONFERENCE ON CIVIL RIGHTS

Mr. HENDERSON. Thank you, Mr. Chairman, Ranking Member Sessions, members of the Committee. I have the privilege of representing the views of the Leadership Conference, the Nation's leading civil and human rights coalition, consisting of more than 200 organizations working to build an America that's as good as its ideals.

This afternoon I will briefly address four of the points that have figured in the debate about Judge Sotomayor's nomination: first, her qualifications for serving on the Nation's highest court; second, her personal background and her empathy for others who have had to work hard to succeed; third, her role in the unanimous ruling by a three-judge panel in the case of *Ricci* v. *DeStefano*; and fourth, her past membership on the board of one of the Leadership Conference's member organizations, the Puerto Rican Legal Defense and Education Fund.

First, let me rejoice in what is self-evident. The nomination of Judge Sotomayor to be an Associate Justice on our Nation's highest court is a milestone by many standards. The Nation's first African-American President has nominated the first Hispanic-American, only the third woman, and only the third person of color to serve on the Supreme Court. While great challenges remain on our Nation's quest for equal opportunity, we have truly reached an historic marker on the journey toward our goal of "Equal Justice For All", the phrased inscribed not far from here on the front of the Supreme Court building.

But hopeful and historic as her nomination has been, Judge Sotomayor should herself be just not by who she is, but by what she has done. Now, let me be as clear as I can: there is no question that she is qualified. Judge Sotomayor's eloquent and thoughtful testimony before this Committee speaks for itself.

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Her distinguished career at Princeton and Yale Law School have been much stated. She then spent 5 years as a prosecutor, as we've heard, in Manhattan, working for the legendary District Attorney Robert Morgenthau—pleased to have him here today—and 8 years as a corporate litigator. Seventeen years as a Federal District Court judge and appellate court judge add up to an individual who is one of the most qualified to have ever come before this Committee.

Second, as with other nominees across the philosophical spectrum, including Justice's Thomas and Alito, Judge Sotomayor has spoken of her family history and her personal struggles. These experiences help her to understand others and to do justice. They further qualify her for the highest court, and she has said and done nothing that could reasonably be understood otherwise.

Third, Judge Sotomayor has participated in thousands of cases and authored hundreds of opinions, but much of the debate about her nomination has concentrated on the difficult case of *Ricci* v. *DeStefano*. Whatever one may feel about the facts of this case, we all agree that the Supreme Court, in its *Ricci* decision, set a new standard for interpreting Title 7 of the 1964 Civil Rights Act. Using this one decision to negate Judge Sotomayor's 17 years on the bench does a disservice to her record and to this country.

Fourth, I must speak to the attacks on Judge Sotomayor because of her service on the board of one of our Nation's leading civil rights organizations. These attacks do an injustice not only to Judge Sotomayor and to the Puerto Rican Legal Defense and Education Fund, but also to the entire civil rights community and to all those who look to us for a measure of justice.

Make no mistake, legal defense funds play an indispensable role in American life. They are private attorneys general that assist individuals, often those with few resources and no other representation, to become full shareholders in the American dream.

When Justice Thurgood Marshall was nominated there were those who questioned his role with the NAACP Legal Defense Fund, but history does not remember their quibbles kindly. Judge Sotomayor has lived the American dream and she understands all who aspire to it. Her qualifications are unquestioned and the lessons that she has learned in her life, as well as in libraries, will serve her and our country well in the years ahead. All those who walk through the entrance to the Supreme Court seeking what is inscribed above its door, "Equal Justice Under Law", can be confident that a Justice Sotomayor will continue to do her part to keep the promise of our courts and our country.

Thank you very much.

Senator CARDIN. Well, thank you very much—for your testimony.

We'll now hear from Frank Ricci, a name that's been mentioned second only to Sotomayor during this hearing. Frank Ricci has over a decade of experience as a firefighter with the New Haven Fire Department and was a plaintiff in the case of *Ricci* v. *DeStefano*. He's a contributing author of two books on firefighting.

It's a pleasure to have you before the Committee.

STATEMENT OF FRANK RICCI, DIRECTOR OF FIRE SERVICES, CONNECTICOSH (CONNECTICUT COUNSEL ON OCCUPATIONAL SAFETY AND HEALTH)

Mr. RICCI. Thank you, Senator. Thank you for the opportunity to appear before this distinguished Committee. I accepted, with honor, the invitation to tell my story. Many others have a similar story and I feel I'm speaking for them as well.

The New Haven firefighters were not alone in their struggle. Firefighters across the country have had to resort to the Federal courts to vindicate their civil rights. Technology and modern threats have challenged our profession. We have become more effective and efficient, but not safer. The structures we respond to today are more dangerous, constructed with lightweight components that are prone to early collapse, and we face fires that can double in size every 30 to 60 seconds.

Too many think that firefighters just fight fires. Officers are also responsible for mitigating vehicle accidents, hazardous material incidents, and handling complicated rescues. Rescue work can be very technical. All of these things require a great deal of knowledge and skill.

Lieutenants and Captains must understand the dynamic fire environment and the critical boundaries we operate in. They are forced to make stressful decisions based on imperfect information and coordinate tactics that support our operational objectives. Almost all our tasks are time-sensitive. When your house is on fire or your life is in jeopardy, there are no time for do-overs.

The lieutenant's test that I took was, without a doubt, a job-related exam that was based on skills, knowledge, and abilities needed to ensure public and the firefighters' safety. We all had an equal opportunity to succeed as individuals and we were all provided a road map to prepare for the exam. Achievement is neither limited nor determined by one's race, but by one's skills, dedication, commitment, and character. Ours is not a job that can be handed out without regard to merit and qualifications.

For this reason, I, and many others, prepared for these positions throughout our careers. I studied harder than I ever had before, reading, making flash cards, highlighting, reading again, all while listening to prepared tapes. I went before numerous panels to prepare for the oral assessment. I was a virtual absentee father and husband for months because of it.

In 2004, the city of New Haven felt not enough minorities would be promoted and that the political price for complying with Title 7, the city's civil service rules, and the charter would be too high, therefore they chose not to fill the vacancies. Such action deprived all of us the process set forth by the rule of law. Firefighters who earn promotions were denied them.

Despite the important civil rights and constitutional claims we raised, the Court of Appeals panel disposed of our case in an unsigned, unpublished summary order that consisted of a single paragraph that made mention of my dyslexia, and thus led many to think that this was a case about me and a disability. This case had nothing to do with that. It had everything to do with ensuring our command officers were competent to answer the call and our right to advance in our profession based on merit, regardless of race.

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Americans have the right to go into our Federal courts and have their cases judged based on the Constitution and our laws, not on politics or personal feelings. The lower court's belief that citizens should be reduced to racial statistics is flawed. It only divides people who don't wish to be divided along racial lines. The very reason we have civil service rules is to root out politics, discrimination, and nepotism. Our case demonstrates that these ills will exist if the rules of merit and the law are not followed.

Our courts are the last resorts for Americans whose rights are violated. Making decisions on who should have command positions solely based on statistics and politics, where the outcome of the decision could result in injury or death, is contrary to sound public policy.

The more attention our case got, the more some people tried to distort it. It bothered us greatly that some perceived this case as involving a testing process that resulted in minorities being completely excluded from promotions. That was entirely false, as minority firefighters were victimized by the city's decision as well. As a result of our case, they should now enjoy the career advancement that they've earned and deserve.

Enduring over 5 years of court proceedings took its toll on us and our families. The case was longer—was no longer just about us, but about so many Americans who had lost faith in the court system. When we finally won our case and saw the messages we received from every corner of the country, we understood that we did something important together: we sought basic fairness and even-handed enforcement of the laws, something all Americans believe in.

Again, thank you for the honor and privilege of speaking to you today.

Senator CARDIN. Mr. Ricci, thank you very much for your testimony.

We'll now hear from Lieutenant Ben Vargas. Benjamin Vargas is a lieutenant in the New Haven Fire Department and was a plaintiff in the case of *Ricci* v. *DeStefano*. He also worked part-time as a consultant for a company that sells equipment to firefighters.

Mr. Vargas.

STATEMENT OF LIEUTENANT BEN VARGAS, NEW HAVEN FIRE DEPARTMENT

Mr. VARGAS. Thank you. Members of this Committee, it is truly an honor to be invited here today.

Notably, since our case was summarily dismissed by both the District Court and the Court of Appeals panel, this is the first time I'm being given the opportunity to sit and testify before a body and tell my story. I thank you for this—Committee for the opportunity.

Senators of both parties have noted the importance of this proceeding because decisions of the United States Supreme Court can greatly impact the everyday lives of ordinary Americans. I suppose that I and my fellow plaintiffs have shown how true that is. I never envisioned being a plaintiff in a Supreme Court case, much less one that generated so much media and public interest. I am Hispanic and proud of the heritage and background that Judge Sotomayor and I share, and I congratulate Judge Sotomayor on her nomination.

But the focus should not have been on me being Hispanic. The focus should have been on what I did to earn a promotion to captain, and how my own government and some courts responded to that. In short, they didn't care. I think it important for you to know what I did, that I played by the rules and then endured a long process of asking the courts to enforce those rules.

I am the proud father of three young sons. For them, I sought to better my life and so I spent 3 months in daily study preparing for an exam that was unquestionably job-related. My wife, a special education teacher, took time off from work to see me and our children through this process.

I knew we would see little of my sons during these months when I studied every day at a desk in our basement, so I placed photographs of my boys in front of me. When I would get tired and went to stop—wanted to stop, I would look at the pictures, realize that their own futures depended on mine, and I would keep going. At one point, I packed up and went to a hotel for days to avoid any distractions, and those pictures came with me.

I was shocked when I was not rewarded for this hard work and sacrifice, but I actually was penalized for it. I became not Ben Vargas the fire lieutenant who proved himself qualified to be captain, but a racial statistic. I had to make decisions whether to join those who wanted promotions to be based on race and ethnicity or join those who would insist on being judged solely on their qualifications and the content of their character. I am proud of the decision I made, and proud of the principle that our group vindicated together.

In our profession, we do not have the luxury of being wrong or having long debates. We must be correct the first time and make quick decisions under the pressure of time and rapidly unfolding events. Those who make these decisions must have the knowledge necessary to get it right the first time. Unlike the judicial system, there are no continuances, motions or appeals. Errors and delays can cost people their lives.

In our profession, the racial and ethnic make-up of my crew is the least important thing to us and to the public we serve. I believe that countless Americans who had something to say about our case understand that now. Firefighters and their leaders stand between their fellow citizens and catastrophe. Americans want those who are the most knowledge and qualified to do the task. I am willing to risk, and even lay down, my life for fellow citizens, but I was not willing to go along with those who placed racial identity over these more critical considerations.

I am not a lawyer, but I quickly learned about the law as it applied to this case. Studying it as much as I studied for my exam, I thought it clear that we were denied our fundamental civil rights. I expected Lady Justice with the blindfolds on, and a reasoned opinion from a Federal Court of Appeals telling me, my fellow plaintiffs, and the public that the court's view on the law—what the court's view on the law was, and do it in an open and transparent way. Instead, we were devastated to see a one-paragraph, unpublished order summarily dismissing our case, and indeed even the notion that we had presented important legal issues to that Court of Appeals.

I expected the judges who heard my case along the way to make the right decisions, the ones required by the rule of law. Of all that has been written about our case, it was Justice Alito who best captured our own feelings. We did not ask for sympathy or empathy, we asked only for even-handed enforcement of the law, and prior to the majority Justice opinion in our case, we were denied just that.

Thank you.

Senator CARDIN. Thank you for your testimony.

We'll now hear from Peter Kirsanow. Peter Kirsanow serves on the U.S. Commission on Civil Rights. He's a member of the National Labor Relations Board, where he received a recess appointment from President George W. Bush. Previously, he was a partner with the Cleveland law firm of Benesch, Friedlander, Coplan & Aronoff. Mr. Kirsanow received his law degree from Cleveland State University.

STATEMENT OF PETER KIRSANOW, COMMISSIONER, U.S. COMMISSION ON CIVIL RIGHTS

Mr. KIRSANOW. Thank you, Mr. Chairman, Senator Sessions, members of the Committee. I am Peter Kirsanow, member of the U.S. Commission on Civil Rights. I am currently back at Benesch, Friedlander in the Labor Employment Practice Group. I'm here in my personal capacity.

The U.S. Commission on Civil Rights was established by the——

Senator SESSIONS. Is that microphone on?

Mr. KIRSANOW. The U.S. Commission on Civil Rights was established by the 1957 Civil Rights Act to, among other things, act as a national clearinghouse for information related to denials of equal protection and discrimination.

In furtherance of the clearinghouse process, my assistant and I reviewed the opinions in civil rights cases in which Judge Sotomayor participated while on the Second Circuit in the context of prevailing civil rights jurisprudence, and with particular attention to the case of *Ricci* v. *DeStefano*. Our review revealed at least three significant concerns with respect to the manner in which the three-judge panel that included Judge Sotomayor handled the case.

The first concern was, as you've heard, the summary disposition of this particular case. The *Ricci* case contained constitutional issues of extraordinary importance and impact. For example, the issues of—that are very controversial and volatile—racial quotas and racial discrimination. This was a case of first impression, no Second Circuit or Supreme Court precedent on point. Indeed, to the extent there were any cases that could provide guidance, such as *Wygant*, *Crowson*, *Adderand*, even private sector cases such as *Johnson Transportation*, *Frank* v. *Xerox*, *Rubber* v. *Steelworkers*, would dictate or suggest a result opposite of that reached by the Sotomayor panel.

The case contained a host of critical issues for review, yet the three-judge panel summarily disposed of the case, as you've heard, in an unpublished, one-paragraph pro curium opinion that's usually reserved for cases that are relatively simple, straightforward, and inconsequential.

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The second concern is that the Sotomayor panel's order would inevitably result in proliferation of de facto racial and ethnic quotas. The standard endorsed by the Sotomayor panel was lower than that adopted by the Supreme Court's test of strong basis in evidence. Essentially, any race-based—decision evoked to avoid a disparate impact lawsuit would provide immunity from Title 7 review. Under this standard, employees who fear the prospect or expense of litigation, regardless of the merits of the case, would have a green light to resort to racial quotas.

But even more invidious is the use of quotas due to racial politics, and as Judge Alito's concurrence showed, there was glaringly abundant evidence of racial politics in the *Ricci* case. Had the Sotomayor panel decision prevailed, employees would have license to use racial preferences and quotas on an expansive scale. Evidence introduced before the Civil Rights Commission shows that when courts open the door to preferences just a crack, preferences expand exponentially.

For example, evidence adduced before hearings of the Civil Rights Commission in 2005 and 2006 show that despite the fact that Adderand was passed more than—or decided more than 10 years ago, Federal agencies persist in using race-conscious programs in Federal contracting, governmental contracting as opposed to race-neutral alternatives. Moreover, even though the Supreme Court had struck down the use of raw numerical rating in college admissions in *Gratz* v. *Bollinger*, thereby requiring that race be only a mere plus factor, a thumb on the scale in the admissions process, powerful preferences show no signs of abating.

A study by the Center for Equal Opportunity showed that at a major university, preferences were so great that the odds that a minority applicant would be admitted over a similarly situated white comparative were 250:1, at another major university, 1,115:1. That's not a thumb on the scale, that's an anvil. And had the reasoning of the *Ricci* case in the lower court prevailed, what happened to Firefighter Ricci and Lieutenant Vargas would happen to innumerably more Americans of every race throughout the country.

The third concern is that the lower court's decision that would permit racial engineering by employers would actually harm minorities who are purported beneficiaries of that particular decision. Evidence adduced at a 2006 Civil Rights Commission hearing shows that there's increasing data that preferenced—preferences create mismatch effects that actually increase the probabilities that minorities will fail if they receive beneficial treatment or preferential treatment.

For example, black law students who are admitted under preferences are 2.5 times more likely not to graduate than a similarly situated white or Asian comparative, 4 times as likely not to pass the bar exam on the first try, and 6 times as likely never to pass the bar exam, despite multiple attempts.

Mr. Chairman, it is respectfully submitted that if a nominee's interpretive doctrine permits an employer to treat one group preferentially today, there's nothing that prevents them from treating another group or shifting the preferences to another group tomorrow, and that's contrary to the colorblind ideal contemplated by the

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

Thank you, Mr. Chairman.

Senator CARDIN. And thank you for your testimony.

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

STATEMENT OF LINDA CHAVEZ, PRESIDENT, CENTER FOR EQUAL OPPORTUNITY

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

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

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

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

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

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

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

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

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

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

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

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

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

Senator CARDIN. Thank you for your testimony.

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

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

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

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

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

Thank you very much.

Senator CARDIN. Thank you, Mr. Chairman.

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

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

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

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

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

Senator CARDIN. Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

Senator CARDIN. Thank you very much.

Senator Sessions.

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

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

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

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

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

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

Senator SESSIONS. I am impressed to hear that.

[Laughter.]

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

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

[Laughter.]

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

Senator SESSIONS. I may want to restate that.

[Laughter.]

Senator SESSIONS. Let me correct the record.

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

Senator SESSIONS. I misspoke.

Mr. HENDERSON. No. Quite all right.

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

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

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

Could you share precisely what that is?

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

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

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

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

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

Mr. VARGAS. Absolutely.

Senator SESSIONS. You think you——

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

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

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

Senator SESSIONS. Thank you.

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

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

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

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

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

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

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

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

Senator SESSIONS. Thank you.

Senator CARDIN. Senator Durbin.

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

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

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

Senator DURBIN. So that would have been——

Ms. CHAVEZ. I admire——

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

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

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

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

Senator DURBIN. Well, I——

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

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

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

Mr. MORGENTHAU. Absolutely not.

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

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

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

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

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

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

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

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

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

[Laughter.]

Senator DURBIN. But I happen to agree with you.

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

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

Senator DURBIN. Thank you very much.

Thanks, Mr. Chairman.

Senator CARDIN. Thank you.

Senator Sessions indicated Senator Graham will be next to inquire.

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

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

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

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

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

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

Senator GRAHAM. Yeah. I totally understand.

Ms. CHAVEZ.—it's not——

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

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

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

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

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

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

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

Senator GRAHAM. Yeah.

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

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

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[Laughter.]

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

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

[Laughter.]

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

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

Mr. VARGAS. Yes, sir.

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

Mr. VARGAS. I received lots of criticism.

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

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

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

Mr. VARGAS. Yes.

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

Mr. VARGAS. Absolutely. Yes.

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

Mr. VARGAS. Thank you, Senator.

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

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

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

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

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

Senator CARDIN. Senator Klobuchar.

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

Senator CARDIN. Senator Specter.

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

[Laughter.]

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

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

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

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

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

Senator KLOBUCHAR. Okay.

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

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

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

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

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

Senator KLOBUCHAR. Very good.

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

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

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

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

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

Mayor BLOOMBERG. No, I wouldn't——

[Laughter.]

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

Senator KLOBUCHAR. I would agree. Thank you.

Senator CARDIN. Senator Hatch.

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

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

Mayor BLOOMBERG. Thank you.

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

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

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

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

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

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

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

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

Mr. KIRSANOW. It was——

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

Mr. KIRSANOW. Right.

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

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

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

Mr. KIRSANOW. Precisely.

Senator HATCH. And this was——

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

Senator HATCH. Right.

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

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

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

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

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

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

Mr. KIRSANOW. Correct.

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

Mr. KIRSANOW. Correct.

Senator HATCH. So the firefighters won.

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

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

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

Mr. VARGAS. That's absolutely right.

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

Mr. RICCI. Yes.

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

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

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

Mr. RICCI. Yes, Senator.

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

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

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

Senator HATCH. Okay.

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

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

Thank you, Mr. Chairman.

Senator CARDIN. Thank you.

Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Senator SPECTER. I regret——

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

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

[Laughter.]

Senator SPECTER. Except that I agreed with their testimony.

Thank you, Mr. Chairman.

Senator CARDIN. Thank you, Senator.

Senator Cornyn.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Senator CORNYN. I couldn't agree more.

Thank you, Mr. Chairman.

Senator CARDIN. Senator Kyl.

Senator KYL. Thank you, Mr. Chairman.

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

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

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

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

Lieutenant Vargas.

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

Senator KYL. That was pretty good.

[Laughter.]

Mr. VARGAS. That was pretty good, huh?

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

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

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

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

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

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

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

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

Thank you.

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

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

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

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

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

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

After Recess [4:29 p.m.]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STATEMENT OF DAVID CONE, FORMER MAJOR LEAGUE BASEBALL PLAYER

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

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

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

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

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

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The owners said that they wanted a salary cap and refused a promise that they would abide by the rules of the just expired contract after the season ended. We had no choice. The players went on strike in August 1994.

I should note that this was before Congress passed the Curt Flood Act authored by Senators Hatch and Leahy which made it clear that baseball's anti-trust exemption could not be used to undermine Federal law.

In response, the owners canceled the remainder of the season which meant that there would be no World Series. Discussions continued through the fall and the early winter but were fruitless. In December 1994, the owners unilaterally implemented a salary cap and imposed new rules and conditions of employment which would have made free agency virtually meaningless.

They announced they would start the 1995 season with so-called replacement players instead of major leaguers. We did not think the owners were negotiating in good faith as they were required to do under Federal law. We went to the National Labor Relations Board. The board agreed with us and went to Federal court to seek an injunction against the owners' unilateral changes.

The United States district judge who drew the case was Judge Sotomayor. The rest is history, or at least baseball history. Judge Sotomayor found that the owners had engaged in bad faith bargaining. She issued an injunction. Her decision stopped the owners from imposing new work rules, ended our strike and got us all back on the field.

The words she wrote cut right to the heart of the matter, and I quote: 'This strike is about more than just whether the players and owners will resolve their differences. It is also about how the principles embodied by Federal law operate. This strike has placed the entire concept of collective bargaining on trial. Issuing an injunction by opening day is important to ensure that the symbolic value of that day is not tainted by an unfair labor practice and the NLRB's inability to take effective steps against its perpetuation.'

Judge Sotomayor grasped not only the complexity of the case, but its importance to our sport. Her decision was upheld by a unanimous Court of Appeals panel comprised of judges appointed by different Presidents from different parties with different judicial philosophies.

On the day he announced her nomination, President Obama observed that some have said Judge Sotomayor saved baseball. Others may think this is an overstatement. But look at it this way. A lot of people, both inside and outside of baseball tried to settle the dispute. Presidents, special mediators, Secretaries of Labor, Members of Congress all tried to help but were not successful. With one decision, Judge Sotomayor changed the entire dispute.

Her ruling rescued the 1995 baseball season and forced the parties to resume real negotiations. The negotiations were not easy, but ultimately were successful which in turn led to an improved relationship between the owners and the players.

Today, baseball is currently enjoying a run of more than 14 years without interruption, a record that would have been inconceivable in the 1990's.

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I believe all of us who love the game, players, owners and fans, are in her debt. If Judge Sotomayor is confirmed, I hope the rest of the country will realize as the players did in 1995 that it can be a good thing to have a judge or a Justice on the Supreme Court who recognizes that the law cannot always be separated from the realities involved in the disputes being decided.

Thank you again and I would be glad to answer any questions you may have.

Senator KLOBUCHAR. Thank you very much, Mr. Cone. Our next witness is Kate Stith. She is the Lafayette S. Foster Professor of Law at Yale Law School where she teaches and writes in the areas of criminal law, criminal procedure and constitutional law.

Previously Professor Stith was an Assistant U.S. Attorney for the Southern District of New York where she prosecuted white collar and organized crime cases. After graduating from Harvard Law School, she clerked for Judge Carl McGowan of the U.S. Court of Appeals for the District of Columbia and for Associate Justice Byron White on the Supreme Court. Thank you for being here and we look forward to your testimony.

STATEMENT OF KATE STITH, LAFAYETTE S. FOSTER PROFESSOR OF LAW, YALE LAW SCHOOL

Professor STITH. I thank you, Senators, for the opportunity to comment on the nomination of Judge Sonia Sotomayor whom I have known since she became a judge in 1992.

As you noted before, I joined the faculty at Yale Law School in 1985. I was a Federal prosecutor in New York and I was also a Special Assistant at the Department of Justice in Washington.

While a Federal prosecutor in New York, I had the pleasure of working with Louis Freeh. It is my judgment that this is an exceptionally strong nomination. My judgment has nothing to do with Judge Sotomayor's sex, ethnicity or personal story. I am judging her on the same criteria that I used when I was asked by the Yale Daily News some years ago whether Samuel Alito would be a strong nomination to the Supreme Court. I answered yes then and I answer yes now.

Specifically I am confident that Sonia Sotomayor would serve this nation with powerful intelligence, vigor, rectitude and an abiding commitment to the Constitution. Moreover, her service as a state prosecutor and a District judge will make her unique on the court to which she will ascend.

My views on her are informed by many sources. First, I have been unusually involved, at least for a professor, with members of the bar and bench within the Second Circuit.

Among these lawyers and judges who know her best, she is held in the highest repute across the board. My views are also based on my many conversations with her. Among the most telling are those in which she has described the attributes she is looking for in prospective law clerks.

Through these discussions over more than 15 years, I believe I gained insight into her view of the role of a judge. The bottom line is this. What she wants in her law clerks are the qualities we all want in a judge.

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She wants to make sure first that they are serious about the law and not about politics or professional opportunities after the clerkship. They must be serious about all areas of the law. For Judge Sotomayor, there are no favorite areas.

Which brings me to a third quality she wants in her clerks. The prospective clerk must be willing to work his or her fingers to the bone if necessary in order to ensure that the opinions Judge Sotomayor writes and those she joins do not miss a relevant precedent and do not get a fact wrong.

There is an overriding fourth quality that the judge considers critical. Is the prospective clerk willing to take criticism, work harder, and where appropriate rethink her initial assessment or his initial assessment of the issues?

Over the years, the judge's former clerks have told me time and again that they greatly appreciate her devoted commitment to the law, as a result of which they were held to higher standards and learned more than in any other time of their lives.

Her conception of the role of a judge is borne out by her judicial opinions that I have read in the area of criminal law and procedure.

On criminal procedure, let me just note that the usual categories of left and right do not easily apply. I would say that her decisions on the whole reflect more pragmatism and less formalism than those of, say, Justice Souter. Sometimes this cuts for the government, sometimes it cuts against it.

I want to focus in particular on one substantive criminal law case, *United States* v. *George* decided in 2004. Judge Sotomayor's unanimous 16-page opinion in that case concerns the meaning of the mens rea, term willfully in a Federal statute that makes it a crime to waillfully falsify a passport application.

Her opinion makes clear that the role of the courts is not to determine what level of mens rea they think should apply, but what Congress intended when it wrote the word willfully.

The opinion then embarks on an heroic effort to figure out what Congress meant in this particular statute. The opinion is so clarifying and insightful that my co-authors and I decided to include a long excerpt from it in our forthcoming criminal law case book.

But the significance of the case isn't only that it is an excellent opinion. It also resulted from the willingness of Judge Sotomayor and two colleagues to reconsider their initial decision when additional arguments were brought to their attention, even though this meant that a different party would prevail.

Their aim was neither to affirm the conviction nor to reverse the conviction, but to find the best resolution of the complex and conflicting precedents on this mens rea issue.

In conclusion, I submit that Judge Sotomayor's opinion in the *George* case reveals four judicial qualities that she clearly possesses.

First, she cared deeply about the issue at hand, no matter how minor or word parsing it may seem even to lawyers. Second, she was willing to reassess her initial judgment and dig deeper.

Third, her legal analysis was exceptionally clear and astute. Fourth, she had no agenda other than trying to get the law right,

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and in a society committed to the rule of law, trying to get the law right is what it means to be fair and impartial.

This is a great judge. I urge you to vote in favor of her confirmation. Thank you, Senators.

Senator KLOBUCHAR. Thank you very much. We next have Dr. Charmaine Yoest who is the President and CEO of Americans United for Life, the first national pro-life organization in the nation whose legal strategists have been involved in every pro-life case before the United States Supreme Court since *Roe* v. *Wade*.

Dr. Yoest began her career in the White House during the Reagan administration. She has also worked as the Project Director of the Family Gender and Tenure Project at the University of Virginia and as a Vice President at the Family Research Council. Welcome, Dr. Yoest. We look forward to your testimony.

STATEMENT OF DR. CHARMAINE YOEST, AMERICANS UNITED FOR LIFE

Dr. YOEST. Thank you very much, Senator Klobuchar, Ranking Member Sessions and members of the committee for inviting me to testify before you today.

As you said, I am here on behalf of Americans United for Life, and we are the nation's oldest pro-life legal organization. Our vision at AUL is a nation where everyone is welcomed in life and protected in law.

We have been committed to defending human life through vigorous judicial legislative and educational efforts since 1971 and we have been involved in every abortion related case before the United States Supreme Court beginning with *Roe* v. *Wade*.

I am here today because of AUL's deep concern about the nomination of Judge Sonia Sotomayor to the United States Supreme Court. A vote to confirm Judge Sotomayor to our highest court is a vote for unrestricted abortion on demand and a move toward elevating abortion as a fundamental right equal to our freedom of religion and freedom of speech.

A nominee's judicial philosophy goes to the heart of his or her qualifications to serve on the United States Supreme Court. Based on Judge Sotomayor's record of prior statements combined with her over a decade-long service on the board of the Puerto Rican Legal Defense and Education Fund, Judge Sotomayor's judicial philosophy makes her unqualified to serve on the Supreme Court.

When judges fail to respect their limited role under our Constitution by imposing their personal preferences regarding public policy through their decisions, our entire judicial system of equal justice under the law is corrupted.

In a series of speeches as we have heard chronicled here this week, Judge Sotomayor has indicated a troubling willingness to celebrate her own personal preferences and characteristics.

Several references have been made during this hearing to the judge's 2001 wise Latina speech. I would note that in that very same speech she stated that 'personal experiences affect the facts that judges choose to see.' Not just what they do see, but what they choose to see.

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Of even greater concern, Judge Sotomayor stated in the same lecture that 'the aspiration to impartiality is just that. It is an aspiration.'

However, impartiality is not merely an aspiration. Impartiality is a discipline and its necessity is enshrined in the judicial oath. A judge who injects personal experiences into a decision corrupts the very foundations of our judicial system.

Perhaps the clearest example of Judge Sotomayor's problematic philosophy is her April 2009 speech in which she said, 'Ideas have no boundaries. Ideas are what set our creative juices flowing. Ideas are ideas and whatever their source, if it persuades you then you are going to adopt its reasoning.'

We see her here building a case for judicial activism, yet creativity is the approach Americans want least from a judge. A judge who approaches the bench seeking to 'implement ideas' is an activist judge by definition.

The laboratories of democracy in our system should remain firmly lodged in the state legislatures, not preempted from the court.

These troubling speeches did not occur in isolation. Looking at the totality of the judge's record must include her 12 years of service on the board of the Puerto Rican Legal Defense and Education Fund. During that time, the organization filed not one, but six amicus briefs in five-abortion related cases before the Supreme Court.

Given her particular emphasis on personal viewpoint in jurisprudence, we believe these cases become uniquely relevant in providing insight into her judicial philosophy.

Judge Sotomayor served the fund as a member and vice president of the board of directors and also as chairperson of the Education and Litigation Committees and has been described as an involved and ardent supporter of their various legal efforts.

What then does her tenure with the organization tell us about her judicial philosophy? The Fund briefs consistently argued the position that abortion is a fundamental right, expressing hostility to any regulation of abortion, including parental notification, informed consent and bans on partial birth abortion.

For example, in *Planned Parenthood* v. *Casey*, the Fund compared abortion to the First Amendment right to free speech and argued that any burden on the right to abortion was unconstitutional.

In *Ohio* v. *Akron* and *Casey*, the Fund asked the court to strike down parental involvement statutes insisting that minors should be 'protected against parental involvement that might prevent or instruct the exercise of their right to choose.'

In *Williams* v. *Zbaraz*, the Fund argued that failure to publicly fund abortions was discriminatory. In *Webster* v. *Reproductive Health Services*, the Fund argued against, against a requirement that physicians personally counsel patients. They even argued in *Webster* that strict scrutiny is required because of the preciousness of the fundamental right to abortion, underscoring not just a willingness to engage in creative jurisprudence, but an ideological commitment to advancing an extremist abortion agenda.

In conclusion, I would like to end on a personal note related to the Fund briefs. We have heard quite a bit about settled versus unsettled this week, and the one thing we do know, that as we have

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seen this week, this country is still very unsettled about abortion doctrine.

However, among the American people there are some elements of abortion related policy that absolutely do provide common ground. Preeminent among these is a core American belief in the bonds between parent and child.

I have five children and the notion that my daughters might be taken for a surgical procedure without my knowledge is horrific. This common sense commitment to protect our children is overwhelmingly shared among all of those who identify themselves as pro-life and pro-choice, and yet it is precisely these kinds of common sense policies like parental notification that are threatened by this nomination.

In the Fund's brief in *Ohio* v. *Akron*, they argued that 'the court would also need to consider whether the state through giving the parents confidential information has enhanced these parents' ability to indoctrinate, control or punish their minor daughters who choose abortion.'

This is a viewpoint far outside the mainstream of American public opinion and it points to another truth about the Fund arguments in their world view which the evidence indicates Judge Sotomayor shares. While arguing to promote abortion to a fundamental right equivalent to the freedom of religion or speech, they actually wish to elevate it even further, placing it singularly alone among rights beyond the reach of the American public to regulate or even debate. Thank you very much.

Senator KLOBUCHAR. Thank you very much. Next we have Sandy Froman. Sandy Froman is the Past President of the National Rifle Association of America. Ms. Froman is also currently a member of the NRA Board of Directors where she has served since 1992 and in 2007 was unanimously elected to a lifetime appointment on the NRA Council.

A graduate of Stanford University and Harvard Law School, Ms. Froman is a practicing attorney and speaks and writes regularly on the Second Amendment. Welcome to the committee, we look forward to your testimony.

STATEMENT OF SANDY FROMAN, ESQ., ATTORNEY, GUN RIGHTS ADVOCATE, AND FORMER PRESIDENT OF THE NATIONAL RIFLE ASSOCIATION

Ms. FROMAN. Thank you, Madam Chair. Chairman Leahy, Ranking Member Sessions, Senator Hatch, thank you for the opportunity to appear before this committee today to comment on the nomination of Sonia Sotomayor as it relates to her views on the Second Amendment.

It is critical that a Supreme Court Justice understand and appreciate the origin and meaning of the right of the people to keep and bear arms, a right exercised and valued by almost 90 million American gun owners.

Yet Judge Sotomayor's record on the Second Amendment and her unwillingness or inability to engage in any meaningful analysis of this enumerated right when twice given the opportunity to do so suggests either a lack of understanding of Second Amendment jurisprudence or hostility to the right.

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In 2004, Judge Sotomayor and two colleagues in *U.S.* v. *Sanchez Villar* discussed the Second Amendment claim in a one-sentence footnote holding without any analysis that the right to possess a gun is clearly not a fundamental right.

Judge Sotomayor reiterated her view earlier this year as par of a panel in *Maloney* v. *Cuomo* holding that the Second Amendment is not a fundamental right, does not apply to the states and that if an object is designed primarily as a weapon, that is a sufficient basis for total prohibition even in the home.

The *Maloney* court ignored directives and precedent from the Supreme Court in last year's landmark case, *District of Columbia* v. *Heller* which held that the Second Amendment guarantees to all law abiding, responsible citizens the individual right to arms, particularly for self-defense.

Although the Supreme Court in *Heller* warned against applying the Supreme Court incorporation cases from the late 1800's without conducting a proper Fourteenth Amendment inquiry, Judge Sotomayor's panel in *Maloney* did just that.

They cited the 1886 case of *Presser* v. *Illinois* decided under the Privileges or Immunities Clause of the Fourteenth Amendment for the position that the Second Amendment does not limit the states and they ignored the Supreme Court's 2008 directive to conduct a Fourteenth Amendment analysis under the modern doctrine of the Due Process Clause to determine if the right is fundamental and should be incorporated.

By contrast, the Ninth Circuit in *Nordyke* v. *King* when faced with the same incorporation question earlier this year did follow the Supreme Court's directive and correctly concluded that the Second Amendment is a fundamental right and does apply to the states through the Due Process Clause.

Our Second Amendment rights are no less deserving of protection against states and local governments than the First, Fourth and Fifth Amendments, all of which have been incorporated.

When faced with the most important question remaining after Heller, whether the right to keep and bear arms is fundamental and applies to the states, Judge Sotomayor dismissed the issue with no substantive analysis.

She and her colleagues also failed to follow Supreme Court precedent when they held that the New York statute could be upheld if the government had a rational basis for the law. They ignored that the Supreme Court in *Heller* rejected the rational basis test for Second Amendment claims.

By failing to conduct a proper Fourteenth Amendment analysis, the *Maloney* court evaded its judicial responsibilities, offered no guidance to lower courts and provided no assistance in framing the issue for resolution by the Supreme Court.

Whenever an appellate judge fails to provide supporting analysis for their conclusion or address serious constitutional issues presented by the case, it is legitimate to ask whether the judge reached that conclusion by application of the Constitution and statutes or based on a political or social agenda.

Judge Sotomayor's view robs the Second Amendment of any real meaning. Under her view, the city of New Orleans' door-to-door

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confiscation of firearms from law-abiding peaceable citizens in the aftermath of Hurricane Katrina was constitutional.

Preventing an individual from exercising what the *Heller* court said was the Second Amendment's core lawful purpose of self-defense is no less dangerous when accomplished by a state law than by a Federal law.

The Second Amendment survives today by a single vote in the Supreme Court. Both its application to the states and whether there will be a meaningfully strict standard of review remain to be decided.

Judge Sotomayor has already revealed her views and they are contrary to the text, history and meaning of the Second and Fourteenth Amendments. As a Circuit Court judge, she is constrained by precedent. But as a Supreme Court Justice appointed for life, she would be making precedent.

A super majority of Americans believe in an individual personal right to arms. They deserve a Justice who will interpret the Second Amendment in a fair and impartial manner and write well crafted opinions worthy of respect from those of us who must live by their decisions.

The President who nominated Judge Sotomayor has expressed support for the city of Chicago's gun ban which is being challenged in *NRA* v. *Chicago*, a case headed to the Supreme Court.

Seating a Justice on the Supreme Court who does not treat the Second Amendment as a fundamental right deserving of protection against cities and states could do far more damage to the right to keep and bear arms than any legislation passed by Congress. Thank you.

Senator KLOBUCHAR. Thank you very much for your testimony, Ms. Froman.

Our next witness is David Kopel. He is currently the Research Director of the Independence Institute in Golden, Colorado and an Associate Policy Analyst at the CATO Institute.

He is also a contributor to the National Review Magazine. He graduated from the University of Michigan Law School. Thank you very much for being here. We look forward to your testimony.

STATEMENT OF DAVID KOPEL, ESQ., INDEPENDENCE INSTITUTE

Mr. KOPEL. The case of *Sonia Sotomayor* v. *the Second Amendment* is not yet found in the record of Supreme Court decisions. Yet if Judge Sotomayor is confirmed to the Supreme Court, the opinions of the newest Justice may soon begin to tell the story of a Justice with disregard for the exercise of constitutional rights by tens of millions of Americans.

New York state is the only state in the union which completely prohibits the peaceful possession of nunchaku, a xenophobic ban enacted after the opening to China in the early 1970s after the growth of interest in martial arts.

In a colloquy with Senator Hatch on July 14, Judge Sotomayor said that there was a rational basis for the ban because nunchaku could injure or kill someone. The same point could just as accurately be made about bows and arrows, swords or guns. All of them

are weapons and all of them can be used for sporting purposes or for legitimate self-defense.

Judge Sotomayor's approach would allow states to ban archery equipment with no more basis than declaring the obvious, that bows are weapons. Even if there were no issue of fundamental rights in this case, Judge Sotomayor's application of the rational basis test was shallow and insufficiently reasoned and it was contrary to Supreme Court precedent showing that the rational basis test is supposed to involve a genuine inquiry, not a mere repetition of a few statements made by prejudice people who impose the law.

The plaintiff in *Maloney* had argued that even putting aside the Second Amendment, the New York prohibition violated his rights under the Fourteenth Amendment. There was no controlling precedent on whether Mr. Maloney's activity involved an unenumerated right protected by the Fourteenth Amendment.

Accordingly, Judge Sotomayor and her fellow *Maloney* panelists should have provided a reasoned decision on the issue. Yet Judge Sotomayor simply presumed with no legal reasoning that Mr. Maloney's use of arms in his own home was not part of the exercise of a fundamental right.

Testifying before this committee on July 14, Judge Sotomayor provided further examples of her troubling attitude to the right to arms. She told Senator Hatch that the *Heller* decision had authorized gun control laws which could pass the rational basis test.

To the contrary, the *Heller* decision had explicitly rejected the weak standard of review which Justice had argued for in his dissent.

Both Judge Sotomayor and some of her advocates have pointed to the Seventh Circuit's decision in *NRA* v. *Chicago* as retrospectively validating her actions in *Maloney*. The argument is unpersuasive. Both the *Maloney* and the *NRA* courts cited 19th century precedents which had said that the Fourteenth Amendment's "privileges or immunities" clause did not make the Second Amendment enforceable against the States.

However, as the *Heller* decision itself had pointed out, those cases "did not engage in the sort of 14th Amendment inquiry required by our later cases."

In particular, the later cases require an analysis under a separate provision of the 14th Amendment, the Due Process clause. Notably, the Seventh Circuit addressed this very issue and provided a detailed argument for why the existence of modern incorporation under the Due Process clause would not change the result in the case at bar. In contrast, Judge Sotomayor's per curiam opinion in *Maloney* did not even acknowledge the existence of the issue.

Various advocates have made the argument that since *Maloney* and *NRA* reached the same result, and since two of the judges in *NRA* v. *Chicago* were Republican appointees who were often called "conservatives," then the *Maloney* opinion must be all right. This argument is valid only if one presumes that conservatives and/or Republican appointees always meet the standard of strong protectiveness for constitutional rights which should be required for any Supreme Court nominee.

In the case of the *NRA* v. *Chicago* judges, that standard was plainly not met. The Seventh Circuit judges actually made the pol-

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icy argument that the Second Amendment should not be incorporated because incorporation would prevent states from outlawing self-defense by people who are attacked in their own homes.

A wise judge demonstrates and builds respect for the rule of law by writing opinions which carefully examine the relevant legal issues, and which provide careful written explanations for the judge's decisions on those issues. Judge Sotomayor's record on arms rights cases has been the opposite. Her glib and dismissive attitude toward the right is manifest in her decisions and has been further demonstrated by her testimony before this Committee. In Sonia Sotomayor's America, the peaceful citizens who possess firearms, bows, or martial arts instruments have no rights which a State is bound to respect, and those citizens are not even worthy of a serious explanation as to why.

Thank you.

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

Senator KLOBUCHAR. Thank you very much. And did I say your name correctly? Oh, well, that was good. Thank you.

Next we have Ilya Somin, and Professor Somin is an assistant professor at George Mason University School of Law. His research focuses on constitutional law, property law, and the study of popular political participation and its implications for constitutional democracy. He currently serves as co-editor of the Supreme Court Economic Review, one of the country's top-rated law and economic journals. After receiving his M.A. in Political Science from Harvard University and his law degree from Yale Law School, Professor Somin clerked for Judge Jerry E. Smith of the U.S. Court of Appeals for the Fifth Circuit.

I look forward to your testimony, Mr. Somin. Thank you for being here.

STATEMENT OF ILYA SOMIN, PROFESSOR, GEORGE MASON UNIVERSITY SCHOOL OF LAW

Mr. SOMIN. Thank you very much. I would like to thank the Committee for the opportunity to testify and, even more importantly, for your interest in the issue of constitutional property rights that I will be speaking about. For the Founding Fathers, the protection of private property was one of the most important reasons for the establishment of the Constitution in the first place.

As President Barack Obama has written, "Our Constitution places the ownership of private property at the very heart of our system of liberty."

Unfortunately, the Supreme Court and other Federal courts have often given private property rights short shrift and have denied them the sort of protection that is routinely extended to other constitutional rights. I hope the Committee's interest in this issue will over time help begin to change that.

In my oral testimony today, I will consider Judge Sotomayor's best property rights decision, *Didden* v. *Village of Port Chester*. In my written testimony, which I hope will be entered into the record, I also discuss her decision in *Krimstock* v. *Kelly*.

The important background to the *Didden* decision is the Supreme Court's 2005 decision in the case of *Kelo* v. *city of New London*,

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which addressed the Fifth Amendment's requirement that private property can only be taken by the Government for a public use. Unfortunately, a closely divided 5–4 Supreme Court ruled in *Kelo* that it is permissible to take property from one private individual and give it to another solely for purposes of promoting economic development, even if there is not any evidence that the promised development will actually occur.

This licensed numerous abusive takings in many parts of the country. Indeed, since World War II, economic development and other similar takings have displaced hundreds of thousands of people, many of them poor or ethnic minorities. But as broad as the *Kelo* decision was in upholding a wide range of abusive takings, Judge Sotomayor's decision in the *Didden* case went even further than *Kelo* in doing so.

The facts of *Didden* are as follows: In 1999, the village of Port Chester in New York declared a redevelopment area in part of its territory where, therefore, property could be taken by eminent domain in order to promote development. And they also appointed a person named Gregg Wasser, a powerful developer, as the main developer for the area.

In 2003, Bart Didden and Dominick Bologna, two property owners in the area, approached the village for permission to build a CVS on their property, and they were directed by Mr. Wasser—they were directed to Mr. Wasser, who told them that they must either pay him $800,000 or give him a 50-percent stake in their business. Otherwise, he threatened he would have the village condemn their property. When they refused his demands, the property was condemned almost immediately after that.

Now, in her decision with two other members of the Second Circuit, the panel that Judge Sotomayor was on upheld this condemnation in a very short, cursory summary order that included almost no analysis. And though it is true that they cited the *Kelo* decision, they made no mention of the fact that *Kelo* actually stated that pretextual takings are still forbidden under the Constitution—pretextual takings being defined as takings where the official rationale for the condemnation was merely a pretext for a plan to benefit a powerful private party of some sort.

There is some controversy over what counts as a pretextual taking and what does not. But if anything does count as a pretextual taking, it is surely a case like *Didden*, where essentially the property would not have been condemned but for the owner's refusal to pay a private party $800,000. Surely, if anything is a pretextual taking, it is a case where property is condemned as part of a scheme for leverage to enable a private individual to extort money from the owners.

In her oral testimony before this Committee, Judge Sotomayor said that her decision was based in part on a belief that the property owners had filed their case too late. I think the important thing to remember about this statement is that in her own decision, she actually specifically wrote that she would have ruled the same way "even if the appellant's claims were not time-barred." So she claimed that even regardless of when they filed their case, she would have come out the same way.

Moreover, as I discuss in my written testimony, her statute of limitations holding was entirely dependent on the substantive property rights holding as well, and I can discuss that further in questions if the Senators are interested.

I think the bottom line about this case is its extreme nature. If one is not willing to strike down a condemnation in a situation like this; if one is not willing to say that this is not a public use, it is not clear that there are any limits whatsoever on the Government's ability to take private property for the benefit of politically powerful individuals.

And on that note, I am happy to conclude, and I thank you very much for the opportunity to testify.

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

Senator KLOBUCHAR. Thank you very much for your testimony.

We are not going to have each Senator ask 5 minutes of questions, and I will start with Director Freeh. You are the only panelist who has had the opportunity to sit with Judge Sotomayor as a fellow judge. What did you learn about her and her approach to judging that led you to endorse her?

Mr. FREEH. You know, I think all the qualities that we have heard in this hearing as the optimal qualities—mainstream, fairmindedness, preparedness, integrity, knowledge and intellect, patience, part of being a good judge is listening and making sure that the parties are all heard, and really, you know, her sense of commitment to getting all the facts and then applying the law.

As you said, Senator, I not only served with her but actually was with her in court, as I mentioned in my opening statement. As we say, I "second-sat" her in a number of her first trials where I actually observed her entire conduct of the trial, preparation, motion practice, instruction to juries, how she treated witnesses. And I think of all the things I observed over a 6-month period was really, you know, how detailed she was in preparing a written opinion.

So this was never a judge that had a predisposition or a pre-notion or a personal agenda, but struggled and committed a lot of time and effort to getting the facts and applying the law. And I think she did that as a brand-new judge. She has done it for 17 years. And I think we can be assured she will do it as a Justice.

Senator KLOBUCHAR. As someone who was appointed by President George H.W. Bush, do you have any reservations about her ability to be a Supreme Court Justice without activism or an ideological agenda?

Mr. FREEH. No, I am totally confident that this would be an outstanding judge, and whether it was President Obama or someone else, as you mentioned, Judge Sotomayor was first appointed by George Bush, the first George Bush. I was also. You know, I think she has all of the mainstream, moderate, restrained adherence to the law qualities that we want, and I think we are going to be very proud of her.

Senator KLOBUCHAR. Thank you.

Mr. Canterbury, you spent more than 25 years as an active-duty police officer in South Carolina. I know what a difficult job you had. From my previous job, I have been able to see it firsthand. Are you confident that, if confirmed, Judge Sotomayor has the

background and judicial record to be a Justice who will be mindful of the need for law enforcement to protect our Nation and have a pragmatic view of law enforcement issues?

Mr. CANTERBURY. We are very confident of that. Based on the over 450 criminal cases that we reviewed, we felt that her judgment was fair, tough, and balanced. Throughout all of the cases that we reviewed, and looking at the totality of her career, we feel very comfortable that she will make a fine judge.

Senator KLOBUCHAR. Thank you very much.

Just as I said Mr. Freeh was the only one on the panel that served with Judge Sotomayor, Mr. Cone, you are the only one on the panel that has pitched a perfect game, as far as I know. Did you believe her to be fair when she ended the baseball strike? I have to tell you that I thought your testimony—people have for 4 days now talked about each specific case and questioned a lot on different cases and were very thorough in their questioning and their understanding. But I thought you so succinctly described the effect that her ruling had on many, many people across this country.

And what do you think that this decision says a little more broadly about her approach to law in general and the impact of her judicial philosophy on the lives of individual Americans?

Mr. CONE. Well, thank you, Senator. You know, from my perspective, as I said in my statement, a lot of people tried to end that dispute, including President Clinton—we were called to the White House—special mediators, Members of Congress. I spent weeks on end here in Washington lobbying Congress on trying to get a partial repeal of the antitrust exemption, which did happen, and Senator Hatch and Senator Leahy certainly sponsored that bill, the Curt Flood Act, which I think had an enormous impact as well. But Judge Sotomayor is the one who made the tough, courageous call that put the baseball players back on the field. You know, from my perspective as a union member, we felt that we were in trouble, that the game was in trouble. It was to the point of almost being irreparably damaged. And she made the courageous decision to put the game back on the field and get the two parties back to the bargaining table and negotiating in good faith.

Senator KLOBUCHAR. Thank you very much.

Senator Sessions.

Senator SESSIONS. Thank you, Madam Chairman. It is good to be with you, and we are glad you are on this Committee.

Senator KLOBUCHAR. Thank you.

Senator SESSIONS. Mr. Cone, I was reading a story about statistical stuff the other day. It came to me that, you know, if you throw a coin, it can land five times in a row on heads. And so I wonder about that a little bit in an effort to have racial harmony on test taking, because sometimes it is just statistically so, which makes me think there is no way the American League could have won—what? –12 out of the last 13 All-Star Games.

Mr. CONE. It makes you wonder, yes.

Senator SESSIONS. Two or three is about all they are worth, right? Thank you for your testimony. We have enjoyed it.

Judge Freeh, nice to see you. I value your testimony, always do, and I appreciate it very much.

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I would note, I think you would agree with me, but former President Bush, former former President Bush nominated Judge Sotomayor as Senator Moynihan's pick. In other words, they had a little deal that President Bush would appoint three judges, I think, and Senator Moynihan would get to pick one, and he nominated the recommendation of Senator Moynihan. Is that the way you remember it?

Mr. FREEH. I think that is correct, but I also think he is supporting this nomination now.

Senator SESSIONS. Okay. That is a good comment. You did good.

Ms. Stith, thank you for your very insightful comments. I appreciated that very much, and it is valuable to us.

Dr. Yoest, I was thinking about this organization, Puerto Rican Legal Defense and Education Fund, PRLDEF, and do board members of your organization know what lawsuits you are pursuing and generally what the issues are?

Ms. YOEST. Thank you for that question, Senator.

Senator SESSIONS. Push your button.

Ms. YOEST. I was asked that question, actually, right after Judge Sotomayor was nominated, and it was the day before my board came to town for one of our annual meetings. And as I have listened to the discussion of her relationship with the fund as a board member, I have found the connection between her association with the cases and her description to really strain credulity.

The fact of the matter is you don't have to have read an individual case or reviewed a particular point as a board member to be intimately associated with it. The point of being a board member for all of us who have dedicated our lives to the nonprofit realm is to have oversight and to have accountability and responsibility for the organization. And so I think it is——

Senator SESSIONS. Well, I think that is probably—most boards should operate that way, at least.

Ms. Froman, is it correct to say that Judge Sotomayor's opinion in Maloney, which said the Second Amendment does not apply to the States, if it is not overruled and if it is followed by the United States Supreme Court, then basically the Second Amendment rights are eviscerated, with regard to cities and States they could eliminate firearms?

Ms. FROMAN. That is correct, Senator. The problem is the *Heller* case did not have to deal with the incorporation issue because it took place in Washington, D.C., which is a Federal enclave and Federal law applies directly. But if the Second Circuit decision or the Seventh Circuit decision remains law, is approved by the Supreme Court, goes up the Supreme Court and is affirmed, then, yes, cities and States can ban guns.

Senator SESSIONS. Does it worry you that the judge who has already ruled on the case one way, and it was a 5:4 case before, now could be deciding—being the deciding vote on how that might turn out?

Ms. FROMAN. It is of great concern to me, Senator, and that is why I am here today to testify. And it is of particular concern to me today because she did not give any reason, she did not explain what the basis was for her holding. It is kind of like when I was in math class, it was not enough to get the right answer. You had

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to show your work so that the professor knew that you actually worked the problem and you did not cheat.

So, you know, without any explanation of how she reached her conclusions, we cannot tell whether that was a legitimate application of the Constitution and the statute.

Senator SESSIONS. I know your organization officially—I see today they said they wanted to see how the hearings went and what the nominee said. After that, has the National Rifle Association now made an announcement today, and what is it?

Ms. FROMAN. Well, I, of course, have been here today, and I am not here to speak on behalf of the NRA. I am here to speak on my own behalf and, of course, on behalf of other American gun owners. The NRA is the oldest and largest civil rights organization in the history of this country. They are dedicated to preserving and protecting the Second Amendment. And I think they have been out every day talking about the concerns that the NRA has over Judge Sotomayor's record.

Senator SESSIONS. Are you aware that—I was just given a document here that said that, "Therefore, the National Rifle Association opposes the confirmation of Judge Sotomayor." Were you aware that that had happened?

Ms. FROMAN. I was told about that while I was here, Senator, yes.

Senator SESSIONS. Okay.

Ms. FROMAN. And so I am sure that they have given a full explanation of that position, and I am glad to see that.

Senator SESSIONS. Mr. Somin, thank you for your testimony. Thank you, Mr. Kopel, for yours. And I frankly feel now obligated to look more closely at the *Didden* case. You raised more serious concerns than I realized. In fact, I guess I was thinking this is worse than I thought after hearing your testimony. I do think that it does impact the property rights of great importance, and thank you for sharing that.

If you want to make a brief comment, my time is——

Mr. SOMIN. Yes, thank you, Senator. I agree with you it raises very important concerns and that these sorts of takings affect thousands of people around the country, particularly the poor and minorities, as the NAACP pointed out in their amicus brief in the *Kelo* case where they indicated that the poor and politically vulnerable and ethnic minorities tend to be targeted for these sorts of condemnations.

Senator SESSIONS. Thank you.

Senator KLOBUCHAR. Thank you very much.

Senator Kyl.

Senator KYL. Thank you, Madam Chairman.

First of all, let me acknowledge those on the panel who I know, but I thank all of you for being here. Louis Freeh, it is great to see you again. I respect your opinions greatly. I want you to know that.

I also respected the way David Cone played baseball very, very much. And I used to root for you, as a matter of fact. I should not say that as an Arizona Diamondbacks fan, but I had another team in the other league.

Senator SESSIONS. Senator Bunning's record, was his perfect game the last one when you did it?

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Mr. CONE. No. His was done back in the 1960's, but there are only, I think, 17 perfect games in the history of the game. I am lucky enough to be one of them.

Senator KYL. And, of course, Dr. Yoest; and Sandy Froman is a person with whom I have consulted over many, many years, long before she was the National President of the NRA, but also on legal matters. And I appreciate her because of her distinguished law career, the judgment that she gives on this.

I wish I could ask all of you a question, but let me just ask a couple here.

First of all, Sandy, the question that Senator Sessions asked I think gets right to the heart of the matter, and I wonder if you could just put a little bit of a legal spin to it. The question is: What would it mean to the gun owners of America if Judge Sotomayor's opinion were to be the controlling law in this country from now on?

She acknowledged under my questioning that it would be more difficult—I do not have her exact quotation here, but it would be more difficult for gun owners to challenge the regulations of states or cities, but it was unclear exactly how much more.

Could you describe the test that would be used in such a situation and, in your opinion, how much more difficult it would be for gun owners to sustain their rights as against States and localities?

Ms. FROMAN. Yes, thank you, Senator Kyl. Well, I believe I heard you questioning one of the panels earlier. You raised that issue yourself, which is she said the rational basis test would be sufficient to sustain any gun ban that the Government wanted to impose, whether it was a city or a state. And the rational basis test is the lowest threshold that the Government has to meet to sustain a ban. They can articulate any reason, pretty much, and it will be sufficient to get past that review.

Now, the Supreme Court in *Heller* made it clear that the rational basis test is not allowed when you are interpreting an enumerated right like the Second Amendment. But she ignored that in the *Maloney* case and talked about rational basis anyway. So that is of great concern to me and I think to the almost 90 million American gun owners that, yes, it is fine to say in *Heller* that we have a right that is protected against infringement by the Federal Government. But that doesn't mean—the *Heller* case doesn't mean that cities and states cannot ban guns, cannot issue whatever regulations they want, as long as they can articulate what will meet this rational basis test. It is a very, very low threshold.

And as a matter of fact, that is why the District of Columbia had their gun ban. That is why the city of Chicago basically has a gun ban that prevents people from having firearms even in their home for self-defense.

So that is what we are concerned about as gun owners in America.

Senator KYL. Thank you very much.

Dr. Yoest, in the questions by Senator Coburn of the nominee, he asked about advances in technology, and as I recall Judge Sotomayor's testimony, she did not want to acknowledge the impact of advances in technology as it relates to the Supreme Court's evaluation of restrictions on abortion.

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Do you believe that advances in technology are important to the viability trimester framework that the Court articulated in Roe, and why?

Ms. YOEST. Well, I would reference back to the confirmation hearings of the Chief Justice in which he went through one of the elements that we look at when we reconsider factual—how things relate to a case, and there has definitely been tremendous advances on the scientific realm as it relates to human life.

So I think it is important to see her, whether or not she is willing to consider that kind of thing, and it also goes to—Americans United for Life works very focused on pro-life legislation at the State level, and part of the challenge that we face is this question of how much the American people are going to be allowed to interact with their duly elected representatives at the State level in restricting abortion in a common-sense way that they would like to see.

Senator KYL. Thank you. Just to be clear, I have recalled her testimony slightly incorrectly. She actually did not say or would not say how she viewed it. She said it would depend upon the case that came before her. So I do not want to mischaracterize her testimony, but your point is that it would be very important for a court in evaluating a restriction imposed by a State.

Ms. YOEST. Yes, sir.

Senator KYL. Okay. Thank you. Again, I wish I had more time to—but we have, I think, one or two panels left here, so we should probably move on.

Senator KLOBUCHAR. Senator, we have two panels left.

Senator KYL. Yes, but we thank you very much. This is an important event in our country's history. You have contributed to it, and we thank you, all of you, for it.

Senator SESSIONS. Thank you, Mr. Canterbury. I appreciate the FOP's——

Senator KLOBUCHAR. Yes, I want to thank all of you, and you just did a marvelous job in stating your opinions. I think it was helpful for everyone, and thank you very much. Have a very good afternoon. It was one of our shortest panels. You are lucky. You can go home and have dinner.

We are going to take a 5-minute break, and then we will have the next panel join us. Thank you very much.

[Whereupon, at 5:36 p.m., the Committee was recessed.]

After Recess [5:46 p.m.]

Senator KLOBUCHAR [presiding].—We are going to get started with our next panel, if you could stand to be sworn in and raise your right hands. Do you affirm that the testimony you are about to give the Committee will be the truth, the whole truth and nothing but the truth, so help you God?

[Witnesses sworn.]

Senator KLOBUCHAR. Thank you. We are joined here by Senator Sessions. I know Senator Kyl may be joining us and has been with us today, and whoever else stops by. But we want to thank you for coming. We have had a good afternoon.

What I am going to do is introduce each of you individually and then you will give your 5 minutes of testimony. I know one of our

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witnesses is a little late. So we are going to start here with you, Ms. Romero.

Ramona Romero is the current national president of the Hispanic National Bar Association and the corporate counsel for logistics and energy at DuPont. She is also a cofounder and former board member of the Dominican-American National Roundtable. She is a graduate of Harvard Law School.

Ms. Romero, we are honored to have you here. Thank you. We look forward to your testimony. You can give your testimony, because our other witness got a little delayed coming over from the House. So thank you.

STATEMENT OF RAMONA ROMERO, NATIONAL PRESIDENT, HISPANIC BAR ASSOCIATION

Ms. ROMERO. Good afternoon. As Madam Chair said, my name is Ramona Romero and I am the national president of the Hispanic National Bar Association, which is known as the HNBA. We are grateful to Chairman Leahy, to you, Ranking Member Sessions, and to all of the members of the Committee for affording the HNBA the opportunity and honor of testifying at this hearing.

This is the fifth time that we have appeared before this Committee in support of the confirmation of a Supreme Court justice. We take great pleasure in endorsing Judge Sotomayor. Her support is based, first and foremost, on the merits of her stellar credentials.

The HNBA was founded in 1972. One of its primary goals is to promote equal justice for all Americans by advancing the participation of Hispanics in the legal profession. It is a nonprofit, voluntary bar association. We have 37 affiliates in 22 states. The HNBA is nonpartisan and it does not represent a particular ideology.

Today, I am accompanied by nine former HNBA national presidents and vice president-elect. Like many Americans, we were proud when President Obama announced the nomination of Judge Sotomayor. As many members of this Committee know, for decades, the HNBA has worked to promote a fair, independent and, yes, diverse judiciary, one that reflects the rich mosaic of the American people.

There are over 45 million Hispanics in the United States. We represent over 15 percent of the population. We are the largest, fastest growing and youngest segment of the population. Yet, Hispanics are under-represented among lawyers and judges.

The appointment of the first Hispanic to the Supreme Court is an important—an important symbolic milestone for our country, just like Justice Marshall was with respect to African-Americans and Justice O'Connor was with respect to women.

The HNBA often reviews the qualifications of judicial candidates, regardless of background of politics. We consider a number of factors: exceptional professional competence, intellect, character, integrity, temperament, commitment to equal justice, and service to the American people and, also, to Hispanics, the community we serve.

Judge Sotomayor more, more than satisfies all of these criteria. Before her nomination, we were already familiar with Judge Sotomayor's impressive background. We had endorsed her for both of her prior judicial appointments.

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In 2005, the HNBA also named the judge on a bipartisan shortlist of eight potential Supreme Court nominees, prepared by a Supreme Court committee, after substantial due diligence. The HNBA's Supreme Court committee, again, performed due diligence on her record after this nomination.

As a result, we are confident that Judge Sotomayor is extraordinarily well qualified to serve as a justice for the Supreme Court. Some have suggested that, if confirmed, the judge will render decisions based on her personal bias. They could not be more wrong.

Her extensive judicial record shows that her background and her experiences do not detract from her ability to adhere to the rule of law. On the contrary, they are a positive.

Her story resonates with all Americans. She is proof that in our country, in our country, there is no limit, even for those of us from the most humble of backgrounds. Her confirmation will mark another key step in our journey as one nation, indivisible.

We are grateful to President Obama for making a wise decision in nominating Judge Sotomayor. Our thanks to all Americans for their interest in one of our country's shining stars.

The HNBA thanks this Committee and urges the Senate to confirm Judge Sotomayor. Thank you for listening.

[The prepared testimony of Ms. Romero appear as a submission for the record.]

Senator KLOBUCHAR. Thank you very much, Ms. Romero. Also, welcome to all of the many past presidents that are there, that is quite a number, as well as vice presidents.

We have now been joined by the honorable Nydia Velázquez, who is the Congresswoman here. I know she is incredibly busy and has joined us, and Senator Sessions and I have both agreed that you would not have to stay for questions.

She is currently serving her ninth term as representative for New York's 12 Congressional District. She was the first Puerto Rican woman elected to the U.S. House of Representatives and currently serves as the Chairwoman of the Congressional Hispanic Caucus, Chair of the House Small Business Committee, and a senior member of the Financial Services Committee.

Because you missed the swearing in, we will do that now. This is the Senate Judiciary Committee, so welcome. Could you raise your right hand? Do you affirm that the testimony that you are about to give before the Committee is the truth, the whole truth and nothing but the truth, so help you God?

Representative VELÁZQUEZ. I do.

Senator KLOBUCHAR. Thank you. You have 5 minutes, Congresswoman, and we are honored to have you here. Thank you.

STATEMENT OF THE HONORABLE LYDIA VELÁZQUEZ, CHAIR, CONGRESSIONAL HISPANIC CAUCUS

Representative VELÁZQUEZ. Thank you. Madam Chairman, Ranking Member, and the members of the Committee, I have known Sonia Sotomayor for over 20 years.

In fact, when I was first elected to Congress in 1993, I asked her to administer my oath of office. I can tell you personally that she is a grounded and professional individual. And over the last 3.5

days, all of us have been able to see her considerable legal ability impressively displayed.

Hispanics everywhere are proud that such a distinguished legal talent hails from our community. We have all been energized by her nomination. But, of course, that is not the reason why she should be confirmed. The case for Judge Sotomayor's confirmation is built on her vast experience, keen intellect, and tremendous qualifications.

It is not that Judge Sotomayor does not have a compelling life history. She does. As so many have already pointed out, hers is a uniquely American story, one that begins in the Bronx projects and ultimately reaches the highest echelons of our legal system.

This background instilled within her the belief that hard work is rewarded and the knowledge that with the right combination of talent and effort, anything is possible in America.

These core values propelled Sonia Sotomayor to remarkable heights. As her career progressed, she managed to reach nearly every level of the legal system. With each new step, she excelled not only as a prosecutor and a litigator, but also as an appellate judge.

Yet, throughout that process of achievement, she never once lost touch with her roots or her Bronx neighborhood. Instead, she augmented her vast legal experience with common sense understanding of working class America. That appreciation will add a valuable perspective to the Supreme Court.

Make no mistake. The stakes are high for Hispanic-Americans. The Supreme Court will rule on many matters that are critical to our community, from housing policy to voting rights. These are delicate issues.

With many of these matters, passion runs deep on both sides. Resolving them fairly will require objectivity, impartiality, and an unwavering commitment to the rule of law.

Judge Sotomayor's record demonstrates these qualities. She has a reputation as a non-ideological jurist, someone who chooses not to spar with those who think differently, but to instead find common ground. When working with Republican appointees, colleagues, Sotomayor's record will show that 95 percent of the time, she managed to forge consensus.

She was able to do this because she commands a sophisticated grasp of legal argument and has a keen awareness of the law's effect on every American.

When the Congressional Hispanic Caucus reviewed a broad range of qualified Supreme Court candidates, these were the traits we were looking for. We were looking for individuals who upheld constitutional values, exhibited a record of integrity, and had a profound, profound respect for our Constitution.

It is our overwhelming belief that Judge Sotomayor meets these criteria. That is why we enthusiastically and unanimously endorse her nomination.

Senators, the decision before the Committee today is one of your greatest responsibilities. I know this is something none of you on either side of the aisle take lightly. But I believe Judge Sotomayor's record of judicial integrity, impartiality and, as she puts it, fidelity to the law, is one we can all admire regardless of party or ideology.

If confirmed, Judge Sotomayor's service on the court will bring great pride to the Hispanic community. That goes without saying. But more importantly, it will add another objective disciplined legal talent to that august body.

Thank you again for the opportunity to testify. I look forward to answering any questions. You can send it to my office, but we are going right now, and I really, really appreciate the opportunity that you have given me on behalf of the Congressional Hispanic Caucus.

[The prepared testimony of Representative Velázquez appear as a submission for the record.]

Senator SESSIONS. Thank you so much, Congresswoman Velázquez. That was an eloquent and personal statement. It means a lot to us, and you have contributed much to the hearing.

Representative VELÁZQUEZ. Thank you. I know her well. I know her heart, her soul, her intellect, but, most importantly, her temperament and integrity. Thank you.

Senator SESSIONS. Thank you.

Senator KLOBUCHAR. Thank you so much, Congresswoman Velázquez. We know you have to vote and there are many things going on over in the House. So we appreciate and understand that. Thank you very much.

Next, we have Theodore M. Shaw. Mr. Shaw is a professor at Columbia Law School and former director-counsel and president of the NAACP Legal Defense Fund. He began his legal career in the Civil Rights Division of the United States Department of Justice. He is a graduate of Wesleyan University and the Columbia University School of Law.

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

STATEMENT OF THEODORE M. SHAW, PROFESSOR, COLUMBIA LAW SCHOOL

Mr. SHAW. Thank you, Madam Chair. Thank you, Senator Sessions, and, in his absence, of course, Chairman Leahy.

I have known Sonia Sotomayor for over 4 years. We first met in 1968 as freshmen at Cardinal Spellman High School in the Bronx. We were among a modest number of black and Latino students, perhaps 10 percent of that school's population, in what was one of the most academically challenging high schools in New York City.

It was a time of great change, great challenge. 1968 was the year that Dr. King was assassinated; also, Robert Kennedy; the year of the Chicago Democratic National Convention; and, there was much unrest.

Many of the minority students at Spellman, including Sonia and I, came from the public housing projects of Harlem or the Bronx or the tenement houses that surrounded them. We were shaped by these extraordinary times and by the communities from which we came, for better or worse.

During that time, the light of opportunity began to shine into corners of society that were long neglected for reasons of race and poverty. Many of us are beneficiaries of what has come to be known as affirmative action; that is, the conscious effort to open opportunities to individuals and groups that had been historically discriminated against and excluded from mainstream America.

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Some people will immediately seize upon that description to talk about "unqualified" individuals. Affirmative action, properly structured and implemented, lifts qualified individuals from obscurity rooted in unearned inequality.

In spite of her brilliance, there was a time when someone like Judge Sotomayor would have been routinely left out of the mainstream of opportunities we have come to associate with somebody of her capabilities and accomplishments.

Sonia was at the top of our class at Cardinal Spellman High School. Everyone, white, black, Latino, Asian, ranked behind her. She was studious, independent-minded, mature beyond her years, thoughtful. She wasn't easily influenced by what was going on around her. She walked her own path.

To be sure, Sonia was comfortable in her own skin and proud of her community and her heritage. She did not run from who or what she was and is. Still, Sonia was not one to be easily swayed by peer pressure, fads, or the politics of others around her.

She approached any issue from the standpoint of fierce intellectual curiosity and integrity. In fact, she was an intellectual powerhouse. Sonia was a leader among students at Cardinal Spellman High School. She set the pace at which others wanted to run.

Sonia did not live a life of privilege. She lost her father at a very young age. She had been diagnosed with diabetes even before she came to high school. It was not something I remember her talking about. She simply carried herself with an air of dignity, seriousness of purpose, and a sense that she was going somewhere.

In my 4 years of high school, I never saw Sonia interact with anyone in a disrespectful or contentious or antagonistic manner. Her temperament was even then judicious.

In short, although I never told her then and although she did not know it, I envied her intellectual capacity, her discipline, her unquestionable integrity. I admired her.

After graduating from Cardinal Spellman at the top of our class and as valedictorian, she was off to Princeton and, somewhat further down in the rankings, I was off to Wesleyan. I did not stay in touch with her over many of the ensuing years, but we did meet up again some years later.

I followed her as one does a star from one's high school orbit. Eventually, of course, she went on to Yale Law School after Princeton. She excelled in everything she did.

Her qualifications for the Supreme Court would ordinarily be a no-brainer but for the politics of judicial nomination. I have faith that the Senate and this Committee will not let those politics get in the way.

My career has been as a civil rights lawyer. I have been in the midst of ideological warfare on contentious issues. I have been unabashed about my point of view. I am conscious of the fact that as I testify about Sonia, there may be some who project my thoughts and beliefs on to her.

Some have already tried to label her as an activist outside of the political mainstream. To be sure, I consider those who work for racial justice and other civil rights to be a vital part of mainstream America. But Sonia's life has not been lived on the battlefield of

ideology or partisanship, where many of us who are labeled or who label ourselves as liberal or conservative have locked horns.

Indeed, her record defies simplistic label. She began her legal career as a prosecutor, not ordinarily a job thought of as a bastion of liberal activism. Her service on the board of the Puerto Rican Legal Defense Fund both speaks to the strength of that organization and the range of her interests from prosecution to civil rights.

Her service was commendable. In fact, this range of experience and commitment places Judge Sotomayor in the mainstream of middle America, where surely Americans are both interested in the prosecution and punishment of those who engage in criminal activities, as well as the protection of civil rights and elimination of invidious discrimination.

I have much more to say, but it is in my written testimony and I see my time is expiring. I would like to refer you to my comments on this whole notion of experience and what that brings to the bench.

But to conclude, I want to say that she has served our nation for 17 years as a Federal district court judge and then as an appellate judge with great distinction. Now, she is being considered for an appointment as associate justice to the United States Supreme Court.

Candor compels me to admit that I swell with pride when I contemplate the possibility that my high school classmate may ascend to the highest court in the land.

But quite aside from this petty and undeserved pride on the part of one who was merely a high school classmate, there are millions of Americans who see for the first time the possibility that someone who looks like them or who comes from a background like theirs may serve on the United States Supreme Court, someone who is supremely qualified, by any measure.

It is a great honor for Judge Sotomayor that President Obama has nominated her to the United States Supreme Court. It will be even a greater honor for our nation if she were to be confirmed and were to serve. Thank you.

[The prepared testimony of Mr. Shaw appear as a submission for the record.]

Senator KLOBUCHAR. Thank you very much. Appreciate it, Mr. Shaw. Our next witness is Tim Jeffries. Tim Jeffries is the founder of P7 Enterprises, a management consulting practice located in Scottsdale, Arizona. Mr. Jeffries serves on the board of directors of several corporations and nonprofit organizations, including the National Organization for Victims Assistance and the Arizona Voice for Crime Victims.

I don't know if you want to add anything, Senator Kyl.

Senator KYL. Well, Madam Chairman, thank you for that opportunity. I think you will see, when he testifies, the basis for his knowledge and passion about the protection of victims' rights and I think that will speak for itself and I am anxious to follow-up with the questions, as well. But I thank you very much.

Senator KLOBUCHAR. Thank you very much. Welcome to the Committee, Mr. Jeffries. We look forward to your testimony.

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STATEMENT OF TIM JEFFRIES, FOUNDER, P7 ENTERPRISES

Mr. JEFFRIES. Thank you, Madam Chairman, Senator Sessions, Senator Kyl. I appreciate the humbling invitation to provide my personal testimony in opposition to the honorable Judge Sotomayor's appointment to the U.S. Supreme Court. The views that I express here today are my own and not the views of any organization I may reference.

As my bio shows, I come from a blue collar family. My father's grandfather served in the Union Army during the Civil War and rode for the Pony Express. My mother's grandparents emigrated from Portugal to America in the 1900s with no money in their pocket and no English in their vocabularies.

Similar to thousands of other simple, hardworking Americans, my involvement in the crime victims support movement was borne from unimaginable tragedy. On November 3, 1981, my beloved older brother, Michael, was kidnaped, beaten, tortured and murdered by a transient gang of street criminals in Colorado Springs, Colorado.

The two murderers stabbed my dear, defenseless brother 65 times and ultimately killed Michael by slashing his throat and crushing his skull with the heel of a remorseless, blood-soaked boot.

Based on Federal crime statistics, 17,000 people are murdered in our country every year. On average, someone is murdered every 31 minutes. On average, every 10 weeks, more people are murdered in our country than passed on that brutal, horrible day of September 11.

In fact, since September 11, 115,000 people have been murdered in America. This gut-wrenching level of violence in our country exceeds the approximate population of Santa Clara, California or Gresham, Oregon or Peoria, Illinois or Allentown, Pennsylvania.

Further compounding this epic national crisis, other violent crimes in our country are committed at an appalling rate. Based on the crime clock produced by the Office for Victims of Crime in the Department of Justice, someone is raped in our county every 1.9 minutes. Someone is assaulted in our country every 36.9 seconds. An instance of child abuse or neglect is reported every 34.9 seconds.

Making matters worse, this breathtaking spectrum of heinous violence in our country does not receive the consistent political action it warrants and the constant media focus it deserves.

Prior to my testimony, my wife sent me a text and she asked, "Where are all the Senators?" And perhaps that is a metaphor for what vexes and undermines the crime victims support movement.

The true horror in verifiable existence of evil in our country are often minimized, if not trivialized, with well intentioned, yet sadly misguided equivocations about the troubled lives of guilty criminals and their various personal circumstances.

Unfortunately, based on public statements, Judge Sotomayor has repeatedly offered misplaced sympathy for criminals, despite the fact that justice exists to protect the innocent and to punish the guilty. Forgiveness and mercy are one thing. Punishment and accountability are another.

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In four situations, four different events that are noted in my testimony, Judge Sotomayor sympathy and perhaps empathy for criminals that may be well intentioned, but I feel is tragically misplaced.

At a Columbia Law School public service dinner, she stated, "It is all too easy as a prosecutor to feel the pain and suffering of victims and to forget that defendants, despite whatever illegal act they have committed, however despicable their acts may have been, the defendants are human being."

In January 1995, in receiving the Hogan-Morganthau Award, Judge Sotomayor stated, "The end result of a legal process is to find a winner. However, for every winner, there is a loser, and the loser is himself or herself a victim," forgetting for the fact that when meeting justice, it's not to find a winner, it's to find justice.

On July 12, 1993, in a Federal sentencing hearing that she presided over, over a cocaine dealer, Judge Sotomayor apologized to the cocaine dealer for having to send him to Federal prison.

She stated the mandatory 5-year sentence was a "great tragedy for our country." She also stated she hoped the cocaine dealer "will appreciate that we all understand that you were a victim of the economic necessities of our society." Then she added, "But unfortunately, there are laws I must impose."

Having viewed the autopsy photos of my massacred brother and heard the heartbreaking stories of thousands of victims and survivors of violent crimes in America, I believe Judge Sotomayor's sympathy for criminals at the expense of the burdens carried by crime victims is unworthy of our nation's highest court, where public safety and protection of the innocent should be paramount.

Whereas Judge Sotomayor's biography is admirable and compelling, it is a great American story of which, as an American, I am proud. I am deeply troubled that she has regularly offered well intentioned, yet misguided sympathy to criminals without notable deference to the pain and suffering of the victim.

These are the very people who need government's protection. Statistics show that the most egregious crime in our country disproportionately impacts the poor, the disadvantaged, the downtrodden, the defenseless. These are the very people that the justices in our highest court must have sympathy for, must have empathy for.

Madam Chairman, I appreciate your patience with my testimony that has extended beyond its time.

Senator KLOBUCHAR. That is fine, Mr. Jeffries.

Mr. JEFFRIES. And I would be happy to answer any questions at the appropriate time.

[The prepared testimony of Mr. Jeffries appear as a submission for the record.]

Senator KLOBUCHAR. That is fine, and thank you for sharing that tragic story. It must have been very difficult.

Neomi Rao is our next witness. Neomi Rao is a professor of law at George Mason University. Previously, she served as associate counsel and special assistant to President George W. Bush and served as a counsel to the Senate Judiciary Committee. She is a graduate of the University of Chicago Law School, that is something we have in common.

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Professor Rao clerked for Supreme Court Justice Clarence Thomas and Fourth Circuit Judge J. Harvey Wilkinson. I look forward to your testimony. Thank you for being here.

STATEMENT OF NEOMI RAO, PROFESSOR, GEORGE MASON UNIVERSITY LAW SCHOOL

Ms. RAO. Thank you very much, Madam Chairman, Senator Sessions and other distinguished members of this Committee. It is an honor to testify at these historic hearings, which have provided the opportunity to have a respectful public dialog about the important work of the Supreme Court and the judicial philosophy of an accomplished nominee.

I have submitted more detailed written testimony and I should state at the outset that I take no position on the ultimate question of the confirmation of Judge Sotomayor.

In my opening remarks, I would like to highlight some points about the judicial role. During these hearings, Judge Sotomayor has expressed broad principles about fidelity to the law with which we can all agree. But fidelity to the law can mean very different things to different judges.

Although in her testimony she has distanced herself from some of her earlier remarks, her speeches and writings might still be helpful in understanding her view of the judicial process.

First, Judge Sotomayor has explicitly rejected the idea that there can be an objective stance in judging. She has explained that every case has a series of perspectives and thus requires an individual choice by the judge.

This goes beyond recognizing the need to exercise judgment in hard cases or the idea that reasonable judges may at times disagree. If there is no objective view, one can question whether there is any law at all apart from the judge's personal choices.

Second, there is the related issue of the role of personal experiences in judicial decision-making. It would be hard to deny that judges are human and made up of their unique life journeys. Many judges recognize this and explain how they strive to remain impartial by putting aside their personal preferences.

Judge Sotomayor's position, however, has suggested that her personal background, her race, gender and life experiences, should affect judicial decisions.

Throughout her testimony, Judge Sotomayor has reaffirmed that she decides cases by applying the law to facts and that she does not follow what is in her heart. Of course, all nominees to the Supreme Court honestly state their fidelity to the law.

Nonetheless, this leaves open the question of how a judge chooses to be faithful to the law. Judges go about this task in different ways. Following the law could mean, as formalists believe, that the judicial role and the privilege of political independence require judges to stick closely to the actual words of statutes and the Constitution. The basic idea is that by focusing on the written law, judges act as fair and impartial arbiters.

Other judges consider that they are following the law when they interpret it to conform to what is rational or coherent or just. They believe that following the law means trying to bring about what they consider to be the best outcome, all things considered. These

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judges may be ruled by pragmatism or personal values, such as empathy.

Even with a sincere purpose of following the law, judges use very different methods for finding what the law requires. For example, some judges are far more likely to determine that the law is ambiguous and, therefore, requires the judge to fill in the gaps.

If the judge finds the law indeterminate, he or she may look to outside sources, such as international law, or to personal values about what is fair or rational. Pragmatic, flexible interpretation of the law allows significant room for individual assessments of what the law requires, as each judge will have his or her own conceptions about what is best.

If the law is really a series of perspectives, this suggests a very thin conception of law. Fidelity to law as a series of perspectives is something very different from fidelity to law as binding written commands of the legislature and Constitution. If law is simply one's own perspective, then fidelity to law is little more than fidelity to one's own views.

The Supreme Court gets a final word with regard to constitutional interpretation. A nominee's judicial philosophy is important, because on the Supreme Court, the only real restraint is self-restraint.

Our constitutional structure does not give judges political power. It gives them the judicial power to decide particular cases through an evenhanded application of the law; to fairly interpret statutes and the Constitution for all that they contain, not more, not less.

In our courts, the rule of law should prevail over the rule of what the judge thinks is best. Thank you for giving me the chance to testify today.

[The prepared testimony of Ms. Rao appear as a submission for the record.]

Senator KLOBUCHAR. Thank you very much, Ms. Rao, for your testimony. Next, we have John McGinnis. John McGinnis is a professor of law at Northwestern University. Previously, he was a deputy assistant attorney general in the Department of Justice's Office of Legal Policy; a graduate of Harvard Law School, where he was the editor of the Harvard Law Review, something he has in common with President Obama. That is not true?

Mr. *McGinnis.* He was president of the Harvard Law Review.

Senator KLOBUCHAR. You were editor. Well, we could just pretend for today. Professor McGinnis also clerked on the U.S. Court of Appeals for the District of Columbia.

Thank you for being here, Professor McGinnis. We look forward to your testimony.

STATEMENT OF JOHN MCGINNIS, PROFESSOR, NORTHWESTERN UNIVERSITY SCHOOL OF LAW

Mr. MCGINNIS. Thank you so much, Chairman Klobuchar, Ranking Member Sessions, for the opportunity to address you. At the outset, I want to make clear that, like my colleague, I am not taking any position on Judge Sotomayor's nomination, although I will say she has my respect and good wishes.

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What this hearing affords is one of the rare opportunities for a constitutional conversation with the American people and where the correct constitutional principles can be identified.

Ultimately, the Constitution rests on the people's confidence in the Constitution and their fidelity to the principles. Only once the correct constitutional principles are identified can the Nation measure a nominee's adherence to those principles and so determine whether he or she should be confirmed.

My subject, the use of international and foreign law, is an issue of substantial importance, not least because the Supreme Court has come to rely on such material. For instance, in *Lawrence* v. *Texas*, the Supreme Court recently relied on the European Court of Human Rights as part of its decision to strike down a statute of one of our states.

In my view, such reliance distorts the meaning of our Constitution. It undermines domestic democracy and it threatens to alienate Americans from a document that is their common bond.

So what are the correct principles? I think they can be simply stated. They are that judges should avoid giving any weight to contemporary foreign or international law unless the language of the Constitution calls for it, and the language of the Constitution generally does not.

If the Constitution, as I believe, should be interpreted according to the meaning it had at the time it was ratified, it follows directly that the use of contemporary foreign or international law is not proper.

The problem with this use, in fact, is that it's contemporary, not simply the fact that it's foreign or international, because the meaning of the Constitution was fixed at the time it was ratified.

But even if one is a self-styled pragmatist about constitutional theory, the use of contemporary foreign or international law in constitutional jurisprudence is still objectionable.

Pragmatists believe the Constitution should only invalidate our laws if they have bad consequences. But a conflict between our law and foreign law is not appropriately used to create any doubt about the beneficence of our own law.

Foreign law is formulated to be good for that foreign nation, not for ours. Indeed, a proposition of foreign law is really only the tip of an iceberg of some complex set of social norms in other nations.

But since the United Nations doesn't share all those norms, importing that single legal proposition into our nation can have very bad consequences for us. International law differs from foreign law, because international at least purports to have some kind of universality, which foreign law does not.

But raw international law also lacks any democratic pedigree and can cast doubt on our democratically made law. Indeed, international law has multiple democratic defects. Totalitarian nations have participated in its fabrication. Very unrepresentative groups, like law professors, still shape its form.

It's also hardly transparent. American citizens have enough trouble trying to figure out what goes on in hearings like this one, let alone in diplomatic meetings in Geneva.

As I read Judge Sotomayor's speech on this issue, her position depends on propositions that seem, to me, in some tension. Judge

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Sotomayor stated that justices should not use foreign or international law, but they should consider the ideas they find in such materials in their decision-making.

I understand, at this hearing, Judge Sotomayor disavowed the use of such materials to have any influence on jurisprudence, and I welcome that disavowal. What she left unexplained, to my satisfaction at least, however, is her view in the speech that such materials can help us decide our issues; her praise for the use of such law in *Lawrence* v. *Texas*, which expressly relied on that European human rights decision; and, perhaps most puzzling of all, her endorsement and her praise for Justice Ginsberg's view when it's well known that Justice Ginsberg, in contrast with, say, Justice Scalia, believes that such materials are relevant to decision-making.

Indeed, Justice Ginsberg says that they're nothing less than the basic denominators of fairness between the Governors and the governed.

Foreign and international law may well contain good ideas, as Justice Sotomayor suggested, but so many other sources that have no weight and should not, I think, routinely be cited as authority.

To put the question in perspective, undoubtedly, the Bible and the Quran have many legal ideas that many people think are good, but we would be rightly concerned if judges used them as guidance for interpreting the Constitution or even routinely cited them.

Depending on what text the judge cited and what she omitted, we might think she was biased in favor of one tradition at the expense of others.

In my view, the rule of law itself ultimately is founded on the proposition that only material that is formally relevant should have weight in a judge's decision, and the way a judge can demonstrate adherence to the rule of law in this context is extremely simple—simply refrain from appealing to the authority of foreign of international law in her opinion.

Thank you very much.

[The prepared testimony of Mr. McGinnis appear as a submission for the record.]

Senator KLOBUCHAR. Thank you very much, Professor McGinnis. Last, but not least, we have Professor Rosenkranz. Nicholas Quinn Rosenkranz is an associate professor at Georgetown University Law Center. After graduating from Yale Law School, he clerked for Judge Frank Easterbrook on the U.S. court of appeals for the seventh circuit and for Justice Anthony Kennedy on the U.S. Supreme Court. He then served as an attorney advisor at the Office of Legal Counsel in the United States Department of Justice.

You should know, Mr. Rosenkranz, that Judge Easterbrook was my professor at law school and I know that must have been kind of a tough clerkship. I am sure you had to work very hard. So we look forward to hearing your testimony. Thank you.

STATEMENT OF NICHOLAS QUINN ROSENKRANZ, PROFESSOR, GEORGETOWN UNIVERSITY LAW CENTER

Mr. ROSENKRANZ. Madam Chair, thank you. Ranking Member Sessions, members of the Committee, I thank you all for the opportunity to testify at this momentous hearing.

I, too, have been asked to comment on the use of contemporary foreign legal materials in the interpretation of the U.S. Constitution. I agree entirely with Professor McGinnis's analysis.

In my remarks, I'll try to explain why this sort of reliance on foreign law is in tention with fundamental notions of democratic self-governance. I should emphasize that I, too, take no position on the ultimate question of whether Judge Sotomayor should be confirmed, and I offer my comments with the greatest respect. But I am concerned that her recent speech on this issue may betray a misconception about how to interpret the United States Constitution.

In this room, and at the Supreme Court, and in law schools, and throughout the nation, we speak of our Constitution in almost metaphysical terms. In the United States, we revere our Constitution. And well we should; it is the single greatest charter of government in history. But it is worth remembering exactly what it is that we revere. The Constitution is a text. It is comprised of words on parchment. A copy fits comfortably in an inside pocket, but copies don't quite do it justice. The original is just down the street at the National Archives, and it is something to see. It is sealed in a titanium case filled with argon gas, and at night it is kept in an underground vault. But during the day, anyone can go and see it and read it, and everyone should. The parchment is in remarkably good condition. And the words are still clearly visible.

The most important job of a Supreme Court justice is to discern what the words on that piece of parchment mean. The job is not to instill the text with meaning. The job is not to declare what the text should mean. It is to discern, using standard tools of legal interpretation, the meaning of the words on that piece of parchment.

Now, sometimes the meaning of the text is not obvious. One might need to turn to other sources to help understand the meaning of the words. One might, for example, turn to the Federalist Papers or to early Supreme Court cases to see what other wise lawyers thought that those words meant.

But what the Supreme Court has done in two recent and controversial cases is to rely on contemporary foreign law in determining the meaning of the United States Constitution. And this is the practice that Judge Sotomayor seemed to endorse in her recent speech. But when one is trying to figure out the meaning of the document down the street at the Archives, it is mysterious why one would need to study other legal documents, written in other languages, for other purposes, in other political circumstances, hundreds of years later and thousands of miles away. To put the point most simply, as a general matter, it is unfathomable how the law of, say, France, in 2009, could help one discern the original public meaning of the United States Constitution.

Those who would rely on such sources must be engaged in a different project. They must be trying to update the Constitution to bring it in line with world opinion. To put the point most starkly, this sort of reliance on contemporary foreign law must be, in essence, a mechanism of constitutional change.

Foreign law changes all the time, and it has changed continuously since the Founding. If modern foreign law is relevant to con-

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stitutional interpretation, it follows that a change in foreign law can alter the meaning of the United States Constitution.

And that is why this issue is so important. The notion of the court "updating" the Constitution to reflect its own evolving view of good government is troubling enough. But the notion that this evolution may be brought about by changes in foreign law violates basic premises of democratic self-governance. When the Supreme Court declares that the Constitution evolves—and it declares further that foreign law may affect its evolution—it is declaring nothing less than the power of foreign governments to change the meaning of the United States Constitution.

And even if the court purports to seek a foreign "consensus," a single foreign country might tip the scales. Indeed, foreign governments might even attempt this deliberately. France, for example, has declared that one of its priorities is the abolition of capital punishment in the United States. Yet surely the American people would rebel at the thought of the French Parliament deciding whether to abolish the death penalty—not just in France, but also thereby, in America.

After all, foreign control over American law was a primary grievance of the Declaration of Independence. It, too, may be found at the National Archives, and its most resonant protest was that King George III had "subject[ed] us to a jurisdiction foreign to our constitution."

This is exactly what is at stake here—foreign government control over the meaning of our Constitution. Any such control, even at the margin, is inconsistent with our basic founding principles of democracy and self-governance.

I hope that the Committee will continue to explore Judge Sotomayor's views on this important issue. Thank you.

[The prepared testimony of Mr. Rosenkranz appear as a submission for the record.]

Senator KLOBUCHAR. Thank you very much, to all of you. Just to clarify, Mr. Rosenkranz, the one case that Judge Sotomayor considered on the death penalty, she actually sustained it. She rejected a claim that it did not apply and I do not think she used foreign law at all to say that it did not apply. She actually sustained the death penalty. Are you aware of that case, the *Heatley* case?

Mr. ROSENKRANZ. Yes, I am aware of it. I am referring primarily to the speech that she gave on this topic.

Senator KLOBUCHAR. Okay. Well, I would say that her opinion probably rules, if you look at how she actually ruled on this. She did not say that you could not have the death penalty because of French law. Thank you.

Ms. Romero, I had some questions about your testimony. You talked about the fact that Ms. Sotomayor's opinions are characterized by a diligent application of the law, reasoned judgment, and an unwavering commitment to upholding the Constitution and Supreme Court precedent.

Do you want to talk to me about how you reached that conclusion?

Ms. ROMERO. We have a Supreme Court committee, as I mentioned, and the committee conducted a thorough review of her background. In addition to reviewing about 100 of her cases, we

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commissioned a review by a group of law professors who reviewed about 100 of her cases.

We reviewed many of her speeches and articles and, also, spoke to dozens of colleagues and people who know her. So we conducted a fairly extensive due diligence. So our conclusion is based primarily on our review of her cases, which I think is what really should prevail here.

Senator KLOBUCHAR. You also noted in your remarks that the judge's opinions can't be readily associated with a particular political persuasion or judicial philosophy, and I think that may be reflected in the fact that she has been endorsed—in our last panel, Louis Freeh, who had been appointed by George H.W. Bush and, also, served as the FBI director.

We had the Fraternal Order of Police, the largest police organization in the country. We have had the National District Attorneys Association that supports her and, in fact, a review of her sentences shows that she is right in the mainstream.

I questioned her yesterday about some of her white collar sentences were actually quite lengthier than some of her colleagues. Do you want to talk about what you mean by that her opinions cannot be readily associated with a particular political persuasion or judicial philosophy?

Ms. ROMERO. Well, there is no pattern that emerges of an activist judge here. It is quite apparent that her opinions are highly driven in that she relies extensively on the application of the law to the facts that face her.

Senator KLOBUCHAR. Thank you. Mr. Shaw, do you want to comment a bit about what she was like in high school? You said she was judicious and I was trying to imagine if I was judicious in high school.

But you did know her from Cardinal Spellman High School. Is that correct?

Mr. SHAW. Cardinal Spellman High School in the Bronx and her temperament was even-keeled, calm. She was very thoughtful, fair-minded. She treated all individuals equally. She exhibited many of the qualities that she exhibits now.

Some of the testimony I have heard here is delivered by people who don't know her and, frankly, who won't let the facts get in the way. It has nothing to do with who she is. But I understand part of what goes on at these hearings.

Her career is one that has been very extensive as a judge and I cannot tell you that she would rule in the way that I would want her to rule in every case if she were confirmed to the Supreme Court. She hasn't done that in her career so far.

But I don't think that's the standard. I think that all any of us can expect and hope for and want is that she is fair, open-minded, and that she applies the law to the facts, and, clearly, her record has done that. Her speeches are not how she should be judged. It's her 17-year record on the bench.

Senator KLOBUCHAR. Thank you. In fact, I imagine you might not have agreed with some of the decisions. I think we found out that of the discrimination claims that are brought before her, she rejected 81 percent of them and, of course, had found for some of them.

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So I think it is a tribute, Mr. Shaw, that you would still be here knowing that you may not have agreed with her on every single decision that she made. Thank you very much.

Mr. SHAW. Thank you.

Senator KLOBUCHAR. Senator Sessions.

Senator SESSIONS. I want to recognize Senator Kyl and let him have my time now. But I would just note Senator Kyl is a superb lawyer, senior member of this Committee, involved in the leadership of the Senate. So I know that is why he has had to get back over right now, because a lot of things are happening.

He also has argued three cases before the U.S. Supreme Court, which very few lawyers in this country can have the honor of ever arguing one.

Senator KYL. Thank you, Madam Chairman. Thank you, Senator Sessions. Just to give you one idea about what it is like to be in leadership, we are trying to figure out right now, and the reason I have been consulting my Blackberry, while listening out of both ears to your testimony, and I thank all of you for being here, is we are trying to figure out if we are going to come back here and vote at 1 a.m. tomorrow morning or we are going to try to have three different votes here yet this evening and not come back at 1 a.m., the kinds of things Senators consider all the time.

Again, let me thank all of you. First, with regard to the last two panelists, I very much appreciate your discussion of foreign law. It is a subject that I think this Committee needs to pay a lot more attention to.

Judge Sotomayor has said two contradictory things and it will be up for us to try to square which will, in fact, govern her decisions on the Supreme Court, should she be confirmed.

She said, on the one hand, on numerous occasions, that she thinks that foreign law should be considered and that she agreed with Justice Ginsberg and disagreed with Thomas and Scalia. I think, Mr. Rosenkranz, you pointed out what that means in terms of the use of foreign law.

Yet, she has said here, even, I think, this morning, that she does not think foreign law should be used in interpreting the Constitution or statutes. So we are left to wonder and I guess we will just have to try to figure that out.

I also wanted to specifically ask Tim Jeffries a question. I know Tim Jeffries and I know of his considerable work on behalf of victims of crime, and that is why I think you are a good person to answer this question, Tim.

To me, there is one place where empathy does play a role in a judge's decisions and I can think of only this one situation, and it is at the time of sentencing, when at least some states and the Federal Government now allows persons who are not parties before the court to make statements before the court at the time of sentencing.

That is a time where, to the extent there is discretion with respect to sentencing, a judge can take into account what people tell him about the victim, about the defendant, about other matters, and empathy cannot help but play a role in that.

Could you just remind us, from your perspective of having worked for victims' rights now, why it is important for judges to

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consider the point of view of victims, in this particular situation, in sentencing statements or in the other situations in which it is appropriate for a victim or a victim's advocate to make an appearance in a given case?

Mr. JEFFRIES. Thank you, Madam Chairman, Senator Kyl. As you know, in the U.S. Constitution, there are over 20 references to defendants' rights. There are no references to victims' rights.

Currently, under the Crime Victims' Rights Act, which is Federal law, there are statutory protections for victims of Federal crimes, which those protections provide the right to be informed, to be present, to be heard. But that is just for Federal crimes.

If you look at the states in our great union, it is a patchwork quilt of victims' protections and in upwards to 15 states, there are no victims' protections whatsoever. It is challenging enough that incomprehensible crime is committed in our country. Fifty people will be murdered today, 760 people will be raped today, over 3,000 people will be assaulted, and over 4,000 children will be abused.

It's incomprehensible and as if that is not tough enough, when people enter the justice system, which should exist to do just things, revictimization often takes place.

Judge Sotomayor is a great American story, valedictorian of her grade school, valedictorian of her high school, the Pyne Prize at Princeton, summa cum laude, phi beta kappa, editor of the Yale Law Journal. She has written 380 opinions. She has given over 180 speeches. Even today, she said, "It's important to use simple words," and I quote.

So I can assure everyone here that when a victim, a victim's family is in a courtroom, above and beyond the fact that they're looking for justice that the system should mete, they're looking for the kindness that a just system should provide.

And whereas I continue to be very impressed with the honorable Judge Sotomayor's story and her record of accomplishment and all the incredible witnesses that have come to support her, I'm extremely concerned that a jurist who understands how important words are, through several decades of speeches, could be so cavalier as it pertains to victims' feelings.

And as I stated in my prepared remarks, forgiveness and mercy are one thing. Justice and accountability are another thing. And so I am just hopeful, I am prayerful that if Judge Sotomayor is confirmed to our nation's highest court, that she will never lose sight of what I'm sure were some very hard days she spent as a prosecutor.

And with all due respect to the troubled lives of guilty criminals, we should be focused on victims.

Senator KYL. Thank you. Thank you, all panelists.

Senator KLOBUCHAR. Thank you very much. Senator Kaufman.

Senator KAUFMAN. I just have a few questions. Ms. Romero, can you tell us what Judge Sotomayor's confirmation would mean to your organization, the long struggle for greater diversity on the Federal bench?

Ms. ROMERO. It's not only about our organization. I think it's about all Americans. It's about all Americans seeing themselves reflected at the highest levels of our profession.

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It's about public trust in the integrity of the judicial system. It's about public faith and public understanding about the law. On the day that Justice Souter announced his retirement, I was in New Mexico speaking to a group of high school students, 600 high school students, primarily Hispanic, in an underserved area of New Mexico, of Albuquerque, and I told them, "I'm going to speak with you for about 5 minutes, give me 5 minutes, and if you want to, afterwards, I will answer any questions you want."

I spoke to them for 5 minutes. Then they asked me questions for 40 minutes. So I was very proud of the fact that they were enormously interested in the law. But some of the questions were a little bit more than troubling in the sense that they reflected some distrust in their interactions with the judicial system and on how the community interacts with the judicial system.

So one of our missions as a bar association is to try to educate youngsters about the fact that the law really is fair and is just and that it reflects them and that it is accessible to them. So it's about that, it's about access.

Senator KAUFMAN. Professor Shaw, can you tell us, just from your vast background, just a little bit about the function of legal defense funds and how they serve society?

Mr. SHAW. Sure. I worked for almost 26 years for the NAACP Legal Defense Fund, ending up being director, counsel and president. The Legal Defense Fund is the organization that was borne out of the NAACP, which I consider to be and I think most historians would consider to be the oldest civil rights organization in this country, even though another claim has been made here today.

But the Legal Defense Fund litigated *Brown* v. *Board of Education* and many of the major civil rights cases on behalf of African-Americans, but also others. PRLDEF was modeled after the Legal Defense Fund, as were many other legal defense funds, including some of the conservative legal defense funds that now exist in other institutions in other parts of the world.

One of the things I would underscore, because I listened with great interest to some of the things that some of the witnesses said about Judge Sotomayor's role as a board member, I know that as deputy director of the Legal Defense Fund and then director-counsel, we made sure that the board understood its role and the staff understood its role.

The board was not responsible for the selection of cases or responsible for legal strategy. In fact, I worked very hard to make sure that those lines remain drawn. That's not to say that the board didn't get engaged in policy, but the staff and the lawyers and the leadership of the organization have responsibility for legal strategy and, also, for deciding what cases would be filed.

And I think that's pretty much the way most legal defense funds, including PRLDEF, operated.

Senator KAUFMAN. Thank you very much. I want to thank the entire panel for being here today.

Senator KLOBUCHAR. Senator Sessions.

Senator SESSIONS. Thank you. Thank all of you. This is another good panel and I think it is enriching our discussion. These will all be part of the record. It is reflective of a commitment that the Sen-

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ate should make and must make to make sure this process is handled correctly. So thank you all.

I think the foreign law matter is a big deal to me. Some people make out like it is nothing to this, this is just talk. But it is baffling to me how a person of discipline would think that foreign opinions or foreign statutes or U.N. resolution could influence the interpretation of an American statute, some of which may be 1970, 1776.

I think you mentioned, Mr. Rosenkranz, that Americans revere the Constitution. I remember at a judicial conference, 11th circuit, Professor Van Alstine said that if you respect the Constitution, if you clearly respect it, you will enforce it as it is written, whether you like it or not; if you don't do that, then you disrespect it and you weaken it.

And the next judge, someday further down the line, will be even more likely to weaken it further and just because you may like the direction somebody bent the Constitution this year in this case does not mean you are going to like it in the future, and our liberties then become greater at risk.

Would you agree with that?

Mr. ROSENKRANZ. Absolutely, Senator.

Senator SESSIONS. Ms. Rao, you discussed of these philosophies. How do you feel about that? Ms. Rao, I am not a legal philosopher and one of the level thoughts I have had in the back of my mind, I think Judge Sotomayor would have been better served to stay away from legal philosophers. It may be the way her momma raised her and so forth. But legal philosophies are another thing.

But she expressed some affirmation of legal realism. Is that not a more cynical approach to the law in which the theory is somewhat to the effect that, well, it is not realistic to be idealistic about words having definite meanings and we all know judges do differently.

Is that a fairly decent summary of that and the danger of that philosophy?

Ms. RAO. I think that is one of the dangers of legal realism. I think that there are two parts of legal realism. There is one part that is largely descriptive, which is that legal realism means that often a judge's viewpoint is going to influence their judging, and I think that everyone recognizes that's a possibility.

But I think many people go a step beyond that to say, well, a judge's individual views should shape their judging, and I think that is a big step.

Senator SESSIONS. So in this law review article, you have read that. Did you read the law review article she wrote? I am not sure it is an explicit endorsement, but it is certainly an affirmation of that philosophy in many ways in her references to it. Would you agree?

Ms. RAO. It seemed that way to me, as well. And I think it's also supported by her other statements in which she has said that there is no objective stance in judging. I think that is all part of the same general idea.

Senator SESSIONS. And there were only perspectives, was that the language? Do you remember those words?

Ms. RAO. Only a series of perspectives.

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Senator SESSIONS. That does not mean much to me. I am not sure I am comfortable with a judge who thinks things are just a series of perspectives.

Have any of you been familiar with the French judicial philosophy that involves single decisions? I am told it is a technique that the French courts utilize to have—my time has——

Senator KLOBUCHAR. You can keep going. Just speak in French from now on.

Senator SESSIONS. I studied it for 2 years. My understanding is that the French courts frequently use very short, unsigned opinions, without dissents and without discussion. So it is very difficult to understand the principle behind their approach to law.

So I just wonder about that. Are you familiar? I didn't see any. Thank you all for your comments and thoughts. We appreciate it very much. This is an important issue and we value your insight.

Senator KLOBUCHAR. Thank you very much, Senator Sessions. And I wanted to thank all of you, as well. Actually, Mr. Rosenkranz, I did appreciate your testimony. I think it is a valued issue to discuss. But I just wanted to make it clear, when I asked you that question about the case, in fact, Judge Sotomayor has written or joined more than 3,000 opinions in her 17 years as a judge and she has never used foreign law to interpret the Constitution or statutes, and including the case I mentioned. That does not mean that it is not a valid point to discuss.

Mr. ROSENKRANZ. She has never used foreign law to interpret the Constitution. I think she may have used it to interpret a Federal statute.

Senator KLOBUCHAR. The point of the issue is that when you brought up the death penalty in the French system, is that she had not used foreign law. In fact, she sustained the death penalty in that case. Thank you.

Senator SESSIONS. There is a national debate. Just Ginsberg favored that in her speech. She endorsed the Ginsberg model and criticized the Scalia model.

Senator KLOBUCHAR. And then one last thing that I wanted to put on the record, a July 9 New York Times article entitled "Sotomayor Meted Out Stiff Prison Terms, Report Indicates," in which it states that, "Most striking was the finding that across the board, Judge Sotomayor was more likely to send a person to prison than her colleagues. This was true whether the offender was a drug dealer or had been convicted of a white collar crime."

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

Senator SESSIONS. Well, on that subject, I would point out that the Washington Post study found that her criminal justice decisions were on the left side of the Democratic judges.

Senator KLOBUCHAR. You know what, Senator Sessions. We will put both articles in the record. Very good.

Senator SESSIONS. Good deal. Mine is already in the record.

Senator KLOBUCHAR. Great. I just want to thank all of you. I know all of your thoughts were heartfelt and well researched. Especially, thank you, Mr. Jeffries, for coming with a difficult situation. I am so sorry about what happened to your brother.

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We are going to break for 5 minutes and then Senator Kaufman is going to be taking over this next panel, our last panel. Thank you very much.

Senator SESSIONS. I would note for the record it is highly unlikely that I would be a ranking member and that Senator Kaufman would be chairing this Committee. What a remarkable development that is.

Senator KLOBUCHAR. Exactly. Just for everyone's knowledge, Senator Kaufman was Senator Biden's chief of staff for many, many years and took over his seat, and so now he is going to be chairing this Committee hearing.

Ms. ROMERO. Madam Chair, if I may?

Senator KLOBUCHAR. This is just a free-for-all. Ms. Romero, please comment.

Ms. ROMERO. No, I'm not commenting. I was just going to ask to ensure that the longer statement can be submitted and inserted into the record.

Senator KLOBUCHAR. Certainly. Everyone's longer statements will be included in this record for all of the panels. So thank you very much. We will recess for 5 minutes and we will return.

[Whereupon, at 6:57 p.m., the Committee was recessed.]

After Recess [7:07 p.m.]

Senator KAUFMAN. We will now call our final panel, saving the best for last, consisting of Patricia Hynes, Dean JoAnne Epps, Mr. David Rivkin, and Dr. Stephen Halbrook.

Before we start, Michael J. Garcia was supposed to be here today but—be here for the hearing, but he thought it was going to be tomorrow. We all thought it was going to be tomorrow. Welcome to the Senate. You never know when things are going to happen. Without objection, what I would like to do is put his statement in the record.

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

Senator KAUFMAN. Also, Congressman Serrano is going to try to make it, but why don't we do first—you know, as with in all the prior panels, all witnesses, as you know, are limited to 5 minutes for their opening statements. Your full written statement will be put in the record. Senators will then have 5 minutes to ask questions of each panel.

I would now like to ask the witnesses to stand and be sworn. Do you swear 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?

Ms. HYNES. I do.

Ms. EPPS. I do.

Mr. RIVKIN. I do.

Mr. HALBROOK. I do.

Senator KAUFMAN. Thank you.

Our first witness is Ms. Patricia Hynes. Patricia Hynes is president of the New York City Bar Association, a former Chair of the American Bar Association's Standing Committee on the Federal Judiciary. She is also a senior counsel of Allen & Overy, LLP. She was Assistant U.S. Attorney in the Southern District of New York and clerked for Judge Joseph Zavatt in the U.S. District Court for

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the Eastern District of New York. She is a graduate of Fordham Law School.

Ms. Hynes, I look forward to your testimony.

STATEMENT OF PATRICIA HYNES, PRESIDENT, NEW YORK CITY BAR ASSOCIATION

Ms. HYNES. Thank you. Thank you, Chairman Kaufman, Ranking Member Sessions, and Senator Whitehouse. I am the president, current president of the Association of the Bar of the city of New York, and I appreciate the opportunity to speak to you this evening regarding the nomination of Judge Sonia Sotomayor to be an Associate Justice of the U.S. Supreme Court.

I am joined this evening by Lynn Neuner, who is sitting right behind me, who chaired the Subcommittee of our Executive Committee that conducted the evaluation of Judge Sonia Sotomayor.

As this Committee is aware, the Association of the Bar of the city of New York is one of the oldest bar associations in the country, and since its founding in 1870 has given priority to the evaluations of candidates for judicial office. As far back as 1874, the association has reviewed and commented on the qualifications of candidates for the U.S. Supreme Court.

It is a particular honor for me to participate in this confirmation process for this particular nominee.

In May 1987, our association adopted a policy that directs the Executive Committee, our governing body, to evaluate all candidates for appointment to the U.S. Supreme Court. The Executive Committee has developed an extensive procedure for evaluating Supreme Court nominees, including a process for conducting research, seeking views of persons with knowledge of the candidate, and of our membership of more than 23,000 members of the New York Bar and other bars. We evaluate the information we receive and express a judgment on the qualification of a person nominated to the U.S. Supreme Court.

In 2007, the Executive Committee of the association moved to a three-tier evaluation system by including a rating of "Highly Qualified." This is the first time the association has used the three-tier rating for a nominee to the Supreme Court.

In evaluating Judge Sotomayor's qualifications, the association reviewed and analyzed information from a variety of sources. We reviewed more than 700 opinions written by Judge Sotomayor over her 17 years on both the circuit court and the district court. We reviewed her speeches, articles, her prior confirmation testimony, comments received from members of the association and its committees, press reports, blogs, commentaries, and we conducted more than 50 interviews with judicial colleagues, former law clerks, numerous practitioners, as well as an interview with Judge Sotomayor herself.

The Executive Committee, on evaluating the qualifications of Judge Sotomayor, passed a resolution at its meeting on June 30th finding Judge Sotomayor highly qualified to be a Justice of the Supreme Court based upon the committee's affirmative finding that Judge Sotomayor possesses to an exceptionally high degree all of the qualifications enumerated in the association's guidelines for evaluations of nominees to the Supreme Court, and those guide-

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lines are: exceptional legal ability, extensive experience and knowledge of the law, outstanding intellectual and analytical talents, maturity of judgment, unquestionable integrity and independence, a temperament reflecting a willingness to search for a fair resolution of each case before the court, a sympathetic understanding of the court's role under the Constitution in the protection of personal rights of individuals, and an appreciation of the meaning of the United States Constitution, including a sensitivity to the respective powers and reciprocal responsibility of Congress and the executive branch.

These guidelines establish a very high standard which, in our opinion, Judge Sotomayor clearly meets. Specifically, the association found that Judge Sotomayor demonstrates a formidable intellect; a diligent and careful approach to legal decision-making; exhibiting a firm respect for the doctrine of judicial restraint, separation of powers, and stare decisis; a commitment to unbiased, thoughtful administration of justice; a deep commitment to our judicial system and the counsel and litigants who appear before the court; and an abiding respect for the powers of the legislative and executive branches of our Government.

We believe Judge Sotomayor will be an outstanding Justice of the United States Supreme Court, and I am very grateful to this Committee for giving me the opportunity to express the views of the Association of the Bar.

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

Senator KAUFMAN. Thank you, Ms. Hynes.

Our next witness is Dean JoAnne A. Epps. JoAnne Epps is the dean of the Beasley School of Law at Temple University, and she has taught at the International Criminal Tribunal for Rwanda. She is here today to speak on behalf of the National Association of Women Lawyers, where she serves as the Co-Chair of the Supreme Court. Dean Epps, I attended Temple for one course. I am sorry I did not graduate. But I have enjoyed Temple basketball for over 50 years, so I am looking forward to your testimony.

STATEMENT OF JOANNE A. EPPS, DEAN, TEMPLE UNIVERSITY BEASLEY SCHOOL OF LAW, ON BEHALF OF THE NATIONAL ASSOCIATION OF WOMEN LAWYERS

Ms. EPPS. Thank you very much, Mr. Senator. Senator Kaufman, Senator Sessions, Senator Whitehouse, I am really honored to be here this evening on behalf of the National Association of Women Lawyers, whose president, Lisa Horowitz, is seated behind me as I speak. And we are here today to urge your vote in support of the confirmation of Judge Sotomayor to be an Associate Justice of the Supreme Court.

After careful evaluation of Judge Sotomayor's background and qualifications, the National Association of Women Lawyers, NAWL, has concluded that Judge Sotomayor is highly qualified for this position. She has the intellectual capacity, the appropriate judicial temperament, and respect for established law and process needed to be an effective Justice of the Supreme Court. She is mindful of a range of perspectives that appropriately should be considered in rendering judicial decisions and, if confirmed, will clearly dem-

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onstrate that highly qualified women have a rightful place at the highest levels of our profession. We, therefore, encourage your vote in favor of her confirmation.

Founded over 100 years ago, and with thousands of members from all 50 States, NAWL is committed to supporting and advancing the interests of women lawyers and women's legal rights. We campaigned in the 1900's for women's voting rights and the right of women to serve on juries, and we supported most recently this year the Lilly Ledbetter Fair Pay Act.

In all of the intervening years, NAWL has been a supporter of the interests of women. As such, NAWL cares deeply about the composition of the Supreme Court and ensuring that it includes the perspectives of all Americans, especially those of women, not just because most of our members are women, but because all of our members care about issues that affect women.

NAWL's recommendation today is based on the work of NAWL's Committee for the Evaluation of Supreme Court Nominees. In evaluating the qualifications of Judge Sotomayor to serve as an Associate Justice, special emphasis was placed on matters regarding women's rights or that have a special impact on women. Eighteen committee members were appointed by the president of NAWL and include law professors and a law dean, appellate practitioners, and lawyers concentrating in litigation. I co-chaired this committee together with Trish Refo, a partner at Snell & Wilmer in Phoenix, Arizona.

We divided our committee work into two categories. Like others who testified here today, we read a large selection of Judge Sotomayor's opinions, and we interviewed more than 50 people who know her in a variety of capacities. Those who were interviewed described Judge Sotomayor as open-minded but respectful of precedent, which is consistent with what we found in her judicial opinions. She is courteous and respectful to those with whom she has professional interactions, including those who do not occupy positions of status or influence. She has treated litigants, attorneys, and court personnel—and, in particular, for our committee's review, women in the courts—with the utmost respect and professionalism both in and out of the courtroom. Those who have interacted with Judge Sotomayor in other capacity, both before and after she was appointed, describe her as a good colleague, a team player, and supportive of institutional goals.

Our review of Judge Sotomayor's writing included her majority opinions, concurrences, dissents, and opinions that she wrote or joined in that were reviewed by the Supreme Court. And from that review, we have concluded that Judge Sotomayor has consistently displayed a superior intellectual capacity, a comprehensive understanding of issues with which she was presented, and a thorough and firm grasp of the legal issues that have come before her.

Looking at the clock, I would like to move to the final point that we would like to say. NAWL supports the confirmation of Judge Sotomayor for the important message that it conveys. NAWL does not believe that Judge Sotomayor should be confirmed solely because she is a woman or a Latina, but the fact is that Judge Sotomayor is, as ultimately we all are, a product of her experiences. And for her, those experiences include life as a woman and

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as a Latina. Both perspectives will be welcome additions to this Court's deliberations.

As a Nation, we have come a long way, but we still have much to do. Women are nearly half of this Nation, but a mere one-ninth of the Supreme Court. The disparity in representation is not trivial in effect. In the legal profession, although women have comprised 50 percent or more of graduating law school classes for more than two decades, they continue to be markedly underrepresented in leadership roles in the profession. As of last year, women were only 16 percent of equity partners in the country's largest law firms; 99 percent of the law firms in this country reported that their highest paid lawyer was a man. Just 23 percent of Federal district and circuit court judges were women. Just 1.9 percent of all law firm partners were women of color. And 19 percent of the Nation's law firms have not one lawyer of color.

Your confirmation of Judge Sotomayor will, therefore, send a strong message to law firms, corporations, Government, and academia that we must and can eliminate the persistent barriers to the advancement of women attorneys. It will reinforce what should be a standard expectation: that women of diverse ethnic backgrounds should, of course, occupy positions of parity with men.

As others have said this week, I long for the day when it would not even occur to anyone to mention Judge Sotomayor's gender or ethnicity, those matters having become non-noteworthy. But that time is not yet here. With this vote, you will send a message, most especially to the wonderful women and girls in your life, telling them not just that they matter but that issues of concern to them matter.

In summary, NAWL, the National Association of Women Lawyers, found Judge Sotomayor eminently qualified for this position, but not simply because she is a woman. She has the intellectual capacity, the appropriate judicial temperament, and respect for established law and process to be an outstanding Supreme Court Justice. She is mindful of the human component of law and symbolizes the triumph of intelligence, hard work, and compassion. Accordingly, NAWL strongly supports her confirmation and urges you to vote in favor of her.

Thank you very much for the opportunity to be here today.

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

Senator KAUFMAN. Thank you, Dean Epps.

Our next witness is the Honorable José E. Serrano. Congressman Serrano, will you please stand and be sworn? Do you swear 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?

Mr. Serrano. I do.

Senator KAUFMAN. Thank you.

Representative José Serrano represents the 16th Congressional District of New York in the Bronx. He is an active member of the Congressional Hispanic Caucus and now is the most senior member of the Congress of Puerto Rican descent. Previously, Representative Serrano served in the 172nd Support Battalion of the U.S. Army Medical Corps and was a member of the New York State Assembly.

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Congressman Serrano, I look forward to your testimony.

STATEMENT OF HON. JOSÉ E. SERRANO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Representative SERRANO. Thank you. And before you start the clock running, sorry I am late. I am Chairman of the Financial Services Appropriations Subcommittee. My counterpart is Senator Durbin, and we just passed our bill with 17 amendments, a motion to recommit, and a lot of issues that had nothing to do with my bill being discussed.

Senator KAUFMAN. No one starts a clock on a member of the Appropriations Committee prematurely.

[Laughter.]

Representative SERRANO. You are well taken care of, Senator.

Senator KAUFMAN. Thank you.

Representative SERRANO. Senator Kaufman, thank you, Senator Whitehouse, thank you, Senator Sessions. Thank you so much for the honor you have given me by inviting me to testify on behalf of Judge Sonia Sotomayor.

Today I represent the proudest neighborhood in the Nation—the Bronx, New York. I cannot begin to describe the pride and excitement that my community feels to know that one of our own stands on the verge of a historic confirmation to the Supreme Court. Like you, I am often greeted by constituents on streets, at diners, after church services, where I cut my hair, at the local bodega or my favorite cuchifrito stand. Usually, we talk about a personal or congressional issue or simply a friendly greeting. Now they just talk about Sonia.

They speak about her as if she was a member of their own personal family, about their pride in her accomplishments. They show a profound understanding of just how significant this nomination is and how it proves that in our country everything is possible.

One of the best examples of the significance of this nomination is the number of people who are watching these hearings. In the Bronx, and in many communities around the Nation, folks have come together to share this moment. That is a clear sign of the pride and joy that they feel. Back home, believe me, it is a celebration.

Like the nominee, my family moved from Puerto Rico to New York. Like her, I grew up in a public housing project in the Bronx. Like her family, we also struggled in our new surroundings. It was tough in the Bronx, but we had dignity and our eye on a better future.

One of the proudest moments of my life came when I was first elected to the New York State Assembly with my classmate, Senator Chuck Schumer. As we were being sworn in, a friend said to my father, "Don Pepe, you are a lucky man. You have two children. One son is a school teacher, and the other is an Assemblyman." My Pop, with that wonderful accented English, looked at him and replied, "I busted my back to get lucky."

I am sure that Judge Sotomayor and her mother have had many similar moments. We are living our parents' dreams, enabled by their sacrifices and years of hard work. But our story is not unique to the community we come from. All around our great Nation there

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are people working day and night, saving, doing without, all in order that their children could live the life that they want for them.

Sonia represents the best of American culture. She comes directly from the strand of our national character that says, "You can be anything you want." It says, "Through hard work, you can reach the top in this country." She is living proof that our dreams for our children are never impossible.

When you invited me to speak, I wondered if my role here today was to tell you about her legal qualifications. Coming before you are many people who will speak to her work and the legal profession. We know that she is highly regarded and that she has a deep understanding of the law and profound respect for the Constitution. She comes before you with more Federal court experience than any other nominee in the last 100 years. You know, I quickly came to the conclusion that my role is to tell you about where she comes from, how she got to this point, and what this means for our country.

We come from rough neighborhoods. We were surrounded by people making do on little. Sometimes there was desperation and despair. Around us were many distractions that could have taken us down a totally different road, but there was also ambition and people determined to make something of themselves. We came from a place where family comes first, where the core values are hard work and looking out for one another.

As I moved out into the wider world, first through the Army and then in my political career, I learned that these were not liberal or New York or Puerto Rican or Latino values. They are American values.

Bronx neighborhoods may not seem as similar to middle America, but the values that we hold dear—family, freedom, looking out for the neighbors—are the same. Everyone watching this nomination this week should know that based upon her background and ideals, they are in good hands with Judge Sotomayor.

When I walk into the Capitol to work every day, I often stop and think how fortunate I am as a kid from a Bronx project to make it here. It is an incredible story that I have lived, but since she was nominated by President Obama, I have had to remember that my story pales in comparison to hers.

In conclusion, this proud woman from the Bronx is perhaps the best and the brightest we have. She has risen to the top through her incredible intellect and hard, hard work. I know that her values are your values and those of people around this country. Her story is my story. But her story is your story or that of your parents' or your grandparents'. She will be a brilliant member of the Court, and I urge you to vote for her nomination, and I thank you for allowing me to show up late and for giving me this honor, which is one of the greatest I have ever had, to testify on behalf of this great woman.

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

Senator KAUFMAN. Thank you, Congressman. It is our honor having you here.

Senator SESSIONS. Congressman, thank you. That was a beautiful statement.

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Representative SERRANO. Thank you.

Senator SESSIONS. We appreciate it very much.

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

Senator KAUFMAN. Without objection.

Representative SERRANO. Thank you.

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

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

Mr. Rivkin, I look forward to your testimony.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Senator KAUFMAN. Thank you, Mr. Rivkin.

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

Mr. Halbrook, I look forward to your testimony.

STATEMENT OF STEPHEN HALBROOK, ATTORNEY

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

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

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

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

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

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

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Now, there are pending before the Supreme Court two cert. petitions on that issue, *NRA* v. *Chicago*, which arose out of the Seventh Circuit, upholding the Chicago handgun ban, held that incorporation had to be decided by the Supreme Court. That court was not able to do it.

And Mr. *Maloney* has filed his own cert. petition and, in fact, he's asked that. if cert. is granted in *NRA* v. *Chicago*, that his case be consolidated with the *NRA* case.

Now, in her questionnaire, in response to this Committee's questions, Judge Sotomayor stated that "conflict of interest would arise from any appeal arising from a decision issued by a panel of the Second Circuit that included me as a member," and she stated that she would recuse herself in that case.

She has decided the issue now pending before the Supreme Court and, therefore, we would expect and we would hope that she would recuse herself if she is, in fact, confirmed.

Now, another per curiam case that she participated in deciding, *Sanchez-Villar*, has disturbing concerns involving both Second and Fourth Amendment rights. That case held that the mere possession of a firearm gave rise to probable cause to search, seize and arrest the person in possession thereof.

Apparently, under New York law, it's a crime to possess a firearm and it's only an affirmative defense that you have a license for it. In that case, the court stated that the right to possess a gun is clearly not a fundamental right.

That was totally unnecessary to the decision. It upheld a conviction of an illegal alien for possession of a firearm. And the correct decision would be to say that illegal aliens don't have Second Amendment rights, and, in fact, the court disregarded a Supreme Court decision in *Verdugo-Urquidez*, decided in 1990, which explicitly stated that the people that the term "the people" in the First, Second and Fourth Amendments refers to are the members of our national community and not to aliens and not to illegal aliens.

A third case I want to mention briefly, *United States* v. *Cavera*, an en banc decision by the Second Circuit, upheld a Gun Control Act prosecution and the sentencing under it. Judge Sotomayor wrote a dissenting opinion that I think is commendable.

She made a statement that "Arbitrary and subjective considerations, such as a judge's feelings about a particular type of crime, should not form the basis of the sentence," and she explained in great detail the reason for that. That's exactly the way the law should be interpreted and constitutional rights should be interpreted, as well. I think she made the correct decision in that case.

The question now is whether she will also take Second Amendment rights seriously, and that's the big unanswered question. Thank you.

Senator KAUFMAN. Thank you, Mr. Halbrook. Congressman Serrano, you talked about your district and how people feel. How are young people growing up going to be affected by Judge Sotomayor being on the Supreme Court?

Representative SERRANO. It's amazing that you ask that question. And I assure the rest of the panel I did not give him that question. But I was talking to my chief of staff this morning, who

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was telling me how many watching parties were taking place in my district this week.

Watching parties, people come together with covered plates, they bring food and they watch. And the question that seems to be rising out of the young people is, "What do I do to go to law school?"

Now, I don't know if this country needs more lawyers, because you know the jokes about that, and I better stop, because I'm not a lawyer. But I believe that what it has done more than anything else—and it's not just her being on the Supreme Court, but the exchanges between this panel and the judge—is that people are becoming more aware of law cases, of law issues.

And so No. 1, I think it will invite young people to consider a legal profession. Second, the issue of pride is so important in your own life.

When I was a young man, there weren't many Puerto Ricans for me to look to in New York as successes. So I always looked to Roberto Clemente, the baseball player, who was such a dignified man and who insisted on being called Roberto and not Bob, and then later on said Bob was Okay. And I saw that growth and then his death was part of that dignity of that man.

But now, it's a different story. Now, there are some people who look to me. There are people who look to artists. There are people who look to other people.

But in closing, let me just say this. Nothing that you can accomplish in this country looks bigger than the presidency or the Supreme Court. So, obviously, it's going to inspire people to say, "I can do it."

And, in fact, she told you here, while she was answering some tough questions, that, in many cases, she was telling people, "You can make it. You can make it." And there's nothing more pro-American than to say to somebody, "You can make it."

Senator KAUFMAN. Thank you. Ms. Hynes, how did Judge Sotomayor's experience as a prosecutor and a commercial litigator affect your ruling on her qualifications?

Ms. HYNES. Well, it just shows how well rounded she is. I was a prosecutor. Indeed, Bob Morganthau appointed me in 1967 and in those days, I was the one woman in that office of 100—I have a great picture of a sea of 100 men and I sit behind Bob, who was the boss. Right? And he started my career as he did Judge Sotomayor's. I've had a wonderful career, but he gave me that opportunity.

And I spent 15 years in the prosecutor's office and I went up through the ranks and became executive assistant. But when I left the prosecutor's office and went out into practice on the defense side, you really get the appreciation that there are two sides to an issue. You really have to measure and judge.

So I think it makes her more well rounded, that she's seen the prosecution side, those issues, the tensions, you heard the representative of the police association. You have Louis Freeh, who we all worked with in that same office.

So she has the appreciation of those tensions, but she also understands the defense side and she combines that with the commercial litigator, a prosecutor, a trial judge, and an appellate judge. She is

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the total package. She is the total package and she has done it in the best possible way.

And when I listen, as I've tried to do to all of the testimony, I think you just have to look at what her background is and her record. And after that, your question should be answered, because she has been a terrific example of someone who has very, very carefully applied the law and done what she thought was right.

We are all proud of her. When I say I'm particularly proud to be here tonight for this candidate, it's because in New York, we know the quality of the judging that we have gotten from Judge Sotomayor.

Senator KAUFMAN. Thank you very much. Dean Epps, based on your analysis of your organization of her record, how would you speak about Judge Sotomayor's judicial temperament?

Ms. EPPS. Thank you very much, Senator. We asked a lot of people who had the opportunity to appear before Judge Sotomayor, to appear as opposing counsel, to work with her as co-counsel, to be litigants before her, and we found universally that people thought she had an extraordinarily appropriate judicial temperament.

That doesn't mean that she's not passionate, which we believe that she is. But in all responses, people described her as respectful, considerate and kind. And so on that particular issue, we were thoroughly satisfied that she has the temperament to be an appropriate associate justice of the Supreme Court.

Senator KAUFMAN. Thank you. Ranking Member Sessions.

Senator SESSIONS. Thank you. Congressman, thank you for your eloquence. I just appreciate that very much. Ms. Hynes, your professionalism and approach is worthy of the New York Bar Association. I agree with you, from the beginning, that her experience is really the rich kind of experience, almost an ideal experience for any Federal appellate judge.

We have wrestled with a lot of issues that are controversial in the legal system today and a lot of us care deeply about those things. We are worried about some of the things we see in the courts. So that affects how you approach a nominee. But her background and her integrity is exceptional and I appreciate that.

Ms. Epps, thank you for your testimony. Mr. Rivkin, I just want to take a minute, because I guess Senator Lindsey Graham asked some questions about national security issues.

You know that Congress and the President have traditionally been accorded near plenary authority in national defense areas. That is, I think, consistent with the heritage of our country, up until very recent years, post 9/11 years.

I call your attention to a case before the second circuit, *Doe* v. *Mukasey*, last year, and that is Attorney General Mukasey, former judge from New York, Mukasey, in which a three-judge panel that included Judge Sotomayor ruled, in part, that certain provisions of the Patriot Act were unconstitutional under the First Amendment.

Specifically, the panel found unconstitutional the provisions of the Patriot Act allowing senior government officials to certify that the release of certain documents would endanger national security.

The panel stated, "The fiat of a government official, though senior in rank and doubtless honorable, cannot displace the judicial obligation to enforce constitutional requirements."

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Does that give insight into Judge Sotomayor's approach to law? The opinion went on to state, "Under no circumstances should the judiciary become the handmaiden of the executive."

Mr. RIVKIN. I think it's a troubling opinion, Senator Sessions. It may strike some people as a technical case. The panel was concerned with the fact that the certifications by senior government officials had to be treated by the courts as conclusive expressed absent a showing of bad faith, and this view that the scheme unduly displaces judicial power, that it makes judiciary a rubber stamp.

And I find that surprising in a couple of ways. First of all, I don't see how you can read the statutory language as establishing a rubber stamp in the context of a bad faith inquiry, let's say, by the director of FBI in making the certification as to the national security consequences of the disclosure of this information.

You can ask the director, "How did you make the decision? What facts did you look at? Was that something you did generically? Did you drill down on it? How often have you rejected such requests in the past?"

So it is a meaningful scrutiny—it's a deferential inquiry, but it's a meaningful inquiry. So I don't understand, especially in a facial challenge, why would you dismiss it as unconstitutional in a few short sentences.

Second, there is nothing unique about treating certifications by government officials as conclusive. There are numerous other criminal justice contexts, including, for example, immunity orders arising in the context of grand jury proceedings, or requests, for pen register information, where such certifications have been treated with enormous deference by the court.

What's interesting, from my perspective, Senator Sessions, is that, ironically enough, more deference has been shown over the years to these types of certifications in pure criminal justice cases (drug cases, health fraud cases), than in national security cases, even though, to me, the public safety concerns are far more palpable in a terrorism case and justify greater judicial deference to the executive.

Senator SESSIONS. I have seen some of that in our Committee. Could you briefly give me this answer and see if I am correct? We have got a lot of people that contend that captured enemy combatants are entitled to habeas corpus.

Even in our Committee, Senators have contended we denied habeas corpus. We have repealed habeas corpus. It is in the Constitution. Why would you deny it to these captives?

But is it not true that when the Constitution was written, it made provision for the habeas corpus, that it would never interpret it as applying to enemy combatants that were captured on the battlefield?

Mr. RIVKIN. And held overseas. That is absolutely right. That was the teaching of the post-World War II, Eisentrager case. That was something that never happened throughout 200 years of American history. Yet the Supreme Court, in the space of four short years, has changed this and imposed a habeas regime to test the Executive's military detention decisions.

Senator SESSIONS. President Bush actually relied on the historic interpretation. He was criticized because the Supreme Court basically changed the law later. Is that correct?

Mr. RIVKIN. That's correct. And the Bush administration merely followed the well established legal architecture, Senator Sessions. For anybody who has seriously looked at the case law, their legal positions were entirely reasonable and solidly anchored in binding precedent.

It is Supreme Court that went away from it own opion decisions. What's even more regretable, from my perspective, is that lower courts are now expanding this further. The biggest problem now is that the lower courts are then extending constitutional habeas to Bagram.

Senator SESSIONS. And reading Miranda warnings, it appears.

Mr. RIVKIN. Miranda warnings are now being roughly read when captering enemy combatants on foreign battlefields.

Senator SESSIONS. Mr. Halbrook, you wrote the brief on behalf of 55 Senators in the *Heller* case and your view, I guess, was accepted.

Is it true that the decision, the *Maloney* decision, that Judge Sotomayor was a member of the panel that ruled on it, and you have expressed concerns about it, is it not true that that case will need to be reversed or the Second Amendment does not apply to the states in any city in the country and state government could completely deny people the right to keep and bear arms?

Mr. HALBROOK. Senator Sessions, the basic issue was, first of all, the meaning of the Second Amendment. In *Heller*, the court said it protects an individual right to keep and bear arms, including possession of a handgun in your home.

And Judge Sotomayor's answers to questions about that decision, by the way, this week, have been very noncommittal as to whether she agrees with the decision. She does recognize that it's precedent, of course.

And then the next issue is whether the Second Amendment applies to the states through the 14th Amendment due process clause, like virtually every other Bill of Rights freedom, assembly, petition, free speech, press, unreasonable search and seizure, the right to counsel, the whole works.

And it's only logical, once it has conceded, it has held that it's an individual right, that it would be considered an explicitly guaranteed right in the Constitution. Being explicitly guaranteed normally means it's a fundamental right and the test of—instead of rational relation, the compelling state interest test would apply, like other fundamental rights.

So that's the issue that's before the Supreme Court right now.

Senator SESSIONS. Regardless of whether or not the precedent justified the decision in *Maloney*, and I think we can argue about that, but the point is that decision would eviscerate effectively the protection, the constitutional protection to keep and bear arms, if it became the Supreme Court opinion.

Mr. HALBROOK. That would be correct.

Senator SESSIONS. The Supreme Court affirmed that approach. It is going to need to reverse that approach or the Second Amend-

ment is severely weakened and really eviscerated. Is that right fundamentally? Am I exaggerating?

Mr. HALBROOK. Well, most of the firearms laws—that's correct. There's 20,000 firearm laws on the books and most of them are at the state and local level, not Federal law.

The Federal Gun Control Act has expanded greatly in the past years, but most firearms possession issues involve state and local law. And the ruling in the seventh circuit case in *NRA* v. *Chicago* and the ruling in *Maloney* is that the Second Amendment has no application to states and localities.

So you could ban firearms. You could ban anything you wanted to ban. Anything that would be an arm, the Second Amendment just doesn't apply. It would be a curious doctrine that here you have the fundamental right, protected in the Bill of Rights, to say that it only applies to the Federal Government.

The 14th Amendment's framers desired and intended that the bill of rights guarantees apply to the states through the 14th Amendment. And one of the big issues of protection was the right of freed slaves to keep and bear arms, because they were violated by the Black Codes that were enacted by the southern states after the Civil War.

And to get rid of that kind of discrimination, to allow freedmen to keep and bear arms, to have free speech and to have all the other rights that are set forth in the Bill of Rights, that was the intent of the 14th Amendment and that's the issue before the Supreme Court now and that's the issue that *Maloney* decided adversely.

Senator SESSIONS. Thank you, Mr. Chairman. You are very kind.

Senator KAUFMAN. Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman. Here we are with the last panel, last witness, last question or last questioner anyway. I do not want to cause undue trouble, but I would like to react to Dr. Halbrook's testimony, which, first of all, I think was fine.

You are very learned. You are outside counsel for the National Rifle Association. You are knowledgeable about their issues. You have won these cases in court before. Your advocacy was ardent, but also very polite and cordial.

So I have no problem with what your testimony said. My concern is this, and I mention this in front of the ranking member, because he has been energetic on this point. There have been an array of witnesses who have made similar points and there has been an array of questioning, really almost nonstop questioning on *Heller* and *Maloney*.

As I understand the history of this, for 220 years, the United States Supreme Court never recognized any individual right to bear arms. Just last year, a new conservative majority, by the barest of majorities, discerned, for the first time, a new constitutional right, individual right, to bear arms, which is fine. That is now the law of the land.

But it applied only in D.C. So it applied only to Federal law. So the case itself never reached the question of the application of the individual right that *Heller* announced in its application to the states or, for that matter, to municipalities.

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And that is against a background tradition of fairly extensive regulation of firearms by states and municipalities, restrictions on felons in possession, regulation of permits to carry concealed weapons, sentencing enhancement for armed crime, prohibitions against unauthorized discharge of firearms in city limits and so forth, all of which are well established.

Now, it could well be that when the Supreme Court is presented with an opportunity to discuss *Heller* and to evaluate whether it should be extended to apply against states and municipalities, that it may choose to do that. But it strikes me that that is presently an undecided question by the Supreme Court.

And as you yourself said a moment ago, the question of the application of precedent in *Maloney* is one we can argue about. What I would hate to have happen here would be to create an atmosphere in which a Supreme Court candidate feels that he or she is going to walk into a volley of fire if he or she will not announce in advance or signal in advance an intention to expand *Heller* beyond where it now is, where the law has never gone before.

Maybe it should go there, maybe it will go there, but the point of fact is that at this point in time, it has not gone there. I believe there is a point at which it verges on unseemly lobbying of the nominee to send signals as to where she will vote when the inevitable petition to expand *Heller* gets brought before the court.

I do not think it is appropriate for her to decide that matter. I do not think her decision in *Maloney* is outside of the bounds of normal judicial precedent, particularly in light of the unique circumstances of the *Heller* decision, the 220 years of having never discovered the right before, the limitation to Federal law by virtue of being a D.C. case, and the long history of state and municipal regulation of firearms without constitutional objection.

So it seems to me that a cautious judge, small "C" conservative judge, would be inclined not to expand *Heller* at that point, but to make her decision within what she perceived the law to be at the time and then if the court wanted to further expand this new constitutional right, that would be the job of the court.

But I hope that we have not, in the course of this hearing, begun to trespass into a point in which the message is being sent to Justice Sotomayor or to subsequent nominees that they need to signal how they will rule on a case that the Supreme Court has not yet decided in order to achieve confirmation, because I think, again, that crosses a boundary between testing the credentials of a candidate in a proper advise-and-consent and what is, I think, unseemly and improper for the advice and consent process, which is to seek commitments in future cases or to lobby as to outcomes in future cases.

I know that the ranking member feels very strongly about that this right should be extended and we will all have the opportunity in due course to make our views known. But I just want to point out that I think in this advise and consent process, there is a point at which making one's point about something does trespass on unseemly lobbying.

I am not sure we have reached that point yet, but I think we are in that neighborhood anyway and I would hope that my colleagues, as they evaluate Justice Sotomayor, would take that into consider-

ation and evaluate her based on her talents, her abilities, and not on her failure to give what I think would be an improper advanced signal as to how she might rule as a Supreme Court justice in *Heller 2*, whatever the case will be named.

Senator SESSIONS. Well, you are a good lawyer and you make a good point. I would say two things.

Senator WHITEHOUSE. We were both U.S. attorneys, so we argue with each other all the time.

Senator SESSIONS. He is my chairman of the Courts Subcommittee. But two things I would say about it. Number one, it has been appropriate to ask nominees about cases they decided, and she has decided this case.

And I think Senator Kyl made a good point. If her case were the one that goes up to the Supreme Court, certainly, she would recuse herself, would have to, I think, under the rules, and maybe even if another one with the very same issue comes up, maybe she should consider it.

Number two, let me tell you what the average American thinks. Just reading the words in the Constitution, it says "Congress shall make no law respecting the establishment of religion or free speech." It says Congress. That means the U.S. Congress. But that applies to the states. That has been incorporated.

The Second Amendment says, well regulated militia, "the right of the people to keep and bear arms shall not be infringed." So that one, all that stuff, it just seems to apply to the people.

Senator WHITEHOUSE. I think the ranking member is a very good lawyer and he makes a very good argument. My only point is that the——

Senator SESSIONS. Maybe we ought to have the experts on that.

Senator WHITEHOUSE.—Supreme Court has not accepted that argument yet and until it does, it is an unanswered question. Again, I do not want to say that we have trespassed that point at this stage, but I do think that it is worth demarcating as we go through this advice and consent process.

But there does come a point where it begins to look like we are pressuring candidates to reach a particular outcome and to make pledges about a particular outcome rather than simply evaluating the merit of their decisions.

But your argument is very well made and it may very well prevail when that case comes before the Supreme Court.

Senator KAUFMAN. I thank the panel. I have no further questions.

Senator SESSIONS. Mr. Chairman, it has been great to serve under your leadership.

Senator KAUFMAN. This has been great. This is a great panel.

Senator SESSIONS. Who needs Pat Leahy? Don't you tell him I said that.

[Laughter.]

Senator KAUFMAN. I need Pat Leahy. All I need is Pat Leahy and a member of the Appropriations Committee. I want to thank the panel and, frankly, I want to thank all the panels.

This is an incredible process. The ranking member said, when he first started, that this is an educational experience for the Amer-

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ican people. I have been dealing with this process for a long time and I really think that is true.

People get to stop for a minute, look at our Constitution, look at the way our process works, and this is a wonderful week in which people came, they argued, they fought, just this last exchange.

Everyone can say what they think. We had not just the members of the Senate, but Members of Congress, from the public. I just think it is a wonderful example of what a great country this is and how our Constitution works.

I would also like to thank Chairman Leahy and Ranking Member Sessions for doing a very thorough hearing, being very open to letting people go where they go and, yet, still getting this whole thing done in record time.

This is an incredibly important process. I believe, as a student of the Congress, outside of the decision to go to war, the decision of who is going to be on the Supreme Court is the single most important decision that you make as a United States Senator, because when you pick a member for the Supreme Court, you are picking someone who serves for life.

If Judge Sotomayor is confirmed and serves in the court, she will probably be here long after this panel of Senators is gone, except for Senator Whitehouse. But anyway, I just want to thank everybody for doing that. The Chairman has left the record open until 5 p.m.

Senator Sessions, anything you would like to say? This hearing is hereby adjourned.

[Whereupon, at 8:04 p.m., the meeting was concluded.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files, see Contents.]

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QUESTIONS AND ANSWERS

The Standing Committee on the Federal Judiciary
American Bar Association

Responses to Written Questions
Regarding
The Nomination Hearing of Judge Sonia Sotomayor
July 17, 2009

Responses Submitted on July 22, 2009

A. Responses to Questions Submitted by Senator Charles E. Grassley

1. As a general rule, does the ABA keep confidential the names of the people it has interviewed, as well as its materials dealing with deliberations and analysis of the nominee? This information is not available to the Judiciary Committee, right?

Confidential materials dealing with deliberations and analysis of the nominee are not available to the Senate Judiciary Committee. These materials are not disclosed to any persons other than the 15 members of the Standing Committee on the Federal Judiciary. A linchpin of the Standing Committee's nonpartisan peer review that the Committee conducts on each nominee is the pledge of confidentiality. For the entire 60 years during which the Standing Committee has conducted these peer reviews, it has promised to maintain -- and has maintained -- the identities of all persons who provide information regarding the professional qualifications of a nominee.

The assurance of confidentiality is critical to the peer evaluation because it allows the Standing Committee to obtain candid and sensitive assessments of a nominee's professional qualifications from lawyers, judges and others. Absent such an assurance, the Standing Committee would not be able to obtain this essential information and perform a meaningful, thorough and objective evaluation of the professional qualifications of a nominee. Over the years, and as recent as the evaluation of Judge Sotomayor, members were informed by individuals interviewed that they were willing to provide the detailed and candid assessments of a nominee's professional qualifications only because of the assurance of confidentiality.

Confidentiality is so critical to our process that it is discussed throughout the *Backgrounder*, the Standing Committee's explanatory booklet setting forth the policies and procedures under which the Standing Committee conducts it evaluations. As we state in the *Backgrounder*:

> A cornerstone of the Committee's peer review process is confidentiality. The Committee strictly maintains the confidentiality of its internal evaluation materials and reports, which are not disclosed to anyone other than Committee members.

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> The Committee maintains the strict confidentiality of the identity of all judges, lawyers and other individuals who provide information the professional qualifications of a prospective nominee unless the interviewee agrees to waive confidentiality. Confidentiality is essential to its ability to obtain candid assessments of a prospective nominee's professional qualifications.

Even with the pre-nomination evaluation process used for nominations to the lower federal courts, all information is maintained in the strictest of confidence. The Standing Committee never publicly discloses this information.

The Standing Committee recently updated its Backgrounder, which is posted on our website at: http://www.abanet.org/scfedjud/ . We have mailed you a printed copy for your ready reference.

2. How do we know that the interviews are not stacked for or against a particular nominee?

The Standing Committee's peer evaluations do not take into consideration the philosophy, political affiliation or ideology of the prospective nominee or any person interviewed regarding the nominee's professional qualifications. Information regarding the nominee's professional qualifications is obtained from a variety of sources, starting with the Personal Data Questionnaire ("PDQ") completed by the nominee and submitted to the Senate Judiciary Committee. The PDQ requires the nominee to provide background information such as past employment and to identify significant cases presided over as a judge or significant litigation handled as a lawyer or judge. In connection with each case or transaction, the nominee also provides the name and contact information for the counsel or lawyers.

Members also obtain information on cases handled or presided over from PACER (federal cases), LEXIS-NEXIS, news articles, GOOGLE, or other public sources. Lawyers and judges interviewed often provide the names of other lawyers and judges involved in cases and transactions and our outreach is to persons identified. Finally, we ask the nominee to identify persons they wish for us to interview who may have knowledge of the nominee's qualifications.

We do not know anything about the personal backgrounds of the lawyers or judges except through the interviews. We do not inquire into an interviewee's ideology or political policy. The sole basis on which we decide to conduct an interview is whether the individuals appear to have relevant information of the nominee's qualifications. If it becomes apparent during the course of an interview that an interviewee does not have personal knowledge of the nominee's professional qualifications and instead is simply trying to influence the Standing Committee's decision, we do not include that interview in the final Formal Report.

Before the Formal Report of an evaluator is sent to the Standing Committee for a rating on a nominee, the Chair reviews each report to determine that all lawyers and judges listed in Question 13 (b) and (c) and Question 17 have been contacted. Question 13, directed to nominees who have held a judicial office, asks for the identity of counsel involved in the ten most significant cases over which the nominee has presided and attorneys who played a significant

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role in the ten most significant opinions written by the nominee. Question 17 seeks the identity of judges, principle counsel, and co-counsel in the ten most significant litigated matters by the lawyer nominee. The very nature of the inquiry under these questions precludes "stacking." If an evaluator is unable to contact the lawyers and judges, and sometimes they are unavailable because of death or retirement, the report will be not submitted to the Standing Committee for a rating until the contacts are made or a full explanation is given as to why the contact was not successful.

That the Standing Committee's interviews are not "stacked" also is demonstrated by the feedback we receive from the interviewees themselves. In providing a positive rating, some interviewees will state that they share a different political philosophy from the nominee or the nominating President or that they lost a case with or before the nominee. Others will state they are of the same political belief as the nominee or have won a case and will still raise issues regarding the professional qualifications of the nominee.

Finally, members of the Standing Committee represent the 13 federal circuits. Members interview lawyers, judges and community and bar representatives in circuits across the United States in conducting our peer review evaluations. The comments we receive are as diverse as the lawyers and judges who practice in those circuits. The interviews on which the Standing Committee bases its ratings reflect the diversity and uniqueness of practice in every federal circuit. In this regard, it would be virtually impossible to "stack" interviews for or against a nominee.

3. Shouldn't the Judiciary Committee have an opportunity to draw its own conclusions from all the ABA's materials, interviews and findings? Why so much secrecy? Shouldn't the ABA process be more transparent?

The ABA process is transparent. The *Backgrounder* fully outlines the ABA process so that lawyers, judges, and all members of the public have knowledge of how the Standing Committee's evaluations are conducted.

As noted earlier, confidentiality is the linchpin of the peer review evaluations. The Standing Committee is able to obtain the detailed assessments of nominees because we can assure those interviewed that our process is confidential. Indeed, the Standing Committee's unique contribution to the vetting process is its extensive, confidential, unbiased peer review of each potential nominee's professional qualifications. Lawyers and judges often tell Standing Committee members that they are willing to give full, frank assessments of the nominee's professional qualifications because of the assurance of confidentiality. While Members always raise confidentiality in the interview process, often the interviewee first raises the confidentiality issue. In the absence of this assurance, interviewees would likely remain silent or refrain from being completely candid, rather than risk public exposure or strain professional relations with the judges and lawyers of the circuits in which they practice. This chilling effect on participation in the peer evaluation process would substantially impede the Standing Committee's ability to perform thorough and candid evaluations of nominees' professional qualifications.

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While we do not provide the Formal Report or the background materials to anyone outside the Standing Committee, we work to ensure that our process is as transparent as possible. The *Backgrounder* explains in detail every aspect of our procedures. The Standing Committee sends the *Backgrounder* to every nominee and the lead evaluator on every investigation fully explains our process to the nominee. The *Backgrounder* is available to the public and posted at all times on our website.

Moreover, the Standing Committee takes seriously all comments from nominees, the Senate Judiciary Committee and others on how our process can be improved. We work continuously to improve our process. As you may recall, we updated our procedures in 2006 because of comments from members of the Senate Judiciary Committee. The newly published *Backgrounder* reflects the Standing Committee's commitment to providing transparency through an in-depth explanation of its evaluation process.

B. Responses to Questions Submitted to Kim Askew, Chair, by Senator Jeff Sessions

In 2006 you gave a "not qualified" rating to judicial nominee Michael B. Wallace, claiming that he lacked "judicial temperament" because his representation of a state Republican party in a redistricting case shows that he was not committed to equal justice. Plaintiffs' counsel in that case was the Lawyers' Committee for Civil Rights. You served on the board of trustees of the Lawyers' Committee for Civil Rights.

1. Shouldn't you have recused yourself from the evaluation of Mr. Wallace given your clear conflict of interest?

The Standing Committee generally responds only to questions related to the nominee that is before the Senate Judiciary Committee for hearing. The Standing Committee follows this practice because we evaluate each nominee on the record presented by that nominee, not on the record presented by any other nominee. However, because your question raises an issue under the Standing Committee's conflict of interest policy, it is important that our position be presented.

In 2006 when the evaluation of Michael B. Wallace took place, my association with the Lawyers' Committee for Civil Rights did not present a conflict of interest and did not require recusal. I did not know the nominee, never participated in any decision of the Lawyers for Civil Rights Committee related to Mr. Wallace, and had never taken a position on any case or policy of the Lawyers' Committee as it related to Mr. Wallace or any entity with which he was affiliated. Finally, the events concerning Mr. Wallace and the Lawyers' Committee took place long before my association with the Lawyers' Committee.

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2. Doesn't your conduct call into question the objectivity of the ABA ratings?

For the reasons set forth above, it does not. As set forth in the *Backgrounder*, the Chair and each member of the Standing Committee strictly enforce the conflict of interest policies and will recuse themselves if a conflict or appearance of impropriety is presented.

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Questions to Sandy Froman from Senator Hatch

Q: Is the right to keep and to bear arms a right the government provides or is it a fundamental right that existed prior to America's founding?

A: The right to keep and bear arms existed prior to America's founding. The Supreme Court explicitly declared that the right to bear arms preexisted the adoption of the Constitution. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2797 (2008).

Q: Was the use of the "rational basis" test in *Maloney* the proper standard of review? What are the practical implications of using rational basis review to evaluate weapons restrictions?

A: The Supreme Court expressly declared that rational-basis review is not the proper test for Second Amendment claims, and therefore Judge Sotomayor was refusing to follow clear Supreme Court precedent by applying that test. The same dissenting justices who argued the Second Amendment secures no individual right also joined another dissent, authored by Justice Breyer, arguing that the D.C. gun ban should be upheld because it passes the rational-basis test. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2851 (2008) (Breyer, J., dissenting). The majority in *Heller* specifically rebutted Justice Breyer's dissent, expressly holding that the rational-basis test is not the appropriate standard of review because it does not sufficiently protect the right to keep and bear arms. *Id.* at 2817–18. All nine justices acknowledged that the D.C. gun ban would survive rational-basis review, *id.* at 2817 n.27, so the fact that the D.C. gun ban was struck down as unconstitutional separately proves that the Court rejected Judge Sotomayor's test.

Q: Judge Sotomayor said that she was following 2nd Circuit precedent in the *Maloney* decision. Do you agree?

A: No, I do not agree. Three issues must be addressed here.

First, it is troubling that as a member of the first appellate panel to take a serious Second Amendment claim post-*Heller*, Judge Sotomayor did not explore in any depth the questions concerning incorporation or what constitutes a fundamental right. While she cited precedent, she did nothing to determine whether those precedents were still binding, summarily stating that they were. This is an abdication of a circuit judge's responsibility to fairly explore relevant legal issues and provide reasons underlying the panel's decision.

Second, whether Judge Sotomayor was following Second Circuit precedent with regards to the rational-basis test is irrelevant, because any such precedent was overruled by *District of Columbia v. Heller*.

Third, Judge Sotomayor went far beyond any precedent. In wrongly applying the rational-basis test, she went a step further to promulgate a rule that is irreconcilable with *Heller*. Judge Sotomayor joined an opinion holding that, if a law regulates a dangerous device that can kill or maim, then that danger is a sufficient basis to completely prohibit such a device. *Maloney v. Cuomo*, 554 F.3d 56, 59 (2d Cir. 2009).

Although *Maloney* involved martial arts weapons that are not firearms, most Second Amendment cases involve firearms. Firearms are inherently dangerous, with the power to kill or maim. Thus, Judge Sotomayor and her colleagues in *Maloney* set up the following syllogism: (1) A law subject to rational-basis review will be upheld as constitutional if it is rationally related to any legitimate state interest. (2) All restrictions on deadly devices are rational. (3) Firearms are deadly. (4) Therefore, all laws restricting firearms are constitutional. Under this flawed framework, the D.C. gun ban in *Heller* would have been upheld. In fact, this reasoning creates a *per se* rule under which any gun restriction would automatically be upheld, rendering the Second Amendment meaningless. This reasoning is fatally deficient, and flagrantly disregards Supreme Court precedent in *Heller*.

Q: Judge Sotomayor said that footnote 23 of the *Heller* decision explained that the 2nd Amendment does not apply to the states. Is that what the footnote says? Does footnote 23 explain that applying the 2nd Amendment to the states would be inappropriate?

A: *Heller*'s footnote 23 does not say that the Second Amendment does not apply to the states, nor does it say that such an application would be inappropriate. This footnote mentions the three cases from the late 1800's wherein the Court held that the Second Amendment does not apply to the states. The first is *United States v. Cruikshank*, and the other two, *Presser v. Illinois* and *Miller v. Texas*, cite *Cruikshank* as the precedent they follow. Footnote 23 expressly notes that *Cruikshank* also stated the First Amendment does not apply to the states. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2813 n.23 (2008). This footnote thus suggests that *Cruikshank* reasons that, to the extent that the First Amendment does not apply to the states, likewise the Second Amendment does not apply to the states to precisely the same extent. The Supreme Court has subsequently incorporated every provision of the First Amendment to the states. *E.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause). This of course suggests that the Second Amendment may well apply to the states, though the Court acknowledged that the incorporation question was not presented in *Heller*. The

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Court in *Heller* also said that these antiquated Second Amendment precedents do not engage in the sort of inquiry the Court later declared to be necessary for Fourteenth Amendment analysis.

Therefore the Court in *Heller* footnote 23 called into question whether the *Cruikshank* line of cases are still good law, and further suggested that lower courts are obliged to attempt to perform the required Fourteenth Amendment inquiry. Judge Sotomayor ignored this, saying that the incorporation question is "settled law," and did not engage in the type of inquiry *Heller* said was required.

Q: In my questions, I talked about the difference between incorporation through the Privileges and Immunities clause of the 14th Amendment and incorporation through the Due Process Clause of the 14th Amendment. Which clause does the Supreme Court use to apply the provisions of the Bill of Rights to the states? Which clause was discussed in the cases cited by the *Maloney* opinion?

A: There are two possible answers to this question, neither of which supports Judge Sotomayor's treatment of the Second Amendment. Those provisions of the Bill of Rights that have been applied to the states have been so applied by incorporating them into the Fourteenth Amendment Due Process Clause. *E.g.*, *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (incorporating the right to counsel). This is important because the earlier cases cited by Judge Sotomayor focused on the Fourteenth Amendment Privileges or Immunities Clause. The question therefore becomes whether those nineteenth-century cases should be read broadly or narrowly.

First, an appellate court could hold that the *Cruikshank* lines of cases only precludes incorporation through the Privileges or Immunities Clause, leaving open the possibility that a court could incorporate the Second Amendment through the Due Process Clause. The Ninth Circuit, in a panel that included two Democrat-appointed judges, unanimously held that the Second Amendment was incorporated through the Due Process Clause. *See Nordyke v. King*, 563 F.3d 439, 457 (9th Cir. 2009). This approach is also advocated by one of the foremost Second Amendment scholars. *See* Nelson Lund, *Anticipating Second Amendment Incorporation: The Role of the Inferior Courts*, 59 Syracuse Law Review 185, 195 (2008).

The second option is that a circuit court could hold that the *Cruikshank* cases cover all of the Fourteenth Amendment. The Seventh Circuit held exactly that, in a case that has now petitioned for Supreme Court review. *See NRA v. Chicago*, 567 F.3d 856 (7th Cir. 2009). In arriving at this conclusion, however, it was again after a lengthy and detailed analysis

of the question, in which the Seventh Circuit noted that there were serious arguments in favor of incorporating the Second Amendment, but then concluded that only the Supreme Court could issue such a holding. This broader reading of *Cruikshank* has been adopted by another lawyer who strongly supports Second Amendment incorporation. *See* Kenneth A. Klukowski, *Citizen Gun Rights: Incorporating the Second Amendment through the Privileges or Immunities Clause*, 39 New Mexico Law Review 195 (forthcoming Oct. 2009). But Judge Sotomayor and her panel in *Maloney* reached this conclusion through a summary glossing over of the issue, without any substantive analysis. This is what Judge Sotomayor was criticized for by another Democrat-appointed judge in another high-profile case. *Id.* at n.524 (citing *Ricci v. DeStefano*, 530 F.3d 88, 92 (2d Cir. 2009) (Cabranes, J., dissenting from denial of rehearing *en banc*)). The Supreme Court later reversed Judge Sotomayor in the *Ricci* case.

Judge Sotomayor followed neither approach. Therefore Judge Sotomayor was violating precedent, rather than following it, raising grave concerns regarding her attitude toward Second Amendment issues and her approach to interpreting the Constitution.

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Senator Tom Coburn, M.D.
Written Questions for the Record
Dr. Stephen Halbrook
July 17, 2009

1. **Do you believe that the Second Circuit in *Maloney v. Cuomo* should have considered whether a Fourteenth Amendment Due Process analysis was required by the Supreme Court's decision in *Heller v. District of Columbia*?**

Yes. The Supreme Court in *Heller* explicitly directed courts to undertake an analysis of its modern jurisprudence to determine whether the Second Amendment is incorporated into the Due Process Clause of the Fourteenth Amendment. Even without this directive, it would be expected that appellate courts would consider the Supreme Court's latest rulings on a given topic.

Nineteenth century cases rejected direct application of the First and Second Amendments to the States based on pre-Fourteenth Amendment precedent.[1] *See United States v. Cruikshank*, 92 U.S. 542, 552-53 (1876); *Presser v. Illinois*, 116 U.S. 252, 265 (1886).[2] Since these cases did not rule on the application of the Second Amendment to the States through the Fourteenth Amendment, *District of Columbia v. Heller*, 128 S. Ct. 2783, 2813 n.13 (2008), admonished: "With respect to *Cruikshank's* continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases."

The only part of the above statement from *Heller* acknowledged by *Maloney v. Cuomo*, 554 F.3d 56, 58 (2nd Cir. 2009) (*per curiam*), was the clause "a question not presented by this case," which referred to whether *Cruikshank* had any validity on incorporation. *Maloney* disregarded the statement that *Cruikshank* "did not engage in the sort of Fourteenth Amendment inquiry *required* by our later cases." (Emphasis added.) Had *Maloney* engaged in that required analysis, it would have acknowledged: "The most familiar of the substantive liberties protected by the Fourteenth Amendment are those recognized by the Bill of Rights." *Planned Parenthood v. Casey*, 505 U.S. 833, 847-48 (1992) (referring to "the specific guarantees elsewhere provided in the Constitution. . . . the right to keep and bear arms").[3]

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[1] *Barron v. Mayor of Baltimore*, 7 Pet. 243, 8 L. Ed. 672 (1833).

[2] For a complete analysis of these cases and their backgrounds, see Halbrook, *Freedmen, the Fourteenth Amendment, & the Right to Bear Arms, 1866-1876* (Praeger 1998), ch. 7; Halbrook, "The Right of Workers to Assemble and to Bear Arms: *Presser v. Illinois*," 76 *Univ. of Detroit Mercy L. Rev.* 943 (Summer 1999).

[3] The most important precedents incorporating substantive Bill of Rights guarantees are cited in my written testimony on page 3, n.2.

Maloney did not cite any of what *Heller* called "our later cases," and instead relied solely on *Presser*. *Presser* held that the Second Amendment did not, in and of itself, limit state action,[4] but made no mention of the Fourteenth Amendment in this discussion.[5] In short, "*Presser* said nothing about the Second Amendment's meaning or scope, beyond the fact that it does not prevent the prohibition of private paramilitary organizations." *Heller*, 128 S. Ct. at 2813.

The Ninth Circuit conducted the required analysis and held that the Second Amendment is incorporated into the Due Process Clause of the Fourteenth Amendment. *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009). The Second Circuit in *Maloney* could have also engaged in a modern Fourteenth Amendment enquiry, even if in the final analysis it concluded that only the Supreme Court may recognize the incorporation of the Second Amendment. Unfortunately, it failed to do so.

2. What role, if any, did protecting the rights of African Americans to arm themselves have in passing the Fourteenth Amendment? Please explain.

The Framers of the Fourteenth Amendment more clearly intended to protect the right of African Americans and all other citizens to keep and bear arms than any other Bill of Rights guarantee. Without the right to provide for their personal security, including protection of their very lives, the freed slaves would be unable to exercise other constitutional rights.

"In the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves." *District of Columbia v. Heller*, 128 S. Ct. 2783, 2809-10 (2008), citing Halbrook, *Freedmen, the Fourteenth Amendment, & the Right to Bear Arms, 1866-1876* (Praeger 1998).[6] The Black Codes passed by the Southern States prohibited

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[4]" But a conclusive answer to the contention that *this amendment* [the Second] prohibits the legislation in question lies in the fact that *the amendment* is a limitation only upon the power of congress and the national government, and not upon that of the state." *Presser*, 116 U.S. at 265 (emphasis added).

[5]*Presser* rejected a claim that the ban on unlicensed armed parades violated the Privileges-or-Immunities Clause of the Fourteenth Amendment insofar as it protected the First Amendment right to assemble. *Id.* at 266-68. No such claim was made regarding the Second Amendment.

[6]Other works by this author include "The Freedmen's Bureau Act & the Conundrum Over Whether the Fourteenth Amendment Incorporates the Second Amendment," 29 *Northern Ky. L. Rev.*, No. 4, 683 (2002); "Personal Security, Personal Liberty, & 'the Constitutional Right to Bear Arms': Visions of the Framers of the Fourteenth Amendment," 5 *Seton Hall Constitutional L. Jour.* 341 (Spring 1995); "The Fourteenth Amendment & the Right to Keep and Bear Arms: The Intent of the Framers," *The Right to Keep and Bear Arms*, Rep. of the Subcom. on the Constitution, Senate Judiciary Com., 97th Cong., 2d Sess., 68 (1982).

possession of firearms by African Americans, and a primary purpose of the Fourteenth Amendment was to prevent such State deprivation of Second Amendment rights. *Id.* at 2809-11.

Rep. Zachariah Chandler endorsed the view that freedom for the slaves required that: "'The right of the people to keep and bear arms' must be so understood as not to exclude the colored man from the term 'people.'"[7] Senator Charles Sumner noted a petition of black South Carolinians "that they should have the constitutional protection in keeping arms . . . and in complete liberty of speech and of the press."[8]

The same two-thirds of Congress that passed the Fourteenth Amendment enacted the Freedmen's Bureau Act,[9] which provided that "the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, . . . including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens . . . ."[10] No other Bill of Rights guarantee was the subject of such an explicit declaration by the same Congress that proposed the Fourteenth Amendment.

Explaining the need for the Act, Rep. Thomas D. Eliot recited a report about black soldiers returning home to Kentucky: "Their arms are taken from them by the civil authorities . . . . Thus the right of the people to keep and bear arms as provided in the Constitution is infringed . . . ."[11] This rendered the freedmen "defenseless, for the civil-law officers disarm the colored man and hand him over to armed marauders."[12]

Similarly, the Civil Rights Act of 1866 also protected the "full and equal benefit of all laws and proceedings for the security of person and property . . . ."[13] The Fourteenth Amendment was needed because, as Rep. George W. Julian explained, the Civil Rights Act

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[7]CONG. GLOBE, 39th Cong., 1st Sess. at 217 (1866).

[8]*Id.* at 337 (1866). *See* 2 *Proceedings of the Black State Conventions, 1840-1865*, at 302 (1980) (petition to Congress in 1866 that Second Amendment rights be protected from deprivation by State of South Carolina).

[9]Halbrook, *Freedmen*, 41-42. *See* CONG. GLOBE, 39th Cong., 1st Sess. 3842, 3850 (July 16, 1866).

[10]§ 14, 14 Stat. 176-177 (1866).

[11]CONG. GLOBE, 39th Cong., 1st Sess. at 2774 (1866).

[12]*Id.* at 2775.

[13]14 Stat. 27 (1866) (today's 42 U.S.C. § 1981).

> is pronounced void by the jurists and courts of the South. Florida makes it a misdemeanor for colored men to carry weapons without a license to do so from a probate judge, and the punishment of the offense is whipping and the pillory. . . . Cunning legislative devices are being invented in most of the States to restore slavery in fact.[14]

Introducing the Fourteenth Amendment in the Senate, Jacob Howard distinguished the "privileges and immunities of citizens" in Article IV of the Constitution from "the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as . . . the right to keep and bear arms . . . ."[15] However, this "mass of privileges, immunities, and rights" did not restrain the States. "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees."[16] No one questioned Howard's explanation.

African Americans were advised by the freedman newspaper *The Loyal Georgian* that "you have the *same* right to own and carry arms that other citizens have."[17] The Freedmen's Bureau proclaimed: "All men, without distinction of color, have the right to keep and bear arms to defend their homes, families or themselves."[18]

Constitutional commentator George Paschal wrote: "This clause [the Second Amendment] . . . is based on the idea, that the people cannot be oppressed or enslaved, who are not first disarmed."[19] "The new feature declared [by the Fourteenth Amendment] is that the general principles which had been construed to apply only to the national government, are thus imposed upon the States."[20]

The Framers broadly referred to the right to have arms as being among the rights, privileges, and immunities protected by the Fourteenth Amendment. Rep. Dawes commented on the judicial protection of "these rights, privileges, and immunities" codified in the Civil Rights Act of 1871.[21] Dawes identified them in part as follows:

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[14]CONG. GLOBE, 39th Cong., 1st Sess. 3210 (1866).

[15]Id. at 2765.

[16]*Id.* at 2766.

[17]*The Loyal Georgian*, Feb. 3, 1866, at 1, quoted in Halbrook, *Freedmen*, 19.

[18]*Id.*

[19]George W. Paschal, *The Constitution of the United States* 256 (1868).

[20]*Id.* at 86.

[21]Today's 42 U.S.C. § 1983.

> He has secured to him the right to keep and bear arms in his defense. . . . It is all these, Mr. Speaker, which are comprehended in the words, "American citizen," and it is to protect and to secure him in these rights, privileges and immunities this bill is before the House.[22]

In sum, protection of the right of African Americans to keep and bear arms played a critical role in regard to the history, intent, and purposes of the Fourteenth Amendment. State laws in the form of the Black Codes made it unlawful for newly-freed slaves to possess firearms or to exercise other civil rights, and a primary goal of the Reconstruction Congress was to eradicate these vestiges of slavery. By guaranteeing this basic right to the means of personal security and personal liberty from infringement by State and local governments, the Fourteenth Amendment remains as a guarantee of the Second Amendment rights of all Americans.

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[22]CONG. GLOBE, 42nd Cong., 1st Sess., 475-76 (1871).

Questions to Stephen Halbrook from Senator Hatch

What is the practical effect on America if the Supreme Court rules that the Second Amendment does not protect a fundamental right?

A ruling by the Supreme Court that the Second Amendment does not protect a fundamental right would mean that the federal, state, and local governments could pass virtually any prohibition on the right to keep and bear arms and the courts would uphold it. Any such ruling would also degrade Bill of Rights freedoms in general by postulating that courts may subjectively evaluate explicit guarantees as not being worthy of protection.

A right is "fundamental" if it is "explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17, 33 (1973). While the Supreme Court has found exceptions to this principle regarding certain procedural rights,[1] an explicitly-protected substantive right is inherently fundamental, and regulation thereof requires strict scrutiny.[2]

District of Columbia v. Heller, 128 S. Ct. 2783 (2008), recognizes the right to keep and bear arms as an explicitly-guaranteed right in the same category as other fundamental rights. "By the time of the founding, the right to have arms had become fundamental for English subjects." 128 S. Ct. at 2798. Blackstone "cited the arms provision of the [English] Bill of Rights as one of the fundamental rights of Englishmen. . . . It was, he said, 'the natural right of resistance and self-preservation,' . . . and 'the right of having and using arms for self-preservation and defence . . . .'" *Id.*, quoting 1 Blackstone, *Commentaries* 139-40 (1765).

"[T]he Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'" *Id.* at 2797.

As with other fundamental rights, the explicit nature of "the right of the people" to have arms precludes application of the rational-basis standard of review. As *Heller* states:

Obviously, the same test could not be used to evaluate the extent to which a

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[1]Even with procedural rights, explicitly-named rights are presumably fundamental. *E.g.*, *Pointer v. Texas*, 380 U.S. 400, 404 (1965) ("The fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief of the Framers of those liberties and safeguards that confrontation was a fundamental right . . . .").

[2]No constitutional right is "less 'fundamental' than" others, and "we know of no principled basis on which to create a hierarchy of constitutional values . . . ." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982).

> legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n. 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938) ("There may be narrower scope for operation of the presumption of constitutionality [*i.e.*, narrower than that provided by rational-basis review] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . .").

Id. at 2818 n.27.

Heller rejects a "judge-empowering 'interest-balancing inquiry' that 'asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'" *Id.* at 2821. Such a test would allow "arguments for and against gun control" and the upholding of a handgun ban "because handgun violence is a problem, [and] because the law is limited to an urban area . . . ." *Id. Heller* responds:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. . . . Like the First, it [the Second Amendment] is the very *product* of an interest-balancing by the people . . . . And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

Id.

"[T]his Court has increasingly looked to the specific guarantees of the (Bill of Rights)" as to incorporation and "has rejected the notion that the Fourteenth Amendment applies to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights . . . .'" *Benton v. Maryland*, 395 U.S. 784, 794 (1969). The guarantee against double jeopardy was fundamental because it could "be traced to Greek and Roman times," it was "established in the common law of England," and "was carried into the jurisprudence of this Country through the medium of Blackstone, who codified the doctrine in his *Commentaries*." *Id.* at 795. The same is true of the Second Amendment.[3]

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[3]*See Heller*, 128 S. Ct. at 2792, 2798-99, 2805 (discussion of Blackstone and the common law); Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* 9-20 (1984) (recognition of right to have arms in Greek and Roman law and philosophy); Halbrook, *The*

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In sum, the Second Amendment protects the fundamental right to keep and bear arms, including the possession of firearms in the home for lawful purposes. As with other constitutional rights, regulation of this right should be subject to strict scrutiny. However, should the right be subjectively devalued by courts as not fundamental, then any and all firearms could be prohibited and the Second Amendment rendered nugatory.

Why did the Founders believe that the Right to Bear Arms was so important?

The Founders saw the right to keep and bear arms as a fundamental human right. The people, both as individuals and as a group, have an inherent right to preserve their lives and liberties from attack, whether from criminals, tyrants, foreign invaders, domestic terrorists, or any other aggressors. The right is further important for hunting and sporting use, which in turn train citizens in the safe and proper use of arms. The right makes possible a well regulated militia, which the Second Amendment declares to be "necessary to the security of a free State."

St. George Tucker, who wrote the first commentaries on the Second Amendment, perhaps explained it best as follows:

> This may be considered as the true palladium of liberty. . . . The right of self defence is the first law of nature . . . . Wherever . . . the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.

Tucker, *View of the Constitution*, in 1 Blackstone, *Commentaries*, App. at 300 (St. George Tucker ed. 1803).

District of Columbia v. Heller, 128 S. Ct. 2783, 2817-18 (2008), reiterates this theme, explaining how the right to have arms, and why that right precludes a handgun ban, is tied to the right to protect life:

> the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of "arms" that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home "the most preferred firearm in the nation to 'keep' and use for protection of one's home

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Founders' Second Amendment 25-26, 114, 293 (2008) (Founders' reliance on right to arms in writings of Aristotle and Cicero); *id.* at 126-69 (the right to have arms was considered fundamental in every State at the founding).

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and family," . . . would fail constitutional muster.

The Second Amendment also prevents oppression: "when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny." *Heller*, 128 S. Ct. at 2801.[4] As stated by the Federalist writer Tench Coxe just after James Madison proposed the Bill of Rights:

> As civil rulers, not having their duty to the people duly before them, may attempt to tyrannize, and as the military forces which must be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms.

Federal Gazette, June 18, 1789, at 2, col. 1.[5]

James Madison referred to "the advantage of being armed, which the Americans possess over the people of almost every other nation," in contrast with the European monarchies, where "the governments are afraid to trust the people with arms." *The Federalist* No. 46, *Documentary History of the Ratification of the Constitution*, vol. 15, at 492-93.

The right of the people to keep and bear arms makes possible a well regulated militia, which the Amendment declares is "necessary to the security of a free State." In addition to being called out by the States, the militia has the federal function when being called forth "to execute the Laws of the Union, suppress Insurrections and repel Invasions." U.S. Const., Art. I, § 8, cl. 15. In World War II, when most able-bodied men were sent abroad in the armed forces, citizens with their own arms provided the backbone for protective forces set up by the States to guard against sabotage and enemy infiltration.[6]

However, as *Heller* remarks: "The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting." 128 S. Ct. at 2801. Exercise of the right for purposes such as hunting and sport promotes the militia and self defense purposes.[7]

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[4]*See Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968) ("A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government.").

[5]Madison concurred with Coxe's analysis. Madison to Coxe, June 24, 1789, *The Papers of James Madison*, Charles F. Hobson *et al.* eds. (1979), vol. 12, at 257.

[6]*E.g.*, M. Schlegal, *Virginia on Guard* (1949).

[7]*McConico v. Singleton*, 2 Mill Const. 244, 1818 WL 787, *1 (S.C. Const. Ct. 1818) ("the militia . . . necessarily constitutes our greatest security against aggression; our forest is the great

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It is noteworthy that the Framers of the Fourteenth Amendment sought to extend Second Amendment rights to African Americans to defend themselves from racist terrorism. That is why the Freedmen's Bureau Act provided that "the right . . . to have full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, . . . including the constitutional right to bear arms, shall be secured to and enjoyed by all the citizens . . . ."[8] A significant aspect of Reconstruction is the promotion of Second Amendment rights for freedmen so they could resist Klan attacks.[9]

Nordyke v. King, 563 F.3d 439, 457 (9th Cir. 2009), captured the historical role of the Second Amendment and why it is applicable against the States as well as the Federal government as follows:

> We therefore conclude that the right to keep and bear arms is "deeply rooted in this Nation's history and tradition." Colonial revolutionaries, the Founders,and a host of commentators and lawmakers living during the first one hundred years of the Republic all insisted on the fundamental nature of the right. . . . Colonists relied on it to assert and to win their independence, and the victorious Union sought to prevent a recalcitrant South from abridging it less than a century later. The crucial role this deeply rooted right has played in our birth and history compels us to recognize that it is indeed fundamental, that it is necessary to the Anglo-American conception of ordered liberty that we have inherited. We are therefore persuaded that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment and applies it against the states and local governments.

How would you describe Judge Sotomayor's view on the 2nd Amendment?

Judge Sotomayor joined in two *per curiam* decisions holding that the right to keep and bear arms is not fundamental and does not apply to the States through the Fourteenth Amendment. The author of a *per curiam* opinion is unknown – all that can be ascertained is that the three judges on the panel agreed with it. Such opinions are normally reserved for cases where precedent is clearly applicable and little or no substantive discussion is warranted.

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field in which, in the pursuit of game, they learn the dexterous use and consequent certainty of firearms").

[8]§ 14, 14 Stat. 176-177 (1866).

[9]Halbrook, *Freedmen, the Fourteenth Amendment, & the Right to Bear Arms, 1866-1876*, *passim* (1998).

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The panel in *United States v. Sanchez-Villar*, 99 Fed. Appx. 256, 258, 2004 WL 962938 (2nd Cir. 2004), held that mere possession of a firearm gave rise to probable cause for a search, seizure, and arrest. The validity of a State law making it a crime merely to possess a firearm raises issues under the core Second Amendment right to "keep" arms. The panel offered no analysis and relied on a 1984 Second Circuit case stating that "the right to possess a gun is clearly not a fundamental right." Both that case and *Sanchez-Villar* involved illegal aliens with firearms, but the intervening decision in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), held that "the people" referred to in the First, Second, and Fourth Amendments "refers to a class of persons who are part of [our] national community," and excludes illegal aliens. *Sanchez-Villar* made no mention of this Supreme Court precedent.[10]

In *Maloney v. Cuomo*, 554 F.3d 56, 58 (2nd Cir. 2009), *cert. petition filed*, No. 08-1592 (June 26, 2009), the panel relied on a nineteenth-century Supreme Court decision holding that the Second Amendment does not apply *directly* to the States. The panel referred to the following statement in *District of Columbia v. Heller*, 128 S. Ct. 2783, 2813 n.23 (2008), only regarding the "question not presented" and ignored the "required" inquiry: "With respect to *Cruikshank's* continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." This matter is discussed in more detail in my written testimony.

Each of the above panels devoted just a few sentences, composing one paragraph each, to the Second Amendment issues raised.

The courts of appeal decide many cases *per curiam*, and it would be unfair to conclude that everything in a *per curiam* opinion represents the considered views of each judge on the panel. However, it would be well to remember the following words of wisdom of Justice Frankfurter in *Ullmann v. United States*, 350 U.S. 422, 428-29 (1956):

> As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion. . . . To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution.

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[10]In addition, by this time *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002), had been decided, holding that the Second Amendment protects an individual right. While obviously not precedent in the Second Circuit, the decision warranted discussion.

RESPONSES TO QUESTIONS FROM SENATOR HATCH

Dear Senator Hatch:

Please find below my responses to your written questions dated July 17, 2009:

1. **Do you agree with Judge Sotomayor's view that standardized tests have inherent cultural bias in them?**

If it is Judge Sotomayor's view that all standardized tests are inherently culturally biased, I disagree. Data show that some standardized tests have been culturally biased. This bias was recognized decades ago, but since that time considerable effort has gone into eradicating the biases. While not all tests have eliminated all vestiges of bias, an assertion that standardized tests have inherent cultural bias in 2009 is inaccurate. Moreover, in the *Ricci* case no probative evidence of cultural bias was adduced. In fact, it is arguable that if the New Haven exam contained any bias, it was a bias in favor of minorities, who were oversampled in preparing the exam and who were overrepresented on the oral exam panels. Finally, the Supreme Court found no evidence that the fire fighters exam was not job related and consistent with business necessity.

2. **Was it proper to issue a summary order in the *Ricci* case? Was it proper to issue a per curiam opinion in the *Ricci* case.**

No. Second Circuit Local Rule 32.1 provides as follows:

Dispositions by summary order

a) Use of summary orders. The demands of contemporary case loads require the Court to be conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision (*sic*) is unanimous *and each judge of the panel believes that no jurisprudential purpose would be served by an opinion, i.e. a ruling having precedential effect*, the ruling may be made by summary order instead of by opinion. (emphasis added)

The *Ricci* case involved both constitutional and statutory issues of extraordinary importance and impact. Consider that the Supreme Court receives thousands of petitions for

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certiorari each term. Approximately one percent (1%) of such petitions are granted. Clearly, the Justices of the Supreme Court discerned that a reasoned opinion in the *Ricci* case would have a jurisprudential purpose. It is, therefore, inconceivable that each judge on the panel believed that its disposition of the *Ricci* case would have no jurisprudential purpose.

Furthermore, per curiam decisions are normally issued in cases that are non-controversial. It is respectfully submitted that a first year law student would immediately perceive that the issues in the *Ricci* case were extremely controversial and that a decision thereon would have a jurisprudential purpose.

3. Judge Sotomayor claimed that she was following established precedent when she issued the *Ricci* decision. Is that true?

No. A review of the Title VII and Equal Protection Clause cases decided by both the 2nd Circuit and the Supreme Court reveals no "established precedent" dispositive of the issues in the *Ricci* decision. As the district court in the *Ricci* case noted, the facts presented the obverse of the traditional *McDonnell Douglas v. Green* analysis. The facts in *Ricci* were peculiar and a matter of first impression. As the Supreme Court stated, "[t]he action presents two provisions of Title VII to be interpreted and reconciled, *with few, if any, precedents* in the court of appeals discussing the issue." *Ricci v. DeStefano,* 557 U.S. ___ (2009) at 16. (emphasis added)

4. Had there been a case in the 2nd Circuit, or the Supreme Court, that dealt with a conflict between disparate impact and disparate treatment?

The Supreme Court has dealt with the tension between disparate impact and disparate treatment, but only in the context of the Equal Protection Clause of the Fourteenth Amendment—*not* in the context of Title VII, as was the case in *Ricci*. See *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Moreover, the facts in the *Ricci* case were one of first impression.

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The 2nd Circuit noted the conflict between disparate treatment and disparate impact in *Hayden v. County of Nassau*, 180 F.3d 42 (2nd Circuit 1999). *Hayden*, however, dealt with a public employers' redesign of a test to comply with a consent decree. It did not concern an employer's act of intentional disparate treatment to avoid disparate impact litigation. *Hayden* is wholly distinguishable from *Ricci* and would not provide precedent to permit disposition of *Ricci* by a means of summary order.

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Senator Tom Coburn, M.D.

Written Questions for the Record

David Kopel, Esq.

July 17, 2009

1. Please describe the different in analyses of the Second Circuit in *Maloney v. Cuomo* and the Seventh Circuit in *NRA v. Chicago*. Was the Second Circuit's opinion in *Maloney* flawed in your opinion?

Answer: The Second Circuit engaged in hardly any analysis, but merely asserted conclusions. The Seventh Circuit produced an extensive analysis of the relevant legal issues.

In particular, the central question of the case—whether the Second Amendment is enforceable against state governments—was brushed aside in a single paragraph by the Sotomayor opinion. The paragraph asserts that Supreme Court decisions prevent the lower federal courts from deciding the question.

The Seventh Circuit, although it ultimately came to the same result as had the Second Circuit, acknowledged that the answer was not so simple. The Seventh Circuit's treatment of the question of whether Supreme Court precedent is controlling was over three times longer than the Second Circuit's treatment.

The difference can hardly be explained as a reflection of varying writing styles. Judge Sotomayor's opinions in general have been described as wordy, lengthy, and ponderous. Yet in *Maloney*, she became terse, indeed reticent.

Judge Easterbrook, the author of the Seventh Circuit opinion, is widely acknowledged as one of the most outstanding legal writers of our times. So his much longer treatment of the issue cannot be ascribed to wordiness or the inability to write concisely. Simply put, Judge Easterbook needed to set forth the legal reasoning which underlay his top-level conclusions, and to address at least some of the arguments against his conclusions. Judge Sotomayor's uncharacteristically brusque opinion provided much less analysis.

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Rather significantly, the record shows that Judge Sotomayor, while usually quite prolix in her opinions, becomes taciturn in the presence of constitutional rights she seems not to favor: the right to arms in *Maloney*, the property right in *Didden*, the right to be promoted on the basis of objective merit rather than race in *Ricci*.

Supreme Court decisions, especially on controversial topics, need to support the legitimacy of the rule of law by offering the American people serious legal reasoning for those decisions. *Maloney* is but one example of Judge Sotomayor's refusal to do so, when the topic involves rights which she disfavors.

2. Was the Supreme Court's decision in *Presser v. Illinois* binding precedent on the Second Circuit in *Maloney* on the question of whether the Second Amendment has been incorporated on the states through the Due Process Clause of the Fourteenth Amendment?

Answer: No, although Judge Sotomayor claimed that it was. *Presser* mainly addressed the question of whether the Second Amendment directly applies to the states by its own terms, and the Court ruled that it does not. The Court very briefly addressed whether the result was changed by the Privileges or Immunities clause of the Fourteenth Amendment. The Court said nothing about incorporation via the Due Process clause of the Fourteenth Amendment.

A Supreme Court decision about the meaning of one clause in an Amendment certainly does not create precedent about the meaning of an entirely separate clause in the Amendment. For example, a decision that a government practice does not violate the First Amendment's Free Exercise clause does not create a precedent about whether that practice violates the Establishment clause.

Judge Sotomayor's per curiam opinion in *Maloney* implicitly recognized this fact. The opinion addressed (albeit in a brusque, conclusory, and unreasoned manner) the argument that the New York law violated the Equal Protection clause of the Fourteenth Amendment.

Obviously, the fact that *Presser* made Mr. Maloney into a loser under the Privileges or Immunities clause of the Fourteenth Amendment created no binding precedent about whether Mr. Maloney had a valid claim under the Equal Protection clause of the Fourteenth Amendment. Judge Sotomayor recognized as much, dealt with the Equal Protection claim, and she did not assert that *Presser* was controlling.

Yet Judge Sotomayor refused even to address the question of the Fourteenth Amendment's Due Process clause. Just as the *Presser* decision on the Privileges or Immunities clause does not create binding precedent about the Equal Protection clause, it does not create binding precedent about the Due Process clause.

Questions to David Kopel from Senator Hatch

Is the right to keep and to bear arms a right the government provides or is it a fundamental right that existed prior to America's founding?

Answer: The majority and dissenting opinions in *Heller* agreed that the Second Amendment right pre-exists the Constitution. The Second Amendment protects "the" right to keep and bear arms, a phrasing which clearly indicates that the Amendment guarantees an existing right, rather than creating a new one.

As to whether the right is "fundamental," the Supreme Court has not formally declared that the Second Amendment is, or is not, a "fundamental right" in the sense that it is protected from state and local government infringement by the Due Process clause of the Fourteenth Amendment. However, the *Heller* opinion itself repeatedly pointed out the English and American common law sources (including William Blackstone's *Commentaries*) which provided the foundation of the Second Amendment clearly recognized the right to armed self-defense to be a "fundamental" and "natural" right. (For details, see David B. Kopel, *The Natural Right of Self-defense: Heller's Lesson for the World*, 59 SYRACUSE LAW REVIEW 235 (2008), http://ssrn.com/abstract=1172255).

Further, Supreme Court opinions in a variety of constitutional cases have repeatedly listed the Second Amendment as among the fundamental elements of "liberty" protected by the Due Process clause of the Fourteenth Amendment. The language first appears in the second Justice Harlan's dissent in *Poe v. Ullman*; a few years later in *Griswold v. Connecticut*, the Court reversed itself, and took the position that Justice Harlan had favored in *Poe*. That language recognizes that the right to arms is part of the "liberty" protected by the Fourteenth Amendment, and also states that the protected liberty is not confined only to enumerated rights:

> "The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment."

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Poe v. Ullman, 367 U.S. 497, 543 (1961)(Harlan, J., dissenting).

The above language has since been quoted with approval in five different Supreme Court opinions: *Albright v. Oliver*, 510 U.S. 266, 306-08 (Stevens, J., dissenting); *Planned Parenthood v. Casey*, 505 U.S. 833, 841 (1992)(O'Connor, J., opinion for the Court); *Moore v. East Cleveland*, 431 U.S. 494, 502 (1976) (Powell, J., plurality opinion); *Roe v. Wade*, 410 U.S. 113, 167 (1973) (Stewart, J., concurring); *see also* David B. Kopel, *The Supreme Court's Thirty-five Other Gun Cases*, 18 ST. LOUIS UNIVERSITY PUBLIC LAW REVIEW 99 (1999), http://davekopel.org/2A/LawRev/35FinalPartOne.htm).

Was the use of the "rational basis" test in *Maloney* the proper standard of review? What are the practical implications of using rational basis review to evaluate weapons restrictions?

Answer: Rational basis was the proper standard only if the Second Amendment did not apply (a point which the Sotomayor per curiam opinion addressed briefly) *and* if, despite what Mr. Maloney had argued in his brief, the New York law did not infringe on any *unenumerated* right protected by the Fourteenth Amendment. Judge Sotomayor's opinion simply assumed that there was no unenumerated right involved, but provided not a scintilla of reasoning in support of that assumption.

Judge Sotomayor's version of the rational basis test—as she used it in *Maloney*, and explained her theory in testimony before the Senate Judiciary Committee—would allow any arm to be banned, as long as the government can provide some evidence that the arm could injure someone. This theory would allow a state or local government to prohibit every and any type of arm.

Judge Sotomayor said that she was following 2nd Circuit precedent in the *Maloney* decision. Do you agree?

Answer: She claimed to be following the pre-*Heller* decision of *Bach v. Pataki*. That case was dispositive on the meaning of *Presser v. Illinois* in regards to the Privileges or Immunities clause of the Fourteenth Amendment. Neither *Bach v. Pataki*, nor *Presser* itself, even addressed the question of the interpretation of the Due Process clause of the Fourteenth Amendment. Accordingly, precedent did not prevent Judge Sotomayor from considering Due Process incorporation.

Judge Sotomayor said that footnote 23 of the *Heller* decision explained that the 2nd Amendment does not apply to the states. Is that what the footnote says? Does footnote 23 explain that applying the 2nd Amendment to the states would be inappropriate?

Answer: Footnote 23 lists three nineteenth-century cases in which the Court rejected non-federal application of the Second Amendment. The Court noted that the theory of one of those cases (*United States v. Cruikshank*, which had also said that the First Amendment right to assemble was only enforceable against the federal government) was no longer valid in light of subsequent cases. The Court noted that the other two cases (*Presser v. Illinois* and *Miller v. Texas*) had not been over-ruled, but that each of nineteenth century cases had "did not engage in the sort of Fourteenth Amendment inquiry required by our later cases."

Accordingly, *Heller* seems to indicate that contemporary lower federal courts are "required" to "engage in the sort of Fourteenth Amendment analysis" which has been created by the "later" Supreme Court cases: namely whether the Second Amendment is incorporated via the Due Process clause.

Footnote 23 does not take any position on whether or not applying the Second Amendment to the states would be appropriate. The footnote simply says that the proper (indeed, "required") way to decide the issue is to "engage in the sort of Fourteenth Amendment inquiry required by our later cases."

In my questions, I talked about the difference between incorporation through the Privileges and Immunities clause of the 14th Amendment and incorporation through the Due Process Clause of the 14th Amendment. Which clause does the Supreme Court use to apply the provisions of the Bill of Rights to the states? Which clause was discussed in the cases cited by the *Maloney* opinion?

Answer: The Supreme Court currently uses the Due Process clause of the Fourteenth Amendment to make most of the Bill of Rights applicable to the states. The *Maloney* opinion, and the cases on which *Maloney* relies, only discuss the Privileges or Immunities clause of the Fourteenth Amendment.

To assert that a decision on the Privileges or Immunities clause creates a binding precedent for the entirely separate Due Process clause is implausible. A Privileges or Immunities decision has no more bearing on the Due Process clause than it does on the Equal Protection clause, or on the Citizenship clause of section 1 of the Fourteenth Amendment.

Answers of John O. McGinnis to questions from Senator Hatch

1. *Do you think Justice Sotomayor's testimony on foreign and international law is consistent with her speech to the ACLU?*

I find it difficult to square Judge Sotomayor's denial that foreign or international law should have any influence on constitutional law with her speech to the ACLU. First, it is well known that there is a debate among the Justices on this subject. Justices Ginsburg and Breyer are strong proponents of its use. Justices Scalia and Thomas are strong detractors. Judge Sotomayor expressly endorsed Justice Ginsburg's view over that of Justices Scalia and Thomas. She conceded that Justices Scalia and Thomas had one good point—the danger of selective use. But this is objection not to the use of foreign and international law in Supreme Court opinions, only to selective use. Second, Judge Sotomayor seems to endorse the use of foreign law in Lawerence v. Texas, the paradigm case for relying on foreign law. As I suggested at greater length in my testimony, the best interpretation of her speech is that she thinks that foreign law may have some influence, but that it cannot dictate results. That is the position of Justices Breyer and Ginsburg, in my view.

It is possible, of course, that Judge Sotomayor was not very familiar with this debate and did not recognize that she was agreeing with those who held the opposite position from what she believed.

2. *What is the difference between the approach to foreign law that Justices Thomas and Scalia take and the approach that Justice Ginsburg takes? Which view is more consistent with Founding principles? Which view best preserves American sovereignty?*

I believe Justice Scalia and Thomas have the far better view. Justices Scalia and Thomas believe that the meaning of the Constitution is fixed at the time it was ratified. It follows directly that contemporary foreign and international law has no relevance.

I am not sure how to characterize Justice Ginsburg's jurisprudential methods and that is part of the problem with them. She appears to sometimes consider consequences and the need for social change in construing the Constitution. Looking at foreign or international may seem consistent with her view, because she believes that international law and foreign law may encapsulate social changes that are going on and thus help American constitutional law reach results with better consequences. The difficulty with relying on foreign and international law, however, is that there is no reason to believe it is likely to have better consequences for the United States than our own democratic system or be better than that system at capturing social change. (I discuss this point at some

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length in my testimony). Even on the premises of her own jurisprudence, it is thus a mistake to rely on foreign or international law in constitutional interpretation.

The views of Justices Scalia and Thomas far better preserve the sovereignty of the United States, because under their view foreign and international cannot influence the interpretation of our founding document. In contrast, the views of Justice Ginsburg would permit citizens in other nations to encroach on our sovereignty, at least at the margin, because their law and legal decisions might influence the interpretation of our own Constitution.

3. *Judge Sotomayor says that her judicial philosophy is "fidelity to the law." What, if anything, does that tell us about her judicial philosophy and what kind of Justice she would be?*

I am not sure the phrase fidelity to law means a great deal unless one makes clear how one goes about legal analysis. After all, no nominee to the Court would say that she was going to be unfaithful to law! As I suggested in answer to question 2, Justices Scalia and Justice Thomas, on the one hand, and Justice Ginsburg on the other have entirely different approaches to law. Unless a judge is willing to tell us the nature of his or her jurisprudential methods, it is difficult to give a lot of meaning to the term "fidelity to law."

Indeed, what disturbs me a little about Judge Sotomayor's speech on foreign and international law is its apparent premise that foreign and international law may became a source to aid judicial decisionmaking, although she correctly concludes that our jurisprudence does not endow this material with formal authority. In my view, fidelity to law means at minimum that only material that is formally endowed with authority should have any weight whatsoever in a judge's decisions.

Responses to Questions Submitted by Senator Sessions

Neomi Rao
Assistant Professor
George Mason University School of Law

1. What are some of the problems with a pragmatic or flexible approach to judging?

Response:

Judge Richard Posner, one of the foremost modern defenders of pragmatism, summarizes the core of legal pragmatism as "a disposition to ground policy judgments on facts and consequences rather than on conceptualisms and generalities."[1] A pragmatic judge must make the most reasonable decision, "all things considered."[2] While this approach may have some advantages and may in fact describe what many judges do, nonetheless it is insufficiently attentive to the formal requirements of the law.

A pragmatic judge will carefully consider the law, but in difficult cases, may rely on practical considerations, such as what outcome will have the best consequences overall. A pragmatic judge does not feel unduly bound by the text of statutes or the Constitution, or previously decided cases. Moreover, a judge who tries to determine the best outcome all things considered will have greater latitude to consider his or her own assessments of what is the best outcome. Such an approach will be necessarily more open to the individual beliefs and commitments of each judge, an openness that undermines the understanding that we are a government of laws, not men.

2. Judge Sotomayor says that she admires Justice Benjamin Cardozo. In his classic text on judging, Justice Cardozo wrote:

> *The great generalities of the constitution have a content and a significance that vary from age to age. The method of free decision sees through the transitory particulars and reaches what is permanent behind them. Interpretation, thus enlarged, becomes more than the ascertainment of the meaning and intent of lawmakers whose collective will has been declared.*

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[1] RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 59 (2005). *See also id.* at 85 ("[Pragmatism] is resolutely antiformalist, it denies that legal reasoning differs importantly from ordinary practical reasoning, it favors narrow over broad grounds of decision at the outset of the development of an area of law, it is friendly to rhetoric and unfriendly to moral theory, it is empirical, it is historicist but recognizes no 'duty' to the past, it distrusts exception-less legal rules, and it doubts that judges can do better in reasonable cases than to reach reasonable (as distinct from demonstrably correct) results.").

[2] *Id.* at 64.

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It supplements the declaration, and fills the vacant spaces, by the same processes and methods that have built up the customary law.

Benjamin N. Cardozo, THE NATURE OF THE JUDICIAL PROCESS, 17-18 (Yale Univ. Press, 1921).

If Judge Sotomayor agrees with this classic quote from Justice Cardozo, what does that say about her view of the role of a judge?

Response:

This quotation comes from a discussion by Justice Cardozo about the process of judge-made law. He explains that in every system of written law is the need for gap-filling or legislation by the judge. His understanding of the judicial role comes from various legal theorists who understand the "judge as the interpreter for the community of its sense of law and order" who "must supply omissions, correct uncertainties, and harmonize results with justice through a method of free decision."[3] Justice Cardozo goes on to explain that in American constitutional law, the "method of free decision" has become the dominant one.[4] This description reflects a wide-ranging view of the role of the judge, who serves in a common law fashion to make law where statutes and the Constitution may be silent, ambiguous, obscure, or unjust.

Justice Cardozo explains that the judge's role is essentially the same when interpreting written texts as when developing the common law.[5] This view may be sharply contrasted with that of modern-day textualists who believe that when interpreting written law, whether statutory or constitutional, judges have a particular duty to interpret the meaning of the law, not impose their own will over that of the legislature or the people.[6]

Justice Cardozo's view of the judge becomes even clearer in his chapter on "The Judge as a Legislator" in which he explains that when the judge has to make difficult decisions he acquires knowledge "just as the legislator gets it, from experience and study and reflection; in brief, from life itself. ... The choice of methods, the appraisement of values, must in the end be guided by life considerations for the one as for the other. Each

[3] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 16 (1921).

[4] *Id.* at 17.

[5] "I will dwell no further for the moment upon the significance of constitution and statute as sources of the law. The work of a judge in interpreting and developing them has indeed its problems and its difficulties, but they are problems and difficulties not different in kind or measure from those besetting him in other fields." *Id.* at 18.

[6] *See generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997).

indeed is legislating within the limits of his competence."[7] Justice Cardozo acknowledges that the judge's sphere is narrower, but nonetheless requires the same legislative process to make, not find, the law.[8] This conclusion reflects a wide-ranging conception of the role of the judge, little constrained by constitutional or prudential considerations.

[7] CARDOZO, *supra* note 3, at 113.

[8] *Id.* at 115.

Responses to Questions Submitted by Senator Hatch

Neomi Rao
Assistant Professor
George Mason University School of Law

1. Judge Sotomayor described her judicial philosophy as "fidelity to the law." Some have described this as a slogan and not a philosophy. Do you agree? Has there been a Supreme Court nominee that has refused to pledge "fidelity to the law"?

Response:

Standing alone, the ideal of "fidelity to the law" says little about judicial philosophy. All federal judges take an oath to "administer justice without respect to persons, and do equal right to the poor and to the rich" and to "faithfully and impartially discharge and perform all the duties" required of them "under the Constitution and laws of the United States."[1] The oath requires allegiance to the Constitution and faithful execution of the judicial role. "Fidelity to the law" echoes an essential commitment of every judge. It does not, however, express how a judge intends to be faithful to the law. A judicial philosophy may be difficult to articulate with clarity and comprehensiveness, but such a philosophy should begin with a conception of the judicial role and explain how judges should interpret the Constitution as well as statutes.

I am not aware of any nominee to the Supreme Court who has refused to pledge fidelity to the law. Recent nominees have appropriately and consistently pledged to uphold the law. For example, during his confirmation hearings, Justice Samuel Alito explained, "A judge can't have any agenda. A judge can't have any preferred outcome in any particular case. And a judge certainly doesn't have a client. The judge's only obligation—and it's a solemn obligation—is to the rule of law, and what that means is that in every single case, the judge has to do what the law requires." Similarly, Chief Justice John Roberts said during his confirmation hearings, "I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability, and I will remember that it's my job to call balls and strikes, and not to pitch or bat."

2. What is the proper role of judges as the Founders understood?

What the Founders considered to be the proper role of a judge is a difficult and complicated question. A number of scholars have addressed this topic with significant

[1] 28 U.S.C. § 453.

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erudition.[2] To mention just one source of understanding at the time of the founding, in Federalist 78, Alexander Hamilton provides one of the most frequently cited discussions of the position and obligations of the federal judiciary. Hamilton explained that judicial review arises from the fact of a written constitution. Courts can review acts of Congress for constitutionality, but this does not mean that the judiciary is superior to the legislature: "It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former."[3] Hamilton also explained that structural limitations on the judiciary made it the weakest branch as it has "neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[4] One might draw from these statements a conclusion that the judiciary should robustly enforce the Constitution, but also that it must stay within the boundaries of its particular role.

3. *If judges fail to be restrained, what are some potential problems that could result from their lack of self-restraint?*

Response:

Judges may lack self-restraint in a number of different contexts, each of which could raise difficulties. As one general example of overreaching, judges may essentially rewrite outdated or ambiguous laws in order to address modern-day problems. Such rewriting, however, frustrates the rule of law by creating uncertainty for parties who must rely on what the law says. Interpretation of laws beyond what the language reasonably includes is not part of the judicial role because judges lack democratic legitimacy and accountability, as well as institutional competence, for legislating. Moreover, if judges regularly update statutes in this way it may undermine the incentives for Congress to fix problems as they arise.

4. *What problems result from judges believing that it is possible to change the meaning of the Constitution?*

Response:

The framers wrote our Constitution to establish the structure of government and to protect individual freedom and liberty. They provided that the Constitution would be the

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[2] *See, e.g.*, PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008) (tracing the history of judicial review and examining ideals about law and judging).

[3] THE FEDERALIST NO. 78, at 404 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

[4] *Id.* at 402.

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supreme law of the land and therefore would supersede all laws inconsistent with the Constitution. As Justice Scalia has explained, the whole purpose of a constitution is "to embed certain rights in such a manner that future generations cannot readily take them away."[5] If the meaning of the Constitution can change without formal amendment, then it no longer possesses the character of a constitution, but is more like ordinary legislation. Legislation can and should respond to new problems and changing social norms. The Constitution, however, was designed to ensure that legislative majorities would not trample on certain fundamental liberties. Simply put, evolution of constitutional meaning can undermine the essential purpose of a written constitution and upset the balance between the judiciary and the political branches.

[5] ANTONIN SCALIA, A MATTER OF INTERPRETATION 40 (1997).

Questions to David Rivkin from Senator Hatch

In what ways have some Supreme Court decisions undermined our national security?

From *Hamdi* to *Boumediene*, the Supreme Court's post-9/11 cases have placed tremendous burdens on the United States' ability to detain captured enemy combatants. The constitutionally-grounded habeas process mandated in *Boumediene* has proven impossible to apply in most instances. With federal district court judges applying demanding evidentiary and other requirements, the government is unable to meet its burden in many habeas cases. The battlefield is simply too dangerous an environment to allow our military to collect evidence against most captured enemy fighters sufficient to support an arrest under criminal law. Efforts to do so are likely to be detrimental to the safety of our soldiers. The prospect of aggressive discovery efforts, undertaken in the context of habeas litigation by plaintiff counsel, and directed at ferreting out sensitive national security information further complicates the situation. These problems were predicted by those of us who have long warned against extending habeas rights to enemy combatant aliens captured overseas.

The problem is not limited to detainees at Guantanamo Bay. The lower courts are now in the process of extending constitutional habeas to detainees held by U.S. forces in Afghanistan. As a result, U.S. forces have already curtailed the extent to which captured enemy combatants can be detained for protracted periods of time. This is the first war in American history where thousands of captured enemy fighters and operatives have been released while hostilities are still ongoing. This "catch and release" paradigm endangers our ultimate victory in Afghanistan. Since many released enemy combatants return to the Taliban, al Qaeda, and other terrorist formations, these litigation-driven releases needlessly jeopardize the lives of American soldiers and civilians.

Concerns that our courts may make further constitutional rights available to alien enemy combatants have led the U.S. military to start using *Miranda* warnings when capturing enemy fighters on foreign soil. The issuance of such warnings severely compromises any opportunities to interrogate these detainees, rendering moot the past several years' debate about appropriate interrogation methods. The resulting lack of actionable intelligence about the enemy complicates our ongoing military operations and is likely to increase U.S. casualties.

While undermining the military's essential ability to detain and interrogate captured enemy fighters is bad enough, trends in the Supreme Court's jurisprudence –in particular, a willingness to disregard well-settled precedent, extend the Constitution's reach to non-U.S. persons overseas and ignore fundamental constitutional limitations on the Judiciary's role in the area of national security – suggest that the Court is likely to continue to expand its writ to other military decisions. The rules of engagement, the

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extent of permissible collateral damage in the context of ongoing combat operations, whether or not a given military engagement amounts to an armed conflict or not are likely to become subjects for judicial review. If this were to happen, U.S. ability to wage war successfully would be dramatically undermined, particularly if we continue to face an enemy unfettered by any normative or legal constraints on the use of force.

Does the Supreme Court's decision to get involved with some aspects of the War on Terror violate the separation of powers?

Yes. The judiciary is the branch of government that is least well-equipped to reach sound judgments about how to prosecute a war in general, what constitutes an appropriate detention regime or how to gather battlefield intelligence. The judiciary is equally poorly-equipped to gainsay judgments made in these areas by the two political branches. It has neither the institutional expertise, nor, given how the courts can only deal with specific cases and controversies, the opportunity to look at policy in a comprehensive manner. It was this relative institutional incapacity, which the Framers understood all too well, that caused them to deny Article III courts the power to engage in an open-ended scrutiny of discretionary national security-related judgments.

Indeed, as the courts' political question doctrine (that is grounded in both prudential and constitutional imperatives) has long recognized, national security judgments are delegated under Articles I and II to the political branches because there are no standards readily ascertainable by the courts that would allow the judiciary to second-guess Executive or legislative judgments about national security matters.

What problems does reliance on foreign law create for our national security?

Reliance on foreign law by Article III courts has a pernicious impact in the national security area. Many of our allies have decisively rejected much of the traditional legal architecture governing armed conflict. They have embraced instead new international and domestic legal regimes that dramatically inhibit the ability of states – although not that of non-state actors – to wage war. These regimes impose historically unprecedented restraints on the circumstances in which a state can legitimately use armed force (the parameters of permissible self-defense), equalize the rights and obligations of lawful and unlawful belligerents, in some important respects, even advantaging unlawful belligerents. They also drastically rework the definition of the extent of collateral damage permissible in the course of combat, as well as recast the fundamental relationship between the international law of war and international humanitarian law.

That our allies have gone in this direction has substantially undermined and, frequently, crippled their ability to wage war decisively and successfully. Our European allies, in

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particular, are perfectly aware of the dramatic policy consequences of their doctrines, but, having abandoned most serious war-fighting capabilities, are not greatly troubled. For the U.S., which remains the primary security guarantor of the existing international system, to be bound by the same dysfunctional legal architecture would be nothing short of calamitous. To the extent that U.S. courts incorporate this dysfunctional legal architecture by reference to, or reliance upon, foreign law, they adversely impact the fighting ability of the U.S. military.

Question for the Record for David Rivkin from Senator

In your written statement you reference a situation at the Bagram A Afghanistan, where lower courts "are already beginning the proces: the habeas regime to individuals captured and held by the U.S. in o world."

- **Can you elaborate on what specific harm may come from**

There are reports that, the decision a District Court Judge in t Columbia, Judge Bates, in the *Maqaleh* case, has caused the curtail operations that might result in the capture of enemy fi Afghan borders. Judge Bates' ruling posits that individuals, in Afghanistan, but who were originally captured outside of / entitled to the same constitutionally-based habeas review as t Bay's detainees. *Maqaleh* has potentially devastating implic: operations of U.S. Special Forces. The net result is that, whil continues to use air assets to attack Pakistan-based al Qaeda a targets, its ground force operations against such targets have This situation clearly benefits the enemy at a time when U.S. trying to turn the tide against a surge in Taliban activities in /

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GEORGETOWN LAW

Nicholas Quinn Rosenkranz
Associate Professor of Law

July 27, 2009

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you again for the opportunity to testify at the Sotomayor confirmation hearing before the Judiciary Committee on July 16, 2009. I write to respond to the written follow-up questions of Ranking Member Sessions and Senator Hatch, and to answer a question that Senator Klobuchar asked during the hearing. I have reproduced the Senators' questions below in italics, and after each question I have written my answer.

RANKING MEMBER SESSIONS' QUESTIONS

RANKING MEMBER SESSIONS QUESTION #1: *Judge Sotomayor, in her hearing testimony, depicted the use of foreign law as akin to using a dictionary because both are texts that are extrinsic to the Constitution. What harms arise from the use of foreign law that distinguish this use from the use of dictionaries? What about using foreign law versus using law review articles?*

ANSWER: There is nothing wrong with consulting extrinsic sources as aids to interpretation of the Constitution. But it is essential to understand the fundamental project of constitutional interpretation before evaluating precisely *which* extrinsic sources will be useful to that project. And conversely, the extrinsic sources chosen by a judge can tell one a great deal about that judge's theory of constitutional interpretation.

If one is trying to determine the meaning of a 220-year-old text, it is easy to see how it might be useful to consult with, for example, an equally old dictionary, to understand how words were used at the time.[1] Likewise, if a scholar has written a careful law review

[1] *See, e.g.*, District of Columbia v. Heller, 128 S.Ct. 2783, 2828 (2008) (citing S. JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773)); United States v. Lopez, 514 U.S. 549, 585–87 (1995) (Thomas, J., concurring) (citing S. JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773); N. BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (26th ed. 1789); T. SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1796)); Morrison v. Olson, 487 U.S. 654, 719

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article about the original public meaning of a particular constitutional provision,[2] it might well be useful to consult such an article. (Far be it from me to suggest that judges should not consult law review articles!) But foreign law is an entirely different matter. As I explained in my written statement, if one is trying to discern the meaning of a particular 220-year-old text, "it is mysterious why one would need to study other legal documents, written in other languages, for other purposes, in other political circumstances, hundreds of years later and thousands of miles away."[3] In short, the distinction is one of relevance. Old dictionaries and careful scholarship may well be useful in determining the original public meaning of the United States Constitution. But contemporary foreign law will almost never be relevant to that project.

And so, if a judge appears to rely on contemporary foreign law in a constitutional case, the suspicion arises that the judge is engaged in an entirely different project. Since, as a matter of logic, contemporary foreign law cannot help discern the original public meaning of the U.S. Constitution, it would seem that such a judge is not trying to *discern* the meaning at all; it may seem, rather, that the judge is engaged in the quite different project of *updating* the meaning of the Constitution, to bring it in line with (the judge's perception of) world opinion. And that is not the proper role of a federal judge.

RANKING MEMBER SESSIONS QUESTION #2: *Is Judge Sotomayor's attempt to distinguish between "using" foreign law, which she says is forbidden, and "considering" the ideas from foreign law, which she says is permitted, and even "commanded" by our legal system an "unintelligible distinction" as one commentator has said?*

ANSWER: The distinction is intelligible only if one posits an idiosyncratically narrow definition of "using" foreign law, which is what Judge Sotomayor seems to have in mind. Her premise seems to be that a court "uses" foreign law only if the court treats the foreign law as binding or outcome-determinative.[4] Thus, when Judge Sotomayor flatly testified

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(1988) (Scalia, J., dissenting) (citing S. JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785)); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 113–14 (2001).

[2] *See, e.g.*, Nicholas Quinn Rosenkranz, *Executing The Treaty Power*, 118 HARV. L. REV. 1867 (2005).

[3] *Hearing Before the Sen. Judiciary Comm. on the Nomination of Judge Sonia Sotomayor to be an Associate Justice of the U.S. Supreme Court*, 111th Cong. (2009), *available at Sen. Patrick J. Leahy Holds a Hearing on the Nomination of Judge Sonia Sotomayor to Be an Associate Justice of the U.S. Supreme Court* (July 16, 2009) (CQ Transcriptions) [hereinafter *July 16 Hearings*] (testimony of Nicholas Quinn Rosenkranz, Associate Professor, Georgetown University Law Center).

[4] *See Hearing Before the Sen. Judiciary Comm. on the Nomination of Judge Sonia Sotomayor to be an Associate Justice of the U.S. Supreme Court*, 111th Cong. (2009), *available at Responses of Judge Sonia Sotomayor to the Written Questions of Senator Jeff Sessions*, http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/upload/QFRsSessions.pdf [hereinafter *Sessions Written Questions*] ("Reading the decisions of foreign courts for ideas, however, does not constitute 'using' those decisions to decide cases."); Sonia Sotomayor, Circuit Judge, U.S. Court of Appeals for the Second Circuit, How Federal Judges Look to International and Foreign Law Under Article VI of the U.S. Constitution, Speech Before the American Civil Liberties Union of Puerto Rico (Apr. 28, 2009), *available at* NEW YORK TIMES, Speech to the A.C.L.U. of Puerto Rico, http://video.nytimes.com/video/2009/06/10/us/politics/1194840839480/speech-to-the-a-c-l-u-of-puerto-rico.html (last visited Jul. 8, 2009) [hereinafter ACLU Speech] ("[W]e don't use foreign or international law. We consider the ideas that are suggested by international and foreign law. That's a very different

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that foreign law should not be "used" in constitutional interpretation,[5] she apparently meant to affirm only that foreign law is not binding and authoritative precedent in United States courts—an utterly uncontroversial proposition.

At the same time, Judge Sotomayor seems to say that judges can and should consider the ideas suggested by foreign law.[6] This is an intelligible distinction but not a reassuring one. Considering foreign ideas may sound innocuous: why shouldn't one consider any and all good ideas, regardless of their source? But, again, the question is one of relevance. If one is genuinely engaged in the project of discerning the meaning of a 220-year-old American text like the U.S. Constitution, there are almost certainly no ideas of any relevance to be found in foreign legal texts written centuries later for entirely different purposes. Good ideas indeed know no borders,[7] and they may be found in a vast array of sources, foreign and domestic. But good ideas *of relevance to constitutional interpretation* are much harder to find—and they are exceedingly unlikely to be found in contemporary foreign law.

RANKING MEMBER SESSIONS QUESTION #3: *Judge Sotomayor spoke favorably of French judicial decision making in a speech, Judicial Independence: What It Takes to Maintain It, stating: "In terms of actual decision-making, judicial panels in France issue only one decision. Unlike courts in the United States, dissenting opinions are very rare. With a single decision, there is less pressure on individual judges and less fear of reprisal for unpopular decisions." Judge Sonia Sotomayor & Jennifer Peng, Judicial Independence: What It Takes to Maintain It, Speech Given at the Colegio de Abogados de Puerto Rico Asamblea Annual 1999, 12–13 (Sept. 11, 1999) ("Bar Association of Puerto Rico Annual Assembly"), available at http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/upload/Question-12-d-No-33-9-11-99-Colegio-de-Abogados-de-Puerto.pdf. What does Judge Sotomayor's favorable reference to this French practice say about her understanding of the role of the judge in the American legal system?*

ANSWER: This brief observation about French judicial practice reveals little about Judge Sotomayor's view of the American judicial role. In the speech, Judge Sotomayor was careful to note: "[N]ot every method is easily transplanted, nor will every method

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concept . . . ."); *see also infra* text accompanying notes 12–17.

[5] *See Hearing Before the Sen. Judiciary Comm. on the Nomination of Judge Sonia Sotomayor to be an Associate Justice of the U.S. Supreme Court*, 111th Cong. (2009), *available at Sen. Patrick J. Leahy Holds a Hearing on the Nomination of Judge Sonia Sotomayor to Be an Associate Justice of the U.S. Supreme Court* (July 14, 2009) (CQ Transcriptions) [hereinafter *July 14 Hearings*] (testimony of Sonia Sotomayor, Circuit Judge, U.S. Court of Appeals for the Second Circuit) ("American law does not permit the use of foreign law or international law to interpret the Constitution. That's a given.").

[6] *See* Sotomayor, ACLU Speech, *supra* note 4 ("[I]deas are ideas, and whatever their source, whether they come from foreign law or international law, or a trial judge in Alabama, or a circuit court in California, or any other place, if the idea has validity, if it persuades you . . . then you are going to adopt its reasoning.").

[7] *See id.* ("Ideas have no boundaries. Ideas are what set our creative juices flowing; they permit us to think. And to suggest to anyone that you can outlaw the use of foreign or international law is a sentiment that's based on a fundamental misunderstanding. What you would be asking American judges to do is to close their minds to good ideas—to some good ideas.").

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necessarily work in a different judicial system. Thus, we must always keep in mind the underlying structure and needs of each culture and the differences among them."[8] She then proceeded to highlight several structural features of the French system, which distinguish it from the American system.[9] And only then did she make the observation quoted in the Question above. Under these circumstances, the observation can tell us little about her view of the American judicial role.

More generally, there is nothing inherently objectionable about comparative law as a scholarly inquiry, or about a descriptive survey of judicial independence around the globe. The objection arises when one brings such an inquiry to bear on the project of interpreting the U.S. Constitution. For *that* project, it is exceedingly difficult to see the relevance of contemporary foreign law.

SENATOR HATCH'S QUESTIONS

SENATOR HATCH QUESTION #1*: Was what Judge Sotomayor said at the confirmation hearing about foreign law consistent with her speech to the ACLU of Puerto Rico?*

ANSWER: There does seem to be some tension between Judge Sotomayor's April 28 speech and her testimony last week. In the speech, Judge Sotomayor seemed to endorse the idea that foreign law could be relevant and helpful in the interpretation of the United States Constitution.[10] In her testimony, by contrast, she seemed to disavow this sort of use of foreign law.[11]

The speech and the testimony can be reconciled only if one adopts an idiosyncratically narrow definition of what it means to "use" foreign law, which is what Judge Sotomayor seems to have in mind. As she put it, "we don't *use* foreign or international law,"[12] but "[w]e consider the ideas that are suggested by international and foreign law."[13] Likewise,

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[8] Judge Sonia Sotomayor & Jennifer Peng, Judicial Independence: What It Takes to Maintain It, Speech Before the Colegio de Abogados de Puerto Rico Asamblea Annual 1999, 11 (Sept. 11, 1999) ("Bar Association of Puerto Rico Annual Assembly"), *available at* http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/upload/Question-12-d-No-33-9-11-99-Colegio-de-Abogados-de-Puerto.pdf

[9] *See id.* at 11–13

[10] Sotomayor, ACLU Speech, *supra* note 4 ("In both those cases [*Roper v. Simmons* and *Lawrence v Texas*], the courts were very, very careful to note that they weren't using that law to decide the American question. They were just using that law to help us understand what the concepts meant to other countries, and to help us understand whether our understanding of our own constitutional rights fell into the mainstream of human thinking. There may well be times where we disagree with the mainstream of international law. But there is much ambiguity in law, and I for one believe that if you look at the ideas of everyone and consider them and test them, test the force of their persuasiveness, look at them carefully, examine where they're coming from and why, that your own decision will be better informed.")

[11] *See July 14 Hearings*, *supra* note 5 (testimony of Sonia Sotomayor, Circuit Judge, U.S. Court of Appeals for the Second Circuit) ("American law does not permit the use of foreign law or international law to interpret the Constitution. That's a given.").

[12] Sotomayor, ACLU Speech, *supra* note 4 (emphasis added)

[13] *Id.*

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later in the speech, she discussed the citation of foreign law in two recent and controversial Supreme Court cases, saying: "In both those cases, the courts were very, very careful to note that they weren't using that law to decide the American question. They were just using that law to help us understand what the concepts meant to other countries, and to help us understand whether our understanding of our own constitutional rights fell into the mainstream of human thinking."[14] Likewise, in her testimony, Judge Sotomayor said: "[T]here's a public misunderstanding of the word 'use.' And what I was talking about, one doesn't use those things in the sense of coming to a legal conclusion in a case."[15] And: "people misunderstand what the word 'use' means. And I noted that use appears to be—to people to mean if you cite a foreign decision, that's means it's controlling an outcome or that you are using it to control an outcome. And I said, no."[16] Finally, in her written answers to the Committee's follow-up questions, Judge Sotomayor wrote: "In some limited circumstances, decisions of foreign courts can be a source of ideas, just as law review articles or treatises can be sources of ideas. Reading the decisions of foreign courts for ideas, however, does not constitute 'using' those decisions to decide cases."[17]

Judge Sotomayor's premise seems to be that a court only "uses" foreign law if the court treats the foreign law as binding or outcome-determinative. Thus, when she testified that she would not "use" foreign law to interpret the U.S. Constitution,[18] she may have meant to affirm only that she would not treat it as binding or outcome-determinative—but that she might still use it to inform her analysis, as she seemed to suggest in her speech. If that is what she means, then the speech and the testimony may be reconciled, but the reconciled position would still be troubling, for reasons discussed in the Answers to Ranking Member Sessions' Questions #1 and #2, above.

SENATOR HATCH QUESTION #2: *What is the difference between the approach to foreign law that Justices Thomas and Scalia take and the approach that Justice Ginsburg takes? Which view is more consistent with Founding principles? Which view best preserves American sovereignty?*

ANSWER: Justice Scalia and Justice Thomas take the position that foreign law is generally irrelevant to the interpretation of the United States Constitution.[19] Justice

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[14] *Id.*

[15] *Hearing Before the Sen. Judiciary Comm. on the Nomination of Judge Sonia Sotomayor to be an Associate Justice of the U.S. Supreme Court*, 111th Cong. (2009), *available at Sen. Patrick J. Leahy Holds a Hearing on the Nomination of Judge Sonia Sotomayor to Be an Associate Justice of the U.S. Supreme Court* (July 15, 2009) (CQ Transcriptions) [hereinafter *July 15 Hearings*] (testimony of Sonia Sotomayor, Circuit Judge, U.S. Court of Appeals for the Second Circuit).

[16] *July 16 Hearings*, *supra* note 3 (testimony of Sonia Sotomayor, Circuit Judge, U.S. Court of Appeals for the Second Circuit).

[17] *Sessions Written Questions*, *supra* note 4.

[18] *See July 14 Hearings*, *supra* note 5 (testimony of Sonia Sotomayor, Circuit Judge, U.S. Court of Appeals for the Second Circuit) ("American law does not permit the use of foreign law or international law to interpret the Constitution. That's a given.").

[19] *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361, 370 n.1 (1989) ("We emphasize that it is *American* conceptions of decency that are dispositive [to the Eighth Amendment inquiry], rejecting the contention of petitioners and their various amici . . . that the sentencing practices of other countries are relevant."); Foster

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Ginsburg, by contrast, takes the position that foreign law may be relevant to the interpretation of the United States Constitution.[20] As I expressed in my written testimony,[21] I believe that the position of Justice Scalia and Justice Thomas (and Justice Alito[22] and Chief Justice Roberts[23]) is more consistent with Founding principles and better preserves American sovereignty. My arguments are set forth in greater detail in

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v. Florida, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring in denial of certiorari) ("While Congress, *as a legislature*, may wish to consider the actions of other nations on any issue it likes, this Court's Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans."); Stephen Breyer & Antonin Scalia, Assoc. Justices, U.S. Supreme Court, Debate at American University: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005) (transcript available at http://www.freerepublic.com/focus/f-news/1352357/posts).

[20] *See* Justice Ruth Bader Ginsburg, U.S. Supreme Court, The Value of a Comparative Perspective in Constitutional Adjudication, Address Before the Constitutional Court of South Africa (Feb. 7, 2006), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_02-07b-06.html.

[21] *July 16 Hearings*, *supra* note 3 (testimony of Nicholas Quinn Rosenkranz, Associate Professor, Georgetown University Law Center).

[22] *See Confirmation Hearing on the Nomination of Samuel A. Alito to be an Associate Justice of the Supreme Court of the United States before the S. Comm. on the Judiciary*, 109th Cong. 471 (2006).

> I don't think that we should look to foreign law to interpret our own Constitution .... I think the framers would be stunned by the idea that the Bill of Rights is to be interpreted by taking a poll of the countries of the world .... The purpose of the Bill of Rights was to give Americans rights that were recognized practically nowhere else in the world at the time. The framers did not want Americans to have the rights of people in France or the rights of people in Russia or any of the other countries on the continent of Europe at the time .... They wanted them to have the rights of Americans. And I think we should interpret our Constitution—we should interpret our Constitution. And I don't think it's appropriate to look to foreign law. I think that it presents a host of practical problems that have been pointed out. You have to decide which countries you are going to survey. And then it's often difficult to understand exactly what you are to make of foreign court decisions. All countries don't set up their court systems the same way. Foreign courts may have greater authority than the courts of the United States. They may be given a policy-making role. And, therefore, it would be more appropriate for them to weigh in on policy issues. When our Constitution was being debated, there was a serious proposal to have members of the judiciary sit on a council of revision, where they would have a policy-making role before legislation was passed. And other countries can set up their judiciary in that way. So you'd have to understand the jurisdiction and the authority of the foreign courts. And then sometimes it's misleading to look to just one narrow provision of foreign law without considering the larger body of law in which it's located. If you focus too narrowly on that, you may distort the big picture. So for all those reasons, I just don't think that's a useful thing to do.

Id.

[23] *See Confirmation Hearing on the Nomination of John G. Roberts to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 201 (2005).

> If we're relying on a decision from a German judge about what our Constitution means, no president accountable to the people appointed that judge and no Senate accountable to the people confirmed that judge. And yet he's playing a role in shaping the law that binds the people in this country .... The other part of it that would concern me is that, relying on foreign precedent doesn't confine judges .... Foreign law, you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever. As somebody said in another context, looking at foreign law for support is like looking out over a crowd and picking out your friends. You can find them. They're there. And that actually expands the discretion of the judge. It allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent—because they're finding precedent in foreign law—and use that to determine the meaning of the Constitution. And I think that's a misuse of precedent, not a correct use of precedent.

Id.

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two recent law review articles,[24] which are enclosed for your convenience and for the Congressional Record.

SENATOR HATCH QUESTION #3: *Judge Sotomayor has said that foreign law does not bind the courts, but it is possible to look to foreign law for ideas. Does any judge believe that they are bound by foreign law when deciding a case? Why is it wrong to look to foreign law for ideas?*

ANSWER: Judge Sotomayor rightly affirms that foreign law is not binding and authoritative precedent in United States courts,[25] a proposition that, to my knowledge, all United States judges accept. However, Judge Sotomayor seems to embrace the idea that foreign law may be a useful source of "good ideas" when interpreting the U.S. Constitution.[26] It may sound innocuous to consult foreign law for "good ideas"—as Judge Sotomayor says, "ideas have no boundaries,"[27] and good ideas may be found in any number of sources, foreign and domestic. The issue, though, is one of relevance. As explained above, in the Answers to Ranking Member Sessions' Questions #1 and #2, it is very difficult to understand how the ideas reflected in contemporary foreign law—however good or bad—could ever be *relevant* to the interpretation of our distinctly American Constitution.

SENATOR KLOBUCHAR'S QUESTION

At the end of the hearing of my panel, Senator Klobuchar stated that Judge Sotomayor had never used foreign law to interpret the U.S. Constitution or U.S. statutes. I contradicted her on the latter point, saying that I thought Judge Sotomayor had used foreign law to interpret a U.S. statute. Senator Klobuchar asked that I follow up on this exchange and to clarify this factual question. Upon further research, I conclude that we were both, in a sense, correct.

The case that I had in mind was *Croll v. Croll*.[28] This case is a somewhat complicated example, however, because it concerned a treaty[29] as well as implementing legislation.[30]

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[24] *See* Nicholas Quinn Rosenkranz, *An American Amendment*, 32 HARV. J. L. & PUB. POL'Y 475, 475–79 (2009); Nicholas Quinn Rosenkranz, *Condorcet and the Constitution: A Response to* The Law of Other States, 59 STAN. L. REV. 1281 (2007).

[25] *See* Sotomayor, ACLU Speech, *supra* note 4 ("Justice Ginsburg has explained, very recently, in an address to the South African Constitutional Court, that foreign opinions are not authoritative. They set no binding precedent for U.S. courts, but they can add to the story [sic] of knowledge relevant to the solution of a question. And she's right."); *July 15 Hearings*, *supra* note 15 ("[My Speech] repeatedly underscored that foreign law could not be used as a holding, as precedent, or to interpret the Constitution or the statutes.").

[26] *See* Sotomayor, ACLU Speech, *supra* note 4 ("Ideas are what set our creative juices flowing; they permit us to think. And to suggest to anyone that you can outlaw the use of foreign or international law is a sentiment that's based on a fundamental misunderstanding. What you would be asking American judges to do is to close their minds to good ideas . . . .").

[27] *Id.*

[28] 229 F.3d 133 (2d Cir. 2000).

[29] Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, *reprinted in* 51 Fed. Reg. 10,494 (1986).

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Judge Sotomayor used foreign law to help interpret the treaty. But, at least arguably, the implementing legislation, and not the treaty, constituted the underlying source of law in the case. Some treaties are non–self-executing, and so do not create domestic rules of law of their own force;[31] these treaties require implementing legislation to create domestic law—and, in such cases, it is the legislation, rather than the treaty, that is the true source of the domestic law.[32] The treaty at issue in *Croll* is probably non–self-executing,[33] or at least the Second Circuit appeared to view it that way, carefully citing not just the treaty but also the implementing legislation.[34] And, if so, it was really the implementing legislation, rather than the treaty itself, that was the source of domestic law in the case. On this reading of the case, Judge Sotomayor used foreign law to interpret the treaty—and, implicitly, used the treaty to interpret the statute. Thus, in this sense, my statement at the hearing was correct: Judge Sotomayor did use foreign law to interpret a U.S. statute—even if only *indirectly*, via a treaty.

Admittedly, though, this characterization of *Croll* is debatable. (Moreover, of course, there is nothing inherently objectionable about using foreign law to interpret a treaty and then using the treaty to interpret its implementing legislation; my testimony concerned the use of foreign law to interpret the U.S. Constitution.) In any event, I know of no case in which Judge Sotomayor used foreign law *directly* to interpret a U.S. statute or the U.S.

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[31] International Child Abduction Remedies Act (ICARA), 42 U.S.C. § 11601 *et seq.* (1995).

[32] *See* Medellin v. Texas, 128 S.Ct. 1346, 1356 (2008); Foster v. Neilson, 27 U.S. 253, 254 (1829); Restatement (Third) of Foreign Relations § 111 (1987); Rosenkranz, *supra* note 2, at 1877–79 (2005); Sotomayor, ACLU Speech, *supra* note 4.

[33] *See* Louis Henkin, FOREIGN AFFAIRS AND THE CONSTITUTION 157 (1972) ("[I]f a treaty is not self-executing it is not the treaty but the implementing legislation that is effectively 'law of the land.'");

[34] Cantor v. Cohen, 442 F.3d 196, 207 n.1 (4th Cir. 2006) (Traxler, J., dissenting) ([The language in Art. 2 of the Hague Convention] does not evidence an intent that the agreement be self-executing; congressional action was thus necessary.); Tai Vivatvaraphol, *Back to Basics: Determining a Child's Habitual Residence in International Child Abduction Cases Under the Hague Convention*, 77 FORDHAM L. REV. 3325, 3339–40 (2009) ("[T]he United States did not officially make the Child Abduction Convention effective as a matter of domestic law until Congress enacted ICARA on April 29, 1988. Implementing legislation was required because the Child Abduction Convention was not self-executing in the United States. With its passage, ICARA incorporated by reference the Child Abduction Convention and detailed procedures for how the Convention would be implemented in the United States.") (internal citations omitted); Merle H. Weiner, *Half-Truths, Mistakes, and Embarrassments: The United States Goes to the Fifth Meeting of The Special Commission to Review the Operation of the Hague Convention on The Civil Aspects of International Child Abduction*, 2008 UTAH L. REV. 221, 253 ("[T]he [Hague] Convention [on the Civil Aspects of International Child Abduction] is not self-executing in the United States . . . ."); *see* Petition for Certiorari, Brief for United States as Amicus Curiae at 4, Abbott v. Abbott, No. 08-327 (May 27, 2009) ("In order to implement the Convention, Congress enacted the International Child Abduction Remedies Act (ICARA), 42 U.S.C. 11601 et seq., which establishes procedures for requesting return of a child abducted to the United States."); *cf.* Medellin, 128 S.Ct. at 1369 ("If the Executive determines that a treaty should have domestic effect of its own force, that determination may be implemented 'in mak[ing]' the treaty, by ensuring that it contains language plainly providing for domestic enforceability. If the treaty is to be self-executing in this respect, the Senate must consent to the treaty by the requisite two-thirds vote consistent with all other constitutional restraints. Once a treaty is ratified without provisions clearly according it domestic effect, however, whether the treaty will ever have such effect is governed by the fundamental constitutional principle that '[t]he power to make the necessary laws is in Congress; the power to execute in the President.'") (quoting Hamdan v. Rumsfeld, 548 U.S. 557, 591 (2006)) (internal citations omitted).

[34] *See Croll*, 229 F.3d at 134 (majority); *id.* at 144 (Sotomayor, J., dissenting).

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Constitution, and so, with that possible qualification, Senator Klobuchar was correct on this point.

I hope that these answers are responsive and useful. Please let me know if the Committee has any additional questions.

Sincerely,

Nicholas Quinn Rosenkranz

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JUDGE SONIA SOTOMAYOR'S RECORD ON CONSTITUTIONAL PROPERTY RIGHTS

SUPPLEMENTAL TESTIMONY BEFORE THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

ANSWERS TO WRITTEN QUESTIONS POSED BY RANKING MEMBER SENATOR JEFFERSON SESSIONS, SENATOR CHARLES GRASSLEY, AND SENATOR ORRIN HATCH

JULY 19, 2009

INTRODUCTION.

I am very pleased to have the opportunity to supplement my testimony on the important constitutional property rights issues raised during the course of Judge Sonia Sotomayor's confirmation hearings for the position of associate justice of the United States Supreme Court. I am also grateful to ranking member Senator Jefferson Sessions and Senators Charles Grassley and Orrin Hatch for their insightful questions focusing on Judge Sotomayor's decision in *Didden v. Village of Port Chester*[1] and her testimony *Kelo v. City of New London.*[2]

In this supplemental testimony, I explain why Judge Sotomayor's testimony before this Committee failed to justify her Second Circuit panel's flawed decision rejecting property rights claims in *Didden.* Responding to questions by Senator Grassley and Senator Herb Kohl, she also misstated some key aspects of the Supreme Court's decision in *Kelo*. The misstatements tended to downplay the sweeping nature of the Court's ruling.

I. ANSWERS TO QUESTIONS POSED BY RANKING MEMBER SENATOR SESSIONS.

A. What are the implications of Judge Sotomayor's decision in the *Didden* case for property rights under the Constitution?

[1] 173 Fed. Appx. 931 (2d Cir. 2006).
[2] 505 U.S. 469 (2005).

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Didden will have little direct effect on property rights because, as an unpublished summary order, it is not binding precedent in the Second Circuit and the Circuit's rules forbid citation of unpublished summary orders filed before 2007.[3] However, *Didden* was a case with such extreme facts that if a court is not willing to hold that there was a "pretextual" taking there, it is difficult to believe that it would find one anywhere. If the approach adopted by the *Didden* panel were to be accepted by the Supreme Court, it would make it virtually impossible to challenge any condemnation under the Public Use Clause of the Fifth Amendment.[4] The Supreme Court's decision in *Kelo* held that any condemnation that the government asserts might serve a "public purpose" is permissible.[5] Only "pretextual" takings, where the official rationale is "a mere pretext" for a scheme "to bestow a private benefit,"[6] can still be invalidated. But if a court is unwilling to conclude that even a condemnation undertaken because the owners refused to pay a large sum of money to private party is pretextual, then the last remaining vestige of protection for property owners will have been gutted.

B. Does *Didden* fall into the mainstream of takings law or is it an aberration?

The law of pretextual takings is still in flux in the wake of *Kelo*. It is difficult to say what the consensus mainstream view will be when if and one emerges.[7] However, to my knowledge, no other federal court has upheld a potentially pretextual condemnation in circumstances as extreme as those of *Didden*. Both before and after *Kelo*, several federal courts have invalidated takings as pretextual in cases with considerably more ambiguous facts, or at least refused to rule in favor of the government without a detailed inquiry into the allegations of pretext.

In *Kelo* itself, the Court cited the 2001 California district court case of *99 Cents Only Stores v. Lancaster Redevelopment Agency* as an example of a pretextual taking that was properly invalidated.[8] For reasons discussed in my original written testimony, *99 Cents* was a much less extreme case than *Didden*.[9]

In *Armendariz v. Penman*, a leading pre-*Kelo* case, the Ninth Circuit invalidated as pretextual a condemnation where low-income housing was taken for the purpose of building a shopping mall.[10] The City of San Bernardino claimed that its objective was to promote "the reduction of urban blight."[11] But the Ninth Circuit refused to defer to the City's assertion because the

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[3] See Second Circuit L.R. § 32.1(c).
[4] This issue is discussed in greater detail in my original testimony. See Ilya Somin, *Judge Sonia Sotomayor's Record on Constitutional Property Rights,* Testimony before the United States Senate Committee on the Judiciary, July 16, 2009, at 6-7 [hereinafter, Somin, *Testimony*].
[5] *Kelo*, 545 U.S. at 473-88 (holding that any potential "public purpose" counts as a "public use," and that the government is not required to prove that the "expected public benefits" will actually be achieved).
[6] *Id.* at 478.
[7] For an excellent discussion of the relevant cases and alternative approaches to the issue, see Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism,* 17 SUP. CT. ECON. REV. 173 (2009).
[8] *Id.* at 487 n. 17 (citing *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), *app. dismissed as moot*, 2003 WL 932421 (9th Cir. Mar. 7, 2003).
[9] Somin, *Original Testimony*, at 6-7.
[10] 75 F.3d 1311 (9th Cir. 1996) (en banc).
[11] *Id.* at 1314.

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evidence indicated that this rationale was a mere pretext for "a scheme . . . to deprive the plaintiffs of their property . . . so a shopping-center developer could buy [it] at a lower price."[12] Unlike in *Didden,* there was no evidence in *Armendariz* that the condemnations were undertaken because the owners had refused to pay money to a private party. And the new owners' planned use for the property was different from the old one, and could potentially have provided some public benefits in the form of alleviating blight or promoting development. By contrast, developer Gregg Wasser planned to use the condemned property in *Didden* for essentially the same purposes as Bart Didden and Dominick Bologna – establishing a drug store.[13]

Three United States district court decisions, including the *99 Cents* decision favorably cited by the Supreme Court in *Kelo,* have since relied on *Armendariz* and refused to defer to pretextual takings that transfer condemned property to private interests.[14] In these cases, too, there was no allegation that the condemnation was enacted because the owners refused to pay money to a private party, and the new owners' planned use for the land was less similar to the original owners' plans than in *Didden.* Similarly, in the post-*Kelo* case of *MHC Financing Ltd. P'ship v. City of San Rafael,*[15] the federal district for the Northern District of California interpreted *Kelo* as requiring "a careful and extensive inquiry" into the question of whether a private-to-private taking was actually adopted for the purpose of benefiting a private party.[16]

In *Franco v. National Capital Revitalization Corporation,* the District of Columbia sought to condemn a Discount Mart store and transfer it to a group of private developers who planned to build a "mixed use retail center."[17] The Court of Appeals for the District of Columbia emphasized that "*Kelo* makes clear that there is room for a landowner to claim that the legislature's declaration of a public purpose is a pretext designed to mask a taking for private purposes."[18] The *Franco* decision remanded the case to the trial court to consider evidence submitted by the owner that suggested that the official rationale for the taking was a pretext for a scheme to provide private benefits to the new owners. It noted that "[i]f the property is being transferred to another private party, and the benefits to the public are only 'incidental' or 'pretextual,' a 'pretext' defense may well succeed."[19] In *Didden,* of course, the taking would not have occurred but for Didden and Bologna's rejection of Wasser's demand that they pay him $800,000 or give him a 50 percent stake in their business. And any possible

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[12] *Id.* at 1321.
[13] Somin, *Original Testimony*, at 7.
[14] *See Aaron v. Target Corp.*, 269 F. Supp. 2d 1162, 1174-76 (E.D. Mo. 2003), *rev'd on other grounds*, 357 F.3d 768 (8th Cir. 2004) (holding that a property owner was likely to prevail on a claim that a taking ostensibly to alleviate blight was actually intended to serve the interests of the Target Corporation); *Cottonwood Christian Ctr. v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002) ("Courts must look beyond the government's purported public use to determine whether that is the genuine reason or if it is merely pretext."); *99*, 237 F. Supp. 2d at 1129 (holding that "[n]o judicial deference is required . . . where the ostensible public use is demonstrably pretextual.").
[15] 2006 WL 3507937 (N.D. Cal. Dec.5, 2006)
[16] *Id.* at *14 (quoting *Kelo*, 545 U.S. at 490 (Kennedy, J., concurring).
[17] *Franco v. Nat'l Capital Revitalization Corp.*, 930 A2d 160, 162-63, (D.C. 2007) . The D.C. Court of Appeals is the highest court of the District of Columbia, and should not be confused with the U.S. Court of Appeals for the D.C. Circuit.
[18] *Id.* at 171.
[19] *Id.* at 173-74.

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public benefits were likely to be minor or nonexistent, given that he intended to use the property for essentially the same purpose as they did.

Finally, it is worth noting that the Supreme Court of Pennsylvania has interpreted *Kelo*, in conjunction with its own previous precedents, as requiring "some substantial and rational proof by way of an intelligent plan that demonstrates informed judgment to prove that an authorized public purpose is the true goal of the taking."[20]

Obviously, proving a pretextual taking claim under *Kelo* is difficult. In the vast majority of cases, the purposes underlying a taking are ambiguous enough that the government is likely to prevail even if the circumstances of the condemnation are suspicious.[21] That said, no other federal court has, to my knowledge, upheld a pretextual condemnation as blatant as that allowed by the Second Circuit in *Didden*.

C. Is Judge Sotomayor's ruling in *Didden* consistent with the Supreme Court's decision in *Kelo v. City of New London* or is it an overreach by a judicial activist?

For reasons discussed in my original testimony, I believe that *Didden* upheld a condemnation that was precisely the sort of "pretextual" taking that the *Kelo* majority indicated is forbidden.[22] At the very least, the *Didden* panel should have carefully the pretext question and the potential relevance of *Kelo* instead of disposing of this important constitutional issue in an unpublished summary order with almost no analysis.

In my view, the phrase "judicial activism" is overused and is often employed as just a synonym for any ruling one considers to be incorrect.[23] I am, therefore, reluctant to apply a phrase whose utility I have previously questioned. Whether or not *Didden* should be considered an "activist" ruling, it is certainly a deeply flawed decision that upheld an unusually flagrant violation of constitutional property rights.

D. In *Didden*, did Judge Sotomayor eliminate the one important opportunity for aggrieved property rights plaintiffs to challenge a wrongful taking by eliminating their opportunity to challenge pretext?

The answer to this question is yes, subject to some minor caveats.[24] For reasons discussed above, [25] the Supreme Court's decision in *Kelo v. City of New London* enables the

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[20] *Middletown Twp. v. Lands of Stone*, 939 A2d 331, 340 (Pa. 2007)
[21] *See* Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After* Kelo, 15 SUP. CT. ECON. REV. 183, 233-240 (2007).
[22] Somin, *Testimony*, at 6-7.
[23] *See* Ilya Somin, *How Useful is the Concept of "Judicial Activism"?*, Volokh Conspiracy weblog, posting of Ilya Somin, Nov. 1, 2007, available at http://volokh.com/archives/archive_2007_10_28-2007_11_03.shtml#1193970176.
[24] As discussed above, *Didden* lacks precedential effect because it was an unpublished summary order, and therefore cannot dictate the outcome of future cases. *See* § I.A, *infra*. However, I assume the question addresses the consequences of adopting the rule of *Didden* as binding precedent.
[25] *See* § I.A, *infra*.

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government to condemn private property for virtually any reason except a pretextual one. But if the taking upheld in *Didden* is not considered pretextual, it is virtually impossible to imagine what would be. Thus, under *Didden,* government has virtually unlimited power to condemn property.

To be sure, property owners might still be able to challenge a taking successfully if the government failed to cite any "public purpose" at all to justify it. Similarly, they could prevail if the condemning authority actually admitted that the official rationale was a mere pretext for a scheme to benefit a private party. As a practical matter, however, it is highly unlikely that the government would be so foolish as to do either. Therefore, *Didden* seems to license virtually any abusive condemnation where the government is minimally savvy enough to cite some sort of public purpose rationale, even a highly transparent one.

II. ANSWERS TO QUESTIONS POSED BY SENATOR GRASSLEY

A. Professor Somin, have you had an opportunity to review Judge Sotomayor's responses to questions on the *Kelo* case? Do you have any concerns with her answers?

I have reviewed Judge Sotomayor's testimony on *Kelo* in response to questions posed by Senator Grassley and Senator Herb Kohl of Wisconsin. Unfortunately, Judge Sotomayor misstated the holding of *Kelo* in two significant ways, both of which tend to downplay the extent to which the Court's ruling endangered property rights.

In response to questioning by Senator Herb Kohl of Wisconsin, Judge Sotomayor incorrectly claimed that *Kelo* "held that a taking to develop an economically blighted area was appropriate."[26] In reality, both sides in the *Kelo* litigation agreed that the area in question was *not* blighted. As Justice John Paul Stevens noted in his majority opinion for the Court, "[t]here is no allegation that any of these properties [that were condemned] is blighted or otherwise in poor condition," and "[t]hose who govern the City [of New London] were not confronted with the need to remove blight in the Fort Trumbull area" where the condemned properties were located.[27]

The absence of blight was precisely what made the *Kelo* case distinctive. It was the first Supreme Court decision to specifically address the question of whether property could be condemned and transferred from one private owner to another solely for purposes of "economic development" in a *non*-blighted area. The Court had already ruled that private-to-private condemnations in a blighted area are permissible in the 1954 case of *Berman v. Parker*.[28] *Berman* led to numerous abuses, including the condemnation of property under state statutes that define "blight" so broadly that almost any area can be declared "blighted"

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[26] *Transcript of Confirmation Hearing of Judge Sonia Sotomayor for the Position of Associate Justice of the United States Supreme Court*, July 14, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/07/14/AR2009071401250_5.html. Since I do not yet have access to the official hearing transcript, I have relied on the version available at the *Washington Post* website.

[27] *Kelo*, 545 U.S. at 475, 483.

[28] 348 U.S. 26 (1954).

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and taken.[29] *Kelo* went even further, however, because there was no allegation of blight in the case. The Court ruled that even non-blighted property can be condemned and transferred to another private owner for "economic development" purposes. It is important to recognize that the *Kelo* Court did not limit "economic" development condemnations to areas where preexisting economic conditions are in any way substandard.[30] As Justice Sandra Day O'Connor pointed out in her dissenting opinion, under *Kelo* "nearly all real property is susceptible to condemnation" because it is always possible to argue that a given piece of land might be put to more productive use by some other owner.[31]

Judge Sotomayor's second noteworthy misstatement of *Kelo* occurred during questioning by Senator Grassley, where she described the case as follows:

> [T]he issue in *Kelo*, as I understand it, is whether or not a state who had determined that there was a public purpose to the takings under the — the takings clause of the Constitution that requires the payment of just compensation when something is — is condemned for use by the government, whether the takings clause permitted the state, once it's made a proper determination of public purpose and use, according to the law, whether the state could then have a private developer do that public act, in essence. Could they contract with a private developer to effect the public purpose? And s so the holding as I understood it in *Kelo* was a question addressed to that issue.[32]

The problem with this answer is that *Kelo* did not simply hold that the state could "contract with a private developer to effect the public purpose" justifying a taking. It held that the state could actually *transfer ownership* of the land to a private party and that this was a constitutionally permissible "public use" if done for the purpose of promoting "economic development." This is very different from simply hiring a private contractor to do work on public land, such as contracting with a private construction firm to build a publicly owned bridge. Moreover, the "contract" metaphor is misleading, since the new private owners of condemned land in economic development takings cases are generally not required by contract to actually provide the economic development that supposedly justified the condemnations in the first place.[33] This state of affairs greatly increases the risk of abuse, since both private interest groups and government officials are able to use inflated claims of economic benefit to justify a taking without fear that they will ever be required to provide the promised gains.[34]

B. Have you reviewed Judge Sotomayor's testimony on the *Didden* case? Do you agree with it? Do you have any concerns with it?

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[29] *See* Ilya Somin, *Blight Sweet Blight,* LEGAL TIMES, Aug. 14, 2006, at 42.
[30] The Court did take note of the City of New London's judgment that the Fort Trumbull neighborhood was sufficiently "distressed" enough to require "redevelopment." *Kelo*, 545 U.S. at 483. But the Court's decision did not depend on that assessment.
[31] *Id.* 504 (O'Connor, J., dissenting). Three other justices signed on to Justice O'Connor's dissent.
[32] *Transcript of Confirmation Hearing of Judge Sonia Sotomayor for the Position of Associate Justice of the United States Supreme Court*, July 14, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/07/14/AR2009071402234_2.html
[33] Somin, *Controlling the Grasping Hand*, at 193-97.
[34] *Id.*

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I have carefully considered Judge Sotomayor's testimony on *Didden*. Unfortunately, I cannot agree with her statements that "*Kelo* didn't control the outcome; the statute of limitations did" and that "the *Kelo* discussion didn't need to be longer because it wasn't the holding of the case."[35] As I explained in my original testimony,[36] Judge Sotomayor's panel clearly ruled on the substantive property rights issue as well. Their summary order specifically states that "*[e]ven if Appellants' claims were not time-barred*, to the extent that they assert that the Takings Clause prevents the State from condemning their property for a private use within a redevelopment district . . . , the recent Supreme Court decision in *Kelo v. City of New London* . . . obliges us to conclude that they have articulated no basis upon which relief can be granted."[37]

In her testimony, Judge Sotomayor suggests that this discussion of *Kelo* was not part of the holding of *Didden.* However, the Supreme Court has specifically ruled that when a court has two alternative rationales for reaching the same result, both are part of the holding, not merely dictum.[38] Obviously, even if "the *Kelo* discussion" was mere dictum, it still reveals the panel's view of the property rights claim it addressed.

Moreover, as explained in my original testimony, the panel's statute of limitations ruling was not merely a technical procedural decision.[39] Rather, it was inextricably linked with their substantive conclusion that there is no meaningful difference between a claim challenging the declaration of a redevelopment area and one challenging a pretextual taking. The panel ruled that the property owners were required to file their case within three years after the declaration of the redevelopment area in 1999. However, there was no pretextual taking until they rejected Gregg Wasser's extortionate demands in November 2003, after which the property was condemned almost immediately.[40] Thus, the panel's statute of limitations ruling is based on an implicit substantive conclusion that the mere declaration of a redevelopment area legitimates any subsequent condemnation within its territory, even if that taking is clearly pretextual.

C. Do you believe that Judge Sotomayor will protect individual property rights if she is confirmed to be an Associate Justice on the Supreme Court?

As discussed in my original testimony, I believe that Judge Sotomayor's record suggests that she would provide solid protection for purely procedural property rights under the Due Process Clause of the Fourteenth Amendment.[41] However, her ruling in the *Didden* case casts serious doubt on her willingness to protect the much more important substantive property

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[35] *Transcript of Confirmation Hearing of Judge Sonia Sotomayor for the Position of Associate Justice of the United States Supreme Court*, July 14, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/07/14/AR2009071402234_5.html.
[36] Somin, *Testimony*, at 8.
[37] *Didden*, 173 Fed Appx. 931, 933 (2d Cir. 2006) (emphasis added) (some citations omitted).
[38] *See, e.g., Richmond Screw Anchor Co. v. United States*, 275 U.S. 331, 340 (1928) (holding that "[i]t does not make a reason given for a conclusion obiter dictum, because it is the only one of two reasons for the same conclusion").
[39] Somin, *Testimony*, at 8.
[40] *Id.*
[41] *Id.* at 8-9.

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rights guaranteed by the Takings Clause of the Fifth Amendment. For reasons explained above, the extreme nature of this ruling is troubling.[42] If a judge is not willing to invalidate a condemnation undertaken because the owners refused to pay a large sum of money to a private party, it is unlikely that she would do so in less blatant cases. It is of course possible that Judge Sotomayor will reconsider her views on these matters if she has more time to think about them after confirmation. Otherwise, her appointment does not bode well for the future of substantive constitutional property rights protected by the Fifth Amendment.

III. ANSWERS TO QUESTIONS POSED BY SENATOR HATCH.

A. Is Judge Sotomayor's ruling in *Didden* consistent with the Supreme Court's decision in *Kelo v. City of New London*?

For reasons discussed above and in my original testimony, I believe that *Didden* upheld precisely the sort of pretextual taking that the *Kelo* Court considered to be forbidden by the Fifth Amendment.[43] At the very least, *Kelo* certainly did not "oblige" the Second Circuit panel to rule in the government's favor, as the summary order claimed.[44]

B. Judge Sotomayor ruled that Didden's claim was time barred, do you agree? Didn't that ruling in effect say that Didden needed to file suit before his property was actually taken?

I strongly disagree with the Second Circuit panel's conclusion that Mr. Didden's claim was time-barred. As explained above and in my original testimony, the panel's statute of limitations ruling was based on the fallacious substantive conclusion that there is no meaningful difference between a claim challenging the mere declaration of a redevelopment area and one challenging a pretextual taking within a redevelopment area.[45]

In addition, the panel's ruling that Didden and his fellow plaintiff Dominick Bologna were required to file their claims before their property was actually condemned creates a cruel Catch-22 dilemma. "[F]ederal courts are precluded from adjudicating a claim of a taking for a private purpose" unless the property owner has "demonstrate[d] that he or she received a 'final decision' from the relevant government entity."[46] If Didden and Bologna had filed a Takings Clause claim before their property was condemned, it would have been dismissed because it was not yet "ripe." In *Didden,* Judge Sotomayor's panel essentially ruled that New York property owners are not permitted to file a claim after a taking has actually occurred either, so long as the condemnation is undertaken more than three years after the redevelopment area is declared. It is surely both perverse and a violation of elementary

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[42] See §§ I.A, D, *infra.*
[43] *See* §§ I.A, D, *infra*; Somin, *Testimony*, at 6-7.
[44] *Didden*, 173 Fed. Appx. at 933.
[45] *See* § II.B, *infra*; Somin, *Testimony*, at 8-9.
[46] *Daniels v. Area Planning Comm'n,* 306 F. 3d 445, 454 (7th Cir. 2002).

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principles of due process to rule that the government can immunize unconstitutional condemnations from legal challenge simply by crafty timing.

C. What effect do cases like *Kelo* and *Didden* have on the poor?

"Economic development" takings of the sort upheld in Didden often victimize the poor and racial minorities for the benefit of politically connected private interest groups, a point I emphasized in my original testimony.[47] This problem has been recognized by commentators and activists from various parts of the political spectrum. For example, the NAACP and Southern Christian Leadership Conference filed a joint amicus brief in *Kelo* urging the Supreme Court to forbid economic development takings in part because of their disproportionate negative impact on low-income minorities and other politically weak groups.[48]

D. The briefs in the *Didden* case were filed prior to the *Kelo* decision being announced. The 2nd Circuit cited *Kelo*, but the parties were not asked to re-brief or re-argue the case in light of this new landmark precedent. Was this proper?

In my experience as a former law clerk on the United States Court of Appeals for the Fifth Circuit, the usual practice in such situations was to ask the parties to file supplemental briefs addressing the new Supreme Court decision. Based upon conversations with former Second Circuit clerks, I understand that the custom in that circuit is similar. Allowing the parties an opportunity to file supplemental briefs gives them a chance to consider the implications of the new decision and helps ensure that the panel takes proper account of it in its own ruling. The *Didden* summary order was not issued until some nine months after *Kelo* was decided on June 23, 2005. This would have allowed plenty of time for the filing of supplemental briefs.

At the same time, I am not aware of any rule requiring panels to request supplemental briefs. As far as I know, the *Didden* panel was within its discretionary authority when it chose not to do so. In my view, it would probably have been more prudent to give the parties an opportunity to weigh in on *Kelo* after it came down. However, the more important problem with the panel's decision was its seriously flawed result, and the way in which it disposed of an important constitutional issue with almost no analysis.

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[47] See Somin, *Testimony*, at 4.

[48] *See Kelo v. City of New London*, Amicus Br. of NAACP, American Association of Retired Persons, & Southern Christian Leadership Conference, 2004 WL 2811057.

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Responses of Judge Sonia Sotomayor
to the Written Questions of Senator Jeff Sessions

Second Amendment

1. Prior to your most recent confirmation hearing, you have spoken clearly about your support for the use of foreign law by United States judges. You have said that you agree with Justice Ginsburg's statement that foreign law helps us know "whether our understanding of our own constitutional rights [falls] into the mainstream of human thinking."

Many countries around the world however, including some of our closest allies, take a far different view from our own country's regarding gun ownership. Great Britain has almost a total ban on the ownership of firearms, Germany has some of the most restrictive firearms ownership laws in Europe, and in Australia, self defense is not considered a legitimate purpose for owning a gun.

On October 31, 2008, members of the United Nations General Assembly passed a resolution supporting the negotiation of a global treaty on the gun trade. The United States was one of only two countries that voted against the resolution.

You have cited approvingly in your speeches the Supreme Court's use of foreign law in determining how to interpret the Fifth and Fourteenth Amendments (*Lawrence*) as well as the Eighth Amendment (*Roper v. Simmons*) to our Constitution.

On Thursday, however, in a discussion with Senator Coburn, you stated, "I will not use foreign law to interpret the Constitution or American statutes. I will use American law, constitutional law to interpret those laws except in the situations where American law directs the court."

a. What did you mean by the word "use"? Did you mean that you would not consider foreign law at all in interpreting the Constitution or statutes, or merely that you would not cite foreign law as the basis for your legal conclusions?
b. Would foreign laws regarding gun ownership be relevant to you in your efforts as a judge to interpret the Second Amendment?
c. If foreign laws are not relevant, how do you distinguish when it is appropriate to use foreign law to assist in the interpretation of the Constitution and when it is not? Isn't foreign law then simply a vehicle by which judges indulge their own policy preferences?
d. If foreign laws are relevant, are the Fifth, Eighth, and Fourteenth Amendments the only places in your mind where foreign law is relevant in interpreting the Constitution?

Response: In my view, American courts should not "use" foreign law, in the sense of relying on decisions of foreign courts as binding or controlling precedent, except when American law requires a court to do so. In some limited circumstances, decisions of foreign courts can be a

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source of ideas, just as law review articles or treatises can be sources of ideas. Reading the decisions of foreign courts for ideas, however, does not constitute "using" those decisions to decide cases.

Because cases raising Second Amendment questions are currently pending before the Court, I would not comment on how I would decide those cases if I am confirmed.

Ricci v. DeStefano

1. In *Ricci v. DeStefano*, you initially joined a summary order dismissing the novel claims of white and Hispanic firefighters who had been discriminated against after they scored higher than other groups on a promotional exam. You failed to cite any precedent and issued a brief one-paragraph summary order, then a one-paragraph *per curiam* opinion. The Supreme Court reversed your opinion.

- **a. Please explain the process for circulating summary orders on the Second Circuit and how that circulation process differs from the circulation of other opinions such as *per curiam* opinions, authored opinions, concurrences, or dissents.**
- **b. At your hearing, you repeatedly said that in *Ricci* you relied on a 78-page district court opinion. The district court's opinion was actually 48 pages (and as published in the federal reporter, only 21 pages). Where did you come up with your number of 78 pages?**
- **c. Why did you choose to withdraw your summary order and instead make the district court's analysis binding precedent in the Second Circuit?**
- **d. Was there a vote taken to issue a summary order by the panel? How did you vote on that decision?**
- **e. Press reports indicate that there was disagreement amongst the panel members—what was the nature of that disagreement?**

Response: The practice of the Second Circuit has changed over the years. Currently, and when *Ricci v. DeStefano*, 264 Fed. Appx. 106 (2d Cir. 2008), was decided, the primary method by which decisions of the Court are circulated is through an email sent each morning by the library of the Second Circuit that lists the cases decided that day and provides a clickable link to the full text of each case's decision, whether it is a signed opinion, a *per curiam*, or a summary order. The decisions also are posted on the Court's website, which is accessible both to Court staff and to the public. Printed copies of the signed opinions and *per curiam*s are then sent to each Judge, and printed copies of the summary orders are sent to the members of the panels that issued them. In addition, a signed opinion, *per curiam*, or summary order is sent to the chambers of each active Judge upon the filing of a motion for rehearing en banc, along with the motion, pursuant to Interim Local Rule 35(a) of the Local Rules of the Second Circuit.

You are correct that the district court's decision was 48 pages long as issued by that court, not 78 pages as I had thought. It is possible that the decision was 78 pages as initially reproduced by Lexis and Westlaw, using those services' "star" pagination, but those original versions of the district court's decision are no longer available.

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Rule 32.1(a) of the Local Rules of the Second Circuit provides that a case may be decided by summary order when the decision of the panel is unanimous and "each judge of the panel believes that no jurisprudential purpose would be served by an opinion." The decision of the panel in *Ricci* to issue a summary order was made in accordance with that Rule. The decision to issue a *per curiam* followed the vote of the Court not to rehear the case *en banc*. Panel members of the Second Circuit do not discuss the internal deliberations of the panels.

Abortion

1. In a recent interview with *New York Times Magazine*, Justice Ruth Bader Ginsburg was quoted as saying the following:

> **"Frankly I had thought that at the time *Roe* was decided, there was concern about population growth and particularly growth in populations that we don't want to have too many of. So that *Roe* was going to be then set up for Medicaid funding for abortion. Which some people felt would risk coercing women into having abortions when they didn't really want them. But when the court decided *McRae*, the case came out the other way. And then I realized that my perception of it had been altogether wrong."**

a. When Justice Ginsburg spoke of abortion advocates' hope that legalized abortion would reduce 'populations that we don't want to have too many of,' what populations do you think that she was talking about?
b. Do you think that it is appropriate for the legislators and judges who make abortion policy to craft such policies with an eye towards reducing the size of particular populations that they view as undesirable?

Response: I cannot speak for Justice Ginsburg in interpreting her statement. I do not think it is the role of a judge to make policy, or to advise legislators on the appropriate grounds for crafting policy.

2. In response to questions from Senator Graham about the Puerto Rican Legal Defense and Education Fund (PRLDEF) and its briefs in abortion cases, you said "[t]o the extent that we looked at the organization's legal work, it was to ensure that it was consistent with the broad mission statement of the fund." You also said that "[t]he issue was whether the law was settled on what issues the fund was advocating on behalf of the community it represented . . . . And so, the question would become, was there a good faith basis for whatever arguments they were making[.]" As several Senators noted, you served on the Board of an organization that filed briefs in the most notable abortion cases between 1980 and 1992. All of those briefs took a similar approach and opposed any limitations—even modest limitations—on abortion.

In 1980, when less than 30% of the population believed that abortions should be legal under any circumstance,[1] your organization asserted that the Supreme Court's opinions

[1] http://www.gallup.com/poll/118399/more-americans-pro-life-than-pro-choice-first-time.aspx

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upholding limits on the use of Medicaid funds "sanction[ed] as constitutionally reasonable and legitimate an unspeakably cruel sacrifice of the lives of and health of poor women."

a. Was this argument consistent with PRLDEF's policy regarding the constitutional right to abortion?
b. Do you believe "the law was settled" so that "there [was] a good faith basis" to make this argument?

Response: As a member of the board of the Puerto Rican Legal Defense and Education Fund, I did not write, edit, or approve briefs drafted by the organization's staff lawyers. While the board was responsible for ensuring that the broad areas of litigation were consistent with the mission statement of the Fund, the board did not review the briefs in cases selected by the staff lawyers, nor the individual arguments made by those lawyers in briefs filed on behalf of the Fund. Because I was not involved in the drafting or editing of this brief, I cannot speak either to the relationship between arguments raised in the brief and PRLDEF policy or to the good faith legal basis for the arguments.

Rule 3.1 of the ABA Model Rules of Professional Conduct states that a "lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." Rule 11 of the Federal Rules of Civil Procedure requires that an attorney make legal arguments that are "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Earlier versions of Rule 11, which were in effect at the time I sat on the PRLDEF board, likewise prohibited attorneys from making frivolous arguments, or arguments which lacked "good ground" or a "good faith" basis. *See* Fed. R. Civ. P. 11 (2009); *see also* Fed. R. Civ. P. 11 (1983).

3. On two different occasions, PRLDEF argued that restricting access to abortions was tantamount to slavery. In 1980, for example, PRLDEF joined an unusual *amicus* brief that argued it was unconstitutional not to use federal funds to pay for abortions. In that brief, your organization stated "[j]ust as *Dred Scott v. Sanford* refused citizenship to Black people, these opinions strip the poor of meaningful citizenship under the fundamental law." PRLDEF thereby compared slavery to a lack of taxpayer dollars to fund abortions. PRLDEF made a similar argument in an *amicus* brief in *Planned Parenthood v. Casey*.

a. Do you believe "the law was settled" so that "there [was] a good faith basis" to make this argument?
b. Do you find the argument made in PRLDEF's brief to be offensive?

Response: As a member of the board of the Puerto Rican Legal Defense and Education Fund, I did not write, edit, approve, or sign briefs drafted by the organization's staff lawyers. While the board was responsible for ensuring that the broad areas of litigation were consistent with the mission statement of the Fund, the board did not review the briefs in cases selected by the staff lawyers, nor the individual arguments made by those lawyers in briefs filed on behalf of the Fund. Because I was not involved in the drafting or editing of this brief, I cannot speak to the

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good faith legal basis for the arguments raised in the brief. The Board assumed that the attorneys would comply with Rule 3.1 of the ABA Model Rules of Professional Conduct (or analogous state rules) and Rule 11 of the Federal Rules of Civil Procedure, each of which requires that an attorney's argument be supported by existing law or a "good faith" argument for extending, modifying, or reversing existing law, or a similar standard. I do not find analogies useful as a substitute for legal argument in general or in this particular case.

4. In 1980, your organization also argued that the Hyde Amendment, which requires that taxpayer dollars not be used to fund abortions, "will operate each year to condemn thousands of poor women and their children to an inescapable cycle of poverty, disease and dependency." Do you believe "the law was settled" so that "there [was] a good faith basis" to make this argument?

Response: As a member of the board of the Puerto Rican Legal Defense and Education Fund, I did not write, edit, or approve briefs drafted by the organization's staff lawyers. While the board was responsible for ensuring that the broad areas of litigation were consistent with the mission statement of the Fund, the board did not review the briefs in cases selected by the staff lawyers, nor the individual arguments made by those lawyers in briefs filed on behalf of the Fund. Because I was not involved in the drafting or editing of this brief, I cannot speak to the good faith legal basis for the arguments raised in the brief. The Board assumed that the attorneys would comply with Rule 3.1 of the ABA Model Rules of Professional Conduct (or analogous state rules) and Rule 11 of the Federal Rules of Civil Procedure, each of which requires that an attorney's argument be supported by existing law or a "good faith" argument for extending, modifying, or reversing existing law, or a similar standard.

5. In 1990, PRLDEF joined an *amicus* brief urging the Supreme Court to hear the *Rust v. Sullivan* case. In *Rust*, the Court considered whether the Constitution requires that Federal funds be used to promote or endorse abortion. In its brief, your organization argued that it was not permissible to restrict spending taxpayer dollars on promoting or endorsing abortions. The PRLDEF brief also opposed a requirement for health providers who received federal funds to "provide a pregnant woman with a list of prenatal care providers 'that promote the welfare of mother and unborn child.'" Do you believe "the law was settled" so that "there [was] a good faith basis" to make this argument?

Response: As a member of the board of the Puerto Rican Legal Defense and Education Fund, I did not write, edit, or approve briefs drafted by the organization's staff lawyers. While the board was responsible for ensuring that the broad areas of litigation were consistent with the mission statement of the Fund, the board did not review the briefs in cases selected by the staff lawyers, nor the individual arguments made by those lawyers in briefs filed on behalf of the Fund. Because I was not involved in the drafting or editing of this brief, I cannot speak to the good faith legal basis for the arguments raised in the brief. The Board assumed that the attorneys would comply with Rule 3.1 of the ABA Model Rules of Professional Conduct (or analogous state rules) and Rule 11 of the Federal Rules of Civil Procedure, each of which requires that an attorney's argument be supported by existing law or a "good faith" argument for extending, modifying, or reversing existing law, or a similar standard.

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6. In the *Rust* brief, your organization also argued that "the right at the heart" of *Roe v. Wade* is "the right to be free from unwarranted governmental interference in the process of deciding whether or not to bear a child." Your organization has said the Constitution requires Federal and state funding for abortions, prohibits the state from providing information, prohibits having a child tell a parent, and even prohibits giving a patient a list of doctors. Do you believe "the law was settled" so that "there [was] a good faith basis" to make these arguments?

Response: As a member of the board of the Puerto Rican Legal Defense and Education Fund, I did not write, edit, or approve briefs drafted by the organization's staff lawyers. While the board was responsible for ensuring that the broad areas of litigation were consistent with the mission statement of the Fund, the board did not review the briefs in cases selected by the staff lawyers, nor the individual arguments made by those lawyers in briefs filed on behalf of the Fund. Because I was not involved in the drafting or editing of this brief, I cannot speak to the good faith legal basis for the arguments raised in the brief. The Board assumed that the attorneys would comply with Rule 3.1 of the ABA Model Rules of Professional Conduct (or analogous state rules) and Rule 11 of the Federal Rules of Civil Procedure, each of which requires that an attorney's argument be supported by existing law or a "good faith" argument for extending, modifying, or reversing existing law, or a similar standard.

7. In 1989, the Fund joined a Supreme Court *amicus* brief filed in *Ohio v. Akron Center for Reproductive Health*, a case regarding Ohio's decision to require children, in most cases, to notify a parent before having an abortion. This is a very reasonable requirement. Your organization argued, among other things, that "establishment and free exercise clause concerns . . . militate toward the invalidation of" the notification provision at issue. This is an extraordinarily aggressive and novel theory. Do you believe "the law was settled" so that "there [was] a good faith basis" to make this argument?

Response: As a member of the board of the Puerto Rican Legal Defense and Education Fund, I did not write, edit, or approve briefs drafted by the organization's staff lawyers. While the board was responsible for ensuring that the broad areas of litigation were consistent with the mission statement of the Fund, the board did not review the briefs in cases selected by the staff lawyers, nor the individual arguments made by those lawyers in briefs filed on behalf of the Fund. Because I was not involved in the drafting or editing of this brief, I cannot speak to the good faith legal basis for the arguments raised in the brief. The Board assumed that the attorneys would comply with Rule 3.1 of the ABA Model Rules of Professional Conduct (or analogous state rules) and Rule 11 of the Federal Rules of Civil Procedure, each of which requires that an attorney's argument be supported by existing law or a "good faith" argument for extending, modifying, or reversing existing law, or a similar standard.

8. In *Akron*, your organization contrasted the "long-term psychological damage" minors "may suffer" if they have to notify their parents prior to an abortion with the harms arising out of an abortion: "Although having an abortion may be stressful, it rarely leads to long-term emotional distress. In fact, the predominant response among both adult and teenage women following an abortion is generally relief. Periods of regret, depression and guilt, if they occur at all, are mild and diminish rapidly." This argument flies in the

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face of common sense and medical and psychological research. Do you believe "the law was settled" so that "there [was] a good faith basis" to make this argument?

Response: As a member of the board of the Puerto Rican Legal Defense and Education Fund, I did not write, edit, or approve briefs drafted by the organization's staff lawyers. While the board was responsible for ensuring that the broad areas of litigation were consistent with the mission statement of the Fund, the board did not review the briefs in cases selected by the staff lawyers, nor the individual arguments made by those lawyers in briefs filed on behalf of the Fund. Because I was not involved in the drafting or editing of this brief, I cannot speak to the good faith legal basis for the arguments raised in the brief. The Board assumed that the attorneys would comply with Rule 3.1 of the ABA Model Rules of Professional Conduct (or analogous state rules) and Rule 11 of the Federal Rules of Civil Procedure, each of which requires that an attorney's argument be supported by existing law or a "good faith" argument for extending, modifying, or reversing existing law, or a similar standard.

9. In March of 1992, while you were still a top policy maker with PRLDEF, your organization joined a Supreme Court *amicus* brief in *Planned Parenthood v. Casey*. In *Casey*, the Court considered whether to overturn *Roe v. Wade*. Your organization's brief argued that, among other things, the "right to privacy is guaranteed to all women, regardless of income, race, or ethnicity . . . . Laws that place obstacles in the path of poor women who have chosen to terminate pregnancy—by imposing delays or procedural obstacles, economic barriers, or other impediments to access—constitute a burden on the privacy rights of poor women." Do you believe "the law was settled" so that "there [was] a good faith basis" to make this argument?

Response: As a member of the board of the Puerto Rican Legal Defense and Education Fund, I did not write, edit, or approve briefs drafted by the organization's staff lawyers. While the board was responsible for ensuring that the broad areas of litigation were consistent with the mission statement of the Fund, the board did not review the briefs in cases selected by the staff lawyers, nor the individual arguments made by those lawyers in briefs filed on behalf of the Fund. Because I was not involved in the drafting or editing of this brief, I cannot speak to the good faith legal basis for the arguments raised in the brief. The Board assumed that the attorneys would comply with Rule 3.1 of the ABA Model Rules of Professional Conduct (or analogous state rules) and Rule 11 of the Federal Rules of Civil Procedure, each of which requires that an attorney's argument be supported by existing law or a "good faith" argument for extending, modifying, or reversing existing law, or a similar standard.

National Security

1. The Second Circuit's *Doe v. Mukasey* panel on which you sat found unconstitutional the provisions of the Patriot Act allowing senior government officials to certify conclusively that the release of certain information by the recipients of National Security Letters would endanger national security. Please explain why you feel that the statutory language indicating that certifications by identified senior government officials "shall be treated as conclusive unless the court finds that the certification was made in bad faith" was unconstitutional. In this regard, please focus on why the review of the process by which the

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certification has been made – in good faith or in bad faith – is *per se* constitutionally deficient. Please reflect in answering this question on the fact that there are numerous other, well-established contexts, some implicating constitutional rights and others statutorily-granted rights, where certification by an individual government official receives virtually no judicial scrutiny. What is so different about the *Doe v. Mukasey*-related language?

Response: I believe that Judge Newman's opinion in *Doe v. Mukasey*, 549 F.3d 861 (2008), which I joined, fully explained the basis for the panel's conclusions in this area. First, Judge Newman's opinion interpreted the relevant statutory provision

> to place on the Government the burden to show a 'good' reason to believe that disclosure may result in . . . a harm related to 'an authorized investigation to protect against international terrorism or clandestine intelligence activities,' 18 U.S.C. § 2709(b)(1), . . . and to place on a district court an obligation to make the 'may result' finding only after consideration, albeit deferential, of the Government's explanation concerning the risk of an enumerated harm.

Id. at 881.

Next, the opinion acknowledged that

> [a]ssessing the Government's showing of a good reason to believe that an enumerated harm may result will present a district court with a delicate task. While the court will normally defer to the Government's considered assessment of *why* disclosure in a particular case may result in an enumerated harm related to such grave matters as international terrorism or clandestine intelligence activities, it cannot, consistent with strict scrutiny standards, uphold a nondisclosure requirement on a conclusory assurance that such a likelihood exists. . . . To accept [such a] conclusion without requiring some elaboration would 'cast Article III judges in the role of petty functionaries, persons required to enter as a court judgment an executive officer's decision, but stripped of capacity to evaluate independently whether the executive's decision is correct.' *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 426 (1995).

Id.

After articulating the standard that ought to govern the district court's review, the opinion expressed

> every confidence that district judges can discharge their review responsibility with faithfulness to First Amendment considerations and without intruding on the prerogative of the Executive Branch to exercise its judgment on matters of national security. Such a judgment is not to be second-guessed, but a court must receive some indication that the judgment has been soundly reached.

Id. at 882.

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2. While Congress has provided some procedure rules – certification by certain senior government officials and the "bad faith"-grounded judicial review in the Patriot Act's sections challenged in *Doe v. Mukasey* – the substantive aspects of the harm to national security-type determinations lie at the very core of the discretionary authority vested in the President under Article III of the Constitution. Please explain how, in your view, Article III courts are supposed to review the quintessentially discretionary national security-related determinations by Executive Branch officials, short of the judges engaging in making discretionary judgments themselves? What is the constitutional basis for such a discretionary policymaking by the Judiciary?

Response: The Executive Branch has broad authority to act, and the Legislative Branch to legislate, in the interests of national security. The precise nature of the judiciary's role in reviewing those actions depends on the substance and nature of the specific legal constraints at issue. Courts do not sit to second-guess discretionary policy decisions; they interpret and apply the law. In doing so, courts often appropriately accord substantial deference to the decisions and actions of the political branches. At the same time, as Justice O'Connor observed in *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004), "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake."

3. Please explain why this type of activity is not foreclosed by the constitutional prong of the political question doctrine, since the determination that the release of given information threatens harm to the national security of the United States has been clearly delegated to a coordinate branch of government – the President – and there are no obvious judicially ascertainable standards by which judges can scrutinize such determinations.

Response: In *Doe v. Mukasey*, the Government did not argue that the issues presented were nonjusticiable political questions, and the panel did not address that issue. Rather, both sides in the case identified judicially administrable standards that they argued should govern the interpretation and application of the relevant statutory and constitutional provisions, and the panel reached conclusions on those matters. Specifically, the panel adopted the following standard: "In showing why disclosure would risk an enumerated harm, the Government must at least indicate the nature of the apprehended harm and provide a court with some basis to assure itself (based on *in camera* presentations where appropriate) that the link between disclosure and risk of harm is substantial." 549 F.3d at 881.

4. The Supreme Court in the *Boumedienne* case indicated, as a part of the multi-factor test for determining whether constitutional habeas was available to certain alien enemy combatants held outside the United State, that one of the factors to consider, both as a threshold matter for ascertaining whether the habeas applies at all and how it applies, were the practical difficulties caused by this application. Please explain what types of practical difficulties it would be appropriate to consider for purposes of this analysis. In particular, please focus on why the issue of the impact of the availability of habeas on the United States' ability to prosecute successfully combat operations should not be properly considered as the key element of the practical difficulties-related analysis? Also, please

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comment on the extent of deference owed by the courts to the Executive Branch's views about practical difficulties, particularly in the context of their impact on the ongoing combat operations.

Response: The Supreme Court in *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), held that "aliens designated as enemy combatants and detained at the United States Naval Station at Guantanamo Bay, Cuba" are "entitled to the privilege of habeas corpus to challenge the legality of their detention." *Id.* at 2240, 2262. In reaching that conclusion, the Court said that "at least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ." *Id.* at 2259. Whether and how those factors should be applied, including the extent to which the courts should defer to the Executive Branch's views about certain "practical obstacles," are questions currently before the lower courts in cases involving the detention of certain individuals at Bagram Airfield, Afghanistan. These cases could well come before the Supreme Court, and so I would not address the scope or application of the *Boumediene* factors in this context.

Property Rights

1. In your opinion in *Didden*, you characterized the threat from the developer as a "voluntary attempt[] to resolve" the dispute between the parties.

- **a. You stated in your opinion that it looked like a legitimate settlement offer. But when one side calls it blackmail and the other side calls it negotiations, isn't that what juries are for? Why did you deny the property owner a jury trial in this case?**
- **b. How voluntary can any sort of "attempt" to settle a dispute be when one party can have the government take the other party's land? When the government makes a statement that ends in "or we'll condemn your property," is that a voluntary attempt to resolve a conflict?**

Response: *Didden v. Village of Port Chester*, 173 Fed. Appx. 931 (2d Cir. 2006), was decided on the basis that the action was barred by the relevant statute of limitations. Where an action is barred by a statute of limitations, it cannot proceed to a jury.

It is not uncommon for parties to seek to negotiate and settle a sales price rather than proceeding to formal condemnation proceedings. If such negotiations do not result in mutually satisfactory settlement terms, the Takings Clause ensures that the court, rather than the parties, will determine the value of the property.

2. In *Didden*, the oral argument before your panel lasted about an hour. That is an exceptionally long time for any appellate court, especially the Second Circuit. Your panel took a little over a year to issue its ruling. Both of these facts suggest that your panel understood the novelty and importance of this case. Your opinion, however, dealt with the plaintiffs' Fifth Amendment claim in one paragraph.

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a. Did you believe that this case was an ordinary takings case?
b. If the landowners' takings claim could be resolved so quickly, why did your panel spend so much time hearing oral argument and drafting its opinion?
c. Why was this opinion not published? It addressed a novel question and novel set of facts. Why did you not allow lower courts to be guided by this case?
d. The *Kelo* case was issued *after* oral argument was completed in *Didden*. Why did your panel not request additional briefing on how *Kelo* applied to this case?

Response: *Didden* was understood by both the trial court and the panel of the Second Circuit that heard the matter to turn on the application of the relevant statute of limitations. The application of a statute of limitations to a set of facts is the sort of ordinary determination that often does not warrant a precedential decision. The panel's handling of the case was in no way unusual or inconsistent with Second Circuit practice. The panel did not request additional briefing after *Kelo* was decided because the statute of limitations issue was dispositive.

Death Penalty

1. As a Board Member for the Puerto Rican Legal Defense and Education Fund, you coauthored a task force position paper opposing the death penalty. This task force report ran through a number of reasons for opposing the death penalty, mentioning everything from the impact on the offender and his family, to world opinion, to Judeo-Christian values. The one thing it does not seem to mention or consider, however, is the victim and his or her family.

a. You signed this anti-death penalty report, which is unequivocal in its opposition to capital punishment. Does this memo reflect your personal opposition to the death penalty when you signed the report in 1981?
b. Do you personally believe that imposition of the death penalty for aggravated first-degree murder is sound policy?
c. Do you have any doubts about or personal opposition to the death penalty?

Response: The PRLDEF Task Force on the Bill to Restore the Death Penalty in New York State was asked to submit a memorandum considering what position the Fund should take on the restoration of the death penalty in New York State. The 1981 memorandum reflects the policy recommendation of the PRLDEF Task Force that the Fund oppose the restoration of the death penalty in New York State. It was not the purpose of the memorandum to reflect my personal views.

Policy considerations about the imposition of the death penalty are determinations for each community and its elected representatives to make by enacting death penalty statutes. The role of a court is limited to reviewing those statutes in specific cases to determine if they are or can be applied in a constitutional manner.

I have no personal views about the death penalty that would interfere with my obligation to apply the law as a judge.

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2. In my view, the worst example of judicial activism is found in the death penalty opinions and dissents of Justices Brennan and Marshall, who for twenty years opposed every death sentence that came before the Court because they believed "the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments." Their view was contrary to centuries of precedent and to the very text of the Constitution, which repeatedly makes reference to capital offenses and contemplates that capital punishment will be used. The Fifth Amendment alone makes three separate references to the death penalty. At the time the Constitution was ratified, the death penalty was applied to a wide range of offenses. In fact, it was the usual penalty for some of the offenses mentioned by name in the Constitution, such as treason and piracy.

a. Do you agree that Justices Marshall and Brennan were engaged in judicial activism when they ignored the text of the Constitution and centuries of Supreme Court precedent to try to outlaw capital punishment?
b. At your 1997 confirmation hearing to be a circuit judge, you told Senator Thurmond that you would interpret the Constitution by "look[ing] at the Constitution and what it meant at the time." Do you continue to hold this view and believe this is the appropriate way to interpret and apply the Eighth Amendment?
c. Would you agree that based on what the Constitution says about the death penalty, there is no reasonable way to conclude that the Framers intended the Eighth Amendment to bar the death penalty in all cases?
d. Do you believe it would be pure judicial activism – like what Justices Marshall and Brennan did – to conclude that the death penalty categorically violated the constitution?
e. Do you agree that it is settled law that the death penalty is constitutional?

Response: "Judicial activism" is not a term I use and I cannot comment on its meaning for others.

In deciding how to apply the Eighth Amendment in particular cases, judges appropriately look to the structure and history of the text, including evidence about how the text was understood when drafted and ratified. Where appropriate in a specific case, I would engage in that undertaking. I would also be bound, consistent with the doctrine of *stare decisis*, to follow judicial precedents that have interpreted and applied the constitutional text in question.

The Supreme Court rejected the argument that the death penalty may never be imposed consistent with the Eighth Amendment in *Gregg v. Georgia*, 428 U.S. 153,187 (1976), and I accept that precedent.

3. In your memo, you state that "[c]apital punishment is associated with evident racism in our society." The Fourteenth Amendment's equal protection clause governs and prohibits racist laws.

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a. What standards would you impose, and what evidence would you deem sufficient, to uphold an equal protection challenge to the death penalty in a specific case?
b. Do you continue to believe that the death penalty is associated with "evident racism" in the United States?

Response: I would analyze any issue regarding the death penalty in light of the factual context and the arguments presented to the Court. As explained by the Supreme Court, a "defendant who alleges an equal protection violation has the burden of proving the existence of purposeful discrimination." *McCleskey v. Kemp*, 481 U.S. 279, 292-93 (1987). The Supreme Court and lower federal courts have adjudicated many equal protection challenges to capital sentences, and may well be called upon to do so in the future. Therefore, I should not opine on the proper application of the Equal Protection Clause or any other constitutional provision in this context.

The "evident racism" argument was set forth in the 1981 PRLDEF memorandum cited above. As noted in my response to question 1, that memorandum reflected the policy recommendations of the Task Force, not my personal views. I have no personal views about the death penalty that would interfere with my obligation to apply the law as a judge.

4. In your memo you state, "Our present perspective on the meaning of our values in the Judeo-Christian tradition, and the state of humanistic thinking in the world judge capital punishment as a violation of those values."

a. You have strongly advocated in favor of the use of foreign law by American judges. Would you look to the "state of humanistic thinking in the world" if considering a constitutional challenge to the death penalty? How does one assess the "state of humanistic thinking in the world"?

Response: In my view, American courts should not rely on decisions of foreign courts as binding or controlling precedent, except when American law requires a court to do so. In some limited circumstances, decisions of foreign courts can be a source of ideas, just as law review articles or treatises can be sources of ideas. The Supreme Court's Eighth Amendment cases establish how the Court considers constitutional challenges to the death penalty, and I accept those decisions.

5. In your memo, you state that the death penalty "creates inhuman psychological burdens for the offender and his/her family."

a. If the death penalty causes – as you wrote -- "inhuman psychological burdens for the offender and his/her family," how can it survive a challenge under the Eighth Amendment as cruel or unusual punishment?
b. What analysis would you use to evaluate these "inhuman psychological burdens" under the Eighth Amendment?
c. Could you vote to uphold the death penalty as constitutional in light of your personal belief that it "creates inhuman psychological burdens"?

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d. You didn't consider victims and their families in your 1981 task force report. Do you believe victim impact is irrelevant to the severity of punishment a court should impose against an offender?

Response: As stated above, the policy recommendation set forth in the 1981 PRLDEF memorandum has no relevance to my consideration of death penalty cases as a judge. The Supreme Court rejected the argument that the death penalty may never be imposed consistent with the Eighth Amendment in *Gregg v. Georgia*, 428 U.S. 153, 187 (1976), and I accept that decision.

Victim impact is certainly relevant to sentencing decisions. A sentencing court is required by statute to impose a sentence that, in part, "reflect[s] the seriousness of the offense," "provide[s] just punishment for the offense," and considers the "nature and circumstances of the offense," 28 U.S.C. § 3553, and the Sentencing Commission has been tasked to consider "the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust." 28 U.S.C. § 994(c)(3).

6. In your memo, you state, "All the major religious organizations have issued public statements opposed to it." And you later refer to the "broad consensus of representative religious and civic organizations" opposed to the death penalty. As a judge or Supreme Court Justice, would you look to "major religious organizations" if you were considering an Eighth Amendment challenge to the death penalty?

Response: As with any other issue that may come before the Supreme Court, I would review the particular facts and arguments presented by the litigants on a case-by-case basis, guided by the Constitution and the Supreme Court's precedent.

7. In your memo, you also state that "The evidence for capital punishment as a deterrent of crime is unconvincing." You later state, again in a conclusory fashion, that "it is unreasonable to think that capital punishment will result in preventing [crime and violence] or diminishing it."

a. Do you believe the problem of crime remains so complex that sentencing policies will have no effect in preventing or diminishing it?
b. Do you believe that more severe sentences as a general matter tend to deter crime?
c. Regardless of your personal beliefs, your statement suggests that there are arguments in favor of the deterrent effect of the death penalty – ones that you described as "unconvincing" and "unreasonable." To someone who believes that capital punishment actually does provide a deterrent effect and that it does reduce crime, would you say that his opinion is "unreasonable"?

Response: The deterrent effect of particular sentences is a policy decision for Congress. The role of a court in reviewing the imposition of a criminal sentence is not to judge the reasonableness of the policy decisions made by Congress in setting that sentence, but rather to evaluate any challenge to the sentence based on the factual record and the applicable precedents.

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Criminal Law

1. In *United States v. Falso*, FBI agents searched Mr. Falso's home under a search warrant obtained from a district court judge. The officers in that case obtained a search warrant to search Mr. Falso's home and computer for images of child pornography based on evidence that Mr. Falso's email address had been found on a paid subscription website to access child pornography – and that Mr. Falso had earlier been arrested for sexually abusing a seven year old girl, and pled guilty to injuring a minor child. Mr. Falso conditionally pled guilty to serious child pornography charges and appealed. You voted ultimately to affirm the district court's conviction. But in doing so, you held that the FBI's search of Mr. Falso's home violated his Fourth Amendment rights.

a. When you were a prosecutor, if you were presented with evidence that someone had accessed a paid subscription to a child pornography website, and that the same individual had a prior arrest for molesting a little girl, would you have hesitated to seek a search warrant to search that person's computer and home?
b. Do you think that evidence of potential access to a child porn website and a prior arrest for sexually abusing a little girl would be a good reason to search a home for child pornography?

Response: In *United States v. Falso*, 544 F.3d 110 (2d Cir. 2008), the majority concluded that the affidavit supporting the search warrant for the defendant's home was not supported by probable cause on the facts of the case. That conclusion was based in part on the fact that the affidavit did not allege that the defendant subscribed to the website at issue, or even that he had actually gained access to the site. The majority also concluded that the evidence seized during the search was nevertheless admissible under the good-faith exception to the exclusionary rule. My decisions as a prosecutor regarding when to seek a search warrant were fact specific. Whether a particular set of facts would provide probable cause to conduct a search of a home would depend on the individual circumstances of the particular case.

Foreign Law

1. In your testimony on July 14, 2009, you stated, "American law does not permit the use of foreign law or international law to interpret the Constitution. That's a given. And my speech explained that – as you noted – explicitly. There is no debate on that question, there's no issue about that question." However, in your speech before the Puerto Rico chapter of the ACLU (PRCLU) on April 28, 2009, stated the following:

> **"We consider the ideas that are suggested by international and foreign law." As to "the question of whether American judges should listen to foreign or international law," you said, "[H]ow can you ask a person to close their ears? Ideas have no boundaries. Ideas are what set our creative juices flowing; they permit us to think."**

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Furthermore, you stated, "[T]o suggest to anyone that you can outlaw the use of foreign or international law is a sentiment that's based on a fundamental misunderstanding. What you would be asking American judges to do is to close their minds to good ideas—to some good ideas. . . . [I]deas are ideas, and whatever their source, whether they come from foreign law or international law . . . or any other place, if the idea has validity, if it persuades you—si te compense [Spanish for "If it persuades you"]—then you are going to adopt its reasoning. . . ."

How do you reconcile your statement that American law forbids the use of foreign law or international law to interpret the Constitution and your statements in your PRCLU speech, such as your statement that to "outlaw the use of foreign or international law is a sentiment that's based on a fundamental misunderstanding?"

Response: As I said in the speech, "we don't use foreign and international law. We consider the ideas that are in foreign and international law. That's a very different concept." In my view, American courts should not "use" foreign law, in the sense of relying on decisions of foreign courts as binding or controlling precedent, except when American law requires a court to do so, as in some cases raising conflicts of law issues or treaty interpretations. In limited circumstances, decisions of foreign courts can be sources of ideas, just as law review articles or treatises can be sources of ideas. Reading the decisions of foreign courts for ideas, however, does not constitute "using" those decisions to decide cases.

2. In your PRCLU speech you favorably cited two infamous Supreme Court decisions, *Roper v. Simmons* (overturning death penalty for juveniles) and *Lawrence v. Texas* (overturning laws against same-sex sodomy) as typical examples of how an American judge may use foreign law in constitutional cases to overturn American statutes. Did the Supreme Court use foreign law to interpret the Constitution in *Roper* and *Lawrence*?

Response: In *Roper v. Simmons*, 543 U.S. 551 (2005), and *Lawrence v. Texas*, 539 U.S. 558 (2003), the Supreme Court cited decisions of foreign courts, but not as controlling authority. Because these cases concern issues that may come before the Court in the future, I would not comment on the reasoning used by the Court to reach its conclusions in those cases.

3. In your PRCLU speech, you stated, "[Courts] were just using that law to help us understand what the concepts meant to other countries, and to help us understand whether our understanding of our own constitutional rights fell into the mainstream of human thinking" in reference to the Supreme Court in *Lawrence* and *Roper*. What relevance does the question of how our constitutional rights fall into the mainstream of human thinking have to the interpretation of the Constitution?

Response: The interpretation of the Constitution is not guided by how our constitutional rights fall into the mainstream of human thinking. For that reason, American courts should not rely on decisions of foreign courts as binding or controlling precedent on questions of constitutional interpretation. In limited circumstances, decisions of foreign courts can be a source of ideas informing our understanding of our own constitutional rights.

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4. In your hearing testimony on July 14, 2009, you stated, "It's important that in the speech I gave, I noted and agreed with Justices Scalia and Thomas that one has to think about this issue very carefully because there are so many differences in foreign law from American law. But that was the setting of my speech and the discussion that my speech was addressing." However, in your PRCLU speech, you said that Justice Scalia and Justice Thomas have "unfortunately endorsed" what you claimed is "the misunderstanding of the American use of that concept of using foreign law."

a. How do you reconcile the statement that you agreed with Justice Scalia and Justice Thomas with your statement that Justice Scalia and Justice Thomas "endorsed" the "misunderstanding" of the use of foreign law?
b. Why do you believe that Justice Scalia and Justice Thomas misunderstand the use of foreign law?

Response: As I explained in my speech, I believe that Justices Scalia and Thomas have "a somewhat valid point" on this issue. In particular, their argument that, because "there are so many international and foreign laws that a judge can look to a law of any country to support his or her own conclusion, because they'll find somebody to agree with them" is "validly taken." At the same time, I also explained in my speech that, in my view, this criticism does not support the conclusion that American judges should ignore entirely the decisions of foreign courts. In some limited circumstances, decisions of foreign courts can be a source of ideas, just as law review articles or treatises can be sources of ideas.

5. In your PRCLU speech, you said that "[Justices Scalia and Thomas] have a somewhat valid point. They argue that because there are so many international and foreign laws, so many of them vary, that a judge can look to the law of any country to support his or her own conclusion, because they'll find somebody who will agree with them. So it's easy to say, this is good idea because England likes it, forgetting to mention that Russia doesn't, that Russian law doesn't. Or vice versa. It is a point that is validly taken." How do you respond to this criticism of the use of foreign law by Justice Scalia and Justice Thomas?

Response: Please see my response to question 4.

6. In your hearing testimony on July 14, 2009, you stated, "The question of use of foreign law then is different than considering the ideas that it may on an academic level provide. Judges, and I'm not using my words, I'm using Justice Ginsburg's words, you build up your story of knowledge as a person, as a judge, as a human being with everything you read . . . . You use decisions from other courts – you build up your story of knowledge."

In your hearing testimony on July 15, 2009, you stated,

> **"What I pointed out to in that speech is that there's a public misunderstanding of the word 'use.' And what I was talking about, one doesn't use those things in the sense of coming to a legal conclusion in a case.**

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> **What judges do – and I cited Justice Ginsberg – is educate themselves. They build up a story of knowledge about legal thinking, about approaches that one might consider. . .**
>
> **But that's just thinking. It's an academic discussion when you're talking about -- thinking about ideas than it is how most people think about the citation of foreign law in a decision. They assume that a – if – if there's a citation to foreign law, that's driving the conclusion. . .**
>
> **In my experience, when I've seen other judges cite to foreign law, they're not using it to drive the conclusion. They're using just to point something out about a comparison between American law or foreign law, but they're not using it in the sense of compelling a result."**

However, in your PRCLU speech, you stated "I share more the ideas of Justice Ginsburg . . . in believing, that unless American courts are more open to discussing the ideas raised by foreign cases, and by international cases, that we are going to lose influence in the world." You warned that the United States would lose influence unless it discussed the ideas from foreign law. You said "Justice Ginsburg has explained, very recently, . . . that foreign opinions . . . can add to the story of knowledge relevant to the solution of a question. And she's right. We have looked, in some Supreme Court decisions, to foreign law to help us decide our issues" and cited *Lawrence* and *Roper* as typical examples. Thus you said that foreign law is not just for pleasure reading but for solving legal problems.

a. **How do you reconcile your statements that foreign law is used only at an "academic level" and your statement that foreign law is used "to help us decide our issues?"**

b. **In what sense do you agree with Justice Scalia and Justice Thomas with respect to the use of foreign law in the interpretation of the Constitution and in what sense do you agree with Justice Ginsburg?**

Response: Both my testimony and my speech distinguished between, on the one hand, using foreign law as binding or controlling legal authority to decide a case, and, on the other hand, considering the decisions of foreign courts in some limited circumstances as a source of ideas. I agree with Justices Scalia and Thomas that foreign law should not be used as binding or controlling legal authority to interpret the Constitution. And I agree with Justice Ginsburg that, in limited circumstances, the decisions of foreign courts can be a source of ideas.

7. In your hearing testimony on July 14, 2009, you stated "[W]hile foreign law . . . [except in treaty interpretation] is not binding, it's American principles of construction that are binding." However, in your PRCLU speech, you stated, ". . . [I]nternational law and foreign law will be very important in the discussion of how we think about the unsettled issues in our own legal system. It is my hope that judges everywhere will continue to do this because . . . *within the American legal system we're commanded to*

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***interpret our law in the best way we can, and that means looking to what other, anyone has said to see if it has persuasive value.*" (Emphasis added.)**

a. **How do you reconcile these two statements: "foreign law . . . is not binding," rather "American principles of construction . . . are binding" *versus* "within the American legal system we're commanded to interpret our law in the best way we can, and that means looking to what . . . anyone has said to see if it has persuasive value"?**
b. **Do you believe that the American legal system commands judges to look for "persuasive value" from foreign law to interpret the Constitution and statutes?**

Response: Both my testimony and my speech distinguished between, on the one hand, using foreign law as binding or controlling legal authority to decide a case, and, on the other hand, considering the decisions of foreign courts in some limited circumstances as a source of ideas. As I said in the speech, "we don't use foreign and international law. We consider the ideas that are in foreign and international law. That's a very different concept." The American legal system does not command judges to look for ideas in foreign law, any more than it commands judges to look for ideas in law review articles or legal treatises.

8. In your hearing testimony on July 15, 2009, in response to a question regarding your citation of authority from the Constitution or statutes to use foreign law in interpreting the Constitution or statutes, you said:

> **"My speech and my record on this issue is I've never used it to interpret the Constitution or to interpret American statutes is that there is none. My speech has made that very clear. . .**
> **Unless the statute requires or directs you to look at foreign law. And some do, by the way. The answer is no. Foreign law cannot be used as a holding or a precedent or to bind or to influence the outcome of a legal decision interpreting the Constitution or American law that doesn't direct you to that law. . .**
> **"There is none. If you look at my speech, you'll see that repeatedly I pointed out both that the American legal system that structured not to use foreign law. It repeatedly underscored that foreign law could not be used as a holding, as precedent, or to interpret the Constitution or the statutes."**

As discussed above, in your speech, you stated that the American legal system "commands" you to look at foreign law, describe its usefulness as a source of "good ideas," list as typical examples *Lawrence* and *Roper*, and warn that the United States will lose "influence" in the world if judges do not use foreign law.

a. **How do you reconcile your hearing testimony on July 15, 2009, with your PRCLU speech arguing that there is legal authority to use foreign law in interpreting the Constitution and statutes?**
b. **What is that legal authority, if it exists?**

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Response: In my view, American courts should not rely on decisions of foreign courts as binding or controlling precedent, except when American law requires a court to do so. In limited circumstances, decisions of foreign courts can be a source of ideas, just as law review articles or treatises can be sources of ideas. The American legal system does not "command" judges to look to foreign law. Rather, the American legal system commands courts to interpret the law by applying the law to the facts of the cases that come before them.

9. In your hearing testimony on July 15, 2009, you said: "We don't render decisions to -- we don't render decisions to please the home crowd or any other crowd. I know that, because I've heard speeches by a number of justices, that in the past justices have indicated that the Supreme Court hasn't taken many treaty cases and that maybe it should think about doing that, because we're not participating in the discussion among countries on treaty provisions that are ambiguous. . . . That may be of consideration in -- to some justices. Some have expressed that as a consideration. My point is, you don't rule to please any crowd. You rule to get the law right under its terms." However, previously, as discussed above, you made it clear that courts need to look at foreign law to make decisions because if it does not, then the United States will "lose influence in the world." How do you reconcile your statement that it does not matter what other countries think of United States legal decision making process with your statement that the United States will lose influence in the world unless it looks at foreign law?

Response: In my view, American courts should not rely on decisions of foreign courts as binding or controlling precedent, except when American law requires a court to do so. In limited circumstances, decisions of foreign courts can be a source of ideas. To the extent that American courts categorically refuse to consider the ideas expressed in the decisions of foreign courts, it may be that foreign courts will be less likely to look to American law as a source of ideas. That does not mean that American courts should issue decisions intended to improve the United States' influence in the world. American courts should issue decisions interpreting the law by applying the law to the facts of the cases that come before them. To the extent that the decisions of foreign courts contain ideas that are be helpful to that task, American courts may wish to consider those ideas. But American courts should not do so merely to improve the United States' influence in the world.

10. You wrote, "[T]he question of how much we have to learn from foreign law and the international community when interpreting our Constitution is not the only one worth posing." Judge Sonia Sotomayor, *Foreword*, in Daniel Terris, Cesare P.R. Romano & Leigh Swigart, THE INTERNATIONAL JUDGE, ix (2007). What specifically have you learned and do you intend to learn "from foreign law and the international community when interpreting our Constitution?'

Response: In my seventeen years as a federal judge, I have never used or considered foreign law in interpreting the Constitution.

11. You wrote "[W]e should also question how much we have to learn from international courts and from their male and female judges about the process of judging

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and the factors outside of the law that influence our decisions." *Id.*

a. What specifically have you learned and do you intend to learn regarding the "process of judging and the factors outside of the law that influence [your] decisions"?
b. How do you intend to apply what you learn from foreign judges to your work as an American judge?

Response: *The International Judge* is a collection of academic essays in the field of comparative law. As I noted in my foreword to that book, there are many interesting questions for academics to consider in this field. I am not, however, a comparative law scholar, and I do not spend my time studying these questions. As for how I apply the work of foreign courts to my duties as a judge, I have not, and do not intend to, rely on decisions of foreign courts as binding or controlling precedent, except when American law requires a court to do so. In limited circumstances, decisions of foreign courts can be a source of ideas for American judges, just as law review articles or treatises can be sources of ideas.

12. In an interview given after your nomination to the Supreme Court it was reported that "[Judge Sotomayor] favors the use of international laws as a point of reference and as part of the broad process of reflection of the United States courts because 'the consideration of ideas has no borders,' and conveyed that she on principle opposes this practice 'because I haven't the guts to flip someone off.'" Cynthia López Cabán, *Sería un regalo maravilloso*, EL NUEVO DIA, 6 (May 2, 2009) ("It Would Be a Wonderful Gift," translated from Spanish) (quoting Judge Sotomayor).

a. Was this passage translated correctly? If not, please provide an accurate translation.

b. What did you mean by your quote in this passage: "she on principle opposes this practice 'because I haven't the guts to flip someone off.'"? *Id.*

Response: In limited circumstances, decisions of foreign courts can be a source of ideas for American judges, just as law review articles or treatises can be sources of ideas. In the quoted language, I was informally expressing my view that I would not refuse to consider an idea that could be helpful simply because that idea was articulated in a decision of a foreign court, any more than I would refuse to consider an idea simply because that idea was articulated in a law review article or a treatise.

13. In your speech, *Judicial Independence: What It Takes to Maintain It*, you wrote favorably of French judicial decision making: "In terms of actual decision-making, judicial panels in France issue only one decision. Unlike court in the United States, dissenting opinions are very rare. With a single decision, there is less pressure on individual judges and less fear of reprisal for unpopular decisions." Judge Sonia Sotomayor & Jennifer Peng, *Judicial Independence: What It Takes to Maintain It*, Speech Given at the Colegio de Abogados de Puerto Rico Asamblea Annual 1999, 12-13 (Sept. 11, 1999) ("Bar Association of Puerto Rico Annual Assembly"). Does your frequent participation in panels that issued

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unsigned *per curiam* opinions and summary orders reflect your agreement with this French practice?

Response: The use of unsigned, *per curiam* opinions and summary orders by panels of which I am a member reflects customary Second Circuit practice, not any personal views about the practice of any foreign court.

14. Law professor William D. Popkin wrote the following:

> **Along with a requirement of writing and officially reporting opinions went an explicit requirement that French judges give reasons for their conclusions. Only in that way (the theory went) could judges be held accountable for their actions. . . . There is, however, a significant irony in the way the French implement this requirement. French judges give a relatively bare-bones statement of law, facts, and reasoning; opinions are laconic—what John Dawson calls the equivalent of flashing a policeman's badge. . . . The irony about French judicial opinion writing is that minimal reason-giving allows French judges to conceal a bold judicial lawmaking role, perhaps even bolder than in the case of United States and English judges because of the lack of any formal notion of precedent. William D. Popkin, EVOLUTION OF THE JUDICIAL OPINION, 38.**

a. Do you agree with this description of French judicial decision-making? If not, please explain why.
b. Do you agree with this statement: "With a single decision, there is less pressure on individual judges and less fear of reprisal for unpopular decisions"?

Response: Because I am only generally familiar with some foreign courts' procedures for decision-making, I would not opine on an academic's detailed evaluation of the workings of another country's judiciary. My statement regarding "unpopular decisions" appeared in a speech that I delivered on September 11, 1999 at the Colegio de Abogados de Puerto Rico Asamblea on the topic of judicial independence. That statement was made in a section of the speech in which I discussed the judicial institutions of other countries, and simply described one aspect of the French judicial system. I did not opine on the merits of that aspect of the French judicial system, or on any other aspect of any of the foreign judicial systems discussed in the speech.

First Amendment

1. In *Landell v. Sorrell* (2d Cir. 2005), you voted to let stand a three-judge panel's decision that restrictions contained in a Vermont campaign finance statute did not violate the First Amendment. The state law placed substantial limits on how much an individual may contribute to a candidate and how much a candidate may spend in a campaign. That second restriction, the limit on expenditures, ran contrary to the Supreme Court's 1976 decision in *Buckley v. Valeo*. Despite this conflict with Supreme Court precedent, you voted not to rehear the case. Justice Breyer, writing for the Supreme Court, eventually reversed the panel decision that you voted to uphold. In explaining why you voted not to rehear this

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case, you joined a concurrence saying that "[t]he issue for us, of course, is not whether the opinion for the panel majority or the dissent was right . . . . The issue for us, then, is whether to grant a rehearing *en banc* because the proceeding involves a question of exceptional importance."

a. Does this statement in the concurrence mean that you concluded that substantial limitations on political expression were not issues of "exceptional importance"?
b. Based on the differing opinions in this case, it appears that circuit judges substantively disagreed as to whether the statute violated the First Amendment. How is this not a "question of exceptional importance"?
c. What if there was a similar disagreement regarding the Second Amendment? Would that case be worthy of rehearing?
d. What about the Fifth Amendment? Would that be an issue of "exceptional importance" and worthy of rehearing?
e. What about the right to an abortion? Would that be an issue of "exceptional importance" and worthy of rehearing?

Response: My vote to deny rehearing en banc in *Landell v. Sorrell* was based on a number of factors, which were set forth in the opinion joined by me and by Judges Sack, Katzmann, and Parker. *Landell v. Sorrell*, 406 F.3d 159, 166 (2d Cir. 2005) (Sack and Katzmann, J.J., concurring in the decision to deny rehearing en banc.) That opinion recognized that "the issue of campaign finance and its relationship to First Amendment protection for political expression is obviously important, at least as a general matter." *Id.* The opinion also noted, however, that the Supreme Court might grant *certiorari* in the case, and en banc review by the Second Circuit would not meaningfully assist the Supreme Court in its decision-making. Moreover, if the Supreme Court did not grant *certiorari*, further proceedings in the district court would better focus any additional review of the case by the Second Circuit. Whether and how these considerations might apply in another case raising a different constitutional issue would depend on the facts and procedural posture of the case.

2. You voted for *en banc* review in *Koehler v. Bank of Bermuda* (2d Cir. 2000), which addressed whether Bermuda corporations and citizens are "citizens or subjects of a foreign state" and subject to a particular kind of federal jurisdiction. In your dissent from the court's denial of *en banc*, you described the case as "exceptional[ly] important[t]" and emphasized that its importance "reaches well beyond our government, to our relations with foreign nations, and the access of foreign entities and individuals to the federal courts."

a. Why did you believe that this case was "exceptional[ly] importan[t]" and deserved *en banc* review but that a case involving substantial limits on political speech did not?

b. Do you believe that cases that touch on "relations with foreign nations" are more "important" than cases that involve core First Amendment questions?

Response: My reasons for dissenting from denial of rehearing en banc in *Koehler v. Bank of Bermuda* are fully set forth in my opinion in that case, which was joined by Judge Leval. 229

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F.3d 187 (2000) (Sotomayor, J., dissenting from denial of rehearing en banc). The issues raised by *Koehler* were fundamentally different from the issues raised by *Landell*. As to the basis for my decision to vote to deny rehearing in *Landell*, see my response to question 1.

3. In *Guiles v. Marineau* (2d Cir. 2006), you endorsed the First Amendment rights of a student to wear a shirt containing images of cocaine and alcohol, as well as the word "cocaine." Do you believe that a student's First Amendment right to wear a shirt displaying images of drugs and alcohol is stronger than the right of a private law-abiding citizen to participate in a political campaign?

Response: In *Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006), the court unanimously concluded that the school's decision to discipline a student for wearing a t-shirt that criticized the President violated the First Amendment. The basis for the court's decision is set forth in its opinion, which was written by Judge Cardamone. *Guiles* did not present the question whether the student's First Amendment rights were "stronger" than the right of a citizen to participate in a political campaign. Each case raised distinct First Amendment concerns.

Hayden v. Pataki

1. In *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006) (*en banc*), the Second Circuit, *en banc*, held that imprisoned felons were not disenfranchised on account of race under the Voting Rights Act just because they are in prison and cannot vote. You dissented from the majority opinion, joining Judge Parker's dissent, and authoring your own dissent, and would have held that New York's felon disenfranchisement law was unconstitutional under the Fifteenth Amendment.

a. Doesn't your dissent in *Hayden* ignore the fact that the convicts' crimes and not any state-based racial discrimination made the felons ineligible to vote?
b. Based on the dissent you joined, do you believe that the whole prison system is racist?

Response: The issue in *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006), was whether New York's felon disenfranchisement law fell within the scope of Section 2 of the Voting Rights Act (VRA). That provision states that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied in any State . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race and color." 42 U.S.C. § 1973(a). My dissent in that case rested on my reading of the plain terms of the statute, which applies to all voting qualifications or prerequisites to voting. I concluded, based on the unambiguous terms of Section 2, that a law disqualifying felons from voting constitutes a "voting qualification" and therefore falls within the scope of the VRA. As I explained in my dissent: "The duty of a judge is to follow the law, not to question its plain terms. I do not believe that Congress wishes us to disregard the plain language of any statute or to invent exceptions to the statutes it has created." 449 F.3d at 368.

My dissenting opinion did not conclude that New York's law violated the Fifteenth Amendment. Instead, I took the position that, because the district court had entered judgment for the

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defendants based only on the parties' pleadings, our Court should have given the plaintiffs the opportunity to undertake factual discovery and to present evidence in support of their allegations.

My dissent did not express a view on whether the entire prison system is racist, and I do not believe that it is.

2. Do you believe that in adopting the Voting Rights Act, Congress intended to require states to install voting booths in prisons?

Response: Actions challenging felon disenfranchisement laws are currently pending in the lower courts. *See, e.g., Farrakhan v. Gregoire*, No. CV-96-076-RHW, 2006 WL 1889273 (E.D. Wash. 2006) (currently on appeal before the Ninth Circuit); *Simmons v. Galvin*, No. 01-11040-MLW, 2007 WL 2507740 (D. Mass. 2007) (currently on appeal before the First Circuit). If a court found that a particular felon disenfranchisement law violated the Constitution or a federal statute, the question of remedy would be a separate consideration. Because these issues could come before the Supreme Court, I would not comment further.

Belizean Grove

1. Up until immediately prior to your nomination to be an Associate Justice of the United States Supreme Court, you were a member of the Belizean Grove, an all-female networking club. In *Sotomayor Found Friends in Elite Group*, a June 4, 2009 article in *Politico*, Kenneth P. Vogel described the Belizean Grove as an "elite but little-known women's-only group." According to its mission statement, "the Belizean Grove is a constellation of influential women who are key decision makers in the profit, non-profit and social sectors; who build long term mutually beneficial relationships in order to both take charge of their own destinies and help others to do the same." The group was formed in 1999 as an answer to the Bohemian Grove, a San Francisco-based men's club. According to the group's founder, no man has ever applied for membership. You attended the group's retreat in Lima, Peru last year. In fact, although you gave a presentation at the retreat on "the challenges the judiciary faces in maintaining its independence from the legislative and executive branches," you did not include those remarks when you submitted your questionnaire to this Committee.

You wrote a letter to Senator Leahy and me on June 19th, informing us that you had resigned from the Belizean Grove. You have maintained that the group does not invidiously discriminate on the basis of sex, and that your membership did not violate the Code of Judicial Conduct. Canon 2C of the Code of Judicial Conduct states that "[a] judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin." The rule provides additional guidance, stating that, "Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive."

In the past, the Senate Judiciary Committee has been hard on judicial nominees who belong to exclusive clubs. In fact, a Committee Resolution from 1990 stated that "membership in such discriminatory clubs conflicts with the appearance of impartiality

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standard required of persons who may serve in positions in the Federal judiciary or the Department of Justice." It went on to say that it was "inappropriate" for a nominee to be a member of such a club "unless such persons are actively engaged in bona fide efforts to eliminate the discriminatory practices." It noted that the "such membership is an important factor which Senators should consider in evaluating such persons, in conjunction with other factors which may reflect upon their fitness and ability."

a. **Why you believe that the Belizean Grove does not invidiously discriminate on the basis of gender?**
b. **How was your membership in this organization any different than that of other candidates like Judge D. Brooks Smith, who was forced to resign from an all-male fishing club?**
c. **Did you ever make any efforts to eliminate the club's discriminatory policy?**
d. **Please explain why your membership did not violate the Code of Judicial Conduct.**
e. **If you believe that your membership in this organization did not violate the Code of Judicial Conduct, please explain why you resigned.**

Response: In my view, the Belizean Grove does not invidiously discriminate on the basis of gender. The group allows men to participate in Belizean Grove activities, and to my knowledge the Belizean Grove has never denied membership to a man seeking admission. Because the Belizean Grove does not practice invidious discrimination on the basis of gender, I did not see the need for any efforts on my part to change the policies of the organization, nor did my membership violate the Code of Judicial Conduct. Nevertheless, because my membership raised concerns on the part of Senators considering my nomination to the Supreme Court, I resigned from the organization. I am not familiar with the circumstances surrounding Judge Smith's fishing club membership, and therefore I am not in a position to compare our respective situations.

Process

1. Please describe with particularity the process by which these questions were answered.

Response: Responses to these questions were drafted by legal staff of the White House based on my guidance. I edited these draft responses, and gave final approval to all answers.

2. Do these answers reflect your true and personal views?

Response: Yes.

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Responses of Judge Sonia Sotomayor
to the Written Questions of Senator Chuck Grassley

1. Last year the Supreme Court held in *District of Columbia, et al. v. Heller*, that the Second Amendment includes an individual right to possess a firearm independent of the prefatory clause regarding militias. In *Maloney v. Cuomo,* you joined a *per curiam* opinion that held that the Second Amendment "applies only to limitations the federal government seeks to impose on this right." The opinion you joined reached this conclusion citing *Presser v. Illinois*, a case from 1886 that held the Second Amendment right to bear arms "imposes a limitation on only federal not state, legislative efforts."

While the *Maloney* opinion relied upon *Presser*, it did note a very important footnote the Supreme Court included in the *Heller* decision. Footnote 23 stated that *Cruikshank*—another early Supreme Court decision finding that the Second Amendment applies to only Congress, not the states—was decided before the Court adopted the incorporation of the bill of rights to the states. In fact, the Supreme Court in *Cruikshank* didn't believe the First Amendment applied to the states, something we wouldn't even think of today. Footnote 23 in *Heller* signals that *Cruikshank,* and its progeny, including *Presser*, all predate the doctrine of incorporation and "did not engage in the sort of Fourteenth Amendment inquiry required by our later cases."

- **Do you believe that the Second Amendment is a fundamental right that should be incorporated to the states via the Fourteenth Amendment's Due Process Clause?**
- **Do you believe the Second Amendment should be incorporated by the Privileges or Immunities Clause of the Fourteenth Amendment?**
- **Why did the *per curiam* opinion in *Maloney* that you joined fail to address the issue of incorporation?**
- **Earlier this year, the Ninth Circuit Court of Appeals reached the opposite conclusion as you and your colleagues in the Second Circuit did in *Maloney.* In *Nordyke v. King*, the Ninth Circuit held that rejected the rigid reliance on *Cruikshank* and its progeny—including *Presser*—and held that the Second Amendment is incorporated to the states via the Fourteenth Amendment. The Ninth Circuit reached this conclusion by conducting the Fourteenth Amendment analysis required by later cases as the Supreme Court noted in Footnote 23. Do you agree or disagree with the Ninth Circuit's reasoning in *Nordyke*?**
- **Why did the Ninth Circuit in *Nordyke* conduct the Fourteenth Amendment analysis indicated by Footnote 23 in *Heller* while your panel in the Second Circuit in *Maloney* did not? Do you believe the Second Circuit panel you sat on should have conducted that analysis?**

Response: The opinion in *Maloney v. Cuomo*, 554 F.3d 56 (2d Cir. 2009) (*per curiam*), concluded that the panel was bound by Supreme Court and Second Circuit precedent holding that the Second Amendment is not incorporated against the States. *Id.* at 58 (citing *Presser v. Illinois*, 116 U.S. 252 (1886); *Bach v. Pataki*, 408 F.3d 75 (2d Cir. 2005), *cert. denied*, 546 U.S. 1174 (2006)).

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The question whether the Second Amendment is incorporated against the States by the Fourteenth Amendment's Due Process Clause is the subject of a circuit split. *Compare Nat'l Rifle Ass'n of America, Inc. v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009), *and Maloney v. Cuomo*, 554 F.3d 56 (2d Cir. 2009), *with Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009). Two petitions for *certiorari* currently raise the question before the Court. Accordingly, I cannot express my views on the merits of this issue, other than to reiterate, as I said during the hearings, that I have an open mind on this question.

2. From 1980 to 1992, you served as a board member of the Puerto Rican Legal Defense and Education Fund (PRLDEF). During that period PRLDEF was involved in numerous abortion cases and consistently argued before the Supreme Court that the scope of the abortion rights pronounced in *Roe v. Wade* should not be reduced in any way.

- **Why did the PRLDEF believe that defending *Roe* was a good way to spend its limited resources when numerous pro-abortion legal groups would be filing supporting briefs? What is the link between Puerto Rican legal interests and abortion?**
- **While you were associated with PRLDEF, it filed six briefs in five abortion related cases before the United States Supreme Court. Did you express any disagreement with the content of those briefs? Do you disagree with the content of those briefs now?**
- **You served as the Chairman of the Litigation Committee for PRLDEF for several years. In that capacity, did you review any of these abortion related cases that were filed by PRLDEF? Were you involved in any abortion policy or litigation strategy? What did you do as the head of the PRLDEF Litigation Committee if not be involved with and knowledgeable of the litigation activities of the Fund?**

Response: As a member of the board of the Puerto Rican Legal Defense and Education Fund ("PRLDEF"), I did not write, edit, or approve briefs drafted by the organization's staff lawyers. While the board was responsible for ensuring that the broad areas of litigation were consistent with the Fund's mission statement, the board reviewed neither the briefs in cases selected by the staff lawyers, nor the individual arguments made by those lawyers in briefs filed on behalf of the Fund. The Board assumed that the attorneys would comply with Rule 3.1 of the ABA Model Rules of Professional Conduct (or analogous state rules) and Rule 11 of the Federal Rules of Civil Procedure, each of which requires that an attorney's argument be supported by existing law or a "good faith" argument for extending, modifying, or reversing existing law, or a similar standard.

The Litigation Committee, like the full Board, focused on issues like resource allocation and ensuring general consistency with the Board's mission statement, but with a more specific focus on the litigation area. For example, as chair of the Litigation Committee, I made recommendations regarding the establishment of a consultant committee to serve as a resource to the litigation staff and regarding the restructuring of the Fund's legal department staff. The Litigation Committee also performed tasks like ensuring access to legal research materials for the staff and reaching out to other Hispanic and civil rights organizations engaged in litigation to discuss common issues. The Committee reviewed the broad areas of litigation in which the Fund

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was participating to ensure that those areas were consistent with the Fund's mission statement. The Committee also considered possible additional areas of litigation that might benefit the community PRLDEF served, but this was done at very high levels of generality – whether we should focus on education, voting rights, public health issues, etc. – and did not involve writing or editing specific briefs or litigation materials, which was the role of the staff attorneys.

3. In several of your speeches, you have indicated that you approve of American judges relying on foreign law in making decisions where such reliance is not expressly required. (Speech, ACLU of Puerto Rico, April 2009.)

- **Does the silence of the U.S. Constitution on a legal issue allow a federal court to use foreign law as an authority for judicial decision-making? When is it not appropriate to look to foreign law for legal guidance or legal authority?**

Response: Foreign law should not be used as binding precedent or legal authority to interpret the United States Constitution. In some limited circumstances, decisions of foreign courts can be a source of ideas, just as law review articles or treatises can be sources of ideas.

4. How do you define "judicial restraint?" How do you currently exercise "judicial restraint" on the appeals court? How will you exercise it on the Supreme Court, if you are confirmed to be an Associate Justice?

Response: I eschew the use of labels to describe my role as a judge. I believe that judges have a limited role in our constitutional system of government. It is the task of a judge to apply the law to the facts of the case. That is how I have approached judging throughout my seventeen years on the federal bench, and that is how I would approach my job if I am confirmed to be an Associate Justice of the Supreme Court.

5. Do you support maintaining "settled" law? What if a case becomes "unsettled" or refined by subsequent rulings? Is it possible that a time could be reached when the entire decision should be overruled?

Response: The Supreme Court's precedents are entitled to stare decisis effect. The doctrine of stare decisis promotes evenhandedness, fairness, consistency, predictability, and reliability. The Court, however, has made clear that stare decisis is not an inexorable command. In some circumstances, the Court will revisit its prior precedent. The Court has set forth factors it uses to decide when to do so. Those factors include: whether the prior precedent has proved workable as it has been applied by the lower courts; whether society has come to rely on the Court's decisions in the area of law at issue; whether developments in related areas of the law have undermined the value of the prior precedent; whether the factual premises underlying the prior precedent have changed since the prior case was decided; and whether the Court has reaffirmed the prior case.

6. Do federal courts have the power to perpetuate decisions that are not supported by the Constitution?

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Response: The Constitution binds all three branches of government, including the federal courts. Article III of the Constitution obligates the federal courts to decide cases or controversies arising under the Constitution, and in fulfilling this obligation the federal courts are required to apply the Constitution as interpreted by the United States Supreme Court.

7. Since its inception, the Federal Sentencing Commission and the Federal Sentencing Guidelines have faced a number of challenges that have come before the Supreme Court. The Supreme Court upheld the constitutionality of the Sentencing Commission in 1989 which led to the introduction of the Sentencing Guidelines across the country. However, in 2005, the Supreme Court held that the mandatory nature of the Federal Sentencing Guidelines violated defendant's sixth amendment right to a jury trial. This decision in *United States v. Booker* and *United States v. Fanfan* severed the provisions making the guidelines mandatory. As a result, the Court held that the guidelines are not to be considered mandatory and are instead merely advisory.

The Court has continued to find problems with the Sentencing Guidelines and recently stated in *Nelson v. United States*, a *per curiam* opinion, "The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable."

- **Do you agree with the Supreme Court that the Sentencing Guidelines are not mandatory and not entitled to a presumption of reasonableness?**
- **If the Sentencing Guidelines are not mandatory and not entitled to a presumption of reasonableness, in your view, is the Sentencing Commission necessary? Should we instead, just commission universities or academics to do statistical analysis of judicial sentences?**
- **Do you believe that decisions by the Sentencing Commission to amend the Guidelines and impose them retroactively are healthy for the Courts? Do you agree that any retroactive application has the potential to severely disrupt the courts and the executive branch agencies forced to relitigate and rehear settled cases? Why or why not?**

Response: In the four and half years since *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court has consistently confirmed that the Sentencing Guidelines "are now advisory." *Gall v. United States*, 552 U.S. 38 (2007). That holding—and the Supreme Court's repeated reaffirmation of *Booker* since 2005—is binding precedent. The Supreme Court has also directed that a sentencing court "may not presume that the Guidelines range is reasonable," although the Guidelines should be "the initial benchmark" of any sentencing. *Id.* The sentencing court must make an individualized assessment based on the facts presented to craft a sentence sufficient, but not greater than necessary, to fulfill the goals of sentencing generally. *See* 18 U.S.C. §3553(a).

It has been my experience that the advisory Guidelines prove useful as a starting point to consider what an appropriate sentence may be. That is because the Guidelines are the product of considered review and collaborative efforts: the "Guidelines as written reflect the fact that the Sentencing Commission examined tens of thousands of sentences and worked with the help of many others in the law enforcement community over a long period of time." *Rita v. United States*, 551 U.S. 338 (2007). The Supreme Court has recognized that the advisory Guidelines

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regime "preserve[s]" the "key role for the Sentencing Commission" that Congress has legislated. *Kimbrough v. United States*, 552 U.S. 85 (2007). As directed by statute, the Commission continues to "formulate and constantly refine national sentencing standards," armed with "empirical data and national experience, guided by a professional staff with appropriate expertise." *Id.* (internal quotation marks omitted). And the Guidelines continue to evolve as the Sentencing Commission reviews sentences imposed by courts, and as it solicits "advice from prosecutors, defenders, law enforcement groups, civil liberties associations, experts in penology and others" in an effort to minimize unwarranted sentencing disparities, while appreciating the individual nuances of a particular case. *Rita*, 551 U.S. 338. Whether the Sentencing Commission continues to be "necessary" is ultimately a question for Congress.

Effective March 3, 2008, the Sentencing Commission voted unanimously to give retroactive effect to an amendment to the Federal Sentencing Guidelines that reduces penalties for some crack cocaine offenses. District and circuit courts are currently examining the impact of *Booker* and retroactive Guidelines provisions on sentencing proceedings under 18 U.S.C. § 3582. For this reason, I would not comment on issues that are likely to come before the Court in the future. Generally speaking, however, it is not a judge's role to question the wisdom of legislative policy choices that are within constitutional limits, even if those choices impose additional burdens on courts or agencies.

8. In a recent U.S. Supreme Court case, *Gant v. Arizona*, the Court put considerable limitations on how search rules under *New York v. Belton* had been interpreted over the years. For nearly 30 years, until this latest reading of the 4th Amendment, law enforcement had used the "bright line" rule created by the *Belton* decision. In his dissent of *Gant*, Justice Breyer said the following:

> **Because the Court has substantially overruled *Belton* and *Thornton*, the Court must explain why its departure from the usual rule of *stare decisis* is justified.**
>
> **While reliance is most important in "cases involving property and contract rights," *Payne*, *supra*, at 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720, the Court has recognized that reliance by law enforcement officers is also entitled to weight. In *Dickerson*, the Court held that principles of *stare decisis* "weigh[ed]" heavily against overruling *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), because the *Miranda* rule had become "embedded in routine police practice." 530 U.S., at 443, 120 S. Ct. 2326, 147 L. Ed. 2d 405.**

I am concerned about this ruling for the following reasons: a) the Court appeared to have disregarded *stare decisis* on this issue; b) this ruling may have a substantial impact on future law enforcement efforts because police officers have relied on the search conditions previous delineated in the *Belton* case; c) the *Gant* decision in limiting searches incident to arrest has over complicated the common sense judgments we ask of our police every day.

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- **As Justice Breyer indicated, the principle of *stare decisis* is also essential to the rules that have been embedded in routine police practice. Do you believe the Court disregarded *stare decisis* in its decision? Do you believe the Court is unduly sending mixed legal messages regarding a search incident to the arrest to our police?**
- **Because of the varying U.S. Supreme Court interpretations of seizure rules for law enforcement officers concerning searches incident to the arrest, do you think that the *Gant* decision may cause police officers to become more reluctant to legitimately seize evidence even in situations where it would permissible under *Gant*? Furthermore, do you believe that the *Gant* ruling jeopardizes convictions for offenders when police officers fail to seize permissible evidence out of the potential uncertainties created by the Court's decision?**
- **How will the *Gant* decision affect local, state and federal prosecutions?**

Response: The Court's holding is binding precedent that must be considered in future cases, and I would not comment on the merits of this recent decision by the Supreme Court.

9. Justice Souter once famously quipped that television cameras would have to "roll over my dead body" in order to gain access to the proceedings before the Supreme Court. As you are filling the seat vacated by Justice Souter, I'd like to hear your views on the topic.

I, and many of my colleagues on this Committee, believe that allowing cameras in the federal courthouse would open the courts to the public and bring about greater accountability. I also think that this openness will help judges do a better job. You probably are aware that for a number of years, I've sponsored a bill, the Sunshine in the Courtroom Act, which gives judges the discretion to allow media coverage of federal court proceedings.

- **Do you share the same view as Justice Souter on allowing television access to the Supreme Court?**
- **What are your thoughts on giving federal judges the discretion to allow the televising and broadcasting of cases?**
- **Have you ever had an appellate court proceeding televised or otherwise released to the press? Have you voted to allow the use of media in any of your proceedings? If so, please explain your involvement.**
- **Would you support opening up the Supreme Court to regular media coverage?**

Response: The use of cameras to televise proceedings in federal courts—including the Supreme Court—is the subject of an ongoing dialogue between Congress and the Supreme Court. I have had limited experience with televising court proceedings as a district court judge, but not as a court of appeals judge. My experience has been positive, and I intend to relay that experience to the Justices on the Supreme Court in future conversations on this issue if I am confirmed.

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10. Perhaps no statute has had as many constitutional challenges as the federal False Claims Act. Since I authored major amendments to it in 1986, the statute has been the subject of substantial litigation and many cases have come before the Supreme Court. The Court has largely rejected many of these challenges, including a 2005 decision in *Vermont Agency of Natural Resources v. United States*, holding that *qui tam* relators have Article 3 standing because of the Government's injury in fact. However, some continue to question whether *qui tam* statutes are constitutional under Article 2—interfering with the Executive Branch's ability to prosecute cases.

- **Are you familiar with these arguments?**
- **Do you agree with the Court's reasoning that a *qui tam* relator has Article 3 standing because of the United States' injury in fact? Why or why not?**
- **Do you have an opinion on the arguments that the *qui tam* provisions are unconstitutional because they impede the Executive Branch? If so, what is your opinion and why?**
- **The Framers of the Constitution, in the First Congress, enacted several *qui tam* statutes. What deference do you give this fact when assessing the constitutionality of *qui tam* statutes in the present day?**

Response: I have never heard a case concerning the constitutionality of the *qui tam* provisions of the False Claims Act, and I am only generally familiar with the arguments on this issue. I would not comment on the merits of a recent Supreme Court decision, or comment on issues that might come before me in the future.

11. Looking through your record it appears you never heard a False Claims Act case in your tenure on the federal bench.

- **Are you familiar with the False Claims Act?**
- **Have you ever written or spoken publicly about the False Claims Act?**
- **What about the issue of the constitutionality of the *qui tam* or any other provisions of the False Claims Act? If so, please explain the circumstances and context and whether you wrote anything on the subject or provided anyone with your views on the subject.**
- **Have you ever written about the constitutionality of *qui tam* provisions in any other federal law? If so, please explain the circumstances and the context and whether you wrote anything on the subject or provided anyone with your views on the subject.**
- **Do you feel you have any bias against the False Claims Act that would impact on your ability to fairly decide a case involving the statute? If so, please explain.**

Response: As a Second Circuit judge, I have heard several cases involving the False Claims Act, including *Masters v. GlaxoSmithKline*, 271 Fed. Appx. 46 (2d Cir. 2008); *United States v. New York Medical College*, 252 F.3d 118 (2d Cir. 2001); *Eisenstein v. Whitman*, 4 Fed. Appx. 24 (2d Cir. 2001); and *United States ex rel. Pentagen Technologies Int'l, Ltd. v. CACI Int'l, Inc.*, 172 F.3d 39 (2d Cir. 1999). Other than the decisions in these cases, I have not written or spoken publicly on the False Claims Act, on the constitutionality of any provision of the Act, or on the

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constitutionality of any *qui tam* provision in any other federal statute. I do not have any bias against the False Claims Act that would impair my ability to decide fairly a case involving the statute.

12. I have long been an outspoken advocate of government whistleblowers. The Whistleblower Protection Act of 1989 remains the primary mechanism for whistleblowers to seek redress for reprisals and prohibited personnel practices taken against them for blowing the whistle on wrongdoing. However, the Executive Branch has not always viewed whistleblowers or whistleblower laws in a favorable light. Some have argued whistleblower protection statutes are unconstitutional because they restrict the activities and decisions of the Executive Branch.

- **Do you believe that the Legislative Branch has the constitutional authority to provide meaningful whistleblower protections for Executive Branch employees?**
- **Do you believe that Congress has the constitutional authority to restrict how the Executive Branch uses taxpayer dollars?**
- **Specifically, does Congress have the authority to limit appropriated funds from paying the salary of any Executive Branch employee that "prohibits or prevents, or attempts or threatens to prohibit or prevent, any other officer or employee of the Federal Government from having any direct...communication or contact with any Member...of Congress?" If not, why not?**

Response: Congress has constitutional authority to provide protection to Executive Branch whistleblowers, so long as any statute enacted by Congress is based upon a legislative power granted by Article I and does not violate any constitutional prohibitions. The Constitution grants Congress the power to appropriate taxpayer funds, and that power permits Congress to limit the Executive Branch's spending of taxpayer funds, again consistent with constitutional requirements. I would not comment on any particular congressional limitation on appropriated funds because the issue could come before the Supreme Court in the future.

13. In 2006, the Supreme Court issued a 5-4 decision in *Garcetti v. Ceballos*, which held that when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their communications from employer discipline. This decision essentially creates a different set of First Amendment rights for public employees and private employees. I'm concerned that the decision has created an incentive for public employees to go outside their chain of command and report wrong doing to the media or some other outside channel because an employer could retaliate against them for speaking up inside the government agency.

- **Do you agree with the Court that public employees that speak up pursuant to their employment responsibilities they should not be entitled to First Amendment protections?**
- **Do you believe that there should be two standards for First Amendment speech for public employees and private employees?**

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- **Do you agree with the Court that the limitation on First Amendment speech by Government employees acting pursuant to their employment responsibilities is necessary for providing "public services efficiently"?**
- **Under *Garcetti*, the Court created a system where there are now two types of First Amendment analysis for Government employees. First, if they speak pursuant to their employment responsibilities to report wrongdoing, they are afforded no First Amendment protection. However, if they speak as a citizen, presumably to the media or some other outside source to relay the concerns, the possibility of First Amendment protection arises, subject to the Court's precedent in *Pickering v. Board of Ed. Of Township High School Dist. 205* and *Connick v. Myers*. Do you agree that this two-step approach creates an incentive for a public employee to report wrongdoing outside of the chain of command? If not, why not?**

Response: I would not comment on the merits of a recent Supreme Court decision.

14. Last year, the federal government started making a large number of investments in private companies, such as banks, other financial institutions and automobile manufacturers. I believe that these investments raise significant legal and constitutional issues.

In 2008, the Federal Reserve, which has the authority to regulate and make emergency advances to banks, lent money to Bear Stearns and AIG, neither of which were banks. The Federal Reserve stated that it was relying on its power "to discount for any individual, partnership, or corporation, notes, drafts, and bills of exchange" in "unusual and exigent circumstances."

- **As a statutory matter, does the Federal Reserve have the authority to lend money to non-banks when that power, read as broadly as it has been in recent months, would nullify other, more specific provisions of the Federal Reserve Act that purport to limit the Fed's authority?**
- **The Supreme Court has stated that the Congress may delegate legislative power to the executive branch only if it provides an "intelligible principle" to guide the exercise of that power. Do you agree that, at a minimum, a statute that authorized the executive branch to take some discretionary action but fails to provide such an "intelligible principle" is an invalid delegation of legislative power?**
- **Does a statute that purports to empower an agency to lend money to any party in any circumstance and provides only that the agency shall promote economic growth and stable prices provide an "intelligible principle" to guide the exercise of that power?**
- **Do you believe that the executive branch, acting through the Federal Reserve, may lend any sum of money to any entity at all, so long as its governors claim that the loan promotes economic growth or stable prices, without any additional authorization from the Congress?**

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- **Do you believe that the executive branch, acting through the Federal Reserve, may bail out any failing business without any additional authorization from the Congress?**
- **Is there any limitation at all on the executive branch's power to bail out failing businesses?**

Response: Congress's power to delegate authority to administrative agencies is limited by the requirement that an intelligible principle must govern any such delegation. This requirement also limits the power of administrative agencies to take action, including in situations in which (1) Congress delegates authority, and (2) an administrative agency takes or proposes to take action, in an effort "to bail out failing businesses." The more particular questions regarding how this requirement applies to past, existing or hypothetical programs would have to be answered in the appropriate factual context. I would not comment on the legality of past actions taken by Congress or by federal agencies, as those actions are, or might be, the subject of litigation in the federal courts.

15. What limitation, if any, does the Fifth Amendment's Takings Clause impose on the taxing power?

Response: Any such question could be answered only after receiving briefs and hearing argument on the issue in the factual context of a particular case, so I would not comment.

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Responses of Judge Sonia Sotomayor
to the Written Questions of Senator Jon Kyl

1. Appended here are the relevant transcript pages (Appendix A) of our discussion of *Ricci v. DeStefano*. Later in the hearing, I said that I would provide you with an opportunity to review your answers and to provide any supplemental explanation that you felt appropriate. If you would like to supplement your answers to my questions regarding *Ricci*, please do.

Response: I would supplement my response to your question regarding the precedent governing the Second Circuit panel's decision in *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008), with the following excerpt from Judge Barrington Parker's opinion—joined by me and by Judges Calabresi, Pooler, and Sack—concurring in the denial of rehearing en banc:

> The district court correctly observed that this case was unusual. Nonetheless, the district court also recognized that there was controlling authority in our decisions—among them, *Hayden v. County of Nassau*, 180 F.3d 32 (2d Cir. 1999) and *Bushey v. N.Y. State Civil Serv. Comm'n*, 733 F.2d 220 (2d Cir. 1984), *cert. denied*, 469 U.S. 1117, 105 S. Ct. 803, 83 L. Ed. 2d 795 (1985). These cases clearly establish for the circuit that a public employer, faced with a *prima facie* case of disparate-impact liability under Title VII, does not violate Title VII or the Equal Protection Clause by taking facially neutral, albeit race-conscious, actions to avoid such liability.

Ricci v. DeStefano, 530 F.3d 88, 90 (2d Cir. 2008) (Parker, J., concurring in the denial of rehearing en banc).

2. Also, in an exchange with Senator Hatch on July 15 (Appendix B) and in an exchange with me on July 16 (Appendix C), you discussed the differences in the roles of a district court judge and a circuit court judge. If you would like to add anything to these comments, please do.

Response: The line from my March 2006 speech quoted in Senator Hatch's question and in your question referred to the fact that circuit court opinions, unlike district court opinions, are binding precedent on all district courts within the circuit and on all panels of the circuit court.

3. To educate the public about the role of a judge, the ABA has described on its website the role of a judge in this way: "Judges are like umpires in baseball or referees in football or basketball. Their role is to see that the rules of court procedures are followed by both sides. Like the ump, they call 'em as they see 'em, according to the facts and law—without regard to which side is popular (no home field advantage), without regard to who is 'favored,' without regard for what the spectators want, and without regard to whether the judge agrees with the law." Do you agree that the ABA's statement provides a helpful way for the public to think about the role of a judge?

Response: I believe that all analogies are imperfect. I agree with the proposition, however, that judges, like umpires and referees, should be impartial, and in that sense the ABA analogy is a helpful way for the public to think about the role of a judge.

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Responses of Judge Sonia Sotomayor
to the Written Questions of Senator John Cornyn

1. You testified that judges do not make law; they only interpret the law. Can you identify any cases decided by any federal court in the history of the United States that "made" law? If so, please identify those cases.

Response: It is the role of Congress, not the federal courts, to make law. I believe that it is the role of the federal courts, including the Supreme Court, to "interpret" law, which is to say that those courts endeavor to determine the effect of the governing law, whether constitutional or statutory, in the context of the factual situation a case presents. In the history of the United States, there have been federal court cases—including Supreme Court cases—that have since been recognized as wrongly decided. I do not think of these cases as courts "making" law, however, as that role belongs to the legislature.

2. In your view, did *Brown v. Board of Education* make law or did it merely interpret law? Please explain.

Response: As explained in my response to question 1, I believe that the Supreme Court "interprets" law. *Brown v. Board of Education*, 347 U.S. 483 (1954), is widely regarded as a correct interpretation of the constitutional command for equal protection of the laws.

3. In your view, did *Roe v. Wade* make law or did it merely interpret law? Please explain.

Response: As explained in my response to question 1, I believe that the Supreme Court "interprets" law. Cases subsequent to *Roe v. Wade*, 410 U.S. 113 (1973), have re-affirmed the core holding of *Roe*. Cases related to termination of pregnancies continue to come before the Court, and therefore it would be inappropriate for me to comment further.

4. In your view, did *Lochner v. New York* make law or did it merely interpret law? Please explain.

Response: As explained in my response to question 1, I believe that the Supreme Court "interprets" law. The reasoning in *Lochner v. New York*, 198 U.S. 45 (1905), has been criticized by the Supreme Court, and that case is now widely regarded as wrongly decided.

5. In your view, did *Dred Scott v. Sanford* make law or did it merely interpret law? Please explain.

Response: As explained in my response to question 1, I believe that the Supreme Court "interprets" law, but *Dred Scott v. Sandford*, 60 U.S. 393 (1956), is widely regarded as wrongly decided.

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6. In your view, did *Bush v. Gore* make law or did it merely interpret law? Please explain.

Response: As explained in my response to question 1, I believe that the Supreme Court "interprets" law. I would not comment on the merits of a recent Supreme Court decision.

7. In your article, *Returning Majesty to the Law and Politics: A Modern Approach*, you pointed out that an area of law can be uncertain when "a given judge (or judges) may develop a novel approach to a specific set of facts or legal framework that pushes the law in a new direction." In your view, when a judge develops a novel approach to a specific set of facts or legal framework that pushes the law in a new direction, is any new law "made"?

Response: As explained in my response to question 1, it is the role of Congress, not the federal courts, to make law. The role of the federal courts is to interpret the laws enacted by Congress by applying the law to the facts of particular cases. In some cases, federal courts perform this role by applying the law to new factual situations. When an appellate court decides such a case, the court's decision is binding precedent for the district courts in that circuit and for future panels of that circuit court. But this task of applying the law to new factual situations is not "making" law. That is a responsibility reserved to Congress.

8. Imagine that a state passes a new criminal statute prohibiting vehicles in a state park. The statute does not define the word "vehicle." Over the course of the next decade, courts in the state are confronted with a series of criminal prosecutions involving go-carts, bicycles, tricycles, motorcycles, Segways, helicopters, and wheelchairs, all of which were brought into state parks. The prosecutions lead to convictions, and the state supreme court rules on which of these means of transportation count as "vehicles" for purposes of the criminal statute prohibiting vehicles in a state park. In each of the cases, the state supreme court recognizes that there is no legislative history to determine what the legislature meant by the term "vehicle." However, the court announces that it will decide what is a "vehicle" based on what it terms "common sense." Applying this methodology, the state supreme court rules in individual cases that motorcycles and bicycles are vehicles but that go-carts, tricycles, Segways, helicopters, and wheelchairs are *not* vehicles. In this scenario, did the state supreme court make any law in your view? If so, why? If not, why not? If you need more information to answer the question, what information would you need to answer the question?

Response: As explained in my response to question 7, in some cases appellate courts apply the law to new factual situations, and those decisions become precedent that the appellate court and the lower courts within its jurisdiction are bound to follow. That does not mean, however, that the appellate courts have "made" law by deciding those cases. In the hypothetical you posit, the law was made when the state legislature passed the criminal statute at issue. The role of the courts is to apply that statute to new factual situations as they come before the courts in the context of particular prosecutions under the statute.

9. This question is a continuation of the question immediately above. Imagine that after the state supreme court has ruled on the meaning of the term "vehicle," the state

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legislature decides to codify the court's holdings. The state legislature enacts a statute stating that the word "vehicle" as used in the statute includes motorcycles and bicycles but excludes go-carts, tricycles, Segways, helicopters, and wheelchairs. The legislature's goal is merely to codify the holdings of the state supreme court. In this scenario, did the state legislature make any law? If so, why? If not, why not? If you need more information to answer the question, what information would you need to answer the question?

Response: In the hypothetical you posit, the state legislature made law by enacting a statute defining the word "vehicle" for purposes of the criminal provision. That action constitutes making law because the passage of legislation is the process by which the policy preferences of the people, as expressed through their elected representatives, are codified in the law. Unlike a court applying the statute to a new set of facts in the context of a particular prosecution, the state legislature is not merely interpreting the law, it is making the law. The legislature's decision as to the proper scope of the term "vehicle" in the statute would therefore properly be based on policy considerations, while a court should not interpret the term "vehicle" according to its own policy preferences.

10. In response to your testimony last Tuesday, Georgetown University Law Center professor Louis Michael Seidman offered the following criticism at the Federalist Society's website, available at http://www.fed-soc.org/debates/dbtid.30/default.asp:

> **I was completely disgusted by Judge Sotomayor's testimony today. If she was not perjuring herself, she is intellectually unqualified to be on the Supreme Court. If she was perjuring herself, she is morally unqualified. How could someone who has been on the bench for seventeen years possibly believe that judging in hard cases involves no more than applying the law to the facts? First year law students understand within a month that many areas of the law are open textured and indeterminate—that the legal material frequently (actually, I would say always) must be supplemented by contestable presuppositions, empirical assumptions, and moral judgments. To claim otherwise—to claim that fidelity to uncontested legal principles dictates results—is to claim that whenever Justices disagree among themselves, someone is either a fool or acting in bad faith. What does it say about our legal system that in order to get confirmed Judge Sotomayor must tell the lies that she told today?**

Please take this opportunity to respond to Professor Seidman.

Response: In my view, it is the task of a court to apply the law to the facts of the cases that come before it. This does not mean that every case will be easy, or that any disagreement between judges as to the proper outcome in a particular case is the result of an intellectual mistake or bad faith. In some cases, the task of applying the law to the facts is very difficult—because the factual situation is a novel one, or because different constitutional or statutory

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provisions point in different directions, or because the case highlights a tension between different lines of precedent, for example. In those cases, the court looks to traditional sources of legal authority, such as the text of the statute or the Constitution and applicable precedent, to make a determination as to the proper application of the law to the facts before it. I do not believe that a court's decisions should be based on a judge's own presuppositions, assumptions, or moral judgments.

11. In the third round of questioning, on Thursday, I asked you about your statement that you would not "use" foreign or international law. You stated that "use appears . . . to people to mean if you cite a foreign decision, that's means it's controlling an outcome or that you are using it to control an outcome." Please identify the sources you are aware of, if any, that have referred to the "use" of foreign law to mean that it is controlling an outcome or being used to control an outcome.

Response: My answer was based on my own understanding of what it means for a court to "use" foreign law to decide a case. In my view, American courts should not rely on decisions of foreign courts as binding or controlling precedent, except when American law requires them to do so, as in some cases involving treaties or conflicts of law. In some limited circumstances, decisions of foreign courts can be a source of ideas, just as law review articles or treatises can be sources of ideas. Reading the decisions of foreign courts for ideas, however, does not constitute "using" those decisions to decide cases.

12. You testified that you would not "use" foreign law to interpret the U.S. Constitution or U.S. statutes. Please answer the following questions that are designed to understand what you mean by the word "use":

a. When the U.S. Supreme Court cites and discusses U.S. Supreme Court precedent, is it "using" that precedent?
b. When the U.S. Supreme Court cites and discusses the decisions of federal circuit courts as persuasive authority, is it "using" those decisions?
c. When a federal court of appeals cites and discusses the decisions of other circuit courts, is it "using" those decisions?
d. **When a federal court cites a law review article as persuasive authority, is it "using" the article?**

Response: When the Supreme Court relies on its prior precedents as legal authority governing a decision, the Supreme Court is "using" those precedents to decide the case before it. Similarly, when the Supreme Court cites and discusses the decisions of lower federal courts as persuasive legal authority, it is using those decisions to decide the case. The same is true of a federal court of appeals citing the decisions of other federal courts of appeals. However, when a federal court references a law review article as the source of an idea that the court applies in its decision, the court is not "using" the article as authority to decide the case, because law review articles have no legal authority in our legal system.

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Responses of Judge Sonia Sotomayor
to the Written Questions of Senator Tom Coburn

1. Why do you think the Supreme Court came to a different conclusion in *Gonzales v. Carhart* than it did in *Stenberg v. Carhart*?

a. What were the state interests at issue in *Gonzales v. Carhart*?

Response: In *Gonzales v. Carhart*, 550 U.S. 124 (2007), the Supreme Court distinguished its prior decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), on the grounds that the Act at issue in *Gonzales* contained extensive legislative findings, was more specific in its coverage, and included an overt act requirement. *Gonzales*, 550 U.S. at 141, 153.

In setting forth the state interests in *Gonzales*, the Supreme Court stated that the "State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child." 550 U.S. 124, 145 (2007) (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, 846 (1992)). In reviewing the constitutionality of the federal ban, the Court focused on "determin[ing] whether the Act furthers the legitimate interest of the Government in protecting the life of the fetus that may become a child." *Id.* The Court also stated that "the government 'has an interest in protecting the integrity and ethics of the medical profession'" and that government has a "legitimate concern" in providing women with information on the manner in which the abortion will be carried out. *Id.* at 157.

2. During your hearing in response to a question from Senator Graham, you described your role on the board of the Puerto Rican Legal Defense Fund as follows: "To the extent that we looked at the organization's legal work, it was to ensure that it was consistent with the broad mission statement of the fund." You further stated that "the issue was whether the law was settled on what issues the fund was advocating on behalf of the community it represented. ... so, the question would become, was there a good faith basis for whatever arguments they were making ..."

a. Do you think a lawyer could make a "good faith" argument that the Constitution requires the federal funding of abortion for those women who cannot afford it?
  i. Is the issue settled law?
b. Do you think a lawyer could make a "good faith" argument that a parental notification law was unconstitutional?

Response: Rule 3.1 of the ABA Model Rules of Professional Conduct states that a "lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law." Rule 11 of the Federal Rules of Civil Procedure requires that an attorney make legal arguments that are warranted by existing law or by a "nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." Earlier versions of Rule 11, which were in effect at the time I sat on the

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PRLDEF board, likewise prohibited attorneys from making frivolous arguments, or arguments which lacked "good ground" or a "good faith" basis.

In a series of cases, the Supreme Court has held that government "need not commit any resources to facilitating abortions" and, if resources are expended, may "make a value judgment favoring childbirth over abortion and . . . implement that judgment by the allocation of public funds." *Webster v. Reproductive Health Services*, 492 U.S. 490, 510-511 (1989); *see also Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding Title X regulations prohibiting recipients from engaging in abortion counseling, abortion referral, and activities advocating abortion); *Harris v. McRae*, 448 U.S. 297 (1980) (upholding the most restrictive version of the Hyde Amendment, which withheld from states federal funds under Medicaid to reimburse the costs of abortions, with an exception only for the life of the woman); *Maher v. Roe*, 432 U.S. 464 (1977) (rejecting due process and equal protection challenges to Connecticut welfare regulation under which Medicaid recipients received payments for medical services related to childbirth, but not for nontherapeutic abortions).

The Supreme Court has also held that "[s]tates unquestionably have the right to require parental involvement when a minor considers terminating her pregnancy." *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 324 (2006). "A State may not restrict access to abortions that are necessary, in appropriate medical judgment, for the preservation of the life or health of the mother," however. *Id.* at 327–28 (internal quotations omitted).

In light of these precedents, whether a lawyer could make a good faith argument that the Constitution requires federal funding of abortion or that a particular parental notification statute is unconstitutional today is a question that would need to be examined in the factual context of a particular case. Because the constitutionality of particular parental notification statutes and particular funding statutes are issues that may come before the Court in the future, I should not comment on whether there might be any good faith argument that would support the proposition that any parental notification or federal funding statute is unconstitutional.

3. You testified that you did not review any of the briefs the Puerto Rican Legal Defense Fund submitted concerning abortion rights. What role precisely did you play with regard to this litigation?

- **a. How did you, as a board member, determine that the legal work in these cases was consistent with PRLDEF's mission statement?**
- **b. In PRLDEF's briefs, the group advocates in favor of public funds for abortion, opposes parental notification laws and practically any other restrictions on abortion such as 24-hour waiting periods and other economic barriers, and opposes the "undue burden" standard. Did you ever express concern or opposition to these positions? If so, how did you express this opposition?**
  - **i. If not, why?**

Response: As a member of the board of the Puerto Rican Legal Defense and Education Fund, I did not write, edit, or approve briefs drafted by the organization's staff lawyers. While

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the board was responsible for ensuring that the broad areas of litigation were consistent with the mission statement of the Fund, the board reviewed neither the briefs in cases selected by the staff lawyers, nor the individual arguments made by those lawyers in briefs filed on behalf of the Fund.

4. Is a state entitled to declare that for all purposes (except abortion law) the life of the human being begins at conception?

a. Why shouldn't the American people be able to debate and come to some political resolution on the matter of abortion?
b. By reserving this matter to itself, didn't the Supreme Court create the very conditions that today poison our politics?
c. Doesn't the "undue burden" test articulated in *Casey* call for a pure policy choice? In a recent *New York Times* article, Justice Ginsburg sure seems to recognize that fact. She stated: "I'm not a big fan of these tests. I think the court uses them as a label that accommodates the result it wants to reach." Do you agree with her statement?

Response: The Supreme Court has held that the liberty provision of the Due Process Clause of the Fourteenth Amendment protects a woman's right to terminate a pregnancy in certain circumstances, and I accept those decisions as the Court's precedents. I cannot speak for Justice Ginsburg, thus I cannot explain what she meant by her statement.

5. Does the Constitution protect the right to engage in scientific research? If so, what are the contours of such a right?

Response: The Supreme Court has not recognized such a right. Because this issue may come before the Supreme Court in the future, I should not comment further on whether such a right exists or the contours of such a right.

6. What constitutes clear and convincing evidence that a cognitively incapacitated patient (with no living will or advance directive) wishes to discontinue life sustaining measures?

Response: In *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990), the Court upheld Missouri's requirement that there be clear and convincing evidence establishing a patient's intent to have life-sustaining nourishment withdrawn. The issue of what constitutes "clear and convincing evidence" would require an examination of the factual record developed in a particular case to determine what evidence is sufficient in reference to the particular statute. This is an issue that could come before the Supreme Court, and therefore I should not comment generally on what constitutes clear and convincing evidence.

7. Since the announcement of the Court's decision in *Vacco v. Quill* and *Washington v. Glucksberg*, has anything changed that would warrant the conclusion that there is a Constitutional right to assisted suicide?

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Response: *Vacco v. Quill*, 521 U.S. 793 (1997), and *Washington v. Glucksberg*, 521 U.S. 702 (1997), are decisions of the Supreme Court, and I accept them. Whether there are any changed factual circumstances that would warrant revisiting those cases is a question that may come before the Court in the future, and so I would not comment on it.

8. Under what circumstances do you think racial preferences are unconstitutional?

a. When do you think they are in violation of the 1964 Civil Rights Act?
b. What do you think are compelling reasons to engage in racial preferences or bias?

Response: Governmental use of racial classifications violates the Equal Protection Clause of the Fourteenth Amendment unless the classifications are narrowly tailored to serve a compelling state interest. The Supreme Court has identified several governmental interests that are sufficiently compelling to permit racial classifications, including remedying the effects of past discrimination, *see, e.g., Wygant v. Jackson Board of Education*, 476 U.S. 267, 274 (1986), and securing the benefits that flow from a diverse student body in the context of higher education, *see, e.g., Grutter v. Bollinger*, 539 U.S. 306, 330 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 268 (2003). In addition, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, prohibits employment discrimination on the basis of race, including both intentional discrimination and, in certain situations, practices that have a disproportionately adverse effect on minorities even though they may not be intended to discriminate in fact. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971).

9. In *Crawford v. Washington*, the Supreme Court overturned long-standing precedent on confrontation of witnesses and the admission of out-of-court statements. Admissibility now depends primarily on whether a statement is deemed "testimonial," not on whether it is reliable. This change has made prosecution of domestic violence cases more difficult. In your view, is the "testimonial" nature of a statement the proper criterion for deciding whether it can be admitted consistently with the Confrontation Clause?

Response: The standard for determining whether an out-of-court statement by an unavailable witness is admissible under the Confrontation Clause of the Sixth Amendment is set forth in *Crawford v. Washington*, 541 U.S. 36, 59 (2004): "Testimonial statements of witnesses absent from trial" are admissible "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." As to the merits of the *Crawford* case, my view is simply that the decision made by the Court is now governing precedent.

10. The Supreme Court has narrowed standing doctrine in recent years. Do you think this is a good development?

a. Should citizens generally be able to challenge executive or congressional action in federal court even if they have not been directly harmed by such action?

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Response: The Supreme Court has applied the standing doctrine in several recent cases. In at least one of those cases, the Court held that the plaintiffs had standing to challenge the government action at issue, *see, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497 (2007), while in others the Court held that the plaintiffs did not have standing *see, e.g.*, *Summers v. Earth Island Institute*, 129 S. Ct. 1142 (2009); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006). I accept these decisions as the Court's precedents and would not otherwise comment on their merits. As to whether citizens should be able to challenge governmental action in federal court even if they have not been directly harmed by that action, the Court has answered that question by applying the traditional standing requirements to the facts of particular cases.

11. Do states have the power to determine the appropriate use of medication within their borders? If so, under what authority?

a. In light of *Gonzales v Oregon*, would the Congress or another federal agency be exceeding the scope of their powers if either were to pass a law prohibiting the use of certain drugs with respect to physician-assisted suicide?

Response: The Supreme Court has stated that "regulation of health and safety is 'primarily, and historically, a matter of local concern,'" *Gonzales v. Oregon*, 546 U.S. 243, 271 (2006) (quoting *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985)), and that our federal system grants States "'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985)).

In *Gonzales*, the Court concluded that the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, did not allow the Attorney General to prohibit doctors from prescribing regulated drugs for use in physician-assisted suicide. Although the Court noted that "the Federal Government can set uniform national standards in th[e] areas" of health and safety, 546 U.S. at 271, it did not address whether a federal law clearly prohibiting the use of certain drugs with respect to physician-assisted suicide would fall within the scope of Congress's legislative authority under the Interstate Commerce Clause or other sources of congressional power, nor whether it would implicate any protections in the Bill of Rights.

12. Was the Court's conclusion in *Ledbetter v. Goodyear Tire & Rubber, Co.*, holding that the relevant statute of limitations imposing a particular time period for initiating an employee claim against an employer had been exceeded by the plaintiff, correct? If not, how did the Court err?

Response: The Court held in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), that the time limit for filing an equal-pay discrimination charge begins at the time of the initial discriminatory pay decision, not when later pay decisions that allegedly perpetuate the effect of the earlier decision occur. Congress responded to this case by enacting the Lilly Ledbetter Fair Pay Act of 2009, which amended the Civil Rights Act of 1964 to make the statute of limitations for an equal-pay discrimination lawsuit began anew with each discriminatory

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paycheck a plaintiff receives. Whatever the merits of the Court's decision, Congress's new statute has supplanted the *Ledbetter* holding.

13. Do you have misgivings about the provision of educational materials and equipment to private schools under *Mitchel v. Helms*?

Response: *Mitchell v. Helms*, 530 U.S. 793 (2000), is a decision of the Supreme Court and I accept it as precedent.

14. Is *Zelman v. Simmons-Harris* settled law? If not, why not?

Response: *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), is a decision of the Supreme Court and I accept it as precedent.

15. Please describe your understanding of the political questions doctrine.

Response: The political question doctrine is a doctrine of justiciability. The Supreme Court has identified a number of factors bearing on whether particular constitutional issues present nonjusticiable political questions. Those factors include whether there is: (1) "a textually demonstrable constitutional commitment of the issue to a coordinate branch of government"; (2) "a lack of judicially discoverable and manageable standards for resolving it"; (3) "an impossibility of deciding [the issue] without an initial policy determination of a kind clearly for nonjudicial discretion"; (4) "the impossibility of a court's undertaking independent resolution [of the issue] without expressing lack of the respect due coordinate branches of government"; (5) "an unusual need for unquestioning adherence to a policy decision already made"; and (6) "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker v. Carr*, 369 U.S. 186, 217 (1962).

16. In 1976, in the case of *Fitzpatrick v. Bitzer*, the Court held that Congress could, consistent with the Eleventh Amendment, override state sovereign immunity through its enforcement power under section 5 of the Fourteenth Amendment. Is *Fitzpatrick* consistent with *Seminole Tribe of Florida v. Florida*? Please compare the decisions?

Response: In *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), the Court held that Congress lacks the power under the Indian Commerce Clause to abrogate states' sovereign immunity under the Eleventh Amendment. It made clear that the same was true for Congress's power under the Interstate Commerce Clause. But *Seminole Tribe* left intact the Court's earlier holding in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), that Congress does have the authority under Section 5 of the Fourteenth Amendment to abrogate states' sovereign immunity. As the Court explained in *Seminole Tribe*, "*Fitzpatrick* was based upon a rationale wholly inapplicable to the Interstate Commerce Clause, *viz.*, that the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment." 517 U.S. at 65-66.

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17. How do you reconcile the tension between an enumerated power, the 10th Amendment, and the Commerce Clause?

Response: The Interstate Commerce Clause is one of the constitutionally enumerated sources of congressional power. Within the scope of that and other sources of federal legislative power, Congress has broad authority. But the constitutional enumeration of federal legislative power is also a limitation: Congress has no authority to legislate except pursuant to a constitutionally enumerated source of power. *See Marbury v. Madison*, 1 Cranch 137, 176 (1803) (Marshall, C.J.) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."). This is a critical feature of our constitutional federalism. The Tenth Amendment underscores this point by providing that "[t]he powers not delegated to the [United States] by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

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THE WHITE HOUSE

June 7, 2009

Honorable Patrick J. Leahy
Chairman, Senate Judiciary Committee
Washington, DC 20515

Honorable Jeff Sessions
Ranking Member, Senate Judiciary Committee
Washington, DC 20515

Dear Chairman Leahy:

I understand that Judiciary Committee staff have requested clarification about Judge Sonia Sotomayor's responses to Senate Judiciary Committee Questionnaire Questions 13(b) and 13(d), which concern her judicial opinions.

Question 13(b) requests "citations for all opinions you have written, including concurrences and dissents." In response to this question, Judge Sotomayor produced a list of all her opinions that are publicly available, including district court opinions available on Westlaw or Lexis but not published in the federal reporters. That list appears in the appendix to the questionnaire.

Question 13(d) requests "a list and copies of all your unpublished opinions." In response to this question, Judge Sotomayor produced a list and copies of all her opinions that are not publicly available. This set of opinions is composed entirely of district court memorandum opinions and orders that were neither published in the federal reporters nor posted on Westlaw or Lexis. The list appears in the appendix to the questionnaire, and the copies appear as attachments to Question 13(d). Staff at the court's archives are still attempting to locate several of these opinions, but we expect to receive them shortly. Those opinions are: Sweeper v. Scully, 88 Civ. 5024; Bowres v. Navistar Int'l Trans., 88 Civ. 8857; Chabad Lubavitch v. City of White Plains, 92 Civ. 9165; Medmar, Inc. v. Abdul M. Fahem & Co., 94 Civ. 3319; ; Emile v. Browner, 95 Civ. 3836; Nonferrous v. Agricultural Bank, 94 Civ. 6161.

Thus, Judge Sotomayor's responses to Questions 13(b) and 13(d) comprise all her judicial opinions.

Finally, because staff have expressed interest in Judge Sotomayor's response to Question 13(d), I offer a brief description of how her unpublished opinions were collected. When Judge Sotomayor was a district court judge, her assistant kept a list of all cases in which the judge drafted an opinion. To prepare a response to Question 13(d), her chambers ran each of the cases on this list through Westlaw; any opinion that was on the list but not available on Westlaw was ordered from the Southern District of New York's storage facility, which is located in Kansas City. To double-check this list, her chambers also asked the Clerk of the Court to run a search

through the Clerk's database for any case in which Judge Sotomayor wrote an opinion as a district court judge.

Please feel free to contact me with any questions.

Sincerely,

Cynthia C. Hogan
Counsel to the Vice President

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

June 10, 2009

The Honorable Sonia Sotomayor
Office of the Counsel to the President
The White House

Dear Judge Sotomayor:

Thank you for providing your questionnaire, assembled materials, and June 6, 2009 questionnaire supplement to the Judiciary Committee. Committee staff are reviewing your questionnaire responses and attachments and have noted a number of apparent omissions. In addition, we believe that some of your responses are incomplete. In view of these concerns, we would respectfully ask that you revisit the questionnaire and provide another supplement as soon as possible. If you believe that your questionnaire is fully responsive, we would appreciate an explanation to that effect.

To assist you in completing your questionnaire, below are some of the potential omissions detected to date:

1) Question 6 asks for your employment record. Although you indicate that you were a member of the board of directors of the State of New York Mortgage Agency, it appears that you also served on the Administration and Personnel Committee (or the Program Committee) and as a member of the board of Community Planning Board #6. In addition, you indicate that you served as a member and vice president of the board of directors of the Puerto Rican Legal Defense & Education Fund; however, in response to Question 25, you indicate that you served as First Vice President. Please clarify your response and supplement as necessary.

2) Question 12(a) requires lists and copies of materials written *or edited*. You have been widely described as an editor of the Yale Law Journal and as Managing Editor of the Yale Studies in World Public Order. However, you have not provided any copies of materials from either publication. Please provide the Committee with copies of any materials you edited during your tenure as an editor of both law reviews.

3) Question 12(b) requires copies and or/descriptions of certain reports, memoranda, or policy statements prepared by specified organizations. You have stated that "As a member of various court committees, I have prepared and contributed to numerous reports and memoranda on court issues, which relate to internal court deliberations and are not available for public dissemination." However, the question is not limited to publicly available reports. Please provide such reports and memoranda.

4) Also with respect to Question 12(b), you initially omitted a report concerning the death penalty that you drafted during your time on the Board of the Puerto Rican Legal Defense & Education Fund. We would appreciate confirmation that a thorough review of those records has been completed, given the initial omission, and that you have provided all relevant documents to the Committee in response to this question.

5) Question 13(g) requires a brief summary of and citations for all opinions where decisions were reversed by a reviewing court or where the judgment was affirmed with significant criticism. For opinions not officially reported, copies are requested. Although you indicate with respect to *Bernard v. Las Americas Communications, Inc.*, that there was no formal opinion, you make no such representation with respect to the *United States v. Gottesman* opinion or the *United States v. Bauers* opinion—yet it does not appear that copies of these opinions have been provided. Please clarify your response.

6) Question 16(d) asks about trial experience and requires "opinions and filings" for cases going to verdict, judgment, or final decision. For three cases you have indicated that "The Manhattan District Attorney's Office is searching its records for information on this case." Please provide us with this information as a supplement to the questionnaire.

7) Also with respect to Question 16(d), you state: "I tried an additional 14 cases during my time as an assistant district attorney, from 1979 to 1984. The Manhattan District Attorney's Office is searching its records for further information on these cases." Please provide us with this information as a supplement to the questionnaire.

8) Question 16(e) asks about appellate practice. Nominees are asked to provide copies of briefs and (if applicable) oral argument transcripts. You state: "I have requested the briefs and any available transcripts from these cases from the Clerk of the Court of the Second Circuit on May 30th and will forward to the Committee as soon as I receive them." Please provide us with this information as a supplement to the questionnaire.

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We are also concerned that some of your responses fail to provide the Committee with the information to which it is entitled in reviewing your nomination.

1) In response to Question 11(b), you state that you are a member of an organization, the Belizean Grove, that discriminates on the basis of sex. However, you indicate that you "do not consider the Belizean Grove to invidiously discriminate on the basis of sex in violation of the Code of Judicial Conduct." Please explain the basis for your belief that membership in an organization that discriminates on the basis of sex nonetheless conforms to the Code of Judicial Conduct.

2) Question 12(d) requires a list of speeches, remarks, lectures, etc., given by the nominee or, in the absence of prepared texts/outline/notes, then a *summary* of the subject matter (not a topic or a description). We believe that numerous entries in your list do not provide a "summary" of your remarks; instead, they set forth general topics. For example:

   - "I spoke on Second Circuit employment discrimination cases";
   - "I spoke at a federal court externship class on Access to Justice";
   - "I spoke on the United States Judicial System";
   - "I participated in a symposium on post-conviction relief. I spoke on the execution of judgments of conviction";
   - "I spoke on the implementation of the Hague Convention in the United States and abroad";
   - "I participated in an ACS Panel discussion on the sentencing guidelines";
   - "I participated in a roundtable discussion and reception on 'The Art of Judging'";
   - " I contributed to the panel, "The Future of Judicial Review: The View from the Bench' at the 2004 National Convention. The Official theme was 'Liberty and Equality in the 21st Century'""

   This list is not exhaustive.

   In addition, we are concerned about the fact that you have failed to provide a draft, video, or transcript for more than half of your speeches, remarks, lectures, etc. According to your questionnaire, you have identified 191 occasions responsive to the questionnaire. For 98, you stated that you could not locate any record, for one you stated that you gave a standard speech, for two you cross-referenced a different speech, for 81 you provided a draft or video, and for eight you provided news clippings instead of a draft, transcript or remarks. We are particularly troubled because there may well be transcripts available for certain remarks: for example, a

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transcript of the 2004 panel entitled "The Future of Judicial Review: The View from the Bench" was available online.

Please advise us of the process you undertook to search for these speeches, and for those that you are unable to provide to the Committee, please provide a more thorough explanation of the content of each speech.

Although you have provided a great deal of information to the Committee, and we appreciate your efforts, it is important that your information be complete to permit the Committee to properly evaluate your record in the short time that has been provided.

Thank you for your attention to this matter. We look forward to your receiving your supplemental answers as soon as possible.

Sincerely,

June 15, 2009

Honorable Patrick J. Leahy
Chairman, United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20515

Honorable Jeff Sessions
Ranking Member, United States Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20515

Dear Chairman Leahy and Senator Sessions:

I write to respond to the June 10, 2009 letter from Senator Sessions and several of your colleagues, as well as to provide additional responsive materials. As I discussed with Senator Sessions on the telephone, my Questionnaire responses provided everything in my possession and in my memory. My responses to the letter are as follows:

1. In addition to the positions listed in response to question 6, during my time on the Board of the Puerto Rican Legal Defense and Education Fund, I served as Special Vice Chairperson (1984-85), as Second Vice-Chairperson (1986), and as First Vice-Chairperson (1987-88). I also served on the Administration and Personnel Committee and the Program Committee of the Board of the State of New York Mortgage Agency ("SONYMA"). Meeting minutes of these SONYMA board committees are attached.
2. My work for the Yale Law Journal as a student editor involved proofreading and citechecking. I did not substantively edit any articles for the Journal, and therefore none of my work is responsive to question 12(a). However, I did edit one article for the Yale Studies in World Public Order. A copy of that article is attached.
3. As I noted in response to question 12(d), I cannot provide documents relating to my work on internal court matters because those documents are kept confidential at the direction of the Administrative Office of the United States Courts and the Chief Judge of the Second Circuit in order to protect judicial branch deliberations. I am not at liberty to disclose them, and must direct the Committee to the AO for further guidance.
4. In responding to the Committee Questionnaire, I thoroughly reviewed my files to provide all responsive documents in my possession. I also requested searches of the files maintained by PRLDEF, which required accessing the organization's archives and therefore required more time. As a result of that search, I have received several additional documents related to my work for PRLDEF, which are attached.

5-8. All requested materials in my possession are attached. As indicated in my Questionnaire responses, any remaining materials will be provided to the Committee as soon as I receive them.

The June 10 letter also asks about my membership in the Belizean Grove. As I explained in response to question 11(a), I am a member of the Belizean Grove, a private organization of

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female professionals from the profit, non-profit, and social sectors. The organization does not invidiously discriminate on the basis of sex. Men are involved in its activities—they participate in trips, host events, and speak at functions—but to the best of my knowledge, a man has never asked to be considered for membership. It is also my understanding that all interested individuals are duly considered by the membership committee. For these reasons, I do not believe that my membership in the Belizean Grove violates the Code of Judicial Conduct.

Finally, the letter asks for more information in response to question 12(d). In preparing that response, I thoroughly searched my files for videos, draft remarks, notes, outlines, and news clippings regarding all speeches or talks I have given, and I provided the Committee with everything I found. As Senator Sessions and I discussed, I have given many speeches in my career, some without prepared written materials. Many of my speeches are intended to educate students, lawyers, and laypeople on the fundamentals of our judicial system and the tools of legal advocacy that I have learned as a lawyer and a judge. These are speeches on general topics, and the most accurate descriptions I can provide of their content are in general terms.

Additional Materials on Matters Listed in Questionnaire Responses

Additional materials on speeches and unpublished opinions listed in my initial responses are attached to this letter as Supplemental Attachments 10-24.

In response to question 6, I indicated that I served on the board of the Maternity Center Association from 1985-86. This was a typographical error. I actually served on the Association Board from 1985-88. I also mistakenly omitted my service as a member of my condominium association board, for 3 Bedford Street, from 2008 to the present.

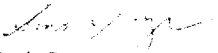
My Financial Net Worth Statement submitted in response to question 23 contained one error regarding the valuation of my interest in my condominium. A revised Statement is attached.

Supplemental Materials

Since my initial responses were submitted, several additional responsive materials have come into my possession—they are attached to this letter as Supplemental Attachments 25-29.

In addition, shortly after my nomination, I advised the Chief Judge of the Second Circuit that I would no longer be able to work on Second Circuit matters. Several unpublished decisions that were in the pipeline when my nomination was announced have been issued since my questionnaire responses were submitted. Accordingly, the following cases should be added to my response to question 13(d): *See Long Woo v. Holder*, No. 08-4078, 2009 WL 1530574 (June 2, 2009); *Chen-Lin v. Holder*, No. 08-4309, 2009 WL 1505179 (May 29, 2009); *Charette v. Department of Social Services*, No. 07-1814, 2009 WL 1475469 (May 28, 2009); *United States v. Savoy*, No. 08-4900, 2009 WL 1457976 (May 27, 2009).

Sincerely,



Sonia Sotomayor

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JUDGE SONIA SOTOMAYOR
SENATE JUDICIARY COMMITTEE QUESTIONNAIRE
SUPPLEMENT TO QUESTION 16(d)

The People of the State of New York v. Julio Pacheo, Indictment No. 5191/81 (1981) (Supreme Court, New York County): Lead counsel

The People of the State of New York v. Wayne C. Artis, Indictment No. 3465/84 (1981) (Supreme Court, New York County): Lead counsel

The People of the State of New York v. Walter Alston, Indictment No. 3118/81 (1981) (Supreme Court, New York County): Lead counsel

The People of the State of New York v. Stephen Tinsley, Indictment No. 870/81 (1981) (Supreme Court, New York County): Lead counsel

The People of the State of New York v. Willie Robinson, Indictment No. 697/81 (1981) (Supreme Court, New York County): Lead counsel

The People of the State of New York v. Robert Thompson, Indictment No. 3888/78 (1978) (Supreme Court, New York County): Lead Counsel

The People of the State of New York v. James Washington and Cheryl Washington, Indictment No. 2688/81 (1981) (Supreme Court, New York County): Lead counsel

The People of the State of New York v. Michael Stevens, Indictment No. 3500/78 (1978) (Supreme Court, New York County): Lead counsel

The People of the State of New York v. Peter Robert Adam, Indictment No. 8116/82 (1982) (Supreme Court, New York County): Lead counsel

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FINANCIAL STATEMENT
NET WORTH

Provide a complete, current financial net worth statement which itemizes in detail all assets (including bank accounts, real estate, securities, trusts, investments, and other financial holdings) all liabilities (including debts, mortgages, loans, and other financial obligations) of yourself, your spouse, and other immediate members of your household.

ASSETS				LIABILITIES			
Cash on hand and in banks		31	985	Notes payable to banks-secured			
U.S. Government securities-add schedule				Notes payable to banks-unsecured			
Listed securities-add schedule				Notes payable to relatives			
Unlisted securities--add schedule				Notes payable to others			
Accounts and notes receivable:				Accounts and bills due		5	752
Due from relatives and friends				Unpaid income tax			
Due from others				Other unpaid income and interest			
Doubtful				Real estate mortgages payable-add schedule		381	775
Real estate owned-add schedule	1	040	500	Chattel mortgages and other liens payable			
Real estate mortgages receivable				Other debts-itemize:			
Autos and other personal property		108	918	Credit card bills		15	823
Cash value-life insurance				Dentist bill (estimate)		15	000
Other assets itemize:							
				Total liabilities		418	350
				Net Worth		763	053
Total Assets	1	181	403	Total liabilities and net worth	1	181	403
CONTINGENT LIABILITIES				GENERAL INFORMATION			
As endorser, comaker or guarantor				Are any assets pledged? (Add schedule)	NO		
On leases or contracts				Are you defendant in any suits or legal actions?	NO		
Legal Claims				Have you ever taken bankruptcy?	NO		
Provision for Federal Income Tax							
Other special debt							

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FINANCIAL STATEMENT

NET WORTH SCHEDULES

Real Estate Owned	
Personal Residence	$ 997,500
Interest in Condominium	43,000
Total Real Estate Owned	1,040,500
Real Estate Mortgages Payable	
Personal Residence	$ 381,775

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June 19, 2009

Honorable Patrick J. Leahy
Chairman, United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20515

Honorable Jeff Sessions
Ranking Member, United States Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20515

Dear Chairman Leahy and Senator Sessions:

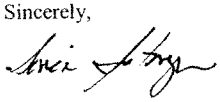
I write to respond to your June 18 letter and to provide a few additional responsive materials.

Your June 18 letter described your request to the Puerto Rican Legal Defense and Education Fund to expedite its response to my request for responsive documents from the years that I was on the PRLDEF Board. My request to PRLDEF sought all records that I had any participation in preparing, as requested in the Committee Questionnaire, and that review has been completed. All responsive documents that I received from PRLDEF have been forwarded to the Committee.

My chambers staff recently discovered a handwritten calendar that was used to keep my schedule from 1992 to 1995. The calendar included entries for several additional events I attended and speeches I gave during that time. The attached list of those events and speeches is provided to supplement my responses to questions 11(c) and 12(d). I have not found drafts of prepared remarks or video recordings of these speeches, and the entries on my handwritten calendar do not include detailed descriptions of my remarks.

My responses to questions 13(b) and 13(c) were based on a search for my cases in the Westlaw database. Since my initial response was submitted, Committee staff have brought to my attention that a search of the LEXIS database reveals several additional district court opinions written by me and several court of appeals per curiam opinions, summary orders, and cases in which I was a panel member but did not write an opinion. The attached list of these LEXIS opinions is provided to supplement my responses to questions 13(b) and 13(c).

Sincerely,



Sonia Sotomayor

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PATRICK J. LEAHY, VERMONT, CHAIRMAN

HERB KOHL, WISCONSIN
DIANNE FEINSTEIN, CALIFORNIA
RUSSELL D. FEINGOLD, WISCONSIN
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TOM COBURN, OKLAHOMA

BRUCE A. COHEN, *Chief Counsel and Staff Director*
BRIAN A. BENCZKOWSKI, *Republican Staff Director*

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

June 19, 2009

The Honorable Jeff Sessions
Republican Ranking Member
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Jeff:

Yesterday, at your request, we sent a joint letter to the Puerto Rican Legal Defense and Education Fund urging it to search for such additional materials that it might have, and that Judge Sotomayor does not, with respect to public policy and litigation matters with which she was involved during her membership in that organization more than 17 years ago before she was appointed by President Bush to the Federal bench. I know that you appreciate my joining your request, which extends beyond the usual requests for information made by the Committee to the nominee and the administration to a private, outside organization.

I also responded to your suggestion at the Judiciary business meeting yesterday morning that we postpone planned hearings so that members could concentrate more of their time reviewing Judge Sotomayor's record. I am postponing a hearing on a priority of mine, the EB-5 investor visa program. In addition, I have prevailed upon Senator Whitehouse, the Chair of the Administrative Oversight and the Courts Subcommittee, to postpone a hearing that would otherwise have proceeded on July 7 on a priority of his having to do with bankruptcies and health care. I have asked Senator Specter and Senator Klobuchar to postpone a hearing on metal theft that had been planned for the Crime Subcommittee on July 8. I had arranged for Senator Specter to chair a Crime Subcommittee hearing on June 23 in response to a request by Senator Thune, but am rescheduling that for after the Sotomayor hearing, as well. And I have asked Senator Schumer, Chair of the Immigration Subcommittee, to postpone a hearing on comprehensive immigration reform that would have proceeded on July 8.

The only hearings the Committee is now scheduled to hold in advance of the Sotomayor hearing more than three weeks from now are two requested by Republican Senators and a routine hearing for executive branch nominees. Senator Hatch has asked Senator Kohl to hold an Antitrust Subcommittee hearing on the college football bowl championship series, which remains planned for July 7 at Senator Hatch's insistence. On Wednesday, you requested a hearing on hate crimes legislation. That is a priority matter or great urgency that the Majority Leader had already said would be considered by the Senate before the August recess. In response to your demand I have asked the Attorney General to return to the Committee next week to testify about that matter.

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The nominations hearing is for only three subcabinet officials. When Republicans were in the majority in 2005, seven nominations hearings for 22 nominees of President Bush were held from the time Justice O'Connor announced her retirement to the confirmation of her successor. Ten of those nominees were for Executive Branch positions and 12 were Federal judicial nominees.

I have sought to accommodate your requests as best I can, just as I did when I delayed the start of the hearing on Judge Sotomayor for a week in order to accord you as much time as possible while still completing Committee consideration of the nomination in July, in time for the Senate to consider it before the August recess.

Sincerely,

PATRICK LEAHY
Chairman

Jeff - You and I can make all this work.

June 19, 2009

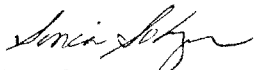
Honorable Patrick J. Leahy
Chairman, United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20515

Honorable Jeff Sessions
Ranking Member, United States Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20515

Dear Chairman Leahy and Senator Sessions:

I am writing to inform you that I have resigned from the Belizean Grove, effective today. I believe that the Belizean Grove does not practice invidious discrimination and my membership did not violate the Judicial Code of Ethics, but I do not want questions about this to distract anyone from my qualifications and record.

Sincerely,



Sonia Sotomayor

JUDGE SONIA SOTOMAYOR

ATTACHMENT TO JUNE 19, 2009 LETTER

Supplement to Question 11(c)

Date	Event Sponsor	Nature of Participation	Funding
9/27/92	Hispanic National Bar Association Annual Conference	I attended this event.	I have no record of receiving funding from the sponsors of this event.
11/15/92	Hispanic National Bar Association Conference	I attended this event.	I have no record of receiving funding from the sponsors of this event.
1/14/93	New York Women's Bar Association Dinner	I attended this event.	Dinner was provided by the sponsor of this event, the New York Women's Bar Association.
1/27/93	Association of the Bar of the City of New York	I judged a moot court competition.	I have no record of receiving funding from the sponsors of this event.
2/28/93	Columbia Law School	I judged a moot court competition.	I have no record of receiving funding from the sponsors of this event.
3/21/93 to 3/24/93	Federal Judicial Center National Workshop for District Judges	I attended this event.	I have no record of receiving funding from the sponsors of this event.
3/26/93	Puerto Rican Bar Association Dinner	I attended this event.	Dinner was provided by the sponsor of this event, the Puerto Rican Bar Association.
4/14/93	Association of the Bar of the City of New York Dinner	I attended this event.	Dinner was provided by the sponsor of this event, the Association of the Bar of the City of New York.
5/19/93	New York Women's Bar Association Dinner	I attended this event.	Dinner was provided by the sponsor of this event, the New York Women's Bar Association.

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Date	Event Sponsor	Nature of Participation	Funding
7/28/93	New York County Lawyers' Association Dinner	I attended this event.	Dinner was provided by the sponsor of this event, the New York County Lawyers' Association.
8/6/93	American Bar Association Women of Color	I attended this event.	I have no record of receiving funding from the sponsors of this event.
8/16/93 to 8/18/93	Federal Judicial Center	I attended a seminar on sentencing.	I have no record of receiving funding from the sponsors of this event.
9/24/93	Hispanic National Bar Association Luncheon	I attended this event.	Dinner was provided by the sponsor of this event, the Hispanic National Bar Association.
9/27/93	Hispanic National Bar Association Convention	I attended this event.	I have no record of receiving funding from the sponsors of this event.
10/1/93 to 10/2/93	New York Bar Conference	I attended this event.	I have no record of receiving funding from the sponsors of this event.
10/25/93	Association of the Bar of the City of New York Dinner	I attended this event.	Dinner was provided by the sponsor of this event, the Association of the Bar of the City of New York.
12/9/93	New York County Lawyers' Association Dinner	I attended this event.	Dinner was provided by the sponsor of this event, the New York County Lawyers' Association.
1/27/94	Association of the Bar of the City of New York	I judged a moot court competition.	I have no record of receiving funding from the sponsors of this event.
1/29/94	New York State Bar Association, Women Trial Attorneys	I attended this event.	I have no record of receiving funding from the sponsors of this event.
4/7/94	Puerto Rican Bar Association Reception	I attended this event.	I have no record of receiving funding from the sponsors of this event.

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Date	Event Sponsor	Nature of Participation	Funding
5/11/94	Committee on the Courts for the New York County Lawyers' Association Luncheon	I attended this event.	I have no record of receiving funding from the sponsors of this event.
5/20/94	Federal Bar Council Conference	I attended this event.	I have no record of receiving funding from the sponsors of this event.
11/1/94	Federal Bar Council event at the University Club	I attended this event.	I have no record of receiving funding from the sponsors of this event.
11/2/94	Fordham Law School	I judged a moot court competition.	I have no record of receiving funding from the sponsors of this event.
12/8/94	New York County Lawyers' Association	I attended this event.	I have no record of receiving funding from the sponsors of this event.
4/17/95	Columbia Law School Federal Court Clerk Externship Class	I gave remarks at this event on "Access to Justice." I also participated in a student-led discussion on this topic.	I have no record of receiving funding from the sponsors of this event.
6/16/95	American Association of Law Professors	I participated in a panel discussion at this event with Judith Resnick.	My travel expenses were reimbursed by the sponsor of this event, the American Association of Law Professors.
9/13/95	The Association of the Bar of the City of New York	I attended this event celebrating the Association's 125th Anniversary.	I have no record of receiving funding from the sponsors of this event.
11/9/95	Puerto Rican Bar Association Reception	I attended this event.	I have no record of receiving funding from the sponsors of this event.

Date	Event Sponsor	Nature of Participation	Funding
11/29/95	Columbia Law School Federal Court Clerk Externship Class	I gave remarks at this event on "Access to Justice." I also participated in a student-led discussion on this topic.	I have no record of receiving funding from the sponsors of this event.

56940.289

Supplement to Question 12(d)

Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
1/27/93	Association of the Bar of the City of New York I have been unable to discover where this event was held.	I judged a moot court competition. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
2/28/93	Columbia Law School 435 West 116th Street New York, NY	I judged a moot court competition. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
6/16/93	United States Attorney's Office, for the Southern District of New York 1 St. Andrews Plaza New York, NY	I spoke to the United States Attorney's summer intern program. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
1/27/94	Association of the Bar of the City of New York I have been unable to discover where this event was held.	I judged a moot court competition. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
11/2/94	Fordham Law School 140 West 62nd Street New York, NY	I judged a moot court competition. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.

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Date	Event Sponsor and Event Location	Nature of Judge Sotomayor's Participation
1/6/95	Puerto Rican Bar Association and the Hispanic National Bar Association Merchants Club Thomas Street and Trimble Place New York, NY	I was the keynote speaker for the "Three Kings Day Celebration in Honor of Newly Elected Supreme Court and Civil Court Judges in New York City." I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
4/17/95	Columbia Law School Federal Court Clerk Externship Class 435 West 116th Street New York, NY	I gave remarks at this event on "Access to Justice." I also participated in a student-led discussion on this topic. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
6/16/95	American Association of Law Professors I have been unable to discover where this event was held.	I participated in a panel discussion at this event with Judith Resnick. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.
11/29/95	Columbia Law School Federal Court Clerk Externship Class Columbia Law School 435 West 116th Street New York, NY	I gave remarks at this event on "Access to Justice." I also participated in a student-led discussion on this topic. I have not found a draft of prepared remarks and have no knowledge if a video of this event exists.

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56940.301

Supplement to Questions 13(b) and 13(c)

U.S. v. De Oleo, 1993 U.S. Dist. LEXIS 2590 (S.D.N.Y. 1993)

Harris v. Garvey, 1993 U.S. Dist. LEXIS 7477 (S.D.N.Y. 1993)

Sadowski v. Technical Career Insts., 1994 U.S. Dist. LEXIS 11797 (S.D.N.Y. 1994)

MG Ref. & Mktg. v. Knight Enters., 1996 U.S. Dist. LEXIS 22941 (S.D.N.Y. 1996)[1]

Cavagnuolo v. Rudin, 1996 U.S. Dist. LEXIS 2025 (S.D.N.Y. 1996)

Muhammad v. Francis, 1998 U.S. Dist. LEXIS 4150 (S.D.N.Y. 1998)[2]

Dones v. Johnson, 1998 U.S. Dist. LEXIS 22260 (S.D.N.Y. 1998)

Grandi v. New York City Transit Auth., 1999 U.S. App. LEXIS 2697 (2d Cir. 1999)

Lutin v. Cassidy, 1999 U.S. App. LEXIS 4659 (2d Cir. 1999)

Haynes v. Mattina, 1999 U.S. App. LEXIS 11847 (2d Cir. 1999)

Reuters Am., Inc. v. Jay Alix & Assocs., 1999 U.S. App. LEXIS 38865 (2d Cir. 1999)

Goines v. Walker, 2000 U.S. App. LEXIS 18320 (2d Cir. 2000)

U.S. Sledziewski, 2000 U.S. App. LEXIS 38585 (2d Cir. 2000)

In re John Perretta, 2000 U.S. App. LEXIS 38590 (2d Cir. 2000)

U.S. v. Secretary of HUD, 239 F.3d 211 (2d Cir. 2001)

Southerland v. Giuliani, 2001 U.S. App. LEXIS 2289 (2d Cir. 2001)

Rosquist v. Consol. Edison Co., 2001 U.S. App. LEXIS 17156 (2d Cir. 2001)

Chu Man So v. Reno, 2002 U.S. App. LEXIS 21700 (2d Cir. 2002)

Choedon v. Bd. of Immigration Appeals, 2006 U.S. App. LEXIS 9006 (2d Cir. 2006)

Bhatti v. Bd. of Immigration Appeals, 204 Fed. Appx. 984 (2d Cir. 2006)

Pascazi v. Angello, 2007 U.S. App. LEXIS 23386 (2d Cir. 2007)

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[1] A subsequent order in this case was listed in response to question 13(b): *MG Refining & Marketing, Inc. v. Knight Enterprises, Inc.*, 25 F. Supp. 2d 175 (S.D.N.Y. 1998).

[2] An earlier order in this case was listed in response to question 13(b): *Muhammad v. Francis*, No. 94 Civ. 2244 (SS), 1996 WL 657922 (S.D.N.Y. Nov. 13, 1996).

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Goldberg & Connolly v. N.Y. Cmty. Bancorp., 2009 U.S. App. LEXIS 9830 (2d Cir. 2009)

Mendez v. Holder, 2009 U.S. App. LEXIS 9951 (2d Cir. 2009)

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JEFF SESSIONS
ALABAMA

COMMITTEES:
JUDICIARY
Ranking Member
ARMED SERVICES
ENERGY AND NATURAL RESOURCES
BUDGET

United States Senate
WASHINGTON, DC 20510–0104

July 8, 2009

The Honorable Sonia Sotomayor
Office of the Counsel to the President
The White House
Washington, DC 20500

Dear Judge Sotomayor:

Thank you very much for the information that you have provided to the Committee thus far during the confirmation process. This letter follows up on information you provided in response to question 16 of your questionnaire. In question 16(a)(ii), you were asked "whether you practiced alone, and if so, the addresses and dates." You answered as follows:

> Yes, with the firm Sotomayor & Associates, 10 3rd Street, Brooklyn, New York 11231, from 1983 to 1986, but this work was as a consultant to family and friends in their real estate, business, and estate planning decisions. If their circumstances required more substantial legal representation, I referred the matter to my firm, Pavia & Harcourt, or to others with appropriate expertise.

Questionnaire at 143-144. You also indicated that you were the "owner" of Sotomayor & Associates. *See* Questionnaire at 145.

You also indicated that you were employed in other legal capacities during that same time period from 1983 to 1986. Until March 1984, you were an Assistant District Attorney with the New York County District Attorney's Office; from April 1984 to December 1987, you were an associate with the law firm Pavia & Harcourt; and from January 1988 to 1994, you were a partner at Pavia & Harcourt. *See* Questionnaire at 144.

Recently, the *New York Times* published an article detailing your work as a solo practitioner with Sotomayor & Associates. According to the article, a former colleague said that outside work at the District Attorney's office was expressly prohibited during the time you were there. The White House separately confirmed that you earned income from Sotomayor & Associates that was reported on your tax returns. At least three former clients were identified, including one for whom you performed legal services "a few years after" you said you had stopped your outside work in 1986. Finally, Sotomayor & Associates was never incorporated.

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1800 Fifth Avenue North
Birmingham, AL 35203–2171
(205) 731-1500

MOBILE
Colonial Bank Central, Suite 230OA
41 West I-65 Service Road North
Mobile, AL 36608-1291
(251) 414-3083

MONTGOMERY
7550 Halcyon Summit Drive
Suite 150
Montgomery, AL 36117
(334) 244-7017

Your answers and the recent public statements have raised a number of issues regarding your legal work as owner of Sotomayor & Associates. Most apparent is the fact that you indicated in your questionnaire that this was solo practice, but the firm name suggests otherwise. As a result, we require additional information regarding your work with Sotomayor & Associates in order better to determine whether that work was consistent with the Code of Professional Responsibility as defined by the American Bar Association and the New York Bar Association. In order fully to determine the nature of your legal work with Sotomayor & Associates, and so that Senators may properly focus on other issues at your confirmation hearing, please provide complete answers to the following questions as soon as possible:

1. Was Sotomayor & Associates organized as a corporate entity? If so, in what form?

2. Before you started Sotomayor & Associates, did you seek consent from the New York County District Attorney's Office to do so? If so, from whom and in what manner?

3. Did the District Attorney's Office consent to your starting Sotomayor & Associates?

4. What was the policy of the District Attorney's Office regarding whether it was permissible for Assistant District Attorneys to form an outside law firm or work with an independent law firm?

5. Before you started your position as an associate with Pavia & Harcourt, did you inform the firm that you had established an independent firm? If so, whom did you inform and in what manner?

6. If so, did Pavia consent to your work with the independent solo firm? If so, who consented and in what manner?

7. What steps did you take at both the District Attorney's Office and at Pavia & Harcourt to avoid any ethical conflicts between client representations?

8. What type of work did you perform with Sotomayor & Associates?

9. Did you, or anyone associated with Sotomayor & Associates, ever represent a client before a court or other judicial body?

10. What specific clients did you represent at Sotomayor & Associates? Please provide the names for all of the clients represented, even if those clients were later referred to Pavia & Harcourt or other firms.

11. Did you ever have a client sign a retainer agreement with Sotomayor & Associates?

12. Did you perform any other solo work other than from 1983 to 1986 as currently indicated on your questionnaire? If so, when and in what capacity?

13. Did you ever receive any compensation – monetary, in kind, or otherwise – for recommending a client to another firm while you were working as an Assistant District Attorney? If so, how were you compensated?

14. Did you receive any fee, barter, or in kind services in exchange for the legal services you provided to clients at Sotomayor & Associates?

15. Did you ever send out a bill for your work with Sotomayor & Associates?

16. What percentage of your work at Sotomayor & Associates was pro bono?

17. Please identify any associates who worked for you at Sotomayor & Associates, and in what capacity.

18. Did Sotomayor & Associates advertise? If so, how?

19. Did you have any separate letterhead for Sotomayor & Associates? If so, please describe how that letterhead was used.

20. Was income from Sotomayor & Associates reported on your tax returns? If so, indicate the years income was reported, how it was reported, and the amount.

Thank you again for the great deal of information you have provided to the Committee during the confirmation process. This information is important to permit Senators to evaluate your record appropriately under the significant time constraints that have been imposed.

I look forward to receiving your response as soon as possible prior to the hearing.

Very truly yours,

Jeff Sessions
United States Senator

56940.306

JEFF SESSIONS
ALABAMA

COMMITTEES:
JUDICIARY
Ranking Member
ARMED SERVICES
ENERGY AND NATURAL RESOURCES
BUDGET

United States Senate
WASHINGTON, DC 20510-0104

July 8, 2009

The Honorable Sonia Sotomayor
Office of the Counsel to the President
The White House
Washington, DC 20500

Dear Judge Sotomayor:

Thank you for responding to the Senate Judiciary Committee questionnaire regarding your nomination to the United States Supreme Court and for submitting additional materials on June 5, June 15, and June 19. After reviewing the materials you submitted, there are several additional points of concern regarding your decision whether to recuse yourself from several cases. In order that Senators may focus on other issues during your confirmation hearing, please provide separate answers for each individually-numbered question below as soon as possible.

According to your questionnaire, you recused yourself from *Cohen v. Empire Blue Cross & Blue Shield*, which you list as docket number 94-241, citing your use of Blue Cross as an insurer, and because you were "involved in a court subcommittee that addressed Blue Cross policy changes" as your reasons for recusal. An electronic search for cases with docket number 94-241 does not retrieve a case captioned *Cohen v. Empire Blue Cross & Blue Shield*. If we assume, however, that you did recuse yourself from this case, it appears that you failed to recuse yourself from two subsequent cases to which Blue Cross was also a party: *Calogera Abbruscato v. Empire Blue Cross & Blue Shield*, 274 F.3d 90 (2d Cir. 2001), and *Devlin v. Empire Blue Cross & Blue Shield*, 274 F.3d 76 (2d Cir. 2001). **(1) Please clarify whether you recused yourself from the first Blue Cross case. If you recused from the first case but not the two more recent cases, please explain why you recused from the first but not the subsequent cases.**

Similarly, your questionnaire indicates that you recused yourself from *United States v. Giffen*, Docket No. 05-5782, 473 F.3d 30 (2d Cir. 2006), although you had "no recollection of the reason." Electronically-available versions of the opinion rendered in the case reflect that you did participate in its disposition. **(2) Please confirm that you did not participate in the disposition of the case and indicate when precisely during the proceedings you recused.**

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Alternatively, if you chose not to recuse yourself, please provide an explanation for that decision.

Additionally, it appears that you have taken a different position with respect to recusal in cases involving the Puerto Rican Legal Defense and Education Fund (PRLDEF) than in cases involving Pavia & Harcourt. In Part II, Question 2 of the questionnaire you submitted when you were nominated to the Court of Appeals for the Second Circuit, you addressed how you would respond to potential conflicts of interest:

> Because my former firm, Pavia & Harcourt, advises me on personal matters, I will continue to recuse myself from any matter in which my form[er] firm or its clients, or a former client with whom I worked are involved. Similarly, I will continue to recuse myself from hearing any matter involving an issue in which I participated while a member of the Board of Directors of the non-profit organizations described in Part III, Question 1. I will further recuse myself from any matter involving a client or associate of my husband-to-be. In all matters, I will follow the dictates of 28 U.S.C. § 455 and the Code of Judicial Conduct.

The non-profit organizations referenced above included PRLDEF, as well as the State of New York Mortgage Agency, the Stanley D. Heckman Educational Trust, New York State's Panel on Inter-Group Relations, and the New York City Campaign Finance Board. According to a 1992 *New York Times* article, you served as "a top policy maker" in PRLDEF "[f]or 12 years." **(3) Why did you employ a different standard of recusal for Pavia & Harcourt than you did for the Puerto Rican Legal Defense and Education Fund, in which you served as "a top policy maker"?**

In *Grant v. Local 638*, 373 F.3d 104 (2d Cir. 2004), Alan Levine, a PRLDEF attorney, provided counsel on the brief for the plaintiffs. You did not recuse yourself from this case. **(4) Why did you not recuse yourself from this case? (5) Did you consider whether to recuse yourself from this case? If so, what factors did you consider, and what analysis did you perform?**

Based on the excerpt quoted above, you pledged to recuse yourself from any PRLDEF matter "involving an issue in which [you] participated while a member of the Board of Directors." **(6)**

Did you determine that this case did not involve an issue in which you participated? (7) How did you define an "issue" for purposes of this analysis? Did you define it broadly—for example, "voting rights"—or did you define it more narrowly—for example, a matter which involved the setting of election districts in a particular area during a particular time?

Finally, you stated in your Supreme Court questionnaire that you served as a Member of the National Council of La Raza from 1998 to 2004 and that you recused yourself from a case in which that organization was a party. (We note that you listed the case only as "National Co. v. Dept. of Justice" in your questionnaire response.) Your questionnaire indicates that you recused not because of your membership in the organization, but because of your relationship with counsel—a former law clerk. **(8) Given that you were a Member of the National Council of La Raza, have you ever considered recusing yourself from cases to which they were a party or in which they intervened? If not, why not? (9) In reaching your decision whether to recuse yourself from a case involving this organization, what factors did you consider? What analysis did you employ? (10) Did any case involving the National Council of La Raza come before you between 1998 and 2004?**

Thank you for the time and effort you have devoted to providing the Committee with information concerning your nomination. These additional questions are also important to permit Senators to evaluate your record properly in advance of the hearings, especially given the significant time constraints that have been imposed.

Thank you for your attention to these matters. I look forward to receiving your response.

Very truly yours,

Jeff Sessions
United States Senator

July 10, 2009

Honorable Jeff Sessions
Ranking Member, United States Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20515

Dear Senator Sessions:

It was a pleasure to meet with you again in person yesterday. I appreciate the opportunity to address these questions in writing prior to my hearing, so that we can remain focused during the hearing on my qualifications and my record. I have provided answers to the best of my recollection below.

1. My practice was informal and was therefore never incorporated.

2. Yes. I sought and received the consent of the DA's office through my immediate supervisor, Silvio Mollo.

3. Yes. At the time of my employment there, the DA's office engaged in a case-by-case analysis of whether to allow any particular outside employment. As Robert Morgenthau has stated publicly, such permission was regularly granted during that period.

4. I do not know whether the DA's office distinguished between forming an outside law firm and working with an independent law firm.

5. Yes. I informed one or both of two litigation partners, Fran Bernstein and David Botwinik.

6. There was no objection to my continuing to counsel my family and friends.

7. My informal assistance to my family and friends never presented any conflict with my other employment.

8. Sotomayor & Associates was an informal practice that allowed me to provide legal advice to family members and friends on simple matters such as will preparation, uncontested divorces, real estate closings, and other business prospects.

9. No, I never appeared in my Sotomayor & Associates capacity before any court or other judicial body.

10. Given that the work was performed decades ago, I do not recall all of the clients for whom I provided legal advice. I recall that I assisted Ken Kinzer, the husband of a close friend of mine, in setting up his dry cleaning business. I recall advising my cousin Miriam Gonzerelli prior to her separation and divorce, and also advising Miriam's mother prior to her own separation and divorce. And I recall assisting my uncle Alfred Gutierrez, an independent insurance salesman, primarily by reviewing contracts for him.

11. No, I never had clients sign retainer agreements.

12. No, I performed no other solo work from 1983 to 1986.

13. No, I never received any compensation for referring a client or anyone else to any law firm.

14. Yes, I received compensation and on occasion gifts—which I valued and reported as income—for the legal services I provided to family and friends.

15. No, I did not send out bills; the compensation was agreed upon in a more informal manner.

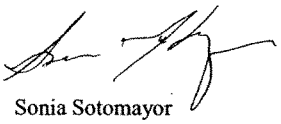
16. My family members and friends paid what they could afford for my services, which was always below market rate.

17. No associates worked for me.

18. No, Sotomayor & Associates engaged in no advertising.

19. I do not recall making or using letterhead.

Sincerely,



Sonia Sotomayor

CC:

Honorable Patrick Leahy
Chairman, United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20515

July 10, 2009

Honorable Jeff Sessions
Ranking Member, United States Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20515

Dear Senator Sessions:

You have asked a number of additional questions regarding my recusals during my six years as a District Court Judge and my eleven years as a Circuit Court Judge. I have always been especially scrupulous about following the Code of Judicial Conduct. As I previously stated on my Senate Questionnaire, I have chosen to remove myself from cases, even when not technically required by ethical rules, to avoid even the appearance of impropriety. I appreciate the opportunity to provide additional clarity on these questions now so that we can, as you suggest, focus on other issues during my confirmation hearing.

1. You asked about my recusal from *Cohen v. Empire Blue Cross & Blue Shield*, which I listed on my Questionnaire as docket number 94-241. You suggest in your letter that I provided an incorrect docket number, but I have reconfirmed that *Cohen v. Empire Blue Cross & Blue Shield* is indeed docket number 94-241. This case was on the docket of the Southern District of New York and can be found by searching the Public Access to Court Electronic Records (PACER) database for number 94-241. I do recall recusing from this case. As I explained on my Questionnaire, I recused because I was serving on a court subcommittee at the time that was addressing changes to the court's Blue Cross policy and because I expected at the time of my recusal in 1996 to have potential claims disputes with Blue Cross as my personal insurer. Those conditions no longer existed in 2001, which is why I did not recuse from the two more recent Blue Cross cases you cite.

2. You asked about my participation in *United States v. Giffen*. As you note, I did in fact participate in *United States v. Giffen*. The indication on my Questionnaire that I had recused was a mistake generated by an error in the Court's reporting system. As I explained in my Questionnaire, the Clerk's Office records recusals, known as judicial disqualifications ("DQs") on internal records, which are available only to court personnel. To help me complete my Questionnaire, the Clerk ran a database search for all DQ mentions during my tenure. That report generated 120 results for cases of mine containing a reference to a "DQ." Normally, only cases from which a judge recused are marked in this system with a "DQ." In *United States v. Giffen*, the report specifically indicated that I was not DQ'd, an indication that caused it to appear when the Clerk

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searched for mentions of "DQ" in my record. The DQ records do not normally indicate cases from which a judge was *not* disqualified. I do not know why there was a specific entry indicating the absence of a DQ from this case, but this entry resulted in the Clerk mistakenly listing that case as one from which I had recused when in fact I had not.

3. You asked why I employed a different standard of recusal for Pavia & Harcourt, my former firm, than I did for the non-profit organizations for which I had previously volunteered as an outside board member. As you point out, I noted on my Questionnaire to the Senate during my nomination to the Circuit Court that I recused from any matter in which my former firm or its clients, or a former client with whom I worked, was involved because my former firm continued to advise me on personal matters. I also noted that I recused from hearing any matter involving issues in which I participated while a member of the Board of Directors of any of the non-profit organizations listed on Part III, Question 1 of that Questionnaire. I believed then and continue to believe that my continuing relationship with Pavia & Harcourt at the time required a broad recusal policy. Although at the time of my confirmation to the Court of Appeals I had a continuing relationship with Pavia & Harcourt, my volunteer service with the organizations listed on my Questionnaire had concluded at the time I took the district bench—and had long since concluded by the time I was nominated to the Circuit Court.

4. You have asked about my participation in *Grant v. Local 638,* 373 F.3d 104 (2d Cir. 2004), a case in which an attorney of the Puerto Rican Legal Defense and Education Fund served as counsel for the plaintiff-intervenors. It appears that the relevant intervention occurred in 2003, more than ten years after my service to PRLDEF as an outside Board Member had concluded. Although I do not recall the precise analysis I performed, I am certain I considered whether I had any relationship with the attorney involved; the attorney in this case was one with whom I had not worked previously. I would also have considered whether I participated personally in the issue during my period of involvement with PRLDEF. If the answers to both questions were negative, I would not have been required to recuse. Prevailing judicial ethics do not require a lifetime recusal from cases involving entities with which a judge was once affiliated.

5. Yes—I considered the factors just described.

6. Yes.

7. You have asked how I defined an "issue" that I worked on during my volunteer work on the Boards of Directors of various non-profits for recusal purposes. I would not say I defined it narrowly or broadly. If a case came before me involving matters on which my prior non-profit work would have posed a conflict under the Judicial Code, I would have

recused. To try to illustrate, I volunteered for the Stanley D. Heckman Educational Trust, which granted college scholarships. I would not have seen that as a reason to recuse from any cases involving college scholarships. On the other hand, had a case come before me regarding one of the scholarships granted by the Trust in which I had any personal involvement, I would have recused.

8. You asked about my former membership in the National Council of La Raza (NCLR), one of the nation's leading Hispanic civic organizations, and whether I ever considered recusing from cases in which they were a party or intervened. I do not recall ever having to consider that question. Between 1998 and 2004, when I was a member of NCLR, only one case came before me in which NCLR was a party – *National Council of La Raza v. Department of Justice*, which I listed on my Questionnaire. As also noted on my Questionnaire, I recall recusing from that case because one of the lawyers was a former law clerk of mine. Because that issue alone mandated my recusal, I do not recall if I considered any other reasons for recusal.

9. You asked what factors I considered in deciding whether or not to recuse from cases involving NCLR. As noted, I do not recall ever having to address this question since in the only case in which it would have arisen, I had to recuse for the other reasons just stated.

10. No other case involving NCLR came before me between 1998 and 2004.

Sincerely,

Sonia Sotomayor

CC:

Honorable Patrick Leahy
Chairman, United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20515

Senator Tom Coburn, M.D.
Written Questions for the Record
Dr. Charmaine Yoest, Americans United for Life
July 17, 2009

1) Judge Sotomayor repeatedly testified that she believed the "central holding" of *Roe v. Wade* was "settled law." Can you please explain what the holding of *Roe v. Wade* was?

In *Roe v. Wade*,[1] the Supreme Court held that the decision to have an abortion was part of the right to privacy protected as a personal liberty under the Due Process Clause of the 14th Amendment of the United States Constitution. While the Court in *Roe* purported to allow regulation of abortion in some circumstances, Justice Blackmun wrote that the Court's opinions in *Roe* and *Doe v. Bolton*,[2] decided on the same day, were "to be read together." In *Doe*, the Court defined "health of the mother" so broadly that it eliminated the state's ability to preserve or enact any meaningful regulations of abortion. The "health of the mother" exception provided that a physician's

> medical judgment may be exercised in light of all factors--physical, emotional, psychological, familial, and the woman's age--relevant to the wellbeing of the patient. All these factors may relate to health. This allows the attending physician [the abortionist] the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.[3]

Therefore, under the *Roe / Doe* framework, an abortionist could offer any reason imaginable to justify performing an abortion at any time during a woman's pregnancy.

Do you believe it is settled law?

No. First, no judicial decision is ever completely "settled." It can be changed by constitutional amendment or subsequent court decision. Furthermore, statutes and case law that conflict with the Constitution can never be considered "settled."

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[1] 410 U.S. 113 (1973).

[2] 410 U.S. 179 (1973).

[3] Id. at 192.

Second, the holding in *Roe* was substantially modified by the Court in *Planned Parenthood v. Casey*.[4] In *Casey*, the Court upheld what it called the central holding in *Roe*, but abandoned *Roe's* trimester framework in favor of a new standard of review – the "undue burden" standard. Under this standard of review, if a law's purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability, the law is unconstitutional. The Court stated: "Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."[5] The Court reaffirmed that legislative bodies may enact laws to protect the unborn post-viability.

In its most recent abortion case, *Gonzales v. Carhart*,[6] the Court upheld the constitutionality of the Federal Partial-Birth Abortion Ban, which lacked the typical "health exception," both before as well as after viability.

Therefore, abortion law is far from settled. The holding in *Casey* was a definitive step away from the Court's former holding that abortion was a fundamental right, with any regulation thereof subject to strict scrutiny. In *Gonzales*, the Court upheld the ban of one abortion procedure and arguably narrowed the unlimited health exception in *Doe*.

2) Did any of the laws of the 50 states regulating abortion survive the decision in *Roe*?

No. The combined effect of *Roe v. Wade* and *Doe v. Bolton* was to render state abortion regulations unenforceable, as discussed above.

3) **Was there any limit to the right to abortion, either in the age of the child in the womb or the reasons for electing that surgery, following *Roe*?**

No. As discussed above, in *Doe v. Bolton*, the companion case to *Roe*, the Court created a broad health exception to the regulations purportedly allowed under the *Roe* framework. The health exception granted abortionists the right to perform abortions for any reason during any time in the pregnancy.

If so, where are those limits?

See above.

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[4] 505 U.S. 833 (1992).

[5] Id. at 879.

[6] 550 U.S. 124 (2007).

4) **Should the courts take into consideration developments in science and technology when considering cases involving life issues?**

Yes.

Why or why not?

In *Roe*, the Court held that the State's interest in protecting the "potentiality of human life" increases through the pregnancy, and purported to allow regulation or proscription of abortion after viability. While the Court in *Casey* threw out *Roe's* trimester framework, it stated that states can regulate more heavily after viability. Therefore, as technology progresses and unborn children are able to survive outside of the womb at earlier stages of development, by the Court's own reasoning, the State's interest in protecting the unborn should begin earlier.

Developments in science and technology should also inform the Court on when life begins. Increased knowledge of when vital bodily functions begin, like the heartbeat and brainwaves, should enable the Court to take judicial notice of when life begins. The Court has historically brushed over these questions as beyond the Court's capacity to answer. However, in the very least, the Court should accept these facts as legislative findings in support of regulations written by legislatures.

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SUBMISSIONS FOR THE RECORD

RESOLUTION OF THE BOARD OF DIRECTORS ON PRESIDENT BARACK OBAMA'S NOMINEE FOR THE CURRENT JUDICIAL VACANCY IN THE UNITED STATES SUPREME COURT

WHEREAS on May 26, 2009, President Barack Obama nominated Judge Sonia Sotomayor to fill the vacancy left by Justice David H. Souter in the United States Supreme Court;

WHEREAS Judge Sotomayor has received widespread support, and in view of this Chapter, is an exceptionally qualified federal jurist with a stellar record of professional achievement;

WHEREAS the Board of Directors of this Chapter is convinced that the nominee will administer justice fairly and impartially, and will faithfully and impartially discharge and perform all the duties incumbent upon her under the Constitution and laws of the United States; and further, will support and defend the Constitution of the United States against all enemies, foreign and domestic, and will bear true allegiance to our Constitution and laws;

WHEREAS this Board of Directors is fully satisfied that Judge Sotomayor possesses the necessary professional skills, temperament, and other qualifications that are required to perform this important judicial role with distinction;

NOW, THEREFORE, the Board of Directors of the Federal Bar Association, Hon. Raymond L. Acosta Puerto Rico Chapter, hereby unanimously resolves:

1. To express its unconditional satisfaction with the qualifications of Judge Sonia Sotomayor to fill the vacancy in the United States Supreme Court, and the Chapter's unconditional support of this important nomination;

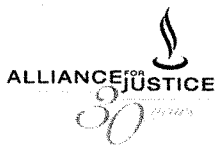
2. To exhort the United States Senate and its Committee on the Judiciary to expeditiously consider and favorably act on Judge Sonia Sotomayor's nomination, so that the United States Supreme Court may have a full complement of Justices by the time the Supreme Court reconvenes on October 5, 2009.

In San Juan, Puerto Rico, this 29th day of May, 2009.

FEDERAL BAR ASSOCIATION ORG. JAN. 5TH 1910

Puerto Rico Chapter

President's Signature



Report on Judge Sonia Sotomayor's
Civil Rights & Constitutional Protections Record

Judge Sotomayor's record in adjudicating civil and constitutional rights is consistent with her record on the bench in other areas. She is a model of judicial restraint, acutely and openly conscious of the limits imposed by her role as a judge. Her opinions thoroughly recount and dissect the facts and contain extensive citation to precedent. She tends to address meticulously every contention raised by the parties. Her reading of statues is driven by conventional attention to the text and traditional indicators of the intent of Congress. Indeed, she does not hesitate to base her decisions on the plain language of a statute where she believes it fully addresses the issue. When she finds that the matter before her is not squarely addressed by precedent, Judge Sotomayor tends to rule narrowly and move the law in small increments, rather than taking large or bold steps. Her approach is very much that of a traditional common law judge.

While Judge Sotomayor has refrained from aggressively interpreting statues or the Constitution, she has paid consistent attention to matters of process, including procedural due process. She insists that individuals in the justice system are entitled to adequate notice, a right to be heard, and representation. She has shown particular attention to the procedural rights of individuals who are less likely to be able to fend for themselves.

Regarding civil rights protections against discrimination, Judge Sotomayor has not departed from her cautious and incremental approach. On matters of employment discrimination, she has ruled for both plaintiffs and defendants, and her rulings are largely unexceptional. As discussed in this report, she has addressed discrimination on the basis of race, gender, disability, and age, and her record is consistently balanced.

Two race related cases have gathered disproportionate attention: *Ricci v. DeStefano* and *Hayden v. Pataki*. *Ricci*, the challenge to New Haven's refusal to certify the results of its test for firefighter promotions, was a unanimous summary affirmance by a panel on which Judge Sotomayor sat. Despite the furor surrounding the decision, it was a modest application of longstanding civil rights precedent to defer to the actions of a local government trying voluntarily to comply with civil rights law. The Supreme Court's reversal of the panel's decision says little about Judge Sotomayor's fitness for the Supreme Court. The Supreme Court created a new standard to govern the case, which Judge Sotomayor could not have applied at the Court of Appeals level. In addition, Justice Souter, whom she will replace, voted to affirm her decision.

In *Hayde*n, the plaintiffs alleged that New York's disenfranchisement of felons violated the Voting Rights Act. Dissenting from a divided *in banc* court, Judge Sotomayor would have held that the Voting Rights Act applied and the case should have been allowed to proceed. Her

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opinion displays judicial modesty, relying on the plain test of the statute, and arguing that if the text were to be rewritten it was up to Congress, and not the court, to do so. Little noticed, of course, is the fact that she did not reach the merits of the plaintiffs' claim.

Judge Sotomayor has not addressed some hot-button constitutional issues while on the bench, including abortion and the death penalty. As a result, critics have mined her extra-judicial statements and activities for some indication of her views. But, surely, her seventeen years on the bench remain the best predictor of her likely behavior as a Justice.

Judge Sotomayor has given unpopular speech First Amendment protection and she has a strong record of protecting the exercise of religion. Though she has been attacked for refusing to extend the protections of the Second Amendment to block state action, her ruling, once again, was a model of restraint in which she pointed out that she was bound by Supreme Court precedent and it was up to the Supreme Court to change its precedents. Her decision was recently seconded by a panel of the Seventh Circuit featuring Judges Easterbrook and Posner. Similarly, her takings jurisprudence has been governed by the Supreme Court's decision in *Kelo* as a precedent and characteristically reflects deference to the decisions of local government.

In the following report, we examine Judge Sotomayor's record in these and other areas of civil and constitutional rights in greater detail.

CIVIL RIGHTS

Race

Opponents of Judge Sotomayor's nomination referred to comments she made during a speech as evidence that she is "racist," and by implication is likely to decide cases based on her racial views. There is no evidence of any racial bias in any of the hundreds of decisions Judge Sotomayor has written. To the contrary, her jurisprudence in cases involving claims of racial discrimination is very much like her jurisprudence in other areas of the law. She is deliberate, measured, and adheres closely to precedent.

Voting Rights

Section 2 of the Voting Rights Act provides that "no voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." Judge Sotomayor participated in two cases involving this section of the Voting Rights Act, both of which challenged New York's statute disenfranchising felons. *Muntaqim v. Coombe*, 449 F.3d 371 (2d Cir. 2006) (in banc), *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006).

The *Muntaqim* and *Hayden* cases presented the same issue: whether New York's disenfranchisement of felons and parolees was a denial of the right to vote in violation of the

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Voting Rights Act. In *Muntaquim,* the Second Circuit, in banc, determined that the plaintiff did not have standing to sue, thus avoiding the substantive issues. *Muntaqim*, 449 F.3d at 375-76.

In *Hayden*, the Second Circuit in banc upheld the New York law prohibiting felon voting, but Judge Sotomayor wrote a separate dissent and joined a dissent by Judge Parker. The primary dissent written by Judge Parker and joined by Judge Sotomayor argued that the majority erred in concluding that the Voting Rights Act did not apply and concluded that the plaintiffs should be permitted to offer proof that they were unlawfully disenfranchised. *Hayden*, 449 F.3d at 343.

In her separate dissent, Judge Sotomayor wrote to make clear that she believed that this was an easy case that should be resolved based on the plain language of the statute. *Id.* at 367-68. Judge Sotomayor supported a strict reading of the plain language of the Voting Rights Act and her approach urged judicial restraint and deference to Congress. She reasoned that, by its terms, the Voting Rights Act applies to all voting qualifications, including felon disenfranchisement. *Id.* She criticized the majority for stretching to find that Congress intended to shield felony disenfranchisement laws from the Voting Right Act and concluded that "even if Congress had doubts about the wisdom of subjecting felony disenfranchisement laws to the results test of [the Voting Rights Act], I trust that Congress would prefer to make any needed changes itself, rather than have courts do so for it." *Id.* at 368.

Employment Discrimination

One of Judge Sotomayor's most talked about decisions is *Ricci v. Destefano*, 530 F.3d 87 (2d Cir. 2008), *denial of re-hearing en banc,* 530 F.3d 88 (2d Cir. 2008). In *Ricci*, seventeen white firefighters and one Hispanic firefighter challenged New Haven's decision to set aside the results of promotional exams that would have resulted in no African-Americans being promoted. The district court agreed with the City and dismissed the plaintiffs' claims on summary judgment. *Ricci v. Destefano*, 554 F.Supp.2d 142 (D.Conn. 2006). Judge Sotomayor sat on a three judge panel that issued a short *per curiam* opinion affirming for the reasons given by the district court in its "thorough, thoughtful, and well-reasoned opinion." *Ricci v. Destefano*, 530 F.3d 87 (2008). The court went on to note that although it sympathized with the plaintiffs' frustration and appreciated their efforts to pass the exam, the City was simply trying to meet its legal obligations to prevent and avoid racial discrimination.

In an order issued days later, a majority of the court, including Judge Sotomayor, voted to deny re-hearing *in banc*. *Ricci v. Destefano*, 530 F.3d 88 (2d Cir. 2008). The decision prompted a protest from some members of the court who argued that the Second Circuit had an obligation to review the matter rather than leave the district court's opinion as the guiding law of the circuit. *See id.* at 94 (Cabranes, J., dissenting). Notably, the dissenters did not take issue with the court's decision on the merits. *Id.* The Supreme Court reversed. It created a new standard for evaluating reliance on disparate impact as a defense to an allegation of intentional discrimination. Judge Sotomayor was bound to apply Second Circuit precedent and could not have anticipated or relied on the Court's new standard.

In addition to *Ricci*, Judge Sotomayor has heard other cases involving a promotional exam or a purportedly race-conscious remedies. When considered as a whole, these cases

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illustrate Judge Sotomayor's fact-specific approach and reveal no inclination to rule one way or another when deciding race-based or other discrimination claims. For example, in *Atkins v. Westchester Cty. Dept. of Soc. Serv.*, 2002 U.S.App. LEXIS 5241 (2d Cir. 2002), she joined an opinion affirming the dismissal of a Title VII challenge by African-American county employees to a promotional exam. The court found the mere fact that the test scores of white applicants "were clustered at the top of the rankings" was not alone sufficient to support a discrimination claim. *Id.* at *3. But, in *Amador v. Hartford*, 2001 U.S.App. LEXIS 23189 (2d Cir. 2001), Judge Sotomayor joined a panel that vacated the lower court's dismissal of a gender discrimination claim by eighteen male police officers also challenging a promotional exam.

In many instances, Judge Sotomayor applied Second Circuit precedent to bar plaintiffs' claims based on procedural defects. *See, e.g., McNeill v. St. Barnabas Hosp.,* 1997 U.S. Dist. LEXIS 18606 (S.D.N.Y. 1997) (finding plaintiff's Title VII and § 1981 claims for discriminatory termination were time barred, and dismissing plaintiff's retaliation claim after finding that plaintiff failed to show any evidence that the defendant's reasons for its treatment of her were pretext for discrimination); *Washington v. County of Rockland,* 373 F.3d 310 (2d Cir. 2004) (ruling that plaintiffs' § 1981 claim of being singled out for discriminatory administrative disciplinary proceedings was untimely after finding no continuing violation).

In other cases she allowed claims to proceed. *See Mitchell v. Reich,* 1994 U.S. Dist. LEXIS 11712 (S.D.N.Y. 1994) (denying a defendant's motion for judgment on the pleadings because plaintiff had pleaded sufficient allegations to establish a *prima facie* case of racial discrimination or retaliation, and stating that "plaintiff should not be barred at this early stage in the litigation"); *Cartagena v. Ogden*, 995 F. Supp. 459 (S.D.N.Y. 1998) (denying defendant's motion for summary judgment because plaintiff alleged sufficient "direct evidence" of discrimination to reach a jury); *Gilani v. NASD,* 1997 U.S. Dist. LEXIS 12287 (S.D.N.Y. Aug. 1997) (dismissing plaintiff's race discrimination and hostile work environment claims as procedurally defective, but allowing plaintiff's retaliation claims). And, she has been open to novel claims of race and national origin discrimination. *See McNeil v. Aguilos,* 831 F.Supp. 1079 (S.D.N.Y. 1993) (allowing Title VII claims of English-only speaker to proceed against non-English coworker communications).

Education, Housing, and Travel

Judge Sotomayor has also ruled in cases with allegations of racial discrimination in other contexts. Consistent with her usual practice, Judge Sotomayor has approached each of these cases with no apparent preconceptions and has thoroughly explored the facts.

In a strongly worded dissent in *Gant v. Wallingford Board of Education*, 195 F.3d 134 (2d Cir. 1999), Judge Sotomayor objected to the majority's decision to dismiss a race discrimination claim brought by a black student who was transferred from first grade to kindergarten after only nine days in his new, nearly all-white school. In reviewing the evidence, Judge Sotomayor wrote that "a jury reasonably could conclude that the school did not give the black student an equal chance to succeed (or fail). . . . In my opinion, [the student] was entitled to an equal opportunity to learn, and failing that a full hearing in court." *Id.* at 153.

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Judge Sotomayor, in a case brought under the Fair Housing Act, allowed Yvette Boykin, an African American plaintiff to proceed with her claim against a bank that denied her a home equity loan. *Boykin v. KeyCorp*, 521 F.3d 202 (2d Cir. 2008). The plaintiff, acting as her own lawyer, alleged the bank discriminated against her because of her race, sex, and property location. Writing for a Second Circuit panel, Judge Sotomayor reversed the district court's judgment that Ms. Boykin failed to file her complaint on time and sent the case back to the district court for further proceedings.

Yet, in *King v. American Airlines, Inc.*, 284 F.3d 352 (2d Cir. 2002), she wrote for a unanimous panel that rejected a claim of racial discrimination brought by two African American airline passengers who were bumped from a flight and whose seats were given to white passengers. Judge Sotomayor dismissed their claims holding that their suit was time barred and preempted by the Warsaw Convention, an international treaty governing air travel.

Gender

Judge Sotomayor's decisions on Title VII sex discrimination claims show that she is receptive to plaintiffs' claims of gender discrimination, especially those involving hostile work environments. In the majority of the sex discrimination cases over which she presided, Judge Sotomayor sided with the plaintiffs. As in other areas of the law, Judge Sotomayor adhered faithfully to Second Circuit precedent when reviewing sex discrimination claims and on at least two occasions her rulings narrowed a plaintiff's ability to seek relief for alleged sex discrimination. *Baba v. Japan Travel Bureau International,* 1995 U.S. Dist. LEXIS 1005 (S.D.N.Y. Jan. 27, 1995), *aff'd* by 111 F.3d 2 (2d Cir. 1997), (ruling that Title VII provides no explicit or implied cause of action against EEOC for a claim that it failed to properly investigate or process an employment discrimination charge); *Williams v. R.H. Donnelly Corp.,* 368 F.3d at 128 (2d Cir. 2004) (denial of employee's request for a lateral transfer is not adverse employment action for purposes of establishing a *prima facie* case of discrimination).

When reviewing procedural hurdles to Title VII sex discrimination claims, Judge Sotomayor was often willing to preserve a plaintiff's claim. For example, in *Black v. N.Y.U. Medical Center,* 1996 U.S. Dist. LEXIS 7178 (S.D.N.Y. 1996), Judge Sotomayor allowed an associate professor's claim that she was not promoted based on her gender to go forward even though the defendant argued that the plaintiff filed too late. Judge Sotomayor based her decision on a finding that the plaintiff's allegations demonstrated a continuing violation and the last act of discrimination alleged fell within the limitations period. In addition, Judge Sotomayor gave the plaintiff a chance to add facts to her Equal Pay Act claim which otherwise might have been dismissed as too vague to go forward.

In an interesting case, Judge Sotomayor's agreed with the result reached by her colleagues on the Second Circuit, but disagreed with their reasoning. In *Higgins v. Metro-North Railroad Co.,* 318 F.3d 422 (2d Cir. 2003), the plaintiff brought tort claims against her employer under the Federal Employers' Liability Act alleging that verbal and physical harassment at work caused her latent multiple sclerosis to become symptomatic. Judge Walker's majority opinion affirmed the grant of summary judgment to defendant. Judge Sotomayor, concurred in the result, but disagreed with the majority's sole focus on the sexual nature of the alleged harassment. *Id.*

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at 428-29. Instead, she viewed the record through the wider lens of inappropriate conduct that might amount to more general abuse of the employees, ultimately concluding that the plaintiff had failed to allege a physical injury necessary to sustain her negligence claims. *Id.* at 431.

Hostile Work Environment

On the Second Circuit, Judge Sotomayor authored two lengthy opinions in which she vacated a district court's ruling and remanded in favor of a hostile work environment claim. In *Raniola v. Bratton,* 243 F.3d 610 (2d Cir. 2001), Judge Sotomayor, writing for a unanimous panel, concluded that a New York City Police Department officer presented enough evidence support a jury verdict in her favor by showing that: her supervisor targeted her with sex-based derogatory remarks; her work assignments were disproportionately burdensome; she was sabotaged at work; and a supervisor threatened her in a meeting saying that if she "opens her mouth, I am going to put one in her fucking head." *Id.* at 618-23.

In *Cruz v. Coach Stores, Inc.,* 202 F.3d 560 (2d Cir. 2000), Judge Sotomayor, again writing for a unanimous panel, agreed with the district court that most of plaintiff Yvette Cruz's claims could not go forward, but reversed and remanded with respect to her hostile work environment claim. Judge Sotomayor relied on Ms. Cruz's testimony about her Human Resources Manager's behavior that included: repeated racially derogatory remarks, repeated statements that she should be barefoot and pregnant, and a tendency to stand very close to women and look at them "up and down in a way that's very uncomfortable." *Id.* at 570-71. Judge Sotomayor found that a reasonable jury could view the racial and sexual harassment as severe and pervasive enough to alter the conditions of her working environment. *Id.* at 571. Judge Sotomayor declined to reach the open question as to whether a plaintiff may aggregate evidence of racial and sexual harassment to support a hostile work environment claim where neither charge could survive on its own. *Id.* at 572 n.7.

Punitive Damages and Other Relief under Title VII

In 1997, Judge Sotomayor presided over a high-profile sex discrimination trial in which a female bank executive sued her employer for failure to promote, disparate treatment, and retaliation. The jury returned a verdict for Plaintiff of $320,000 in back pay and $1.25 million in punitive damages. *See* Benjamin Weiser, "Jury Finds Bank Must Pay Damages for Sex Discrimination," *New York Times,* May 20, 1997, at B6. On review of post-trial motions, Judge Sotomayor left the punitive damage award in place by holding that: the jury could find punitive damages based on a preponderance of the evidence instead of the more demanding clear and convingcing standard; punitive damages were available under both Title VII (which capped damages at $300,000) and the New York City anti-discrimination law (which has no damages cap); and that the damages assessed by the jury were reasonable and not excessive. *Greenbaum v. Svenska Handelsbanken,* 979 F. Supp. 973 (S.D.N.Y. 1997); 26 F. Supp. 2d 649 (S.D.N.Y. 1998); 67 F. Supp. 2d 228 (S.D.N.Y. 1999).

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Disability

In this area of law, Judge Sotomayor has taken strong positions protecting the rights of individuals with disabilities. *See, e.g., Capobianco v. City of New York*, 422 F.3d 47 (2d Cir. 2005) (reversing summary judgment for employer, holding that worker with visual impairment may have disability); *Price v. City of New York*, 2008 U.S. App. LEXIS 3133 (2d Cir. 2008) (reversing summary judgment and remanding to district court issue of whether task was essential function of the job); *Norville v. Staten Is. Univ. Hosp.*, 196 F.3d 89 (2d Cir. 1999) (reversing jury verdict for employer refusing to reassign employee to comparable position; jury received wrong jury instruction); *Persons with Disabilities v. Kirk*, 448 F.3d 119 (2d Cir. 2006) (holding that federal law governing care and treatment of institutionalized individuals required state health department to disclose peer review records of patients who died in their care).

Although she robustly interprets statutory mandates, she does so within the limits of the law. *See, e.g., Johnson v. New York Hosp.*, 189 F.3d 461 (2d Cir. 1999) (giving substantial deference to employer determination of essential job functions); *Lloret v. Lockwood Greene Engineers, Inc.*, 1998 U.S. Dist. LEXIS 3999 (S.D.N.Y. 1998) (finding that post-termination depression is not sufficient to warrant tolling of the statute of limitations). In a matter of first impression in the Circuit, Judge Sotomayor authored a decision holding that "mixed motive" analysis – a pleading standard allowing discrimination claims to survive when both discriminatory and non-discriminatory motives are in play – applies to ADA employment cases. *Parker v. Columbia Pictures Indus.*, 204 F.3d 326 (2d Cir. 2000). This allowed a plaintiff to present his case to a jury where he alleged that he was fired only in part due to his disability.

On more than one occasion, Judge Sotomayor filed rigorous dissents highlighting the majority's lack of attention to the needs of incapacitated people and writing that the court should have offered greater protection. *E.E.O.C. v J.B. Hunt Transp.*, 321 F3d 69 (2d Cir. 2003) (dissenting from panel holding that truck driver applicants suffering from sleep problems were not disabled); *Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642 (2d Cir. 1999) (dissenting from panel upholding settlement agreement after appointment of guardian *at litem* who usurped plaintiff's ability to negotiate terms).

Judge Sotomayor also held that prevailing parties in administrative proceedings are entitled to attorneys fees in Individuals with Disabilities in Education Act cases. *A.R. ex rel. R.V. v. New York City Dep't of Educ.*, 407 F.3d 65 (2d Cir. 2005). And, she held that the law's "stay put" provisions, which require a school to keep current student services during a placement dispute, are not subject to administrative exhaustion requirements. *Frank G. v. Board of Educ. Of Hyde Park*, 459 F.3d 356 (2d Cir. 2006). This result is similar to that recently reached by the Supreme Court in *Forest Grove Sch. Dist. v. T. A.*, 2009 U.S. LEXIS 4645 (June 22, 2009).

Age Discrimination

Judge Sotomayor has written opinions in relatively few age discrimination cases. In these, she ruled for the plaintiffs and defendants in roughly equal measure. *See, e.g., EEOC v. Doremus & Co.*, 921 F. Supp. 1048 (S.D.N.Y. 1995) (holding that plaintiff presented sufficient evidence of age discrimination to survive summary judgment), *Lanahan v. Mutual Life Ins. Co.*,

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15 F. Supp. 2d 381 (S.D.N.Y. 1998) (entering summary judgment for the defendant where plaintiff did not produce credible evidence that he suffered workplace age discrimination).

On the Second Circuit, most of the age discrimination cases in which Judge Sotomayor participated were cases that turned on the particular facts in the record, and many of the appeals were decided in unsigned *per curiam* opinions or unpublished summary orders. *See, e.g. Lee v. Am. Int'l Group, Inc.*, 31 Fed. Appx. 764 (2d Cir. 2002) (summary order), *O'Hara v. Mem'l Sloan-Kettering Cancer Ctr.*, 27 Fed. Appx. 69 (2d Cir. 2001) (summary order), *Mauro v. Southern New Eng. Telcomms., Inc.*, 208 F.3d 384 (2d Cir. 2000) (*per curiam*).

Judge Sotomayor has only written once – in dissent – in an age discrimination case. In an opinion entitled *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006) and discussed in further detail elsewhere in this report, Judge Sotomayor objected to the majority's dual holding that the Religious Freedom Restoration Act ("RFRA") amended the Age Discrimination in Employment Act ("ADEA") and that RFRA was constitutional. Judge Sotomayor took the position in dissent that the majority unnecessarily decided the constitutionality of RFRA when it could have, and should have, decided the case simply by holding that the "ADEA does not apply to employment suits brought against religious institutions by their spiritual leaders." *Id.* at 118-19.

In addition to this dissent, Judge Sotomayor was on the panel in several novel or interesting Second Circuit age discrimination cases. In *Cross v. New York City Transit Authority*, 417 F.3d 241 (2d Cir. 2005), the New York City Transit Authority appealed a judgment entered after a jury found that it discriminated against the plaintiff employees based on their age by denying them training and demoting them. The Transit Authority argued that the ADEA did not authorize the imposition of liquidated damages against government employers. Judge Raggi, writing for a unanimous panel that included Judge Sotomayor, examined the text of the ADEA and held that liquidated damages could be awarded in cases where employers willfully engage in age discrimination. *Id.* at 254-55. In *McGinty v. New York*, 251 F.3d 84 (2nd Cir. 2001), Judge Cardamone wrote an opinion, in which Judges Sotomayor and Katzmann joined, holding that the New York State and Local Employees Retirement System was an arm of the state entitled to Eleventh Amendment immunity from suit. And, in *Rose v. N.Y. City Bd. of Educ.*, 257 F.3d 156 (2d Cir. 2001), Judge Sotomayor was part of a unanimous panel that granted an age discrimination plaintiff a new trial after the district court improperly charged the jury.

LGBT

Judge Sotomayor has encountered very few cases addressing the rights of LGBT individuals. Her limited rulings, however, display sensitivity towards those bringing claims of discrimination on the basis of their sexual orientation. In *Holmes v. Artuz*, 1995 U.S. Dist. LEXIS 15926 (S.D.N.Y. 1995), Judge Sotomayor protected the rights of a gay prisoner who sued the prison *pro se* after he was removed from his job there because of his homosexuality. Despite Judge Sotomayor's acknowledgement that a prison inmate has no constitutional right to a specific prison job or to keep that job, she denied defendants' motion to dismiss and directed the court's Pro Se Office to try to find the plaintiff a lawyer. She found a case could be made that removing a person from a job because of that person's sexual orientation could violate the equal protection clause of the constitution. Her analysis, that open hostility toward LGBT individuals

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is not a legitimate state interest, was recognized and adopted by the Supreme Court in *Romer v. Evans*. 517 U.S. 620 (1996). During her confirmation hearing to the Second Circuit, she was questioned about this case by both Senators Ashcroft (on the basis of the ruling) and Sessions (about the fact the she allowed a prisoner the opportunity to find *pro bono* counsel).

Judge Sotomayor also sat on a Second Circuit panel that issued a summary order after considering the case of a gay man who sued the City of New York alleging that his supervisor claimed he was not a "real man" and tried to "toughen him up" by assigning him work involving heavy lifting. *Miller v. City of New York*, 2006 U.S. App. LEXIS 10730 (2d Cir. April 26, 2006). The district court held that the plaintiff, Mr. Miller, failed to offer sufficient evidence that he suffered discrimination on the basis of sex, as opposed to sexual orientation. The Second Circuit disagreed, holding that Mr. Miller presented enough evidence that he was discriminated against because of his failure to conform to gender norms and thus could go forward with his sex discrimination case.

CONSTITUTIONAL LAW

First Amendment

During her seventeen years on the bench, Judge Sotomayor has emerged as a strong defender of First Amendment free speech rights, protecting a citizen's right to be free from undue governmental interference even in the face of unpopular and offensive conduct. In *Pappas v. Giuliani*, 290 F.3d 143, 154 (2d Cir. 2002), Judge Sotomayor dissented from an opinion upholding the firing of a New York City Police officer who was caught distributing racially offensive and anti-semitic screeds. She acknowledged that although she personally found "the speech in this case patently offensive, hateful, and insulting," it was entitled to First Amendment protection. *Id.* And in *Okwedy v. Molinari*, 333 F.3d 339 (2d Cir. 2003), she joined a unanimous panel holding that a public official violated First Amendment by threatening to force the removal of offensive billboards. Yet, Judge Sotomayor's rulings has applied limits to speech rights where appropriate. In *Doninger v. Niehoff*, 527 F.3d 41 (2d Cir. 2008), she joined a unanimous panel upholding the decision of school officials to disqualify a student from running for student government office after she posted "a vulgar and misleading message" about a school event on her personal blog.

Applying the First Amendment, Judge Sotomayor has recognized the right of citizens to meaningfully participate in electoral contests. In *Lopez Torres v. New York State Bd. of Elections*, 462 F.3d 161 (2d Cir. 2006), she joined a unanimous opinion affirming a the district court's ruling enjoining the State of New York from proceeding under a party-based system of electing trial court judges that made it difficult for candidates who were not the favorites of a political party. The court reasoned that the First Amendment protected voters and candidates rights to have a "realistic opportunity to participate in [a political party's] nominating process, and to do so free from burdens that are both severe and unnecessary." Id., at 187. The Supreme Court reversed, writing that there is no "constitutional right to have a 'fair shot' at winning the party's nomination." *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008). Justice Stevens, in a concurrence, wrote "to emphasize the distinction between constitutionality

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and wise policy," and concluded with Justice Marshall's remark that "The Constitution does not prohibit legislatures from enacting stupid laws."

In a case involving the right to political association, *Kraham v. Lippman,* 478 F.3d 502 (2d Cir. 2007), Judge Sotomayor wrote for a unanimous panel affirming summary judgment for the state. The plaintiff alleged that court rules prohibiting high-ranking members of political parties and their family members from receiving appointments as court fiduciaries violated her right of political association. The court rejected this claim and found that the intent of the rule – to protect the integrity and appearance of integrity of the judicial system – far outweighed any imposition it might impose on party leadership. *Id.* at 508.

Second Amendment

Judge Sotomayor has only twice considered a claim challenging restrictions on firearms. Both times the panels on which she sat affirmed the right of states to make and enforce gun control laws under the Second Amendment.

In *Maloney v. Cuomo,* 554 F.3d 56, 58 (2d Cir. 2009), the plaintiff was arrested for illegal possession of a "nunchaku" – a weapon consisting of two sticks connected by a chain. He challenged New York's statutory ban on nunchakus as an infringement of his Second Amendment right to keep and bear arms. The trial court rejected this argument. In a unanimous *per curiam* opinion, a Second Circuit panel that included Judge Sotomayor affirmed, citing longstanding direct precedent holding that the Second Amendment did not apply to state regulations, as opposed to federal regulations such as those at issue in the recent Supreme Court case involving gun rights in the District of Columbia. *Id.* at 58. The Seventh Circuit, in an opinion written by Judge Easterbrook, one of the nation's most prominent conservative jurists, recently agreed with the Second Circuit. *See Nat'l Rifle Assoc., Inc. v. Chicago,* 2009 U.S. App. LEXIS 11721, *4-5 (2d Cir. 2009).

Similarly, Judge Sotomayor was part of a panel that issued a summary order affirming a drug dealer's conviction and rejecting in a footnote his argument that New York's laws forbidding him from carrying a gun violated the Second Amendment. *United States v. Sanchez-Villar*, 99 Fed. Appx. 256 (2d Cir. 2004), vacated and remanded on other grounds by 544 U.S. 1029 (2005). The panel quoted longstanding Second Circuit precedent that "the right to possess a gun is clearly not a fundamental right." *Id.* at *5 n. 1.

Eighth Amendment

J Judge Sotomayor's Eighth Amendment cases reveal a jurist who carefully considers the totality of the circumstances and decides cases on the specific facts before her. She maintains a balanced tone when ruling in favor of prisoners or prison officials. Judge Sotomayor's Eighth Amendment decisions also show her to be respectful of legal precedent and fair-minded in applying that precedent. The cases discussed below, which involve prisoner treatment and medical issues, illustrate Judge Sotomayor's measured approach to the Eighth Amendment.

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When considering Eighth Amendment claims of prisoner mistreatment, Judge Sotomayor has decided cases for and against prisoners. In *Higgins v. Artuz*, 1997 U.S. Dist. LEXIS 12034 (S.D.N.Y. 1997), Judge Sotomayor ruled against an inmate who claimed he had been denied privileges as a member of the Honor Block of the prison because he encouraged other inmates to file grievances. The inmate's Eighth Amendment allegations centered on alleged verbal harassment and profanity. Judge Sotomayor's, in accordance with clear and ample precedent, held that the claims could not support a finding of an Eighth Amendment violation. The opinion also dismissed complaints about poor prison conditions holding that they amounted to inconveniences not deliberate indifference or wanton infliction of pain. By contrast, in *Dellamore v. Stenros*, 886 F.Supp. 349 (S.D.N.Y. 1995), Judge Sotomayor found that a prisoner's allegations that he was subjected to a body cavity search by corrections officers while unnecessarily handcuffed and held in a chokehold, could survive the Government's motion for summary judgment. Judge Sotomayor concluded that the evidence presented by the plaintiff could support a claim under the Eighth Amendment that the officers had used excessive force.

In several cases, Judge Sotomayor ruled in favor of plaintiff prisoners alleging Eighth Amendment claims arising out of improper medical treatment. For instance, in *Thomas v. Arevalo*, 1998 U.S. Dist. LEXIS 11588 (S.D.N.Y. 1998), a prisoner argued that the delay in diagnosis of and treatment for his detached retina which resulted in vision loss violated his Eighth Amendment rights. After a careful analysis of the facts under the "deliberate indifference to medical needs" standard, Judge Sotomayor denied the defendant state and private physicians' motions, finding that this was a clear case of serious medical need, and an issue of fact arose as to whether the doctors acted with "deliberate indifference." However, Judge Sotomayor granted the defendant nurses' motions for summary judgment, finding that the plaintiff presented no evidence against them. In *Holton v. Fraitellone*, 1997 U.S. Dist. LEXIS 8431 (S.D.N.Y. 1997), Judge Sotomayor concluded that an oral surgeon's failure to take x-rays and perform surgery on a prisoner who suffered from a degenerative and painful jaw condition, despite recommendations from ten other surgeons, pointed to deliberate indifference.

Judge Sotomayor has also decided against prisoners claiming Eighth Amendment violations based on their medical treatment. In *Vento v. Lord*, 1997 U.S. Dist. LEXIS 11022 (S.D.N.Y. 1997), Judge Sotomayor ruled against a prisoner who alleged that she did not receive proper x-rays. Judge Sotomayor concluded that the claim amounted to a disagreement with medical diagnoses and dissatisfaction with the medical treatment received and, as such, did not rise to the level of "deliberate indifference" required to sustain an Eighth Amendment claim. Similarly, in *Muhammad v. Francis*, 1996 U.S. Dist. LEXIS 16785 (S.D.N.Y. 1996), Judge Sotomayor granted prison officials' motion for summary judgment because their failure to refer an inmate to an orthopedic surgeon after complaints of leg pain did not rise to the requisite level of "deliberate indifference."

Section 1983 Claims Alleging Violations of the Fourth Amendment

A person wrongfully searched or falsely arrested in violation of his or her constitutional rights under the Fourth Amendment may bring a civil law suit for damages pursuant to Section 1983 of the Civil Rights Act. True to form, Judge Sotomayor has written careful, narrow decisions in this area, rarely finding a constitutional violation and always limiting the holding to the case at hand.

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Searches and Seizures

Balancing homeland security against civil liberties, Judge Sotomayor ruled that a ferry company's practice of searching the carry-on bags of randomly selected passengers and inspecting randomly selected vehicles did not violate the Fourth Amendment. *Cassidy v. Chertoff,* 471 F.3d 67 (2d Cir. 2006). The Second Circuit held the government's "special needs" of fighting terrorism and the legislative authority given to the Coast Guard to devise security plans enjoyed deference such that the minimally intrusive nature of the search policy outweighed the plaintiffs' privacy interests.

Judge Sotomayor has also authored two separate opinions – one partial dissent, one dissent – reviewing allegedly unconstitutional strip searches. The first, *N.G. v. State of Connecticut,* 382 F.3d 225 (2d Cir. 2004), is noteworthy in light of the Supreme Court's ruling *Safford Unified School District v. Redding,* 557 U.S. __ (2009) (holding that strip-search of 13 year-old student was unreasonable because it was excessively intrusive in light of student's age, sex,and suspected infraction). In *N.G.,* Judge Sotomayor dissented in part, disagreeing with the majority's decision holding certain strip searches constitutional. She found that the government failed to demonstrate that its special needs overcame the privacy interests of emotionally troubled adolescents never charged with a crime and allowed for strip searches in the absence of individualized suspicion. *Id.* at 238. Taking care to describe the physical details of the strip searches, Judge Sotomayor wrote that the court should be especially wary of strip searches of children given how susceptible to influence and psychological damage they may be, in particular when dealing with children who may have been sexually abused. *Id.* at 239.

In *Kelsey v. County of Schoharie,* 2009 U.S. App. LEXIS 10985 (2d Cir. May 22, 2009), the majority reversed the district court's finding that a "clothing exchange procedure" for newly admitted jail inmates violated of the Fourth Amendment because it was a strip search executed without reasonable suspicion. In dissent, Judge Sotomayor accused the majority of assuming the wrong party's version of the facts and ignoring key testimony about the intrusiveness of the process. Judge Sotomayor would have affirmed the district court and ruled the practice unconstitutional. *Id.* at *31-45.

False Arrest

Judge Sotomayor has authored two opinions on the Second Circuit reviewing claims of false arrest in violation of the Fourth Amendment. In *Jaegley v. Couch,* Judge Sotomayor held that a plaintiff is not entitled to damages for false arrest so long as the arrest was supported by probable cause. 439 F.3d 149, 154 (2d Cir. 2006). In another unanimous decision, Judge Sotomayor denied a claim for damages by a man who was arrested for sexually abusing his daughter but never faced went to trial because the prosecution dropped the charges. *Smith v. Edwards,* 175 F.3d 99 (2d Cir. 1999). The Court held that no false arrest took place because, although information was withheld from the judge issuing the arrest warrant, that information would not have changed the judge's finding that there was probable cause for arrest. *Id.* at 104.

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Due Process

Judge Sotomayor is a defender of Due Process clause rights. She consistently protects individuals' rights to have a meaningful opportunity to be heard and participate in the legal process before their life, liberty, or property is taken away.

For example, in *Southerland v. Giuliani*, 4 Fed. Appx. 33 (2d Cir. 2001). Judge Sotomayor was part of a panel that issued a summary order that allowed a plaintiff to proceed with his case against New York's child welfare organization and some of its employees who took his children away from him without giving him a hearing. The panel reiterated Second Circuit precedent that "a state actor may not deprive a parent of the custody of his children without a pre-deprivation hearing unless the children are immediately threatened with harm, in which case a prompt post-deprivation hearing is required." *Id.* at 36 (internal quotations omitted). *See also Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002) (holding that police department policy of seizing and keeping vehicles driven by DWI defendants without a hearing violated due process); *Segal v. City of New York*, 459 F.3d 207, 218 (2d Cir. 2006) (a "reasonably prompt, post-termination name-clearing hearing" constitutes sufficient due process protection for a government employee alleging injury to her reputation).

In *Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642, 658 (2d Cir. 1999), Judge Sotomayor issued a powerful dissent defending the due process rights of a mentally disabled woman in an employment suit against her employer. After the defendants learned that the plaintiff had been involuntarily committed to psychiatric hospitals since her employment ended, the district court ordered her to submit to a psychiatric examination and subsequently appointed a guardian *ad litem* without holding a hearing. The trial court approved a settlement negotiated by the guardian and the plaintiff, with the help of another guardian, objected. A majority of the Second Circuit approved what the trial court did, but Judge Sotomayor dissented arguing that the plaintiff's due process rights were violated when she was not given adequate notice of the implications of the appointment of a guardian *ad litem*. She argued that courts faced with mentally ill litigants "must go to greater lengths than would be necessary in the ordinary case." *Id.* at 658.

Judge Sotomayor has also defended the procedural due process rights of prisoners. In *Anderson v. Recore*, 446 F.3d 324 (2d Cir. 2006), she wrote for a unanimous panel that found the Department of Correctional Services violated a prisoner's right to notice and an opportunity to be heard before being removed from a temporary release program, even where the prisoner had received a disciplinary hearing before the removal. And in *Mills v. Fenger*, 216 Fed. Appx. 7 (2d Cir. 2006), Judge Sotomayor joined a unanimous panel to hold that a detainee's due process rights were violated when he was denied medical care for a ruptured tendon.

Privacy and Reproductive Rights

Despite her lengthy career on the bench, Judge Sotomayor has never considered a direct challenge to a legislative restriction on abortion. She has, however, participated in a handful of decisions which relate to reproductive rights and which offer some insight into her views on privacy and family rights.

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Judge Sotomayor authored several Second Circuit opinions in asylum cases involving forced family planning policies and other women's rights issues. Her most expressive opinion in the privacy arena is in *Lin v. United States Dep't of Justice*, 494 F.3d 296 (2d Cir. 2007), in which the Second Circuit, sitting *en banc,* denied automatic refugee status to spouses or unmarried partners of people who had been forced to undergo an abortion or involuntary sterilization as a result of China's family planning policies. *Id.* at 327-334. Concurring in the judgment but dissenting from the majority's reasoning, Judge Sotomayor strongly objected to the majority's contention that the harm of forced sterilization or abortion did not extent to spouses as well as those who had undergone the coercive procedures. *Id.* at 329. She referred to a "desired pregnancy" as a "fundamental right" and wrote that the "termination of a wanted pregnancy under a coercive population control program can only be devastating to any couple, akin, no doubt, to the killing of a child." *Id.* at 330. *See also Lin v. Mukasey,* 553 F.3d 217 (2d Cir. 2009) (opinion, joined by Judge Sotomayor, reversing denial of asylum and remanding for determination of whether the petitioner could show that he had a well-founded fear that he would be forcibly sterilized if he were returned to China and sought to have another child).

Judge Sotomayor also recognized the rights of intimate partners under the First Amendment. In *Adler v. Pataki*, 185 F.3d 35 (2d Cir. 1999), she joined an opinion reversing summary judgment for state officials in a case where a state employee alleged that his First Amendment right of intimate association was violated when he was fired in relation for a lawsuit filed by his wife against state officials. Reading Supreme Court precedent to find that the constitution protects a right to intimate association, the Second Circuit concluded that the state unconstitutionally encroached on that right because "[a] relationship as important as marriage cannot be penalized for something as insubstantial as a public employer's discomfort about a discrimination lawsuit brought by an employee's spouse." *Id.* at 44.

However, Judge Sotomayor wrote for a panel that rejected a claim that the Bush Administration's "Mexico City Policy," which prohibited foreign organizations from receiving development funds unless they agreed to neither perform abortions nor promote abortion generally, violated the First Amendment speech and association rights of reproductive rights organizations. *See Center for Reproductive Law and Pol. v. Bush*, 304 F.3d 183 (2d Cir. 2002). Relying on Second Circuit precedent rejecting a substantively identical challenge brought by another organization, *see Planned Parenthood Fed. of Amer., Inc. v. Agency for Int'l Dev.,* 915 F.2d 59 (2d Cir. 1990), Judge Sotomayor held that the First Amendment claims were not viable. *Id.* at 190. The Second Circuit also rejected the plaintiffs' due process and equal protection claims, noting that "[t]he Supreme Court has made clear that the government is free to favor the anti-abortion position over the pro-choice position, and can do so with public funds." *Id.* at 198.

Prior to joining the bench, Judge Sotomayor sat on the boards of directors of the Puerto Rican Legal Defense and Education Fund ("PRLDEF") and the Maternity Center Association, both of which support access to reproductive health care. During her time on the PRLDEF board, the organization joined a series of *amicus curiae* briefs submitted to the Supreme Court defending the rights of poor women, and women of color, who were disproportionately affected by state laws restricting access to abortions and other reproductive health care. In each of these briefs, PRLDEF described its *amicus* interest as, among other things, "safeguarding the rights of Puerto Ricans of low economic status

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[and protecting] Puerto Rican women and other women of color [who] are particularly vulnerable to discrimination[.]" *See, e.g.*, Brief *Amici Curiae* in *Webster v. Reproductive Health Serv.*, 1989 U.S. S. Ct. Briefs LEXIS 1529, *88 (March 28, 1989); *see also* Brief *Amici Curiae* in *Rust v. Sullivan*, 1990 U.S. S. Ct. Briefs LEXIS 692, *55 (May 4, 1990) ("The Fund recognizes that restrictions or limitations on the provision of health services, including information concerning abortions, deny women access necessary to fully exercise their rights, and place Latinos at an even greater risk of inadequate and dangerous treatment and unwanted pregnancies."). These briefs take the position that a woman has a right to safe and legal reproductive healthcare, but because Judge Sotomayor did not sign any of these briefs or appear in any of these cases, it is not known whether she was involved in these cases or agreed with PRLDEF's position.

Takings / Substantive Due Process and Property

Judge Sotomayor's rulings in the area of substantive due process and takings claims show her case-by-case approach to judging.

After *Kelo v. City of New London,* 545 U.S. 469 (2005), the landmark Supreme Court condemnation case that permitted the state to take a person's land and transfer it to a private party as part of an economic development plan, Judge Sotomayor considered a similar factual scenario in *Didden v. Village of Port Chester*, 173 Fed. Appx. 931 (2d Cir. 2006). The plaintiffs owned property adjoining and partially within a Village of Port Chester redevelopment district. After unsuccessful negotiations with the Village's developer, the plaintiffs' property was condemned in connection with the redevelopment project. Plaintiffs sued alleging that that they had a right "not to have their property taken by the State through the power of eminent domain for a private use, regardless of whether just compensation is given." *Id.* at 933. The trial court dismissed the cased on the ground that it was barred by the statute of limitations and, in a unanimous summary order, Judge Sotomayor and two of her colleagues affirmed. The panel went on to say that even if they were to consider the plaintiffs' Takings Clause arguments on the merits, they were bound by *Kelo* to determine that the case was not viable. *Id.*

Yet in another case litigated against the backdrop of Port Chester's redevelopment prokect, *Brody v. Village of Port Chester*, 434 F3d 121 (2d Cir. 2005), Judge Sotomayor ruled against the Village indicating that, even after *Kelo*, deference to local government actors is not unlimited. In *Brody*, the plaintiff owned property within the Village redevelopment area. He refused to sell the property voluntarily, and the Village started condemnation proceedings against him and others. In an opinion written by Judge Wesley and joined by Judge Sotomayor, the court rejected the Village's contention that a public use determination did not require due process protection because it was a purely legislative decision, and emphasized the "crucial" role courts play enforcing limitations on public use.

In *Clubside, Inc. v. Valentin*, 468 F.3d 144 (2d Cir. 2006), Judge Sotomayor wrote for the court and dismissed a developer's claims that a local government denied it due process when it refused to extend the municipal sewer district to include the plaintiff's property. The Second Circuit reversed the district court's ruling in favor of the developer and held that the developer

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had no constitutionally protected property interest in the sewer extension and thus, the city did not, and could not, infringe on the plaintiff's constitutional rights. *Id.* at 152-54.

Separation of Powers - Limits on the Executive and the Legislature

Judge Sotomayor joined a unanimous panel on the Second Circuit declaring unconstitutional portions of the Patriot Act prohibiting recipients of "national security letters," *i.e.* subpoenas for information on users of wire and/or electronic communication services, from speaking out about the letters. *Doe v. Mukasey*, 549 F.3d 861 (2d Cir. 2008). The panel rejected provisions of the statute that effectively stripped the courts of the power to meaningfully review the government's decisions to restrict the speech of national security letter recipients. *Id.* at 881-83 The panel objected to the statute to the extent that it "would cast Article III judges in the role of petty functionaries, persons required to enter as a court judgment an executive officer's decision, but stripped of capacity to evaluate independently whether the executive's decision is correct." 549 F.3d at 881. It reiterated the principle that "[u]nder no circumstances should the Judiciary become the handmaiden of the Executive" and declared the statute unconstitutional to the extent it purported to absolve the government of the need to seek judicial review before restricting disclosure or entitled the government a "conclusive presumption" in its favor. *Id.* at 881-83, *citing United States v. Smith*, 899 F.2d 564, 569 (6th Cir. 1990),

The panel also defended the courts against Congressional encroachment, asserting that "the Constitution envisions a role for all three branches when individual liberties are at stake." *Id.* at 882. It rejected any attempts by Congress to evade constitutional standards recognized by the courts and invoked the Supreme Court's admonition in *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) that "[w]hen the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed." 549 F.3d at 871.

In addition to asserting a strong role for the courts to review executive and legislative action, the *Doe* court also invoked its authority to interpret certain provisions of the statute in a way that would preserve their constitutionality. *Id.* at 883-85. Where the court felt its interpretive authority could go no further, it made recommendations to the government for future actions so that it could avoid actions that would render the statute constitutional as applied. *Id.* As a result, the court, including Judge Sotomayor, struck a balance between preserving the statute and protecting civil liberties.

In *Bartlett v. New York State Board of Law Examiners*, 970 F. Supp. 1094, 1134 (S.D.N.Y. 1997), Judge Sotomayor considered the appropriate standard of review for an equal protection claim under the Americans with Disabilities Act ("ADA") in view of *City of Boerne v. Flores*, 500 U.S. 926 (1997). In *Boerne*, the Supreme Court invalidated the Religious Freedom Restoration Act on the grounds that the Fourteenth Amendment authorized Congress to enforce existing rights, but did not allow Congress to create substantive rights. In the ADA context, Judge Sotomayor reasoned that "[a]t the very least, *Boerne* tells us that Congress may not, under the ADA, directly alter the level of scrutiny afforded the disabled under the Equal Protection

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Clause." 970 F. Supp. at 1134. She went on to note, however, that whether courts could themselves adopt a heightened level of scrutiny in response to the explicit Congressional suggestion in the text of the ADA remained an open question, and that it was one for the Supreme Court, not the district court, to decide. *Id.* at 1134-1135. Judge Sotomayor allowed the claim to proceed but then applied a rational basis standard to conclude that no equal protection violation had occurred.

This case highlights the extent to which Judge Sotomayor's jurisprudence is guided by, and constrained by, legal precedent. Accordingly, although she lauded the plaintiff and praised her "superior effort" and "courage" in the face of "crippling" challenges, Judge Sotomayor's respect for the plaintiff did not prevent her from applying the law to dismiss some of the plaintiff's claims.

Judge Sotomayor similarly urged a close adherence to the language of *Boerne* in *Hankins v. Lyght*, 441 F.3d 96, 105 (2d Cir. 2006). In that case, Judge Sotomayor dissented from a majority opinion that distinguished *Boerne* to hold that the Religious Freedom and Restoration Act ("RFRA") was constitutional. The majority concluded that the RFRA represented a constitutionally valid amendment to the Age Discrimination in Employment Act ("ADEA"). 441 F.3d 109. Judge Sotomayor dissented from the majority's consideration of the constitutional issues, arguing that because the RFRA was irrelevant to the dispute, the majority "violate[d] a cardinal principle of judicial restraint[.]" *Id.* Although she declined to engage in the debate regarding RFRA's constitutionality, she emphasized that *Boerne* had established that RFRA went far beyond the substantive protections of the First Amendment, and implicitly questioned the majority's disregard of *Boerne*'s holding. *Id.* at 112.

While Judge Sotomayor has frequently joined decisions recognizing a strong role for the judiciary, she also recognizes and respects constitutional limitations on the courts. For example, in *Connecticut v. Cahill*, 217 F.3d 93 (2d Cir. 2000), a dispute involving fishing rights between the states of Connecticut New York, Judge Sotomayor dissented from the majority's decision to hear the case, arguing that the Supreme Court had exclusive jurisdiction over all controversies between the states, *id.* at 105.

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Americans for Democratic Action
1625 K Street, N.W. * Suite 210 * Washington, D. C. 20006
(202) 785-5980 * FAX (202) 785-5969
http://www.adaction.org * email: www.adaction@ix.netcom.com
Where it's more than just politics. It's about taking a stand.

July 10, 2009

Dear Senator:

On behalf of Americans for Democratic Action, (ADA), we write to support the nomination of Judge Sonia Sotomayor to be an Associate Justice of the United States Supreme Court. She is a brilliant jurist who, in her distinguished career, has worked at almost every level of our judicial system - as a prosecutor, litigator, trial court and appellate judge – and would bring more federal judicial experience to the Supreme Court than any Justice in 100 years.

President Obama has stated that he sought someone with a sharp and independent mind, and a record of excellence and integrity. He wanted a nominee who rejects ideology and shares his deep respect for our nation's Constitutional values.

Upholding those Constitutional values requires more than just the intellectual ability to apply a legal rule to a set of facts. It requires a common sense understanding of how laws affect the daily realities of people's lives. Judge Sotomayor embodies those qualities.

As a trial judge, she earned a reputation as a sharp and fearless jurist who does not let powerful interests bully her into departing from the rule of law. In 1995, for example, Judge Sotomayor ended the baseball strike by issuing an injunction against major league baseball owners.

Judge Sotomayor served 11 years on the U.S. Court of Appeals and has participated in more than 3000 panel decisions. She has authored roughly 400 opinions, handling difficult issues of Constitutional law, complex procedural matters and lawsuits involving complicated business organizations.

In addition to her distinguished judicial service, Judge Sotomayor is a Lecturer at Columbia University Law School and was also an adjunct professor at New York University Law School until 2007.

Her life experience is an inspiring American story. Her three decade career provides Judge Sotomayor with unique qualifications to be the next Supreme Court Justice.

For these reasons, I urge you to vote for the confirmation of Judge Sonia Sotomayor to the U.S. Supreme Court before the August recess.

Sincerely,

Darryl H. Fagin
Legislative Director

President Richard Parker * *Executive Committee Chair* Allen Kukovich * *Counsel* Jack Blum * *Treasurer* Jim Clarke
Secretary Maria Wilkinson * *National Director* Michael J. Wilson

AMERICANS UNITED FOR LIFE

May 4, 2009

The Honorable Patrick J. Leahy
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Leahy:

We understand that Associate Justice of the Supreme Court, David Souter will retire at the end of the Court's current term. The President will soon send to the United States Senate a nominee to our highest court.

Americans United for Life is a public-interest law and policy organization whose vision is a nation in which everyone is welcomed in life and protected in law. We will oppose any nominee to the Court who believes social activism trumps interpreting the Constitution.

The Constitutionally-protected right to self-government is threatened when judges arrogate to themselves the legislature's power to craft public policy. The most important question a nominee for the Supreme Court must answer is to articulate their judicial philosophy: will they advance an agenda that limits the right of the people to determine the content of abortion-related laws through the democratic process?

The President has expressed a public commitment to reducing the frequency of abortion in the United States. Appointing a nominee who intends to read the Freedom of Choice Act into the Constitution will undermine that objective, increase the number of abortions nationwide, and further disenfranchise millions of Americans who want to settle this issue through the democratic process.

Furthermore, elevating abortion to a fundamental right on the same plane as the freedom of speech would void common-sense abortion regulations that the vast majority of Americans support, like the prohibition on partial-birth abortion. Such a move would also require taxpayer funding of abortion, eliminate informed consent and parental notice and consent laws, state requirements that abortions be done only by physicians, and more. A judicial nominee who intends to pursue such a radical agenda should be summarily rejected by the Senate.

In the days ahead, we look to our Senators to uphold their duty to raise serious questions on the nominee's judicial philosophy and reject any nominee who places personal preference over upholding the Constitution.

Sincerely,

Charmaine Yoest

Charmaine Yoest, Ph.D.
President and CEO

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AMERICANS UNITED FOR LIFE

The Honorable Patrick J. Leahy
Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Jeff Sessions
Ranking Member
U.S. Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

July 10, 2009

Dear Chairman Leahy and Ranking Member Sessions:

I am writing today because of Americans United for Life's deep concern about the nomination of Judge Sonia Sotomayor to the United States Supreme Court. Based on our research, we believe that Judge Sotomayor's judicial philosophy is far outside of the mainstream, and that her confirmation will dramatically shift the dynamics of the Court. Contrary to conventional wisdom, Judge Sotomayor's nomination to replace Justice David Souter is not a philosophical 1-for-1 switch; instead, we believe that on the controversial issues of the day, like abortion, she will be worse than Souter.

We at Americans United for Life, like most Americans, believe that a nominee's judicial philosophy goes to the heart of his or her qualifications to serve on the United States Supreme Court. Based on Judge Sotomayor's judicial philosophy and involvement with the radical pro-abortion organization, the Puerto Rican Legal Defense and Education Fund ("PRLDEF"), we believe that a Justice Sotomayor would undermine any efforts by our elected representatives to pass even the most widely accepted regulations on abortion.

During the twelve years that Judge Sotomayor served as a governing board member of the PRLDEF, the organization filed six amicus briefs in five abortion-related cases before the Supreme Court. In Planned Parenthood v. Casey (1992), the Fund urged the Court to apply strict

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scrutiny and strike down Pennsylvania's informed consent requirements and reflection period. The Fund declared that it "oppose[d] any efforts to . . . in any way restrict the rights recognized in Roe v. Wade," compared abortion to the First Amendment right to free speech, and argued that any "burden" on the right to abortion was unconstitutional. Justice Souter, however, voted in Casey to uphold Pennsylvania's informed consent law and 24-hour reflection period.

In Ohio v. Akron Center for Reproductive Health (1990) and Casey (1992), the Fund asked the Court to strike down parental involvement statutes, arguing in Akron that "adolescent women's right to choose [should] not [be] infringed by [parental] notification statutes," and insisted that minors should be "protected against parental involvement that might prevent or obstruct the exercise of their right to choose." Justice Souter, however, has twice voted to uphold state parental-involvement laws. (Casey (1992) and Lambert v. Wicklund (1997)).

In Williams v. Zbaraz (1980) and Rust v. Sullivan (1991), the Fund argued strongly in favor of American taxpayer-funded abortion. In Zbaraz, the Fund unsuccessfully argued that abortions must be publicly funded and that failure to do so was "discriminat[ory]" and a violation of equal protection guarantees. Furthermore, the Fund unsuccessfully argued in Rust that since abortion is a "fundamental right," restrictions on taxpayer funding through Title X that prohibited its use to refer for abortions should be invalidated. Finally, the Fund argued in Webster v. Reproductive Health Services (1989) that the Court should apply strict scrutiny and strike down limitations on the use of state resources to provide abortions. Justice Souter, however, voted with the Supreme Court in Rust to uphold prohibitions on the use of taxpayer dollars for abortion counseling and referrals.

In Webster v. Reproductive Health Services (1989), the Fund argued that record keeping and reporting requirements relating to abortion were solely designed to "harass" abortion patients and providers. Also, in Casey (1992), the Fund unsuccessfully urged the Court to apply strict scrutiny and strike down Pennsylvania's record keeping and reporting requirements. Justice Souter, however, voted in Casey to uphold a portion of Pennsylvania law that required "record keeping and reporting" on abortions performed in the state, viewing such requirements as "reasonably directed to the preservation of maternal health."

Despite his support for Roe vs. Wade, Justice Souter voted repeatedly to uphold laws such as limits on taxpayer funding for abortion, informed consent, and parental notification – which polls show are supported by at least 70 percent of the American public – whereas the PRLDEF consistently argued that such common sense regulations were unconstitutional.

Just recently, Judge Sotomayor stated in an interview with U.S. Sen. Jim DeMint (R-S.C.) that she had never thought about whether an unborn child has constitutional rights. This lack of reflection in a time when Americans are more pro-life than ever before can only lead us to believe she is not only completely out of touch with American values, but would threaten the legal protections for unborn children at any stage in pregnancy, including late-term, nearly viable babies.

We have attached our "top ten" questions for your use during the hearing. Please consider asking Judge Sotomayor these questions, which may also be found on AskSotomayor.com. Ameri-

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cans and their elected representatives deserve to learn more about Judge Sotomayor's judicial philosophy before she is given a lifetime appointment to our nation's highest court.

Sincerely,

Charmaine Yoest

Charmaine Yoest, Ph.D.
President & CEO, Americans United for Life

CC:

The Honorable Harry Reid, Majority Leader
The Honorable Mitch McConnell, Minority Leader
Members of the Senate Committee on the Judiciary

Attachment

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The Honorable Harry Reid
Majority Leader
United States Senate
522 Hart Senate Office Building
Washington, DC 20510

The Honorable Mitch McConnell
Minority Leader
United States Senate
361A Russell Senate Office Building
Washington, DC 20510

July 23, 2009

Dear Majority Leader Reid and Minority Leader McConnell:

On July 8, 2009, I sent a letter on behalf of Americans United for Life to members of the United States Senate Judiciary Committee, requesting that they carefully question Judge Sotomayor about her judicial philosophy and her involvement with the Puerto Rican Legal Defense and Education Fund ("PRLDEF"). I also testified in Judge Sotomayor's hearing about our concern that Judge Sotomayor would be an activist on the Supreme Court. We were pleased that members of the Committee asked Judge Sotomayor thoughtful questions covering these important topics. However, we were deeply disappointed that Judge Sotomayor's answers did not relieve our concerns. Therefore, I am writing today to urge you and your colleagues in the United States Senate to vote against Judge Sotomayor's nomination to the United States Supreme Court.

We at Americans United for Life, like most Americans, believe that a nominee's judicial philosophy goes to the heart of his or her qualifications to serve on the United States Supreme Court. Before her hearing, we were concerned that Judge Sotomayor's judicial philosophy was far outside of the mainstream, based on her record of prior statements and her involvement with the PRLDEF. We feared that as a justice, Judge Sotomayor would undermine any efforts by our elected representatives to pass even the most widely accepted regulations on abortion and circumvent the will of the people.

During her hearing, Judge Sotomayor failed to adequately justify statements she made that reflected an activist philosophy. One misstatement might truly be a poorly chosen "rhetorical flourish," as she described her "wise Latina" comment. However, Judge Sotomayor has repeatedly made statements while serving as a judge which demonstrate that she does not understand or respect the appropriate role of a Supreme Court Justice. Furthermore, Judge Sotomayor has

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flip-flopped on her view of the role of foreign law in American jurisprudence, an area of judicial activism that greatly concerns many Americans. Prior to her hearing, Judge Sotomayor stated that foreign law could be "relevant to the solution of a question" before a court. In her hearing, however, she stated that she would "not use foreign law to interpret the Constitution or American statutes." After the hearing, she changed her position yet again. In an answer to a written follow-up question from Senator Coburn, she stated that "in limited circumstances, decisions of foreign courts can be a source of ideas informing our understanding of our own constitutional rights." Judge Sotomayor's inconsistency on this topic leads us to believe that as a Justice, she will consider whatever sources of law she deems relevant, even if those sources are not part of American constitutional, statutory, or case law.

Additionally, Judge Sotomayor did not provide satisfactory answers to questions about whether she agreed or disagreed with radical positions taken by the PRLDEF in its six briefs filed in five abortion-related cases during the twelve years that she served as a governing board member of the Fund. (Judge Sotomayor also served as Chairman of the Litigation Committee which reviewed and recommended a litigation program for the Fund during her service.) While Judge Sotomayor stated that she did not review the briefs, she acknowledged that she "did know that the fund had a health-care docket that included challenges to certain limitations on a woman's right to terminate her pregnancy under certain circumstances." It is difficult to believe that Judge Sotomayor, who was described in the *New York Times* as an "involved and ardent supporter of their various legal efforts during her time with the group," was not thoroughly familiar with and did not agree with arguments made by the PRLDEF in these abortion cases.

In Planned Parenthood v. Casey (1992), the Fund urged the Court to apply strict scrutiny and strike down Pennsylvania's informed consent requirements and reflection period. The Fund declared that it "oppose[d] any efforts to . . . in any way restrict the rights recognized in Roe v. Wade," compared abortion to the First Amendment right to free speech, and argued that any "burden" on the right to abortion was unconstitutional.

In Ohio v. Akron Center for Reproductive Health (1990) and Casey (1992), the Fund asked the Court to strike down parental involvement statutes, arguing in Akron that "adolescent women's right to choose [should] not [be] infringed by [parental] notification statutes," and insisted that minors should be "protected against parental involvement that might prevent or obstruct the exercise of their right to choose."

In Williams v. Zbaraz (1980) and Rust v. Sullivan (1991), the Fund argued strongly in favor of American taxpayer-funded abortion. In Zbaraz, the Fund unsuccessfully argued that abortions must be publicly funded and that failure to do so was "discriminat[ory]" and a violation of equal protection guarantees. Furthermore, the Fund unsuccessfully argued in Rust that since abortion is a "fundamental right," restrictions on taxpayer funding through Title X that prohibited its use to refer for abortions should be invalidated. Finally, the Fund argued in Webster v. Reproductive Health Services (1989) that the Court should apply strict scrutiny and strike down limitations on the use of state resources to provide abortions.

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In Webster v. Reproductive Health Services (1989), the Fund argued that record keeping and reporting requirements relating to abortion were solely designed to "harass" abortion patients and providers. Also, in Casey (1992), the Fund unsuccessfully urged the Court to apply strict scrutiny and strike down Pennsylvania's record keeping and reporting requirements.

Furthermore, it is striking that while the PRLDEF repeatedly argued during Judge Sotomayor's time of service that abortion, which is not in the text of the Constitution and is not part of the fabric of American history, was a "fundamental right," Judge Sotomayor was unable to justify her failure to see the Second Amendment right to bear arms as a fundamental right. This failure to recognize the "fundamental" nature of enumerated Constitutional rights, while simultaneously claiming that unenumerated rights are "fundamental," is deeply troubling in a Supreme Court nominee whose job, if confirmed, will be to apply, not re-invent, our written Constitution.

As a circuit court judge, Judge Sotomayor is obligated to follow Supreme Court precedent. However, as a Supreme Court Justice, Judge Sotomayor will have no higher court whose decisions she must follow; rather, she will author precedents that other courts must follow. Therefore, her judicial philosophy, as reflected in her speeches and activism with the PRLDEF, is quite possibly the single most important factor to be evaluated in considering her nomination to the Supreme Court. Perhaps, as a Justice, Judge Sotomayor would exercise the restraint she generally exhibited on the Circuit Court, rather than the activist philosophy she demonstrated in her speeches and advocacy. However, we feel that this is too great of a risk to take with a lifetime appointment to our highest court.

Americans want Justices on the Court who apply the law, not make policy. We respectfully ask that you vote against Judge Sotomayor's nomination. This vote will be recorded in AUL Action's annual scorecard.

Sincerely,

Charmaine Yoest

Charmaine Yoest, Ph.D.
President & CEO, Americans United for Life

CC:

Members of the United States Senate

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AMERICANS UNITED FOR LIFE

Top Ten Questions for Judge Sotomayor

Question 1: Under Article I of the U.S. Constitution, all legislative power belongs to Congress. The judiciary is given no legislative role. Do you believe that this is and continues to be the appropriate structure for our government?

Question 2: What did you mean when you said in 2005 that "the Court of Appeals is where policy is made?"

Question 3: In 1973, the U.S. Supreme Court "found" the right to abortion in the due-process clause of the Fourteenth Amendment. Strong disagreement on this issue continues to abound. Do you think the role of the Supreme Court is to settle public debates? Do you agree with the plurality opinion in *Planned Parenthood v. Casey* that when the Supreme Court has decided a debated question, the contending sides should accept that resolution and go home?

Question 4: Do you believe that *Roe v. Wade* is an "established precedent," or, in other words, "settled law?"

Question 5: You have expressed support for maintaining "settled law." What if a case becomes "unsettled" or refined by subsequent rulings, as in the case of *Roe v. Wade*? When is it appropriate to overturn a precedent?

Question 6: While you were a board member of the Puerto Rican Legal Defense and Education Fund (PRLDEF), the Fund repeatedly argued that abortion was a "fundamental right" and that any state limits on abortion should be examined with strict scrutiny. How can abortion be a "fundamental right" if it is not found in the text of the Constitution and was never recognized as a right in American history prior to *Roe v. Wade*?

Question 7: Do you agree with Justice Souter that strict scrutiny need not apply to common-sense regulations of abortion, such as informed-consent and parental-involvement laws, or do you agree with the PRLDEF that none of these laws are Constitutional? In other words, do you agree with the Fund that it violates the Constitution for a state to give women all available information about abortion and potential risks to their health?

And do you agree with the Fund that it violates the Constitution for a state to require parental involvement in a child's abortion decision?

Question 8: Do you agree with Justice Souter that the Constitution does not require the use of taxpayer dollars for abortions, or do you agree with the PRLDEF that taxpayer funding of abortion is Constitutionally required?

Question 9: Is the question of when human life begins a scientific or a religious question?

Question 10: It has been reported that in an interview with a U.S. senator, you stated that you had never thought about whether an unborn child has constitutional rights. Is that a correct representation of what you said? Would you care to clarify? Furthermore, are there any other groups of human beings whose rights, or lack thereof, you have never considered?

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AMERICANS UNITED FOR LIFE

Worse than Souter: A Comparison Chart

As Americans United for Life President & CEO Charmaine Yoest wrote in the *Washington Times*:

When President Obama nominated Judge Sonia Sotomayor to the U.S. Supreme Court, the conventional wisdom was that she would be an apt replacement for retiring Justice David H. Souter, maintaining the high court's "balance" — or, more accurately, its lopsided liberal tilt.

"But Team Obama knows something most Americans don't. When it comes to the landmark 1973 decision Roe v. Wade and the abortion cases that have since made it to the Supreme Court, Sotomayor is no Souter. Rather, her record shows that for the overwhelming majority of Americans who support at least some restrictions on abortion, she is worse than Justice Souter — reading a "fundamental right" to abortion into the Constitution.

The following chart, compiled by AUL's legal experts, gives in-depth background on how Supreme Court Justice David Souter's record compares with Judge Sotomayor's history of abortion advocacy through her work with the Puerto Rican Legal Defense and Education Fund (PRLDEF). Judge Sotomayor has never disavowed the fund's radical pro-abortion views, which were fully on display during her twelve years as an active member of its governing board.

Abortion		
Issue	**Justice Souter**	**Judge Sotomayor**

Overall View of "Right" to Abortion	In his abortion decisions, including *Planned Parenthood v. Casey* (1992), Justice Souter has treated abortion as a constitutionally protected – but not fundamental – right. Thus, under his view, states, while not able to completely prohibit abortion, may enact common-sense regulations on abortion.	Justice Sotomayor has a long record of leadership and activism with the Puerto Rican Legal Defense and Education Fund (PRLDEF), a group that sees abortion as a fundamental right akin to the right to free speech and the right to vote – rights that, unlike abortion, are actually enumerated in the Constitution. She has never disavowed the positions that the PRLDEF held on her watch. Before becoming a judge, she served as a member of the governing board of the PRLDEF and was, according to a number of the fund's lawyers, "an involved and ardent supporter of their various legal efforts" (*New York Times*, May 28, 2009). In at least six amicus briefs filed in U.S. Supreme Court abortion cases (between 1980 and 1992), PRLDEF argued that abortion is a fundamental right and that any restrictions on abortion are subject to the harshest level of judicial scrutiny. As a result, it argued, such regulations should be ruled unconstitutional – particularly the common-sense regulations that Judge Souter has consistently upheld.
State Policy Declaring that Life Begins at Conception	No information.	Based on her view of abortion as expressed in the PRDLEF briefs, Judge Sotomayor would likely vote to invalidate such statements as a threat to what she perceives as a woman's fundamental right to an abortion. In fact, in *Webster v. Reproductive Health Services* (1989), PRDLEF urged the Supreme Court to invalidate a Missouri law in its entirety including a preamble declaring that the state's policy position that human life begins at conception.

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Freedom of Choice Act (FOCA)	FOCA treats abortion as a fundamental right – a view the Justice Souter has repeatedly rejected.	Based on arguments made in PRLDEF amicus briefs, Judge Sotomayor believes that abortion is a fundamental right and will likely read FOCA's radical principles into the U.S. Constitution.
Partial-Birth Abortion	In *Stenberg v. Carhart* (2000) and *Gonzales v. Carhart* (2007), Justice Souter voted to strike down both state and federal bans on partial-birth abortion.	Based on her view that abortion is a fundamental right, Judge Sotomayor would likely vote to strike down any federal or state ban on partial-birth abortion.
Limitations on Post-Viability Abortion	No information.	Judge Sotomayor's PRLDEF record indicates she would be firmly against such limitations. In fact, in the brief it filed in *Webster v. Reproductive Health Services* (1989), the PRDLEF urged the Supreme Court to strike down a Missouri law requiring viability testing before certain abortions — calling such testing "useless and expensive."

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Informed Consent	In *Planned Parenthood v. Casey* (1992), Justice Souter voted to uphold Pennsylvania's informed consent law and 24-hour reflection period.	Based on her view that abortion is a fundamental right, Judge Sotomayor would likely vote to strike down state informed consent laws, denying women complete and accurate medical information about abortion, its complications, and its consequences. In an amicus brief filed in *Casey*, PRLDEF urged the Court to apply strict scrutiny and strike down Pennsylvania's informed consent requirements and reflection period. The Fund declared that it "**oppose[d] any efforts to . . . in any way restrict the rights recognized in** *Roe v. Wade;***" compared abortion to the specifically-enumerated right to free speech, and argued that any "burden" on the right to abortion was unconstitutional.** **Earlier in *Webster v. Reproductive Health Services* (1989), the Fund had opposed a requirement that physicians personally counsel women seeking an abortion – a requirement that the Supreme Court has found to be medically appropriate and completely reasonable. Moreover, it characterized informed consent requirements as "intrusive," "distorted," and "**designed to frighten women from obtaining abortions."
Ultrasound Requirements	No information.	Judge Sotomayor's PRDLEF record indicates she is against such requirements. The Fund's brief in *Webster v. Reproductive Health Services* (1989) argued against "ultrasound testing" for every abortion.

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Parental Involvement	Justice Souter has twice voted to uphold state parental-involvement laws: *Planned Parenthood v. Casey* (1992) (Pennsylvania's parental-consent law) and *Lambert v. Wicklund* (1997) (Montana's parental-notice law). Moreover, in *Ayotte v. Planned Parenthood* (2006), he voted to overturn a lower court's injunction invalidating New Hampshire's parental notice law in its entirety, recognizing that the law would likely be constitutional in (at least) some applications.	Based on her view that abortion is a fundamental right, Judge Sotomayor would likely vote to strike down both parental-consent and parental-notice laws, failing to protect both children and parental rights. In an amicus brief filed in *Ohio v. Akron Center for Reproductive Health* (1990), PRLDEF again declared, **"The Fund opposes any efforts to . . . in any way restrict the rights recognized in** *Roe v. Wade***"** and championed on a "fundamental right to abortion. Moreover, it argued that "adolescent women's right to choose [should] not [be] infringed by [parental] notification statutes," insisting that minors should be "protected against parental involvement that might prevent or obstruct the exercise of their right to choose." The Supreme Court rejected these arguments and upheld the law. Later, in an amicus filed in *Casey* (1992), PRLDEF unsuccessfully urged the Court to ignore its previous ruling in *Akron* and to strike down Pennsylvania's parental-consent law.

Limits on the Use of Taxpayer Funding	In *Rust v. Sullivan* (1991), Justice Souter voted to uphold prohibitions on the use of federal Title X funding for abortion counseling and referrals.	In *Center for Reproductive Rights v. Bush* (2002), Judge Sotomayor, then with the Second Circuit and bound by both U.S. Supreme Court and Second Circuit precedents, upheld the "Mexico City policy" (which prohibits non-governmental organizations from using taxpayer funding to advocate for abortion overseas) against a challenge from an abortion advocacy group. Ultimately, Judge Sotomayor agreed with the government's argument that it had a rational basis for favoring "the anti-abortion position over the pro-choice position" with public funds. However, in two separate amicus briefs filed before the U.S. Supreme Court, the PRLDEF argued against limitations on taxpayer funding of abortions. Specifically, *Williams v. Zbaraz* (1980), the Fund unsuccessfully argued that all "medically necessary" abortions (essentially, code words for abortion-on-demand) must be publicly funded and that failure to do so was "discriminat[ory]" and a violation of equal protection guarantees. Later, in *Rust v. Sullivan* (1991), the Fund again unsuccessfully argued that, since abortion is a "fundamental right," restrictions on Title X funding that prohibited the use of such funding to counsel on or refer for abortions should be invalidated.

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Limitations on the Use of State Facilities and Personnel for Abortions	Given Justice Souter's support for other limitations on the use of taxpayer funding to promote or provide abortions, it is likely that he would find limitations on the use of state facilities and personnel constitutional.	Based on her view that abortion is a fundamental right, Judge Sotomayor would likely vote to strike down any meaningful limits or prohibitions on the use of state facilities (such as public hospitals) or personnel for abortions. In an amicus brief filed in *Webster v. Reproductive Health Services* (1989), PRLDEF unsuccessfully urged the Court to apply strict scrutiny and strike down limitations on the use of state resources to provide abortions. The Fund argued that abortion is a "precious right;" that"all state-created obstacles" should be reviewed under strict scrutiny (the highest standard of judicial review reserved for fundamental rights); and that regulations that might increase the cost of abortion or decrease the ease of its availability were unconstitutional.
Regulation of Abortion Providers (includes regulation of the facilities and personnel that perform abortions)	In *Mazurek v. Armstrong* (1997), Justice Souter voted to uphold a Montana statute "restricting [the] performance of abortions to licensed physicians" only (*i.e.*, "physician-only" requirement). Moreover, while Justice Souter was on the Court, the Supreme Court twice refused to hear appeals of lower court rulings upholding comprehensive state abortion clinic regulations. *Greenville Women's Clinic v. Bryant* (reviewed denied in 2001 and again in 2003).	Based on her view that abortion is a fundamental right, Judge Sotomayor would likely vote to strike down any meaningful regulation of the facilities or specific medical personnel that perform or assist in the performance of abortions.

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Abortion Reporting	In *Planned Parenthood v. Casey* (1992), Justice Souter voted to uphold a portion of a Pennsylvania law that required "record keeping and reporting" on abortions performed in the state, viewing such requirements as "reasonably directed to the preservation of maternal health."	Based on her view that abortion is a fundamental right, Judge Sotomayor would likely vote to strike down reporting requirements on the incidence of abortion and its complications as "burdensome" on abortion providers. In an amicus brief filed in *Casey* (1992), PRLDEF unsuccessfully urged the Court to apply strict scrutiny and strike down Pennsylvania's record keeping and reporting requirements. Earlier, in *Webster v. Reproductive Health Services* (1989), PRLDEF argued that such requirements were solely designed to "harass" abortion patients and providers, completely ignoring the need for meaningful data in assess the safety and efficacy of abortion.
Regulation of Abortifacients (RU-486)	No information.	Based on her view that abortion is a fundamental right, Judge Sotomayor would likely vote to strike down any regulation of abortifacients.
Funding of Abortion Alternatives (includes direct subsidies and "Choose Life" license plates)	Since Justice Souter joined the Court, the Supreme Court has refused to review decisions in three legal challenges to "Choose Life" license plate programs: *Rose v. Planned Parenthood* (2004) (successful challenge to South Carolina's program); *ACLU v. Breseden* (2006) (unsuccessful challenge to Tennessee's program); and *Stanton v. Arizona Life Coalition* (2008) (successful challenge by pro-life group to Arizona's refusal to issue the specialty plates despite the group's compliance with all legal prerequisites).	No information.
Legal Protection of the Unborn		

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Issue	Justice Souter	Judge Sotomayor
Unborn Victims of Violence (also known as "fetal homicide" and "fetal assault")	No information.	No information.
Wrongful Birth and Wrongful Death (Civil) Lawsuits	In *Smith v. Cote* (1986), a case that Justice Souter decided as a member of the New Hampshire Supreme Court, he recognized a cause of action for wrongful birth: essentially, a claim brought by the parents arguing that, but for a physician's negligence in making prenatal diagnoses, they would have aborted a disabled, deformed, or sick child. Justice Souter and the majority held that, in some circumstances, parents may be injured by the imposition of extraordinary liabilities following the birth of a child. However, Justice Souter and the majority rejected the wrongful-life claim (brought on behalf of the child and arguing that the child should never have been born), holding that the courts should not become involved in deciding whether a given person's life is or is not worthwhile, and stating that "[t]he right to life, and the principle that all are equal under the law, are basic to our constitutional order."	No information.
Wrongful Death (Civil) Lawsuits in Death of Unborn Child	No information.	No information.
Born-Alive Infant Protection	No information.	No information.
Abandoned Infant Protection (also known as "Baby Moses" laws)	No information.	No information.

Biotechnologies		
Issue	**Justice Souter**	**Judge Sotomayor**
Bans on Human Cloning	No information.	No information.
Bans on Destructive Embryo Research (DER)	No information.	No information.
Bans on State Funding of DER	No information.	No information.
Policies Promoting Adult Stem-Cell Research and Other Ethical Alternatives	No information.	No information.
Regulation of Assisted Reproductive Technologies (such as IVF)	No information.	*In Saks v. Franklin Covey Co* (2003), Judge Sotomayor joined a Second Circuit opinion rejecting a claim that exclusion from coverage of surgical impregnation procedures, including *in vitro* fertilization, violated Title VII and the "Pregnancy Discrimination" Act.
End of Life		
Issue	**Justice Souter**	**Judge Sotomayor**
Assisted Suicide	In both *Washington v. Glucksberg* (1997) and *Vacco v. Quill* (1997), Justice Souter declined to find a federal constitutional right to assisted suicide, upholding state bans (in Washington and New York, respectively) on assisting a suicide. However, in *Gonzales v. Oregon* (2006), Justice Souter and the majority ruled that the federal "Controlled Substances Act" did not authorize the United States Attorney General, through interpretive rule, to prohibit the prescription of federal-regulated drugs for use in physician-assisted suicide.	
Promotion of Palliative Care	No information.	No information.

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Healthcare Freedom of Conscience		
Issue	**Justice Souter**	**Judge Sotomayor**
Protection for Individual Healthcare Providers	No information.	No information
Protection for Healthcare Institutions	No information.	No information.
Protection for Insurance Providers and Other Healthcare Payers	No information.	No information.
First Amendment Rights of Abortion Demonstrators		
Issue	**Justice Souter**	**Judge Sotomayor**
Constitutionality of "Bubble Zones"	Justice Souter has repeatedly upheld municipal, city, and other ordinances prescribing a "bubble zone" around abortion clinics (within which demonstrators may not enter or engage in protected First Amendment speech). *See e.g., Madsen v. Women's Health Center* (1994); *Schenck v. Pro-Choice Network of Western New York* (1997), and *Hill v Colorado* (2000).	No information.
Other Related Issues	In *Scheidler v. NOW*, Justice Souter and the majority ruled that the federal "Racketeer Influenced and Corrupt Organizations Act" (RICO) could not be used in an effort to sustain a nationwide injunction and a damage award against anti-abortion demonstrators.	*In Amnesty America v. Town of West Hartford (2004),* Judge Sotomayor permitted demonstrators (who happened to be pro-life) to maintain their Fourth Amendment claims of unreasonable seizure against the town of West Hartford for the officers' use of allegedly excessive force in countering the demonstrators' passive resistance to arrest.

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July 7, 2009

VIA Electronic Mail and Fax

Honorable Jeff Sessions
Ranking Member, United States Senate Judiciary Committee
335 Russell Senate Office Building
Washington, DC 20510

Dear Senator Sessions:

Recent news reports have conveyed your comments regarding Judge Sotomayor's role while on the Board of Directors of the Puerto Rican Legal Defense and Education Fund (PRLDEF), made on June 23, 2009 on the Senate Floor and in subsequent press releases. The undersigned have served on the PRLDEF Board and are familiar with Judge Sonia Sotomayor's voluntary service with that organization. As former colleagues of Judge Sotomayor, we write to provide you with information and clarification as to the role and function of PRLDEF's Board of Directors and of Judge Sotomayor's role as a member of the Board.

PRLDEF is a non-profit, non-partisan organization created in 1972 to provide a legal voice to the Latino community. The PRLDEF Board of Directors is a voluntary Board comprised of outstanding members of the Legal and Civic community. In addition to the signatories below, past directors of PRLDEF include the Honorable Jose Cabranes of the United States Court of Appeals for the Second Circuit, former Senator Jacob Javits, former Congressman Herman Badillo, now a Senior Fellow at the Manhattan Institute, and former United States Attorney General Nicholas deB. Katzenbach. Through the years, PRLDEF Board members have brought to the organization a commitment to excellence in keeping with the organization's mission: to use the power of the law and education to create a more equitable society. Financial support for PRLDEF comes from widely regarded foundations such as Ford, Carnegie and United Way, and corporations, including TimeWarner and Chevron Texaco.

The Board contributes to the organization in three major areas: (1) assisting the organization in securing financial support by participating in fundraising activities; (2) overseeing the organization's programs, including providing general policy direction and ensuring adequate staffing and resources; and (3) creating and periodically updating the organization's strategic planning, and evaluating the President and General Counsel in its implementation. The Board has a number of Committees and Board members often serve on several Committees. Service on Committees is similar to general Board service, with a more specific focus on a particular aspect

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of the organization. The Board normally met three or four times a year, and Committees of the Board met on an as needed basis throughout the year.

Neither the Board as a whole nor any individual member selects litigation to be undertaken or controls ongoing litigation. In fact, ABA Model Code 6.03 provides that Board members have no attorney-client relationship with the clients of a legal services organization and therefore do not control the activities of staff lawyers in individual cases. The Board's role is thus limited to overall policy questions such as whether to emphasize employment, housing, or education. Operational decisions were and are appropriately delegated to the organization's President and General Counsel; the President reported generally on the organization's docket at Board meetings. Judge Sotomayor, and the full Board, understood their advisory role and did not step outside of that role. Understanding this factual context, we hope you will see that your description that "Judge Sotomayor served in senior leadership roles" at PRLDEF is a mischaracterization.

PRLDEF is a traditional civil rights organization squarely in the mold of the NAACP LDF, the Lawyers Committee for Civil Rights under Law, the Mexican American Legal Defense Fund (MALDEF), the Asian American Justice Center, the National Women's Law Center, and the National Partnership for Women and Families, among others. We are proud to have served on the Board of this organization that has aided Latinos to succeed in school, the work place and help to make the American Dream a reality for all Americans.

We stand available to answer any questions or respond to requests the Senate Judiciary may have for us. Judge Sonia Sotomayor is a colleague who has served our Nation, not only as a prosecutor, private practice attorney and judge, but also through her commitment to community and civic service.

Sincerely,

Mari Carmen Aponte
Former Executive Director, Puerto Rico Federal Affairs Administration

Sandra Ruiz Butter
Former President, VIP Community Services

Ernest J. Collazo
Collazo Carling & Mish LLP

George A. Davidson
Hughes Hubbard & Reed LLP

Dr. Ricardo Fernandez
President, Lehman College, City University of New York

Andres V. Gil
Davis, Polk & Wardwell, LLP

Ambassador Gabriel Guerra-Mondragon
Former U.S. Ambassador to Chile

Dorothy James
Former Provost and Dean of Faculty, Connecticut College

Harold S. Lewis Jr.
Walter F. George Professor of Law, Mercer University Walter F. George School of Law

Benito Romano
Freshfields Bruckhaus Deringer LLP

Judah C. Sommer
Senior Vice President, UnitedHealth Group, Inc.

Affiliation for Identification Purposes Only

cc: Honorable Patrick Leahy
Chairman, United States Senate Judiciary Committee

REPUBLICAN PARTY OF PUERTO RICO
544 Aldebaran Street – Ground Floor
San Juan Puerto Rico 00922
Tel 787-793-8084, Email: republican@prtc.net

Hon. Carlos Mendez
State Chair

Hon. Luis G. Fortuño
National Committeeman

Zoraida F. Fonalledas, Esq.
National Committeewoman

Ricardo Aponte, Esq.
Executive Director

June 22, 2009

The Honorable Patrick Joseph Leahy
Chairman
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Leahy:

Greetings from the United States Territory of Puerto Rico.

On June 13th the Executive Committee of the Republican Party of Puerto Rico unanimously approved a resolution in support of the nomination of Judge Sonia Sotomayor to the United States Supreme Court, the highest court in our Nation.

We hereby submit a copy of the aforementioned resolution for inclusion in the record. Thank you for the opportunity to contact the Committee on this matter . Please do not hesitate to contact us if you need any additional information.

Sincerely,

Ricardo Aponte
Executive Director

REPUBLICAN PARTY OF PUERTO RICO
544 Aldebaran Street – Ground Floor
San Juan Puerto Rico 00922
Tel 787-793-8084, Email: republicanPR@gmail.com

RESOLUTION

THE REPUBLICAN PARTY OF PUERTO RICO CONGRATULATES JUDGE SONIA SOTOMAYOR FOR HER NOMINATION TO THE UNITED STATES SUPREME COURT, SUPPORTS HER CONFIRMATION AND URGES FOR A FAIR AND BALANCED SENATE CONFIRMATION PROCESS.

WHEREAS, Puerto Ricans have been U.S. citizens by birth since 1917; and

WHEREAS, for the first time in the history of the Supreme Court a Puerto Rican has been nominated to the highest court in our Nation.

WHEREAS, Sonia Sotomayor has served as a judge on the United States Court of Appeals for the Second Circuit since October 1998.

WHEREAS, she was appointed to the District Court for the Southern District of New York by President George H.W. Bush.

WHEREAS, in spite of the challenges of growing up in a housing project without financial resources she has become a role model for all Puerto Rican Americans in the mainland and the island. to younger generations about the opportunities available for all Puerto Ricans throughout our Nation.

WHEREAS, she was born to a Puerto Rican family, and grew up in a public housing project in the Bronx after her family relocated to New York City during World War. Her father was a factory worker with a third-grade education, who died when Sotomayor was nine years old. Her mother, a nurse, then raised Judge Sotomayor and her brother.

WHEREAS, her mother impressed upon Judge Sotomayor and her brother the importance of an education and as she grew up graduated as valedictorian of her class at Blessed Sacrament and at Cardinal Spellman High School in New York.

WHEREAS, Judge Sotomayor went on to Princeton University for her undergraduate studies, graduating *summa cum laude*, and then Yale Law School, where she served as an editor of the Yale Law Journal and as managing editor of the Yale Studies in World Public Order.

WHEREAS, Judge Sotomayor has extensive experience in the practice of law and has served as a judge for two decades, having been nominated to the bench by both a Republican and a Democratic President.

Supporting Statehood for Puerto Rico

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WHEREAS, the Republican Party of Puerto Rico calls on all Senators to conduct a confirmation process based solely on questions regarding her experience, decisions, jurisprudence, judicial temperament and the role of the Supreme Court.

BE IT RESOLVED, that the REPUBLICAN PARTY OF PUERTO RICO supports the confirmation of Judge Sonia Sotomayor to the United States Supreme Court and calls for a fair and thorough confirmation process of Judge Sonia Sotomayor.

BE IT FURTHER RESOLVED that the Republican Party of Puerto Rico extends its warmest congratulations to Judge Sonia Sotomayor for her accomplishment and urges her to serve as a voice for the 4 million disenfranchised U.S. citizens of Puerto Rico as we seek full citizenship rights.

(Adopted by Republican Party of Puerto Rico on June 13, 2009)

June 29, 2009

The Honorable Patrick J. Leahy, Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Jeff Sessions, Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Sessions:

As the new President and CEO of the Arizona Hispanic Chamber of Commerce, I write to express our organization's support for the confirmation of Judge Sonia Sotomayor as Associate Justice of the Supreme Court of the United States. In her seventeen years of service to date as a federal trial and appellate judge, and throughout the course of her entire career, Judge Sotomayor has strongly distinguished herself through her outstanding intellectual credentials and her deep respect for the rule of law, establishing herself beyond question as fully qualified and ready to serve on the Supreme Court.

Judge Sotomayor will be an impartial, thoughtful, and highly-respected addition to the Supreme Court. Her unique personal background is compelling, and will be both a tremendous asset to her on the Court and a historic inspiration to others. Her legal career further demonstrates her qualifications to serve on our nation's highest court.

During her long tenure on the federal judiciary, Judge Sotomayor has participated in thousands of cases, and has authored approximately 400 opinions at the appellate level. She has demonstrated a thorough understanding of a wide range of highly complicated legal issues, and has a strong reputation for deciding cases based upon the careful application of the facts of cases to the law.

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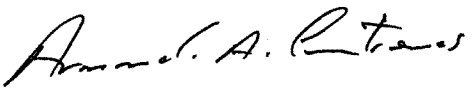
Judge Sotomayor has garnered broad support across partisan and ideological lines, earning glowing praise from colleagues in the judiciary, law enforcement community, academia, and legal profession who know her best.

I urge you not to be swayed by the efforts of a small number of detractors who only wish to tarnish Judge Sotomayor's outstanding reputation as a jurist. These efforts have included blatant mischaracterizations of a handful of her rulings, as well as efforts to smear her as a racist based largely on one line in a speech that critics have taken out of context from the rest of her remarks. We hope that your committee will strongly reject the efforts at character assassination that have taken place since her nomination.

In short, Judge Sotomayor has an incredibly compelling personal story and a deep respect for the Constitution and the rule of law. Her long and rich experiences as a prosecutor, litigator and judge match or even exceed those of any of the Justices currently sitting on the Court. Furthermore, she is fair-minded and ethical, and delivers thoughtful rulings in cases based upon their merits. For these reasons, I strongly urge you to vote to confirm Judge Sotomayor.

Respecfully,



Armando A. Contreras
President and CEO
Arizona Hispanic Chamber of Commerce

June 10, 2009

The Honorable John McCain
United States Senate
241 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Jon Kyl
United States Senate
730 Hart Senate Office Building
Washington, D.C. 20510

Dear Senators Kyl and McCain:

The undersigned members of Arizona law school faculties enthusiastically support the nomination of Judge Sonia Sotomayor to the United States Supreme Court. As the confirmation process goes forward, we trust that you will conclude, as we have, that Judge Sotomayor is exceptionally well qualified to serve on our nation's highest court.

Judge Sotomayor's experience spans the private and public sectors, two branches of government, and both trial and appellate levels of the federal bench. Her seventeen years as a federal judge, her service as a state prosecutor, and her private practice in international and corporate law mean that Judge Sotomayor will bring unusually complete and multi-faceted experience with the law to the Supreme Court.

Moreover, we do not dismiss the significance of Judge Sotomayor's experience as a Latina who grew up in the housing projects of the South Bronx. Judge Sotomayor has seen and experienced life and our society in ways that are not currently represented on the Supreme Court. Particularly when combined with her varied and comprehensive professional activities, Judge Sotomayor's wisdom from this perspective will add an important ingredient to the Supreme Court's consideration of the cases that come before it. She will also provide inspiration to countless youth in Arizona and elsewhere, for whom Judge Sotomayor will serve as an example of the limitless opportunities made possible by hard work and education.

Signed

[The references to school affiliation are for identification purposes only. The views expressed in this letter are those of the signatories only and are not expressed on behalf of any educational institution.]

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Arthur Andrews, James E. Rogers College of Law, Univ. of Ariz.
Andrew Askland, Sandra Day O'Connor College of Law, Ariz. State. Univ.
Barbara A. Atwood, James E. Rogers College of Law, Univ. of Ariz.
Charles E. Ayres, James E. Rogers College of Law, Univ. of Ariz.
Katherine Barnes, James E. Rogers College of Law, Univ. of Ariz.
Robert Bartels, Sandra Day O'Connor College of Law, Ariz. State. Univ.
Paul Bender, Sandra Day O'Connor College of Law, Ariz. State. Univ.
Paul D. Bennett, James E. Rogers College of Law, Univ. of Ariz.
William Boyd, James E. Rogers College of Law, Univ. of Ariz.
Charles Calleros, Sandra Day O'Connor College of Law at Ariz. State. Univ.
Eugene Clark, Phoenix School of Law
G. Jack Chin, James E. Rogers College of Law, Univ. of Ariz.
Robert N. Clinton, Sandra Day O'Connor College of Law, Ariz. State. Univ.
Evelyn Cruz, Sandra Day O'Connor College of Law, Ariz. State. Univ.
Robert Dauber, Sandra Day O'Connor College of Law, Ariz. State. Univ.
David A. Gantz, James E. Rogers College of Law, Univ. of Ariz.
Stephen Gerst, Phoenix School of Law
Steven Gonzales, Phoenix Law School
Zelda Harris, James E. Rogers College of Law, Univ. of Ariz.
Kenney F. Hegland, James E. Rogers College of Law, Univ. of Ariz.
David Kader, Sandra Day O'Connor College of Law, Ariz. State. Univ.
Maureen Kane, Phoenix School of Law
Diana Lopez-Jones, James E. Rogers College of Law, Univ. of Ariz.
Lynn Marcus, James E. Rogers College of Law, Univ. of Ariz.
Alan A. Matheson, Sandra Day O'Connor College of Law, Ariz. State. Univ.
Myles V. Lynk, Sandra Day O'Connor College of Law, Ariz. State. Univ.
Michael O'Connor, Phoenix School of Law
Claudine Pease-Wingenter, Phoenix School of Law
Suzanne Rabe, James E. Rogers College of Law, Univ. of Ariz.
Celia Rumann, Phoenix School of Law
Andrew Silverman, James E. Rogers College of Law, Univ. of Ariz.
Roy Spece, James E. Rogers College of Law, Univ. of Ariz.
Ralph Spritzer, Sandra Day O'Connor College of Law, Ariz. State. Univ.
Lee Tucker, James E. Rogers College of Law, Univ. of Ariz.
Rebecca Tsosie, Sandra Day O'Connor College of Law, Ariz. State. Univ.
Elliott Weiss, James E. Rogers College of Law, Univ. of Ariz.
David B. Wexler, James E. Rogers College of Law, Univ. of Ariz.
Brent White, James E. Rogers College of Law, Univ. of Ariz.
Penny L. Willrich, Phoenix School of Law
Winton Woods, James E. Rogers College of Law, Univ. of Ariz.

Signatures collected by Charles Calleros

cc: The Honorable Patrick J. Leahy, Chair, Senate Judiciary Committee
The Honorable Jeff Sessions, Ranking Member, Senate Judiciary Committee

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NATIONAL LATINO FARMERS & RANCHERS TRADE ASSOCIATION

May 6, 2009

The Honorable Barack Obama
President of the United States of America
1600 Pennsylvania Avenue, NW
Washington, DC

Dear Mr. President:

The resignation of Justice Souter from our nation's highest court affords an historic opportunity to appoint a nominee who combines a range of unrivaled traits. Judge Sonia Sotomayor is such a nominee.

Judge Sotomayor's personal and professional experiences make her uniquely sensitive to the concerns of a wide range of Americans. She was raised by a widowed mother in a Bronx housing project and worked hard to graduate summa cum laude from Princeton and to become an editor of the Yale Law Journal. For the first four years of her career, Judge Sotomayor prosecuted criminal defendants under Manhattan's legendary District Attorney Robert Morgenthau. She later spent eight years representing businesses at the international firm of Pavia & Harcourt.

Judge Sotomayor's legal career has included not only criminal prosecution and commercial litigation, but also academia and appointment to the federal bench at the age of thirty-eight. For the past ten years, her intellect, integrity, and consensus-building have made her a highly respected jurist on the Second Circuit. This followed a distinguished career as a federal trial judge, during which Judge Sotomayor's pragmatism and resolve brought the national baseball strike to an end that satisfied all parties. She taught for over nine years at the New York University School of Law and at Columbia Law School, and has been a mentor to hundreds of attorneys and students as a member of the Puerto Rican and the Hispanic National Bar Associations. This wealth of experience has impressed upon her both the law's potential, as well as its limits.

NATIONAL LATINO FARMERS & RANCHERS TRADE ASSOCIATION
717 D Street, NW, Suite 400
Washington, DC 20004
202-628-8833 ▼ Fax: 202-628-1140

There is no other candidate who possesses such consummate legal skills combined with a wide-ranging personal and professional background. For these reasons, Judge Sotomayor is the best choice for our country's next Supreme Court Justice.

Sincerely,

Rudy Arredondo
President/CEO

cc: Mr. Rahm Emanuel
Ms. Valerie Jarrett
Members of the Senate Judiciary Committee
Hon. Patrick J. Leahy
Hon. Herb Kohl
Hon. Arlen Spector
Hon. Dianne Feinstein
Hon. Orrin G. Hatch
Hon. Russell D. Feingold
Hon. Charles E. Grassley
Hon. Charles E. Schumer
Hon. Jon Kyl
Hon. Richard J. Durbin
Hon. Jeff Sessions
Hon. Benjamin L. Cardin
Hon. Lindsey Graham
Hon. Sheldon Whitehouse
Hon. John Cornyn
Hon. Ron Wyden
Hon. Tom Coburn
Hon. Amy Klobuchar
Hon. Edward Kaufman

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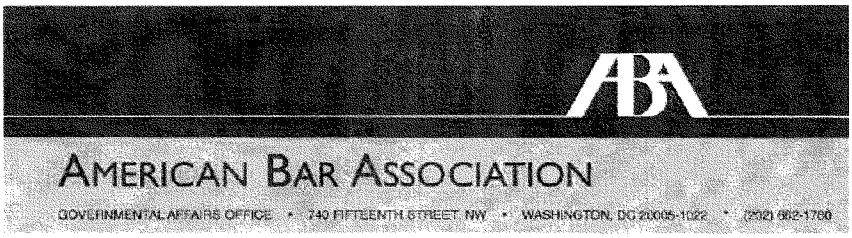

STATEMENT

OF

KIM J. ASKEW

STANDING COMMITTEE ON THE FEDERAL JUDICIARY
AMERICAN BAR ASSOCIATION

concerning the

NOMINATION OF

THE HONORABLE SONIA SOTOMAYOR

to be an

ASSOCIATE JUSTICE OF THE SUPREME COURT
OF THE UNITED STATES

before the

COMMITTEE OF THE JUDICIARY
UNITED STATES SENATE

JULY 16, 2009

Mr. Chairman and Members of the Committee:

My name is Kim J. Askew of Dallas, Texas, and it is my privilege to chair the American Bar Association Standing Committee on the Federal Judiciary. I am joined today by Mary M. Boies of New York, our Second Circuit representative and the lead evaluator on the Standing Committee's investigation of Judge Sonia Sotomayor. We are honored to appear here today to explain the Standing Committee's evaluation of the professional qualifications of Judge Sotomayor to be Associate Justice of the Supreme Court of the United States. I am pleased to report that the Standing Committee gave her its highest rating and found her "Well Qualified."

The Standing Committee has conducted its unique and comprehensive evaluations of the professional qualifications of nominees to the federal bench since 1948. Our Committee is composed of fifteen distinguished lawyers from every federal circuit in the United States. These lawyers, who voluntarily provide hundreds of hours of service to this Committee every year, each conduct a thorough, non-partisan, non-ideological peer review of each nominee using long-established standards that measure a nominee's integrity, professional competence, and judicial temperament. The Standing Committee does not propose, endorse or recommend nominees. Its sole function is to evaluate the professional qualifications of a nominee and then rate the nominee either "Well Qualified," "Qualified," or "Not Qualified."

The Standing Committee's investigation of a nominee for the United States Supreme Court is based upon the premise that the nominee must possess exceptional professional qualifications. The significance, range, complexity and nation-wide impact of issues that such a nominee will confront on the Court demands no less. As such, our investigation of a Supreme

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Court nominee is more extensive than nominations to the lower federal courts, and procedurally different in two principal ways.

First, Standing Committee members conduct investigations into the nominee's professional qualifications in every federal circuit in the United States, not only in the resident circuit of the nominee. Standing Committee members conducted hundreds of confidential interviews concerning Judge Sotomayor's professional qualifications. Each Standing Committee member prepared a confidential circuit report which is included in the comprehensive confidential final report on which the Standing Committee bases its rating.

Second, the Standing Committee commissioned three Reading Groups of distinguished scholars and practitioners to review the nominee's legal writings and advise the Standing Committee. Judge Sotomayor has been a prolific writer over her nearly seventeen years of service as a judge. Two of the nation's leading law schools, Georgetown University Law Center and Syracuse University College of Law, formed Reading Groups composed of professors who are recognized experts in the substantive areas of law they reviewed. Collectively, these professors have decades of practice in law firms, non-profit organizations and state and federal government.

The Practitioners' Group is composed of nationally recognized lawyers with substantial trial and appellate practices. All of the readers are familiar with Supreme Court practice and most have briefed and argued cases in the Supreme Court or are former law clerks to Justices on the Supreme Court. The Reading Groups are guided by the same standards that are applied by the Standing Committee, and assist in evaluating the nominee's analytical skills, knowledge of the law, application of the facts to the law, and the ability to communicate effectively.

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As with every nomination, the Standing Committee undertook an extensive investigation into the professional qualifications of Judge Sotomayor. We initially contacted some 2,600 persons who potentially had knowledge of Judge Sotomayor's professional qualifications, including every federal judge in United States, state judges, lawyers, and community and bar representatives. The Committee received responses from over 850 persons, and Standing Committee members personally interviewed or received letters or emails from over 500 judges and lawyers who knew Judge Sotomayor or had appeared before her. Lawyers and judges often provided court transcripts, speeches and briefs for the Standing Committee's consideration. The Committee Members and the reading groups collectively analyzed over 1,000 of Judge Sotomayor's opinions, speeches and other writings.

The Standing Committee based its evaluation on these interviews with more than 500 judges, lawyers, law professors and community representatives from across the United States; analyses of the opinions, speeches and other writings of Judge Sotomayor; reports of the three Reading Groups; and an in-depth personal interview of the nominee that was conducted by Second Circuit Representative Boies and Chair Askew on June 26, 2009. Each member of the Standing Committee reviewed the final report and individually evaluated the nominee using one of the three ratings previously mentioned. The 2008-09 Standing Committee unanimously concluded that Judge Sotomayor was "Well Qualified" to be Associate Justice of the United States.

The Standing Committee concluded that Judge Sotomayor's integrity, professional competence and judicial temperament meet the high standards for appointment to the Supreme Court of the United States. Judge Sotomayor has distinguished herself throughout her career as a prosecutor, lawyer in private practice, judge and adjunct professor and legal lecturer. She has

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served with distinction for almost seventeen years on the federal bench, as a District Court Judge and as a member of the Second Circuit Court of Appeals. She has shown leadership through her service on court and judicial administration committees, including budget, technology and court administration and case management committees. She has taught for ten years at Columbia University School of Law and New York University School of Law. Her work in the community is well-known. The nominee is the recipient of honorary degrees and many awards that recognize her professional excellence and contributions to the profession. She is admired and respected by her peers and colleagues.

Judge Sotomayor has a reputation for integrity and outstanding character and is universally praised for her diligence and industry. Her professional competence places her at the top of the profession. She has an outstanding intellect, strong analytical abilities, sound judgment, an exceptional work ethic, and is known for her detailed courtroom preparation and thorough decisions. As a judge, she has written on a range of complex issues and has mastered even the most difficult or arcane areas of law. Her judicial temperament meets the high standards for appointment to the Supreme Court.

Concerns were raised during our evaluation regarding the nominee's writing and some aspects of her judicial temperament. We have carefully reviewed these concerns through interviews and reviews of her writings, and have resolved them to our satisfaction. These are set forth in detail in the accompanying correspondence to this Committee, which we ask to be made a part of the record. In determining that these concerns did not detract from the highest rating of "Well Qualified" for Judge Sotomayor, the Standing Committee was persuaded by the judge's overall record of seventeen years of distinguished service on the court, and the overwhelming

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responses of lawyers and judges who praised Judge Sotomayor on all three criteria, including her professional competence as demonstrated in her writings and her overall judicial temperament.

On behalf of the Standing Committee, thank you for the opportunity to present these remarks.

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Defending Liberty
Pursuing Justice

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July 15, 2009

The Honorable Patrick J. Leahy
Chair, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: ***Standing Committee Evaluation***
Nomination of the Honorable Sonia Sotomayor to be
Associate Justice of the Supreme Court of the United States

Dear Mr. Chairman:

This letter is submitted in response to the invitation from the Senate Committee on the Judiciary to the American Bar Association Standing Committee on the Federal Judiciary ("Standing Committee") to present its statement on the evaluation of the Honorable Sonia Sotomayor to be Associate Justice of the United States Supreme Court.

President Obama announced his nomination of Judge Sotomayor for Associate Justice on May 26, 2009. The Standing Committee began its evaluation that very day and continued its work for the next several weeks. This letter outlines the nature, scope and findings of the Standing Committee's evaluation. The Standing Committee unanimously concluded that Judge Sotomayor merits our highest rating and is "Well Qualified" for appointment to the Supreme Court of the United States.

As with nominations to the lower federal courts, the Standing Committee's evaluation of Judge Sotomayor is based on a comprehensive, non-partisan, non-ideological peer review of the nominee's integrity, professional competence and judicial temperament. The Standing Committee did not base its rating on or seek to express any view regarding Judge Sotomayor's ideology, political views or political affiliation. It also did not seek to determine how Judge Sotomayor might vote on specific issues or cases that might come before the Supreme Court of the United States.

THE STANDING COMMITTEE'S EVALUATION PROCESS

1. The Process

As set forth in the ABA's *Backgrounder*:

> To merit the Committee's rating of "Well Qualified," a Supreme Court nominee must be a preeminent member of the legal profession, have outstanding legal ability and exceptional breadth of experience, and meet the very highest standards of integrity, professional competence and judicial temperament. The rating of "Well Qualified" is reserved for those found to merit the Committee's strongest affirmative endorsement.[1]

In arriving at its conclusion that the nominee meets these criteria, the Standing Committee considered four primary sources of information:

A. Solicitation of Comments from Persons Likely to Have Relevant Information

The fifteen members of the Standing Committee contacted in writing or by phone over 2,600[2] individuals from all over the country whom the Standing Committee believed might have information to provide that would be relevant to our evaluation. The individuals from whom we

[1] American Bar Association, *Standing Committee on the Federal Judiciary What it is and How it Works* ("Backgrounder") at p 10.

[2] The Standing Committee contacted over 2,600 persons who might have knowledge of the professional qualifications of the nominee. We received responses from some 850 persons. The Committee obtained input on Judge Sotomayor's professional qualifications from over 500 lawyers, judges, law professors, and members of the community.

solicited input included justices of the Supreme Court of the United States, judges on the Courts of Appeals and District Courts, United States Magistrate Judges and United States Bankruptcy Judges. These judges included all of Judge Sotomayor's colleagues on the United States Court of Appeals for the Second Circuit ("Second Circuit") and her former colleagues on the United States District Court for the Southern District of New York. As a result of this outreach, we received substantive input from federal judges from around the country who had sat both regularly and by designation on hundreds of panels of the Second Circuit with Judge Sotomayor and on judicial and court administration committees.

As part of this process, the Standing Committee also contacted state court judges, co-counsel, opposing counsel and lawyers who had appeared before Judge Sotomayor during her near 17-year tenure as a federal judge. These included lawyers from across the country, many who won their particular cases and many who lost.

Those from whom the Standing Committee sought input also included all lawyers and judges identified in the nominee's Personal Data Questionnaire who had knowledge of her professional qualifications. In addition to information on their knowledge of the nominee's professional qualifications, judges and lawyers provided information for the Standing Committee's consideration such as court transcripts, briefs and speeches. They also identified other lawyers and judges with knowledge of the nominee's professional qualifications who were then contacted by the Standing Committee. The Committee interviewed law school deans, law school faculty and legal scholars, many with personal knowledge of the nominee's professional qualifications and others who regularly studied her opinions in various substantive areas of law. Because of Judge Sotomayor's long-standing and extensive community service, the Committee also interviewed many non-lawyers.

B. Review of the Nominee's Writings

The Standing Committee members read the Second Circuit opinions of the nominee, all of her District Court opinions that had been reversed, criticized, or vacated on appeal, and various speeches and writings. We also commissioned three "Reading Groups" to provide us with detailed feedback regarding the degree of professional competence demonstrated in a wide and representative range of the nominee's writings. These groups independently evaluated the nominee's legal writings for analytical ability, clarity, knowledge of the law, application of law to facts, and the ability to communicate effectively.

Two of the nation's leading law schools, Georgetown University Law Center and Syracuse University College of Law, assembled groups of accomplished law professors with specialized knowledge in the substantive matters covered by the opinions they analyzed and decades of legal practice in law firms, non-profits organizations, and state and federal governments. Michael Gottesman, Professor of Law, led the Reading Group of 13 professors at Georgetown. Lisa A. Dolak, Board of Advisors Professor of Law, led the 12 professors who participated in the Syracuse Reading Group. Roberta D. Liebenberg and Thomas Z. Hayward, Jr., both former Chairs of this Standing Committee, led the Practitioners' Reading Group, which consisted of 11 distinguished lawyers from around the country with substantial trial and appellate practices. Many of the readers are former law clerks to Justices on the Supreme Court and have briefed and argued cases in the Supreme Court. The members of the Reading Groups and the substantive areas of their expertise and review are listed in Exhibits A, B, and C appended to this letter.

The law libraries at Georgetown and Syracuse greatly facilitated the analyses of the nominee's writings by establishing a courseware site containing the nominee's published and

unpublished opinions, articles, previous confirmation testimony, and speeches. This voluminous collection of material was indexed according to more than 50 subject matters, with categories ranging from constitutional and individual substantive areas of law to federal statutes and state laws. The Standing Committee and the Reading Groups had full access to this site.

While the Reading Groups focus primarily on the nominee's professional competence, their analyses also provide useful guidance in assessing the integrity and judicial temperament of the nominee. The Standing Committee and Reading Groups collectively reviewed over 1,000 of Judge Sotomayor's published and unpublished opinions, articles, immigration orders, *en banc* decisions and speeches. The Standing Committee again thanks the Reading Groups for their thoughtful and insightful work.

C. Prior Ratings

The Standing Committee considered its evaluations of Judge Sotomayor when she was nominated to the United States Court of Appeals for the Second Circuit in 1997 and to the United States District Court for the Southern District of New York in 1991. Her rating in 1997 was "Well Qualified," with a minority of the Standing Committee finding her "Qualified." The 1991 rating was "Qualified," with a minority of the Committee found her "Well Qualified."[3]

D. Interview of the Nominee

Second Circuit representative Mary M. Boies and Chair Kim J. Askew personally interviewed Judge Sotomayor in her chambers at the United States Courthouse in Manhattan.[4]

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[3] The majority rating of the Standing Committee is the official rating. The minority rating is given for informational purposes only.

[4] Following its usual practice, the Committee interviewed the nominee after it reviewed her writings and had conducted most of the interviews with persons having knowledge of the nominee's personal qualifications so that adverse information, if any, could be fully discussed with the nominee in her interview.

THE EVALUATION OF JUDGE SOTOMAYOR'S PROFESSIONAL QUALIFICATIONS

1. Integrity

In evaluating integrity, the Standing Committee considers the nominee's character and general reputation in the legal community, as well as the nominee's industry and diligence. The Committee also considers the extent to which there have been any findings of ethical violations or the like by a nominee. Judge Sotomayor has earned and enjoys an excellent reputation for integrity and outstanding character. Lawyers and judges uniformly praised the nominee's integrity as follows:

> "Integrity - the highest. She is impeccable in this regard."
>
> "She always acts as a judge with integrity."
>
> "She is a totally upright judge. She is devoted to the law."
>
> "[She gets] the highest possible marks on character. She is totally incorruptible. She has extraordinary dedication to being a good judge and she works very hard."
>
> "Judge Sotomayor displayed the highest level of character possible."
>
> "She has great integrity."
>
> "She is a person of utmost integrity and good character…"

Judge Sotomayor is universally praised for her industry and diligence and is recognized as one of the hardest-working judges on her court. On the basis of hundreds of interviews with members of the legal profession and community and a review of her writings, the Standing Committee concluded that Judge Sotomayor possesses the integrity required to receive a "Well Qualified" rating.

2. Professional Competence

"Professional competence" encompasses such qualities as intellectual capacity, judgment, writing and analytical abilities, knowledge of the law, and breadth of professional experience. A

Supreme Court nominee must possess "exceptional professional qualifications," including an especially high degree of legal scholarship, academic talent, analytical and writing abilities, and overall excellence. The nominee must be able to write clearly and persuasively, harmonize a body of law, apply the law to the facts, and give meaningful guidance to the trial and circuit courts and the bar.[5] Judge Sotomayor's professional competence is exceptional.

Judge Sotomayor possesses a strong educational background and a broad range of professional experience. She graduated from Princeton University, *summa cum laude*, in 1976 where she was a member of *Phi Beta Kappa*. She obtained her law degree from Yale Law School in 1979 and served as an Editor of the *Yale Law Journal*. Upon graduation from Yale, Judge Sotomayor began her legal career as an Assistant District Attorney prosecuting criminal cases in the New York County District Attorney's Office. She next spent eight years in private practice handling trials and arbitrations.

In 1992, she began six years of service as a judge on the United States District Court for the Southern District of New York. Since 1998, she has served as a Circuit Judge on the United States Court of Appeals for the Second Circuit. During her tenure as a judge, she also served as a Lecturer-in-Law at Columbia University and as an Adjunct Professor at New York University Law School. Lawyers and judges identified Judge Sotomayor's broad-based experience as a prosecutor, litigator, and trial and appellate court judge as significant strengths she would bring to the Supreme Court.

Throughout her career, Judge Sotomayor has shown an outstanding intellect, industry, and a superior work ethic. In her early career, she was known as a "tough and skilled" prosecutor whose trial skills and abilities often exceeded those of her peers and more senior prosecutors. As

[5] *Backgrounder* at p. 9.

a United States District Judge, she had a well-known ability to command a courtroom and move cases to trial. She has a reputation for being one of the hardest working and best prepared judges on the Second Circuit. She is well informed and her judgment is sound. She is industrious and possesses a work ethic described as "amazing," "extraordinary," and "exceptional." She is known among the bar and her colleagues for her preparedness at oral argument and the vigor and incisiveness of her questioning. Judge Sotomayor has been awarded several honorary degrees and long recognized for her service to the community and profession by community organizations and bar associations.

Lawyers and judges spoke of the nominee's professional competence:

> "Her professional competence and intellectual capacity are at the top. She has the superior breadth of experience."
>
> "Judge Sotomayor is held in the highest regard for her abilities as a jurist, including her strong intellect, scholarship and knowledge of the law. She is greatly respected for her integrity, fairness and civility and her work ethic is virtually legendary. As a member of the United States Court of Appeals for the Second Circuit, Judge Sotomayor has decided some of the most difficult legal issues of the day with intelligent, well-reasoned decisions that have won her the respect of her colleagues and the entire legal establishment. On the District Court, she was widely regarded as a stellar trial judge who could command a courtroom and move the toughest cases expeditiously."
>
> "Judge Sotomayor is a gifted, bright and good judge."
>
> "The judge enjoys a phenomenal reputation and her legal acumen is well known and highly praised in legal and judicial circles."
>
> "She is just outstanding, brilliant and hard working."
>
> "I have the highest regard for Judge Sotomayor's intellect and legal ability. She has the great ability to zero in on the key issue."
>
> "She has impressive intellectual capacity and her writing and analytical skills are top-notch."

The Reading Groups addressed her professional competence:

> "[T]he opinions I have reviewed speak very highly of Judge Sotomayor's professional competence. In particular they demonstrate that she has excellent analytical abilities."
>
> "My review of Sotomayor's work indicates that she has exceptional professional qualifications. She is highly competent and has a well-demonstrated judicial temperament. Her knowledge is both broad and deep. She writes clearly and reasons with great intelligence."
>
> "Her decisions are detailed and quite comprehensive, as she strives to address all of the relevant facts and argument of the parties, the decision being reviewed, and the applicable case law. She consistently demonstrates intellectual vigor and honesty and her opinions provide meaningful guidance to the parties, lower courts and practitioners. ...Accordingly, Judge Sotomayor easily satisfies the criterion of professional competence."

In her nearly 17 years on the federal bench, Judger Sotomayor has been a prolific writer. Her opinions are well-reasoned, well-organized, meticulously researched, easily understandable, and demonstrate a profound command of the law, even when sophisticated and complicated factual and legal issues are presented. Her writing style is direct. As a reader succinctly noted: "As a matter of style, Judge Sotomayor's opinions are precise, confident and decisive." She has written on a range of issues and has demonstrated an intellectual mastery[6] of the varied subjects on which she has written. Another Reading Group member noted: "No issue, no matter how arcane or difficult, escaped the nominee's grasp." Her opinions are respectful and professional in tone and approach even when she writes in dissent or disagrees with the position of another judge or party.

Reading Groups made the following additional assessments regarding Judge Sotomayor's opinions:

> "[H]er writing and analytical skills are top-notch."

---

[6] All of the Reading Groups noted that Judge Sotomayor had been exposed to a wide range of issues and had demonstrated the ability to master complex and often arcane areas of law and to write cogently in resolving those issues.

> "Without exception, each and every opinion … could be characterized as exhaustingly thorough … scrupulously researched, transparent in the analysis, and clearly organized. No shortcuts to results without impressive and overwhelming background research and analysis of every claim. No stone unturned, no path avoided."
>
> "[I] find the written opinions of Judge Sotomayor to be even-handed, extremely articulate and carefully reasoned. They are analytical, logical and appropriate nuanced. They betray a keen intelligence, a wonderful writing ability and an extraordinary grasp of both facts and law pertinent to the cases."
>
> "Her opinions are well organized and she is able to write about complicated legal theories and complex transactions in a way that can be easily understood."
>
> "Her opinions are clear, fluid, meticulously reasoned and supported point-for-point with applicable case law."
>
> "Judge Sotomayor's opinions are precise, confident and decisive. She does not engage in extraneous editorializing."

The Standing Committee also considered comments, including some from members of the Reading Groups, that criticized Judge Sotomayor's opinions as less than imaginative, lacking in flourishes, and lengthy. These criticisms are about writing style, not substance. All of the Reading Groups noted her careful approach to drafting opinions, which one group aptly described as follows: "In virtually every opinion, she provides an extremely detailed recitation of the facts, a list of every argument advanced by each side, and a lengthy articulation of the applicable law. She then addresses and resolves every argument advanced." The aspects of her writings that drew some criticism, specifically the lack of rhetorical flourishes and the lengthy discussions of all issues raised, are each signs of strong analysis and an attempt by the nominee to show litigants that their positions are thoroughly and carefully considered by the court.

She also seeks to give guidance to the lower courts. A judge commented that Judge Sotomayor writes opinions that allow judges to "figure out the holding and then understand where to go from there." Another applauded her opinions as "clear, forceful and helpful to the lower courts." She "understands the consumers of our opinions: the parties, the district courts

and the practicing bar. Judge Sotomayor writes with clarity for these groups." A noted law professor teaches from Judge Sotomayor's opinions in her civil procedure class because they are good examples "of careful, lawyerly writing."

Judge Sotomayor's opinions show an adherence to precedent and an absence of attempts to set policy based on the judge's personal views. Her opinions are narrow in scope, address only the issues presented, do not revisit settled areas of law, and are devoid of broad or sweeping pronouncements. Analyses from the Reading Groups include:

> "Judge Sotomayor is a very strong adherent of judicial restraint. She applies and follows Supreme Court and Second Circuit precedent faithfully, without attempting to find artful ways to distinguish it."
>
> "She is clear regarding those issues she is deciding and those she is not. She does not address issues not properly before her."
>
> Her opinions "do not appear to be platforms for the nominee to express political or philosophic views."

Judges and lawyers confirm her adherence to judicial precedent:

> "She is not an activist. … She focuses on the issue the court has to decide rather than pontificating on big, big issues. She is a business-like judge who focuses on deciding the cases before her, on the particular set of facts and body of laws."
>
> "She is "so on-the-books-law-and-order" and "so not a judicial activist."
>
> "She follows precedent. Some opinions for which she is criticized are the ones in which she is following precedent."

Based on the foregoing, the Standing Committee concluded that Judge Sotomayor has consistently demonstrated the highest level of professional competence.

3. <u>Judicial Temperament</u>

In evaluating "judicial temperament," the Standing Committee considers the nominee's compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias, and commitment to equal justice under the law.

A. Compassion and Decisiveness

Lawyers and judges consistently give Judge Sotomayor the highest rating on compassion and decisiveness. The Standing Committee received no adverse comments in this regard. A judicial colleague noted that she goes out of her way to know everyone in the courthouse, including the maintenance staff and janitors who might be invisible to others. She works to give her full time and attention to the litigants and issues before her.

During the nominee's interview, the Committee raised the issue of "empathy" and whether she believes it has a proper role in judging. Judge Sotomayor stated that:

> [E]mpathy is listening, reading all the briefs and knowing the record. But listening is not judging. You listen intently to completely understand a party's position, but then you apply the law, wherever it takes you. Empathy does not decide cases. The law does. Nor does empathy towards one party result in prejudice to another.

She told the Committee, "If I understand one party's motivations or intentions, that does not minimize those of the other party. The law decides the case."

Judge Sotomayor is unquestionably decisive. Many attribute this to her broad experiences as a prosecutor, private lawyer and trial judge.

B. Concerns Regarding Judicial Temperament

Two areas of concern regarding judicial temperament were raised by a very small number of those interviewed: (a) her "aggressive" questioning at oral argument, which resulted in the occasional comment that she was discourteous, condescending, did not listen to arguments, and did not always display appropriate judicial demeanor; and (b) a concern that comments such as those in the "wise Latina woman" or "wise woman" speeches reflect a possible lack of commitment to equal justice under the law or suggested that the nominee was result-oriented and

not free from bias, especially on issues of national origin, race or gender.[7] These concerns were thoroughly examined through interviews, a careful review of her opinions and in our interview with the nominee.

i. Style of Questioning at Oral Argument

While judges and lawyers overwhelmingly praised Judge Sotomayor's courtesy and patience, a very small number criticized her for her "aggressive" questioning during oral argument, her purported lack of courtesy and patience, and her failure to listen to arguments. After thoroughly investigating each criticism, the Standing Committee ultimately agreed with the overwhelming weight of opinion, shared by judges, lawyers, courtroom observers, and former law clerks, that her style on the bench is: (a) consistent with the active questioning style that is well known on the Second Circuit; (b) directed at the weak points in the arguments of parties to the case, even though it may not always seem that way to the lawyer then being questioned; (c) designed to ferret out relative strengths and shortcomings of the arguments presented; and (d) within the appropriate bounds of judging.

Judge Sotomayor is unquestionably an assertive and direct questioner of lawyers who appear before her and is an active participant in debating the merits of cases with colleagues in conference. As noted above, this sort of interaction is not unusual for the Second Circuit on which she sits. According to the comments of those interviewed, she comes to arguments well-

[7] Judge Sotomayor used the words: "I would hope that a wise Latina woman [or a wise woman] with the richness of her experiences would, more often than not, reach a better conclusion than a white male." Judge Sotomayor made these comments during at least four speeches presented at: the 40th National Conference of Law Reviews in Puerto Rico (1994); the Woman's Bar Association of the State of New York at the Tarrytown Conference Center (1999); a Symposium at the University of California, Berkeley School of Law Symposium (2001); and the Princeton Women's Network of New York City at the Princeton Club (2002).

prepared and is known for her thorough knowledge of the record. The vast majority of lawyers who offered comments appreciated her style:

> "She is everything you would want in a judge. Although she is tough, her temperament is very good. She is respectful of the lawyer."
>
> "She was incredibly prepared at the argument. She had the most detailed knowledge of the case of anyone on the Panel, and she asked about the weakest part of my case. She did the same with my adversary."
>
> "She was courteous but forceful with her questions. She always asked the right questions. She gets right to the point and doesn't mince words."

The Standing Committee interviewed over 500 lawyers and judges around the country and received negative comments from fewer than ten on these issues. Of course, the Standing Committee discussed these criticisms in detail with the nominee during our interview. She expressed suitable concern, while at the same time describing her approach at oral argument in a manner consistent with that described by the overwhelming majority of those interviewed. She assured the Standing Committee that while she is an assertive and active questioner, her purpose is only to understand the arguments on both sides. She prepares thoroughly and asks questions because it is her way of getting to the heart of the issues she must resolve. She says that her intent is to thoroughly probe conflicting positions to obtain all relevant information before making a decision.

The comments of judges on the Second Circuit, others who sat by designation with Judge Sotomayor, and courtroom observers confirm that the nominee's judicial temperament is appropriate:

> "I have never seen her be unkind to a lawyer. I have sat with two judges who were overbearing – but Judge Sotomayor has never done that."
>
> "Yes, she can be characterized as brusque. She is a forceful and assertive questioner especially if she perceives a weakness in the lawyer's case that the lawyer is trying to cover up. A lot of lawyers do not like that. She will point out

> what the lawyers are trying to mask out. I see no basis for criticism in that regard."
>
> "She does not suffer unprepared lawyers easily. She is sharp with lawyers who are not prepared or who do not answer her questions. A lot of judges are like that and they should be. Basically, she's normal. She's not out of the mainstream. Some may feel intimidated, but I have seen judges who are a lot tougher than she."
>
> "She is an active questioner, maybe the tone is a bit off-putting to some lawyers, but the good practitioners recognize that while she occasionally adopts a sharp tone, she is not mean or demeaning."
>
> "She might be tough with lawyers who aren't prepared but I do the same thing. While she is hard-nosed and asks hard and direct questions, she is not rude. I have been judging long enough to know the difference between brusqueness and demanding preparation; I sit on many Circuit Courts around the country."

While the Standing Committee took all of the criticisms seriously and investigated each one, the Committee was persuaded by the overwhelming number of judges and lawyers who praised Judge Sotomayor for her patience, courtesy, and collegiality; believed her style of questioning was appropriate and temperate; and appreciated her preparedness and ability to hone in on the issues, and commitment to making decisions based on a thorough analysis of the facts presented and the law. Moreover, most lawyers regard a vigorous form of questioning as apt and desirable, providing counsel an opportunity to know the judge's mind and to respond accordingly.

ii. Freedom from Bias and Commitment to Equal Justice under the Law

The Standing Committee also addressed comments made by Judge Sotomayor in speeches, some of which recently raised questions as to whether she is biased in her decision-making or lacks a commitment to equal justice under the law. While the Standing Committee reviewed all of the nominee's speeches, we comment here on the statements in the speeches that

are frequently referred to as the "wise Latina woman" comments. We also addressed her comment in a 2005 symposium that the "Court of Appeals is where policy is made."[8]

We discussed these comments in great depth with Judge Sotomayor during her interview. She noted that the "wise Latina woman" comment needed to be evaluated in the context of the speeches in their entirety, which focused on the need for diversity in the judiciary. These speeches discussed several civil rights cases and how the presence of women and people of color on the federal bench might have affected the results in those cases. The Standing Committee read the speeches in their entirety and considered the overall context. Nevertheless, viewed in isolation, the comment could be seen as expressing a view that could suggest bias in her perspective. The Standing Committee thus considered whether bias of any type was evident in the lengthy record of the nominee's conduct and decisions as a judge.

Based on the review of the written record described above, and the comments of lawyers and judges familiar with the nominee and her work, the Committee unanimously found an absence of any such bias in the nominee's extensive work. Lawyers and judges overwhelmingly agree that she is an absolutely fair judge. None (including those many lawyers who lost cases before her) reported to the Standing Committee that they have ever discerned any racial, gender, cultural or other bias in her opinions or any aspect of her judicial performance. Lawyers and judges commented that she is open-minded, thoroughly examines a record in far more detail than many circuit judges, and listens to all sides of an argument.

The Standing Committee received the following statements addressing the lack of bias in Judge Sotomayor's judicial performance and opinions:

---

[8] This statement was made at a Duke Law Symposium in 2005.

> "She absolutely does not show the slightest bias be it racial, cultural or ethnic in her performance, opinions or conduct. We have many cases in which we can tell that a party is Hispanic and she has never shown the slightest indication of bias."
>
> "Absolutely nothing in her performance, opinion or conduct indicates racial, cultural or other bias."
>
> "She is not biased in any way. She tries to follow the law."
>
> "She has no racial or ethnic bias whatsoever."
>
> "I have never seen any indication of bias or tendency to favor one cultural or ethnic group over the other."
>
> "[I] has never seen any bias on her part. A lot of what is in the press right now is 'otherworldly.' She follows precedent."
>
> "Judge Sotomayor has no bias, no thumb on the scale."
>
> "It is 'just crazy' to claim that she has any bias, racially, culturally or otherwise.... She cares about the Hispanic community, and she will speak to those groups, but she leaves those views at home when she goes on the bench."
>
> "There is absolutely no racial or cultural bias in her decision-making. She is absolutely not a biased judge. Her opinions are shaped by her experiences as are everyone's -- whether they think that is true or not.... She does not paint the evidence into something based on a personal point of view."
>
> "She has never, never showed any racial or cultural bias."
>
> "[I have] never seen Judge Sotomayor act from any cultural or ethnic bias."
>
> "Judge Sotomayor has 'absolutely never' shown in her conduct, performance or opinions any bias if tendency to favor one group of class or party over another."

The Standing Committee also examined the statement made by Judge Sotomayor at a legal symposium that the "Court of Appeals is where policy is made." The Standing Committee concluded that the context of the statement makes it clear that she was referring to the fact that the courts of appeals, unlike the district courts, set precedent. Those interviewed believed that: "She is an absolutely straight judge. Every time a judge decides a case, that judge is making policy. Let's be honest about it." "That's just true. The Supreme Court statistically takes only

about 80 cases per year, so that means that for most cases the buck stops in the Court of Appeals."

While the Standing Committee is sensitive to any suggestion that a judicial nominee may lack appropriate judicial temperament and has accordingly given careful scrutiny to Judge Sotomayor's opinions, conduct and comments on and off the bench, the nominee's extensive record and the comprehensive scope of first hand feedback by the Standing Committee from sources all around the country allowed the Standing Committee to conclude unanimously that her judicial temperament meets the high standards for appointment to the Supreme Court.

CONCLUSION

Judge Sonia Sotomayor has distinguished herself in every aspect of her legal career. Whether as a prosecutor, lawyer, judge, or legal lecturer, Judge Sotomayor has set the highest standards for herself and, as recognized by numerous honorary degrees and awards, is a model of excellence in the profession. She is a highly intellectual and hard-working jurist. She understands the issues at many levels of the federal judicial system because she has seen them first-hand and addressed them through her work on administrative and judicial committees. She fosters excellence in the legal profession by teaching law students and sharing with them her vast experience and insights about the law and effective lawyering. She is well known for her volunteer work in the community over the years. She is deeply admired and respected and is clearly a role model to many.

The Standing Committee carefully examined all concerns that were raised. Our own investigation of these matters and the overwhelmingly positive feedback from lawyers and judges who have worked with her in various capacities led us to conclude that none of these

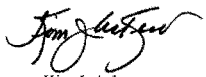
concerns detracted from the exceptional professional qualifications of this nominee. Indeed, Judge Sotomayor's distinguished background in practice and her exemplary performance on the federal bench for almost 17 years strongly override any of the concerns raised.

Judge Sotomayor meets the highest professional standards of professional competence, integrity and temperament. It is the unanimous opinion of the Standing Committee that she is "Well Qualified" to serve as Associate Justice of the Supreme Court of the United States.

In accordance with our procedures, the Standing Committee reserves the right to re-open this evaluation any time prior to the confirmation of Judge Sotomayor to be Associate Justice of the Supreme Court of the United States if new information of a material nature develops that warrants additional investigation and re-examination of this rating.

Thank you Mr. Chairman and Members of the Committee for the opportunity to participate in the confirmation hearings of the Honorable Sonia Sotomayor.

Respectfully,



Kim J. Askew
Chair

cc: Members, Committee on the Judiciary, United States Senate
H. Thomas Wells, Jr., President, American Bar Association
Members, ABA Standing Committee on the Federal Judiciary

EXHIBIT A

READING GROUP
GEORGETOWN UNIVERSITY LAW CENTER

Hope Babcock, Professor of Law
(Administrative Procedure, Environmental Law, Freedom of Information Act, Indian Law, Justiciability, Regulated Industries, Statutory Interpretation)

Michal J. Cedrone, Associate Professor of Legal Research and Writing
(Death Penalty and Habeas Corpus, Federal Sentencing, Other Criminal Law & Procedure, First Amendment – Religion, Prisoner Civil Claims/Eighth Amendment, Health Law and Insurance Programs)

Stephen B. Cohen, Professor of Law
(Federal Taxation)

Sherman L. Cohn, Professor of Law
(Civil Procedure, Appellate Procedure, Jurisdictional and Choice of Law, Professional Responsibility, International Law)

Michael R. Diamond, Professor of Law; Director of the Harrison Institute for Housing and Community Development, Georgetown Law
(Corporate Law)

Michael H. Gottesman, Professor of Law
(Equal Protection, Substantive Due Process, Second Amendment, Twenty-First Amendment, Separation of Powers, Employment Discrimination, Voting Rights, Other Civil Rights, Labor and Employment)

Vicki C. Jackson, Carmack Waterhouse Professor of Constitutional Law; Associate Dean (Transnational Legal Studies)
(Federalism, Government/Government Officers Immunity Law)

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Donald C. Langevoort, Thomas Aquinas Reynolds Professor of Law; Co-Director, Joint Degree in Law and Business Administration
(Securities Law)

Naomi Mezey, Professor of Law
(Procedural Due Process, Statutory Interpretation)

Julia L. Ross, Professor of Legal Research and Writing
(First Amendment – Speech, Intellectual Property, Fifth Amendment, Sixth Amendment, Arbitration and ADR)

Paul F. Rothstein, Professor of Law
(Substantive Criminal Law, Fourth Amendment, Evidence, Antitrust, State Tort Law)

Philip G. Schrag, Professor of Law; Director, Center for Applied Legal Studies and Public Interest Law Scholars Program
(Asylum)

Carlos Manuel Vazquez, Professor of Law
(International Law)

William T. Vukowich, Professor of Law
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EXHIBIT B

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(Commercial Transactions, Insurance Law, ERISA, Contracts and Remedies)

Hannah R. Arterian, Dean and Professor of Law
(Constitutional Law, Employment and Labor Law)

William C. Banks, Board of Advisors Distinguished Professor
(Constitutional Law, National Security Law)

Jeremy A. Blumenthal, Associate Professor of Law
(Criminal Law, Property, Law and Social Science)

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* * * * *

Thomas R. French, Professor of Law, Associate Dean, H. Douglas Barclay Law Library

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EXHIBIT C

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Landis C. Best, Cahill Gordon & Reindel LLP, New York, NY
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John J. Bouma, Snell & Wilmer, Phoenix, AZ
(State Substantive Law – Contracts and Torts)

David S. Friedman, Massachusetts Attorney' General's Office, Newton, MA
(Title VII – including Employment Discrimination, Americans with Disabilities Act, Age Discrimination in Employment Act, Voting Rights Act, Fair Housing Act, Other Civil Rights and Administrative Procedure)

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Richard B. Kapnick, Sidley & Austin, Chicago, Illinois
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The Honorable Timothy K. Lewis, Schrader Harrison Segal & Lewis LLP, Washington, DC
(Sixth Amendment – Jury Right, Confrontation, Counsel, Speedy Trial; Sentencing, and Other Criminal Law & Procedures)

Roberta D. Liebenberg, Fine, Kaplan & Black, Philadelphia, PA
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Pursuing Justice

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Washington, DC 20005-1022
Facsimile: (202) 662-1762

Please respond to.
Kim J. Askew, Esq.
[redacted]

VIA FACSIMILE AND FIRST CLASS MAIL

July 7, 2009

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Re: Nomination of the Honorable Sonia Sotomayor to the United States Supreme Court

Dear Chairman Leahy:

The ABA Standing Committee on the Federal Judiciary has completed its evaluation of the professional qualifications of the Honorable Sonia Sotomayor who has been nominated for an Associate Justice position on the United States Supreme Court. As a result of our investigation, the Committee is of the unanimous opinion that Judge Sotomayor is "well qualified" for a position on that Court.

A copy of this letter has been provided to Judge Sotomayor.

Sincerely,

Kim J. Askew
Chair

cc: The Honorable Sonia Sotomayor
The Honorable Gregory B. Craig
The Honorable Cassandra Q. Butts
Jonathan E. Meyer, US Department of Justice
ABA Standing Committee on the Federal Judiciary
Denise A. Cardman, Esq.

[redacted]

This letter was sent to the following members of the Committee on the Judiciary, United States Senate, 224 Dirksen Senate Office Building, Washington, D.C. 20510-6275 on July 7, 2009.

Majority:

Hon. Patrick J. Leahy, Chairman
Hon Herbert Kohl
Hon. Dianne Feinstein
Hon. Russell D. Feingold
Hon. Charles E. Schumer
Hon. Richard J. Durbin
Hon. Benjamin L. Cardin
Hon. Sheldon Whitehouse
Hon. Ron Wyden
Hon. Amy Klobuchar
Hon. Edward E. Kaufman
Hon. Arlen Specter

Minority:

Hon. Jeff Sessions, Ranking Member
Hon. Orrin G. Hatch
Hon. Charles E. Grassley
Hon. Jon Kyl
Hon. Lindsey O. Graham
Hon. John Cornyn
Hon. Tom Coburn

ASPIRA An Investment in Latino Youth

June 15, 2009

The Honorable Patrick Leahy
Senator
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

RE: Vote to Confirm Judge Sonia Sotomayor to the U.S. Supreme Court
VIA FAX: 202.224.3479

Dear Senator Leahy:

ASPIRA, the largest national Latino organizations in the United States and the only national organization dedicated exclusively to the education of Latino youth, urges you, as a member of the Senate Judiciary Committee, to vote to confirm Judge Sonia Sotomayor after a thorough but swift confirmation process.

Judge Sotomayor's outstanding academic credentials, keen intellect, extensive judicial experience, and long history of fairness and adherence to the law, make her an exemplary candidate to serve on the Supreme Court. Raised by a single mother in public housing in the Bronx, Judge Sotomayor went on to graduate with honors from Princeton and Yale Law School, two of the most prestigious universities in the country. In her three-decade career, Judge Sotomayor has served as an Assistant District Attorney, a litigator in private practice, and served as U.S. District judge for six years before serving eleven years on the U.S. Court of Appeals for the 2nd District. She was appointed to the District Court by Republican President George H.W. Bush and to the appeals court by President Clinton. She has participated in over three thousand court decisions, and has written over 380 opinions. No other Supreme Court nominee in the last 100 years has had the experience she will bring to the court. Judge Sotomayor's compelling life experiences will allow her to bring a range of experiences and perspectives to the court's deliberations.

We sincerely hope that you will join the majority of senators, Republicans and Democrats to confirm this exemplary American to the Supreme Court.

Sincerely,

Ronald Blackburn Moreno
President and CEO

The ASPIRA Association, Inc. • National Office
1444 Eye Street, NW, Suite 800 • Washington, DC 20005 • (202) 835-3600 • Fax (202) 835-3613 • Email: info@aspira.org • www.aspira.org
Associates: Connecticut, Florida, Illinois, New Jersey, New York, Pennsylvania, Puerto Rico

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NEW YORK
CITY BAR

PATRICIA M. HYNES
PRESIDENT
Phone: (212) 382-6700
Fax: (212) 768-8116
phynes@nycbar.org

June 30, 2009

Hon. Patrick J. Leahy
433 Russell Senate Office Building
Washington, DC 20510

RE: Evaluation of Nomination Judge Sonia Sotomayor

Dear Senator Leahy:

The Association of the Bar of the City of New York reviewed and evaluated the nomination of Judge Sonia Sotomayor to be a Justice of the United State Supreme Court. The Association found Judge Sotomayor to be Highly Qualified for that position.

A report detailing our findings can be found at:
http://www.nycbar.org/pdf/report/11693606_3.pdf

Sincerely,

Patricia M. Hynes

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
42 West 44th Street, New York, NY 10036-6689

June 30, 2009

The Honorable Patrick Leahy
Chairman
United States Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

The Honorable Jeff Sessions
Ranking Member
United States Senate Judiciary Committee
335 Russell Senate Office Building
Washington, DC 20510

Dear Senators Leahy and Sessions:

As professors of Disability Law, Disability Rights Law, and Special Education Law from across the country, we write to express our support for the confirmation of Judge Sonia Sotomayor for appointment to the United States Supreme Court.

A review of Judge Sotomayor's record on disability law issues indicates that she has an excellent understanding of the various laws' application to people with disabilities in various contexts, including disability civil rights, employment, special education, Social Security, Medicaid, and guardianship.

Judge Sotomayor's record shows that she takes a balanced, thoughtful approach to disability issues. Her analysis is consistently thorough, practical and respectful of individual rights. In close cases, she does not appear to follow any particular ideology or activist agenda.

Definition of Disability

With the passage of the Americans with Disabilities Amendments Act of 2008, Congress repudiated much of the way that the Supreme Court has interpreted the Americans with Disabilities Act's definition of disability. Notwithstanding this flux in the law, Judge Sotomayor's opinions in this area stand out as being careful and reasoned, as she has engaged in searching inquiries into the nature of plaintiffs' impairments to determine whether they meet the functional and legal definition of disability. (See Bartlett v. New York State Board of Law Examiners, 2001 WL 930792 (S.D.N.Y. 2001).

Judge Sotomayor has not been reluctant to dissent in cases where the law was being applied overly narrowly, particularly on the issue of coverage based on an employer's perceptions of disability ("regarded as"). (See EEOC v. J.B. Hunt Transp., Inc., 321 F.3d 69, 78 (2d Cir. 2003) (Sotomayor dissenting)). After the passage of the ADA Amendments Act, Judge Sotomayor's interpretation of the "regarded as" prong of disability now has been adopted as consistent with congressional intent.

Discrimination

Judge Sotomayor has authored decisions holding, as a matter of first impression in the Second Circuit, that "mixed motive" analysis (allowing discrimination claims where there are both discriminatory and non-discriminatory motives for a challenged action) applies in ADA employment discrimination claims

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(See Parker v. Columbia Pictures Industries, 204 F.3d 326 (2d Cir. 2000)). Her opinion fully analyzed, and was consistent with, precedents in other jurisdictions and the demonstrated intent of Congress.

Reasonable Accommodation

Judge Sotomayor has participated in several cases reversing grants of summary judgment for ADA defendants where there were questions of fact regarding whether plaintiff's requested accommodations were reasonable. Judge Sotomayor wrote a decision reversing a jury verdict against the plaintiff for failure to give a jury instruction indicating that, in determining whether reassignment to a vacant position is a reasonable accommodation, an offer of an inferior position is not reasonable when a comparable, or lateral, position is available. (See Norville v. Staten Is. Univ. Hosp., 196 F.3d 89 (2d Cir. 1999)).

Education

Judge Sotomayor's education opinions reflect an appropriate concern for parents' procedural rights, recognizing that, only by ensuring parents' rights to hearings and records can their children's substantive educational rights be ensured, while also balancing states' rights under the "cooperative federalism" envisioned by the Individuals with Disabilities Education Act (IDEA). (See Taylor v. Vermont Dep't of Educ., 313 F.3d 768 (2d Cir. 2002). She has also written opinions recognizing that the IDEA exhaustion requirement is not so inflexible as to require parents to engage in futile efforts. (See Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195 (2d Cir. 2002)).

Constitutionality of Federal Civil Rights Legislation

Judge Sotomayor has resisted judicial attempts to artificially limit federal legislative authority to articulate and enforce individual rights. While demonstrating respect for precedent, she has not interpreted the Constitution to prevent Congress from recognizing individual and civil rights. (See Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006) (Sotomayor joining dissent from en banc decision); Connecticut v. Cahill, 217 F.3d 93 (2d Cir. 2000) (Sotomayor dissenting)). Her opinions reflect a deference to Congress and to the plain language of the Constitution.

The Supreme Court is the guardian of our rights and freedoms. As such, we recognize the importance of each nomination to the Court. Based on her record as a district court judge and as a judge on the Second Circuit Court of Appeals, we believe Judge Sotomayor has demonstrated appropriate respect for the rule of law and the importance of individual rights. Therefore, we urge you to confirm the nomination of Judge Sonia Sotomayor to the U.S. Supreme Court.

Michael Waterstone
Professor of Law
Associate Dean of Academic Programs
Loyola Law School, Los Angeles

Peter Blanck
University Professor
Chairman, Burton Blatt Institute
Syracuse University

Michael Stein
Executive Director
Harvard Law School Project on Disability
Professor of Law
William and Mary Law School

Mark C. Weber
Vincent de Paul Professor of Law
DePaul University College of Law

Deirdre M. Smith
Assoc. Professor of Law and
Director of the Cumberland Legal Aid Clinic
University of Maine School of Law

Robert Dinerstein
Professor of Law
American University
Washington College of Law

Carrie Griffin Basas
Assistant Professor of Law
University of Tulsa College of Law

Arlene S. Kanter, Professor of Law
Laura J. and L. Douglas Meredith Professor
Director, Disability Law and Policy Program
Co-Director, SU Center on Human Policy, Law, and Disability Studies
Syracuse University College of Law

Wendy E. Parmet
Matthews Distinguished University
Professor of Law
Northeastern University School of Law

Michael L. Perlin
Professor of Law
Director, International Mental Disability Law Reform Project
Director, Online Mental Disability Law Program
New York Law School

Marianne Engelman Lado
Visiting Assistant Professor
Seton Hall University School of Law

Ani B. Satz, Ph.D., J.D.
Associate Professor
Emory University School of Law
Rollins School of Public Health

Ruth Colker
Distinguished University Professor and Heck-Faust Memorial Chair in Constitutional Law
Michael E. Moritz College of Law
The Ohio State University
Columbus, Ohio

Michael A. Schwartz
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Paul M. Secunda
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Loyola Law School

Jeanette Cox
Assistant Professor of Law
University of Dayton School of Law

Laura Rothstein
Professor and
Distinguished University Scholar
Louis D. Brandeis School of Law
University of Louisville

All institutions for identification purposes only

Jun-30-09 11:31am From- 2123986634 T-351 P.002/003 F-515

NEW YORK
CITY BAR

Contact: Alan Rothstein
(212) 382-6623

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK FINDS JUDGE SONIA SOTOMAYOR HIGHLY QUALIFIED FOR U.S. SUPREME COURT

New York, June 30, 2009 – Patricia M. Hynes, President of The Association of the Bar of the City of New York, announced that the Association has concluded that Judge Sonia Sotomayor is Highly Qualified to be a Justice of the United States Supreme Court.

The Association found that Judge Sotomayor demonstrates a formidable intellect; a diligent and careful approach to legal decision-making; a commitment to unbiased, thoughtful administration of justice; a deep commitment to our judicial system and the counsel and litigants who appear before the court; and an abiding respect for the powers of the legislative and the executive branches of our government.

In conducting its evaluation, the Association reviewed and analyzed information from a variety of sources: Judge Sotomayor's written opinions from her seventeen years on the circuit court and district court; her speeches and articles over the last twenty-one years; her prior confirmation testimony; comments received from the Association's members and committees; press reports, blogs and commentaries; interviews with her judicial colleagues and numerous practitioners; and an interview with Judge Sotomayor.

The Association determined that Judge Sotomayor possesses, to an exceptionally high degree, all of the qualifications enumerated in the Guidelines established by the Association for considering nominees to the United States Supreme Court: (1) exceptional legal ability; (2) extensive experience and knowledge of the law; (3) outstanding intellectual and analytical talents; (4) maturity of judgment; (5) unquestionable integrity and independence; (6) a temperament reflecting a willingness to search for a fair resolution of each case before the court; (7) a sympathetic understanding of the Court's role under the Constitution in the protection of the personal rights of individuals; and (8) an appreciation for the historic role of the Supreme Court as the final arbiter of the meaning of the United States Constitution, including a sensitivity to the respective powers and reciprocal responsibilities of the Congress and Executive.

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The Association has been evaluating judicial candidates for nearly 140 years in a non-partisan manner based upon the nominees' competence and merit. Although the Association had evaluated a number of Supreme Court candidates over the course of its history, in 1987 it determined to evaluate every candidate nominated to the Supreme Court.

In 2007, the Executive Committee of the Association moved from a two-tier evaluation system in which candidates were found to be either "qualified" or "not qualified", to a three-tier evaluation system. The ratings and the criteria that accompany them are as follows:

> **"Qualified."** The nominee possesses the legal ability, experience, knowledge of the law, intellectual and analytical skills, maturity of judgment, common sense, sensitivity, honesty, integrity, independence, and temperament appropriate to be a Justice of the United States Supreme Court. The nominee also respects precedent, the independence of the judiciary from the other branches of government, and individual rights and liberties.
>
> **"Highly Qualified."** The nominee is qualified, to an exceptionally high degree, such that the nominee is likely to be an outstanding Justice of the United States Supreme Court. This rating should be regarded as an exception, and not the norm, for United States Supreme Court nominees.
>
> **"Not Qualified."** The nominee fails to meet one or more of the qualifications above.

The present review is the first time the Association has utilized this three-tier system for a Supreme Court review.

About the Association
The New York City Bar Association (www.nycbar.org), since its founding in 1870, has been dedicated to maintaining the high ethical standards of the profession, promoting reform of the law and providing service to the profession and the public. The Association continues to work for political, legal and social reform while implementing innovative means to help the disadvantaged. Protecting the public's welfare remains one of the Association's highest priorities.

Association of
Prosecuting Attorneys

July 10, 2009

Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

Honorable Jeff Sessions
Ranking Minority Member
Committee on the Judiciary
United States Senate
335 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Sessions:

On behalf of the Association of Prosecuting Attorneys (APA), we offer our support to the Honorable Sonia Sotomayor's nomination to become the next Associate Justice of the United States Supreme Court. APA is a national "think tank" that represents all prosecutors and provides additional resources such as training and technical assistance in an effort to develop proactive innovative prosecutorial practices that prevent crime, ensures equal justice and makes our communities safer.

Judge Sotomayor's proven record as a prosecutor, private litigator, District Court Judge and Federal Appellate Judge has shown her dedication to the law, equality of justice and ensuring safer communities. Her distinguished tenure as a Federal District Court Judge would bring additional insight about the trial process to the Supreme Court.

Judge Sotomayor, with her trial experience as both a trial judge and prosecutor, would bring practical experience to the highest court in the land. Therefore, the APA fully supports Judge Sotomayor's nomination to the Supreme Court and we urge her confirmation.

Respectfully submitted,

Glenn F. Ivey
Chairman of the Board of Directors,
Association of Prosecuting Attorneys

David R. LaBahn
President and CEO,
Association of Prosecuting Attorneys

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County of Los Angeles
Sheriff's Department Headquarters
4700 Ramona Boulevard
Monterey Park, California 91754-2169

LEROY D. BACA, SHERIFF

July 7, 2009

The Honorable Patrick Leahy
Chairman, Senate Committee on the Judiciary
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Leahy:

CONFIRMATION OF JUDGE SONIA SOTOMAYOR TO THE UNITED STATES SUPREME COURT

As Sheriff of the Los Angeles County Sheriff's Department, which is the largest Sheriff's Department in the country in one of the most diverse counties in the world, I support the confirmation of Judge Sonia Sotomayor as a United States Supreme Court Associate Justice and, respectfully, urge your Committee to support her nomination.

As you know, Judge Sotomayor has had the gamut of legal experience beginning with her legal education from Yale University. Judge Sotomayor's work as an Assistant District Attorney for the New York County District Attorney's Office and her work in private practice, led to her nomination by President George H.W. Bush to the United States District Court for the Southern District of New York, for which she was confirmed by the United States Senate. She served in that capacity until President Bill Clinton nominated her to the United States Court of Appeals for the Second Circuit, followed by her second Senate confirmation.

Judge Sotomayor possesses all the traits important for service on the United States Supreme Court. Her educational background, diverse legal experience, and personal story have all contributed to her current success and will continue to positively shape her future on the United States Supreme Court.

A Tradition of Service

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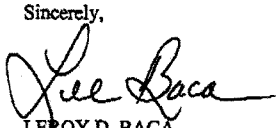
Judge Sotomayor is an excellent nominee for Associate Supreme Court Justice. I am confident that confirmation of her nomination would be a great step forward for our Supreme Court and our Country. Thank you for your service to our Country and making these critical decisions that profoundly impact our Democracy. Should you have any questions, do not hesitate to contact me directly at (323) 526-5000.

Sincerely,



LEROY D. BACA
SHERIFF

THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, NY 10007

STATEMENT OF MICHAEL BLOOMBERG
MAYOR
NEW YORK, NEW YORK

BEFORE

THE SENATE COMMITTEE ON THE JUDICIARY

ON

THE NOMINATION OF JUDGE SONIA SOTOMAYOR
TO BE ASSOCOATE JUSTICE
OF THE UNITED STATES SUPREME COURT

JULY 16, 2009

Good afternoon. Chairman Leahy, Ranking Member Sessions, and all the members of the Committee: Thank you for the opportunity to testify before you today. I am Mike Bloomberg, and I am here not only as the Mayor of New York, the City where Judge Sonia Sotomayor has spent her entire career, but also as someone who has appointed or re-appointed more than 140 judges to New York City's Criminal and Family courts. So I appreciate the job before you.

About three months ago, when President Obama invited Governors Schwarzenegger and Rendell and me to the White House to discuss infrastructure policy, I also found an opportunity to tell him what many of the best legal minds I know were telling me: Judge Sonia Sotomayor would be a superb Supreme Court Justice. I strongly believe she should be supported by Republicans, Democrats, and independents – and I should know, because I've been all three.

Judge Sotomayor has all of the key qualities that I look for when I appoint a judge. First, she is someone with a sharp and agile mind, as her distinguished record and her testimony make clear. And as a former prosecutor, commercial litigator, district court judge and appellate judge, she brings a wealth of unique experience.

Second, she is an independent jurist who does not fit squarely into an ideological box. A review of her rulings by New York University's Brennan Center found that judges on the Second Circuit Court who were appointed by Republicans agreed with her more than 90 percent of the time when overruling a lower court decision and when ruling a governmental action unconstitutional. So this is clearly someone whose decisions have cut across party lines, which is something that the Supreme Court could use more of.

And third, whether you agree or disagree with her on particular cases, she has a record of sound reasoning. In interviewing judicial candidates, I like to ask questions that have no easy answers and then listen to how they develop their responses. I want to know that they are open-minded enough to change their views if they hear compelling evidence, and to see if they can provide a strong rationale for their legal conclusion – even if I disagree with it.

The fact is, you're never going to agree with a judicial candidate on every issue. I've appointed plenty of judges whose answers I don't entirely agree with. And I should point out, Judge Sotomayor has ruled against New York City in a number of cases. So I am not here as someone who agrees with the outcome of her decisions 100 percent of the time, and I don't think that should be the standard.

I am not a lawyer or a constitutional scholar, but I think the standard should be: Does she apply the law based on rational legal reasoning and is she within the bounds of mainstream thinking on issues of basic civil rights? And on both questions, I think the answer is, unequivocally: yes.

It is impossible to know how she will rule on cases in the future, or even what those cases might be. Given that a Supreme Court Justice is likely to serve for decades, focusing on the issues du jour rather than intellectual capacity, analytical ability, and just plain common sense would miss what we as a country clearly need: someone who has the ability to provide us with

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the legal reasoning and guidance that will be necessary to navigate the uncharted waters of tomorrow's great debates. And I am very confident that Judge Sotomayor has that ability.

Finally, as the Mayor of her hometown, I should make two brief points: First, on the issue of diversity: The Supreme Court currently includes one member who grew up in Brooklyn and one who grew up in Queens. So there's no doubt that adding someone from the Bronx will improve the diversity of the court. (And if you disagree, you haven't been to Brooklyn, Queens, and the Bronx.) But seriously, Sonia Sotomayor is the quintessential New York success story.

She beat all the odds and rose to the very top. If that's not the American dream, I don't know what is. However, I don't believe she should be confirmed on the strength of her biography. But I do think her life story tells you an awful lot about her character and ability.

Second, I just want to add a caution against those who would suggest that Judge Sotomayor's service to the Puerto Rican Legal Defense and Education Fund is somehow a negative. That organization is a well-respected civil rights group in New York City, and although we have not always seen eye-to-eye on every issue, there's no question that it has made countless contributions to our City. Judge Sotomayor should be judged based on her own record, not the record of others in the group.

Thank you again for the opportunity to testify, and I urge you to confirm Sonia Sotomayor as a Justice of the United States Supreme Court.

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THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, NY 10007

July 7, 2009

The Honorable Patrick J. Leahy
Chairman, Judiciary Committee
433 Russell Senate Office Building
United States Senate
Washington, DC 20510

The Honorable Jeff Sessions
Ranking Member, Judiciary Committee
335 Russell Senate Office Building
United States Senate
Washington, DC 20510

Dear Chairman Leahy and Senator Sessions:

As Mayor of the largest city in the country and the place where Judge Sonia Sotomayor has spent her career, I strongly support President Barack Obama's nomination of Judge Sotomayor to serve as an Associate Justice of the United States Supreme Court.

One of my responsibilities as Mayor is to appoint judges to New York's Family and Criminal Courts, which gives me the opportunity to assess the qualifications of many judicial candidates. Over the past seven and half years, I have interviewed candidates for more than 40 judicial seats and have, like you, developed a strong sense of the qualities that will strengthen our justice system. Based on this experience, I have great confidence that Judge Sotomayor's rulings demonstrate her knowledge of the law, objectivity, fairness, and impartiality, which are essential qualities for any judge. Just as important, she possesses the character, temperament, intelligence, integrity, and independence to serve on the nation's highest court, and her well-respected record of interpreting the law and applying it to today's world is perhaps the best indication of her exceptional ability as a judge.

Judge Sotomayor's impressive 30-year career has given her experience in nearly all areas of the law. As an Assistant District Attorney in Manhattan, she earned a reputation as an effective prosecutor. As a Judge in the Southern District of New York, she established a record that amply supported her appointment to the Second Circuit. And in her current role as a Judge in the U.S. Court of Appeals for the Second Circuit, she is admired for her knowledge and understanding of legal doctrine, having taken part in over 3,000 panel decisions and authored close to 400 opinions. In each role, she has served the public with integrity and diligence.

Judge Sonia Sotomayor is an outstanding choice for the United States Supreme Court, and I stand firmly behind her candidacy.

Sincerely,

Michael R. Bloomberg
Mayor

MRB:crr

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Patrick J. Leahy
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

RE: Support of the Confirmation of the Honorable Sonia Sotomayor to the United States Supreme Court

Dear Senator Leahy:

The California Women Lawyers strongly supports the confirmation of Judge Sonia Sotomayor to the United States Supreme Court. A review of Judge Sotomayor's judicial record, as precisely articulated by the Women's Bar Association of New York in their statement, demonstrates a woman of many dimensions. Judge Sotomayor is highly intelligent, thoughtful and analytical. At the same time, Judge Sotomayor demonstrates an understanding of "real life" and how the opinions of the Court affect those who live by those opinions.

While much has been made about Judge Sotomayor's upbringing, her ethnicity and background and her gender, these aspects of what makes Judge Sotomayor who she is today should be viewed as enhancing her qualifications to be a Supreme Court Justice. Judge Sotomayor is a strong, independent woman of color who matured from such humble roots to become a respected and honored jurist who clearly has committed herself to public service. There is no doubt that Judge Sotomayor will continue on her path of excellence and of judicial independence. Undoubtedly, she has the intellect and will to evaluate the law and the facts and come to a fair decision.

For more than 35 years, the California Women Lawyers has served as the voice for more than 30,000 women attorneys and judges in the State of California. It is with that voice that we express our support for the confirmation of Judge Sonia Sotomayor. We request that our Letter of Support be entered into the Confirmation Hearing Record.

If we can be of any further assistance, please do not hesitate to contact us.

Sincerely

Jean M. Pledger

Jean Pledger
President

Affiliates: Black Women Lawyers Association of Los Angeles; Fresno County Women Lawyers; Kern County Women Lawyers Association; Lawyers Club of San Diego; Monterey County Women Lawyers; Napa County Women Lawyers; Orange County Women Lawyers; Queen's Bench; Santa Barbara Women Lawyers; Women Lawyers Section of Santa Clara Bar Association; Women Lawyers Association of Los Angeles; Women Lawyers Association of San Luis Obispo County; Women Lawyers of Alameda County; Women Lawyers of Long Beach; Women Lawyers of Sacramento; Women Lawyers of Santa Cruz County

TESTIMONY

of

Chuck Canterbury

President,

National Fraternal Order of Police

on

the Nomination of Sonia M. Sotomayor to be an Associate Justice of the Supreme Court of the United States

before the

Senate Committee on the Judiciary

16 July 2009

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Good morning, Mr. Chairman, Ranking Member Sessions, and distinguished Members of the Committee on the Judiciary. As National President of the Fraternal Order of Police I am the elected spokesperson of more than 327,000 rank-and-file police officers—the largest law enforcement labor organization in the United States.

I am very pleased to have this opportunity to testify in support of the nomination of Judge Sonia M. Sotomayor to the Supreme Court of the United States.

Before I begin I would like to thank you Mr. Chairman for the invitation to appear this morning. The FOP is grateful for your steadfast leadership and for your strong support of the law enforcement community.

Speaking as a law enforcement officer, I think it says a lot about the character of a young person, who won a scholarship to Princeton University, graduated *summa cum laud*, and then graduated from Yale Law School to accept as her first job in the legal field that of poorly paid prosecutor in the District of Manhattan–especially at a time when crime in our urban centers was increasing at an alarming rate. Yet this is exactly what Judge Sotomayor did.

She spent five years with that office, prosecuted many criminal cases, including a triple homicide. In this time, she put a lot of bad guys behind bars and forged an excellent working relationship with the men and women working the beat in Manhattan. She earned their respect and a reputation as being tough, which in our profession is a compliment.

After several years in private practice, Judge Sotomayor was nominated to the U.S. District Court for the Southern District of New York by President George H.W. Bush in 1992. In 1998, she was named to the U.S. Court of Appeals for the Second Circuit, one of the most demanding circuits in the country, by President William J. Clinton. As an appellate judge, she has participated in over 3,000 panel decisions and authored roughly 400 opinions, handling difficult issues of constitutional law, complex procedural matters, and lawsuits involving complicated business organizations.

Some of Judge Sotomayor's critics have pounced on a few of these decisions as well as some comments made during speaking engagements and have engaged in some pretty wild speculation as to what kind of Supreme Court Justice she will make.

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

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

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

Over the course of Judge Sotomayor's career, she has analyzed each case on its merits. In fact, the *Washington Post* recently ran an article which noted that she went into "uncommon detail" when reviewing and ruling on the cases which came before the appellate court. To me, that's evidence of a strong commitment to duty and to the law–two characteristics we should all expect from a judge.

Let me cite a few cases with which I am familiar because they deal with issues that every beat cop in the United States has dealt with in the real world. In *United States v. Falso*, an offender indicted on 242 counts relating to child pornography sought to have the evidence against him thrown out because the search warrant sworn out against him lacked probably cause. Judge Sotomayor's ruling held that the error was "committed by the district court in issuing the warrant, not by the officers who executed it." The conviction was upheld.

Similarly, in *United States v. Santa* she ruled that law enforcement officers executing a search of a suspect based on an arrest warrant they believe to be active and valid should not result in the suppression of evidence even if the warrant had, in fact, expired. In *United States v. Howard*, she overturned the district court's decision to suppress evidence of drug trafficking by finding warrantless automobile searches to be constitutional.

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

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

Law enforcement officers have to make difficult decisions every day, many of which involve enforcing the law and safeguarding the rights of a suspected offender.

Judge Sotomayor clearly demonstrates she understands the fine line that officers must walk and, in her rulings, reflect a working knowledge–not a theoretical knowledge–of the everyday realities of law enforcement work. After reviewing her record, I can say that Judge Sotomayor is a jurist in whom any beat cop could have confidence.

It is for this reason that the Executive Board of the National FOP unanimously voted to support her nomination to the Supreme Court.

I believe that the President has made a fine choice in Sonia M. Sotomayor for the Supreme Court of the United States.

I also want to emphasize that, in addition to the FOP, all major law enforcement organizations have announced their support for her nomination.

She is clearly well-qualified and also possesses the requisite knowledge, experience, and legal acumen to serve on our nation's highest court and I hope the Committee will send her nomination to the Senate floor as expeditiously as possible.

Thank you again, Mr. Chairman, for the invitation to appear today, and to all the Members of the Committee for their kind attention. I would be pleased to answer any questions you may have.

Statement of

The Honorable Benjamin L. Cardin

United States Senator
Maryland
July 13, 2009

U.S. SENATOR BENJAMIN L. CARDIN (D-MD)
CONFIRMATION HEARING FOR JUDGE SONIA SOTOMAYOR
TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES
OPENING STATEMENT – AS DELIVERED
JULY 13, 2009

Judge Sotomayor, welcome to the United States Senate. I think you you'll find that each member of this Committee and each member of the United States Senate wants to do what's right for our country. Now we may differ on some of our views, as will come out during this hearing, but I think we all share a respect for your public service. Thank you for your willingness to serve on the Supreme Court of the United States and thank your family for the sacrifices they have made.

I am honored to represent the people of Maryland in the U.S. Senate, and to serve on the Judiciary Committee, as we consider one of our most important responsibilities – whether we should recommend to the full Senate the confirmation of Judge Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States.

The next term of the Supreme Court that begins in October is likely to consider fundamental issues that will impact the lives of all Americans. In recent years, there have been many important cases decided by the Supreme Court by a 5-4 vote. Each Justice can play a critical role in forming the needed consensus in our nation's highest court. A new Justice could – and very well may – have a profound impact on the direction of the court.

Supreme Court decisions affect each and every person in our nation. I think of my own family's history. My grandparents came to America more than 100 years ago. I am convinced that they came to America not only for greater economic opportunities, but because of the ideals expressed in our Constitution, especially the First Amendment guaranteeing religious freedom. My grandparents wanted their children to grow up in a country where they were able to practice their Jewish faith and fully participate in their community and government. My father, one of their sons, became a lawyer, state legislator, circuit court judge and President of his synagogue. And now his son serves in the U.S. Senate.

While our Founding Fathers made freedom of religion a priority, equal protection for all races took longer to achieve. I attended Liberty School No. 64, a public elementary school in Baltimore City. It was part of a segregated public school system that – under the law – denied

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every student in Baltimore the opportunity to learn in a classroom that represented the diversity of our community.

I remember with great sadness how discrimination was not only condoned but, more often than not, actually encouraged against Blacks, Jews, Catholics, and other minorities in the community. There were neighborhoods that my parents warned me to avoid for fear of my safety because I was Jewish. The local movie theater denied admission to African Americans. Community swimming pools had signs that said "No Jews, No Blacks Allowed." Even Baltimore's amusement parks and sports clubs were segregated by race. Then came Brown v. Board of Education and, suddenly, my universe and community were changed forever.

The decision itself moved our nation forward by correcting grievous wrongs that were built into the law. It also brought to the forefront of our nation's consciousness a great future jurist from Baltimore – Thurgood Marshall. Marshall had been denied admission to the University of Maryland Law School due to the color of his skin but went on to represent the plaintiffs in the 1954 landmark Brown vs. Board of Education. And in 1967, it was Marshall – the grandson of a slave – who was appointed by President Lyndon Johnson as the first African American to serve on the Supreme Court.

The nine justices of the United States Supreme Court have the tremendous responsibility of safeguarding the framers' intent and the guiding values of our Constitution, while ensuring the protections and rights found in that very Constitution are applied to and relevant to the issues of the day. At times, the Supreme Court has and should look beyond popular sentiment to preserve these basic principles and the rule of law. The next justice, who will fill Justice Souter's place on the court, will be an important voice on these fundamental issues.

It is my belief that the Constitution and Bill of Rights were created to be living documents that stand together as the foundation for the rule of law in our nation. Our history reflects this. When the Constitution was written, African Americans were considered property and counted only as three-fifths of a person. Non-whites and women were not allowed to vote. Individuals were restricted by race as to whom they could marry. Laws passed by Congress and decisions by the Supreme Court undeniably moved our country forward, continuing the progression of Constitutional protections that have changed our Nation for the better.

Before the Court ruled in Brown vs. Board of Education that "separate was not equal," the law permitted our society to have separate facilities for black and white students. Before the Court ruled in Loving vs. Virginia, a state could prohibit persons from marrying based on race. Before the Court ruled in Roe vs. Wade, women had no constitutional implied right to privacy. These are difficult questions that have come before the Court, and that the Framers could not have anticipated. New challenges will continue to arise but the basic framework of protections remains.

I want to complement President Obama in forwarding to the United States Senate a nominee, Judge Sonia Sotomayor, who is well qualified for our consideration. Her well-rounded background, including extensive experiences as a prosecutor, trial judge and appellate judge, will prove a valuable addition to our nation's highest court.

As a relatively new member of the Senate Judiciary Committee, as I prepared for this week, I considered a few key standards that apply to all judicial nominations. First, I believe nominees must have an appreciation for the Constitution and the protections it provides to each and every American. She (or he) must embrace a judicial philosophy that reflects mainstream American values, not narrow ideological interests. They should have a strong passion to continue the Court's advancements in Civil Rights. There is a careful balance to be found here: our next Justice should advance the protections found in our Constitution, but not disregard important precedent that has made our society stronger by embracing our civil liberties. I believe judicial nominees also must demonstrate a respect for the rights and responsibilities of each branch of government. These criteria allow me to evaluate a particular judge and whether she or he might place their personal philosophy ahead of the responsibility of the office.

As this Committee begins considering the nomination of Sonia Sotomayor, I want to quote Justice Thurgood Marshall, who said, "None of us got where we are solely by pulling ourselves up by our bootstraps." Judge Sotomayor is a perfect example of how family, hard work, supportive professors and mentors, and opportunity all can come together to create a real American success story.

She was born in New York, to a Puerto Rican family, and grew up in a public housing project in the South Bronx. Her mother was a nurse and her father was a factory worker with a third-grade education. She was taught early in life that education is the key to success, and her strong work ethic enabled her to excel in school and graduate valedictorian of her high school. She attended Princeton University, graduating cum laude and Phi Beta Kappa, and she received the highest honors Princeton awards to an undergraduate. At Yale Law School, she was editor of the Law Review, where she was known to stand up for herself and not to be intimidated by anyone.

Nominated by both Democratic and Republican presidents, for 17 years she has been a distinguished jurist and now has more federal judicial experience than any Supreme Court nominee in the last hundred years.

This week's hearings are essential. With some understanding of the context of Judge Sotomayor's life and the role that she potentially is about to fill on the Supreme Court, I believe it is particularly important during this confirmation hearing to question Judge Sotomayor on the guiding principles she would use on reaching decisions. For example, it is important for me to understand her interpretation of "established precedent" on protecting individual Constitutional rights. I believe it would be wrong for Supreme Court Justices to turn their back on landmark Court precedents protecting individual Constitutional rights.

It is likely that the Supreme Court will consider important protections in our Constitution for women, our environment and consumers, as well as voting rights, privacy, and the separation of church and state, among others, in coming years. The Supreme Court also has recently been active in imposing limits on executive power. It will continue to deal with the Constitutional rights in our criminal justice system, the rights of terror detainees and the rights of non-citizens.

All of these issues test our Nation's – and the Supreme Court's – commitment to our founding

principles and fundamental values. For this reason, we need to know how our nominee might approach these issues and analyzes these decisions.

Mr. Chairman, I look forward to hearing from Judge Sotomayor on these issues and I expect that she will share with this Committee, and the American People, her judicial views and her thoughts on the protections in our Constitution.

Once again, I want to thank Judge Sotomayor for her public service and readiness to take on this great responsibility for our Nation. And again, I also wish to thank her family for their clear support and sacrifice that has brought us to this hearing today.

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Carol Tavris, Ph.D. – Fellow, American Psychological Assn.
Lionel Tiger, Ph.D. – Prof. (Anthropology), Rutgers Univ.

Questions for Nominee Judge Sotomayer
Submitted via fax 202 224-9516

July 09 2009

The Honorable Patrick J. Leahy, Chairman
Committee on the Judiciary
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Jeff Sessions
Committee on the Judiciary
United States Senate
335 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Sessions:

The Center for Inquiry writes to express our support for the Confirmation of Judge Sonia Sotomayor as Associate Justice of the Supreme Court of the United States. In her seventeen years of service to date as a federal trial and appellate judge, and throughout the course of her entire career, Judge Sotomayor has strongly distinguished herself through her outstanding intellectual credentials and her deep respect for the rule of law, establishing herself beyond question as fully qualified and ready to serve on the Supreme Court.

The Center is concern with and committed to science, reason, free inquiry, secularism, and planetary ethics.

We respectfully submit the following questions for consideration for Judge Sotomayer:

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1) Does the Establishment Clause requires neutrality with respect to religion and non-religion, meaning that government may not act in any way that would favor religion in general over non-religion; or does the Establishment Clause merely require that government may not favor any one religion over others?

2) What test or tests should the Court apply in Establishment Clause cases: the three-part *Lemon* test, Justice O'Connor's "endorsement test," Justice Kennedy's "coercion test," or some other test or combination of tests? In what way does the answer depend on the nature of the issue before the Court?

3) Does the Free Exercise clause ever make it necessary for the government to carve out exceptions to generally applicable laws that burden an individual's ability to exercise his or her religious belief, such that religious believers can avoid complying with laws that are binding on everyone else?

4) Does she support the central holding of *Roe v. Wade*, and would she deem all subsequent cases that narrowed the scope of *Roe*

5) Does she support the ruling in the 1989 case of *Texas v. Johnson* that mere offensiveness of a form of expression cannot be a basis for banning it, such that the First Amendment protects the right to burn an American flag, in protest, as long as the individual flag so destroyed is not the property of someone else?

We know that your work is cut out for you with these hearings. Thank you for all you do for the American people and for your time and consideration in this matter.

Sincerely,

Toni Van Pelt

Toni Van Pelt
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TESTIMONY OF

LINDA CHAVEZ

CHAIRMAN, CENTER FOR EQUAL OPPORTUNITY

BEFORE THE

SENATE JUDICIARY COMMITTEE

REGARDING THE

NOMINATION OF JUDGE SONIA SOTOMAYOR

TO THE UNITED STATES SUPREME COURT

July 16, 2009

Introduction

Thank you, Mr. Chairman, for the opportunity to testify before you today regarding the nomination of Judge Sonia Sotomayor to be an Associate Justice on the United States Supreme Court.

I testify today not as a wise Latina woman, but as an American who believes that skin color and national origin should not determine who gets a job, promotion, or public contract, or who gets into college or receives a scholarship.

My name is Linda Chavez, and I am chairman and founder of the Center for Equal Opportunity, a nonprofit research and educational organization that focuses on public policy issues that involve race and ethnicity, including civil rights, bilingual education, and immigration and assimilation policies.

I have served as Staff Director of the U.S. Commission on Civil Rights (1983-1985), and Chairman of the National Commission on Migrant Education (1988-1992). In 1992, I was elected by the United Nations' Human Rights Commission to serve a four-year term as U.S. Expert to the U.N. Sub-commission on the Prevention of Discrimination and Protection of Minorities, and I was Co-Chair of the Council on Foreign Relations' Committee on Diversity from 1998-2000. Finally, I am the author of, among other books, *Out of the Barrio: Towards a New Politics of Hispanic Assimilation* (Basic Books 1991).

Why You Should Not Vote To Confirm This Nominee

My message today is straightforward, Mr. Chairman: Do not vote to confirm this nominee. I say this with some regret, because I believe Judge Sotomayor's personal story is an inspiring one, which proves that this is truly a land of opportunity where accidents

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of birth and class do not determine whether you can succeed. Unfortunately, based on her statements both on and off the bench, I do not believe Judge Sotomayor necessarily shares that view. It is clear from Judge Sotomayor's record that she has drunk deep from the well of identity politics. I know a lot about that well, and I can tell you that it is dark and poisonous. It is, in my view, impossible to be a fair judge and also believe that one's race, ethnicity, and sex should determine how someone will rule as a judge. Yet, Judge Sotomayor has repeatedly said that race, ethnicity and gender are determinants of one's point of view. She has said, for example, that "[w]hether born from experience or inherent physiological or cultural differences, a possibility" that, she said, she "abhor[ed] less or discount[ed] less" than some of her colleagues, she believed that "gender and national origins may and will make a difference in our judging." She added, "I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage."[1] If there were any doubt that Judge Sotomayor's embracing of identity politics has fatally compromised her ability to be a good judge, those doubts should be laid to rest by the way she handled the New Haven firefighters case, *Ricci v. DeStefano*, which has already been extensively discussed at these hearings and which I discuss below.

Judge Sotomayor and Identity Politics

The nominee was bitten by the identity politics bug at an early age. She was an affirmative action activist as an undergraduate, pushing for race-based hiring goals and timetables for faculty hiring.[2] She proudly insists that she was admitted to Princeton because of affirmative action. In her senior thesis, she took a Puerto Rican nationalist position and refused to call the U.S. Congress by its proper name; instead, referring to

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this body as either the "North American Congress" or the "mainland Congress." As one history professor noted, "This kind of rhetoric was very trendy, and not uncommon, among the Latin Americanist fringe of the academy."[3] And she continued her activism as a student at Yale Law School, protesting when a law-firm interviewer asked a politically incorrect question about affirmative action.

Her commitment to identity politics is perhaps best exemplified by her long association with the Puerto Rican Legal Defense and Education Fund and its many controversial causes. She urged quota-seeking lawsuits challenging civil-service exams, seeking race-conscious decision-making similar to that used by the city of New Haven in the now infamous firefighters case.[4] She opposed the death penalty as racist.[5] She made dubious legal arguments in support of bilingual education and, more broadly, in trying to equate language requirements with national origin discrimination.[6] Elsewhere she supported race-based government contracting.[7] She also said, "America has a deeply confused image of itself"[8]—apparently because most Americans think that the celebration of diversity should not include politically correct discrimination. The list is endless.

Nor can she distance herself from this mindset by claiming that the Puerto Rican Legal Defense and Education Fund's positions were not her own, because her own extensive extrajudicial writings and speeches make clear that she shared these views. The example that has received the most attention is her "Wise Latina" speech at Berkeley, the revelation of which would have resulted in the immediate and embarrassed withdrawal of the nomination had she been a white male expressing the view that "differences in logic and reasoning" are hardwired according to ethnicity and sex.

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The "Wise Latina" speech was no anomaly. Rather, its themes had been declared before and would be declared again later. Consider, for example, the following statement from Judge Sotomayor: "Since I have difficulty defining merit and what merit alone means, and in any context, whether it's judicial or otherwise, I accept that different experiences in and of itself, bring merit to the system. . . . I think it brings to the system more of a sense of fairness when these litigants see people like myself on the bench."[9]

Implicit in Judge Sotomayor's criticism of the "underrepresentation" of Latinos, blacks, and women in various jobs is the notion that these groups are somehow entitled to proportional representation. She complained in 2001, for example, that Latino judges made up "only 10 out of 147 active Circuit Court judges and 30 out of 587 active district court judges. Those numbers are grossly below our proportion of the population."[10] The first problem with this line of reasoning is that so few Latinos have completed college, much less law school, which is generally a prerequisite for becoming a judge. In 2000, the American Bar Association estimated that only 3.4 percent of attorneys were Latino, suggesting, that if anything, Latinos were somewhat overrepresented on the federal bench compared to their availability in the pool from which judges are selected.

But this whole way of looking at the world is deeply troubling. If some groups are "underrepresented" in certain fields, then logically, others are "overrepresented." But who decides how many is too many? According to a study by the National Science Foundation, Asian Americans earn almost 7 percent of advanced degrees in science and engineering and more than 8 percent of the undergraduate degrees in those areas, despite being only about 4 percent of the population.[11] Should we limit the number of Asian Americans who may go into these fields in order to ensure that more Latinos and blacks

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be represented? And if we adopt proportional representation as our goal, how do we achieve it short of setting racial, ethnicity, and gender quotas? And in this era when increasing numbers of Americans are multi-racial, who determines when a person "counts" as black or Latino or Asian or white?

But even if Judge Sotomayor rejects strict racial and ethnic quotas, as she certainly must if she is to adhere to the plain meaning of civil rights laws and the Constitution, she appears to be solidly in favor of preferential treatment based on national origin. For instance, the *New York Times* reports that she "rejected the proposition that minorities must become advocates of 'selection by merit alone.'" She seems deeply suspicious of standardized testing, and sees nothing wrong with ignoring test results in order to give preference to underrepresented groups, as the city of New Haven did in the *Ricci* case, despite having invested considerable time and money ensuring that the test was not racially or culturally biased. Judge Sotomayor's views may be based on her own history; she proudly insists that she benefited from such preferential treatment, noting that her own test scores were not equal to her peers' at Princeton and Yale. She also has admitted that, while serving on the board of the Puerto Rican Legal Defense and Education Fund, she encouraged "cases attacking civil service testing."[12]

From Identity Politics to Identity Judging

A straight line can be drawn from identity politics to identity judging—that is, to a particularly noxious kind of judicial activism.

Judicial activism occurs when a judge ignores the text of the Constitution or other law and instead follows his or her own policymaking preferences. It can involve making up something that *isn't* in the law, or ignoring something that *is* there. We would not

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accept a President who refused to follow the law, and it baffles me that some people seem happy to confirm judges who share the same inclination.

If Judge Sotomayor believes that her ethnic and gender identity make her better qualified than others to be a federal judge, then she ought to explain how this identity helps her in interpreting legal texts. She has never done that, and of course the reason why is obvious: She doesn't believe that her ethnic and gender identities help her in reading a constitutional or statutory provision. But she does seem to believe that those identities should be injected into her judicial decision-making, instead of or in addition to her reading of the law.

Will Judge Sotomayor engage in judicial policymaking as an Associate Justice? Of course she will: She was caught on tape admitting that she already does so as a court of appeals judge, when she said that the "appeals court is where policy is made." She followed her statement with a wink and a nod, adding: "I know this is on tape and I should never say that because we don't make law, I know. OK, I know. I'm not promoting it, and I'm not advocating it, I'm -- you know. OK. Having said that, the court of appeals is where, before the Supreme Court makes the final decision, the law is percolating -- its interpretation, its application."[13]

And in her "Wise Latina" speech, she suggested that she cannot really be "objective," that "impartiality" is at best an "aspiration," that even morality is "relative," that "there can never be a universal definition of wise," and that "[p]ersonal experiences affect the facts that judges choose to see."[14] All of this is perfectly consistent with judicial activism, and none of it is consistent with the rule of law. And indeed she has written that it is a "public myth that law can be certain and stable."[15]

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Exhibit A: Ricci v. DeStefano

For evidence that Judge Sotomayor's identity politics has infected her judging, we need look no further than the New Haven firefighters case, *Ricci v. DeStefano*. The Committee is, I'm sure, quite familiar by now with the case, so I'll just describe it briefly. The plaintiffs were applicants for promotion in the fire department of New Haven, Connecticut. The city administered a test, but then decided to throw out the results because too many whites, and not enough African Americans, did well on it. The white and Latino firefighters who had earned promotions then sued, arguing that they had been discriminated against on the basis of race, in violation of Title VII of the 1964 Civil Rights Act and the U.S. Constitution.

Now, as I noted earlier, judicial activism can involve ignoring a guarantee that *is* in the Constitution or a statute as well as making up one that is not in it. That's what Judge Sotomayor did in *Ricci*.

The text of Title VII is a litany of prohibitions directed at employers to ensure that they not make decisions in their treatment of employees based on race and ethnicity (as well as sex and religion). The statute also says that testing is permissible and that nothing in the law requires racial or ethnic balancing in the workplace.

Yet Judge Sotomayor ruled that it violated no law for New Haven to throw out the results of a promotion test because the city didn't like the racial and ethnic composition of the group of firefighters who passed the test. In order to do so, she ignored the main thrust of Title VII and seized on one small subsection, which makes it possible for employers to be sued if they use a selection device that has a significant "disparate

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impact" on the basis of race or ethnicity, unless that device is "job related for the position in question and consistent with business necessity."

But it is very odd to seize upon a relatively small part of Title VII and read it in a way that swallows the antidiscrimination focus of the overwhelming bulk of the statutory scheme. Such a reading not only undermines Title VII, but also the Constitution, which forbids government employers from denying "the equal protection of the laws." There is nothing in the Constitution's text that suggests an exception when the discrimination is of a politically correct variety.

As you know, the Supreme Court reversed Judge Sotomayor and ruled 5-4 in favor of the firefighters. Even the dissenting justices did not endorse the approach taken by the lower courts, which dismissed the plaintiffs' claims without a full hearing. What's more, President Obama's own legal experts thought that the Second Circuit's decision was wrong, in light of the evidence that the city's actions were motivated, not by any real legal concerns, but by nothing but racial politics. So the Justice Department's brief also urged that Judge Sotomayor's decision be reversed and sent back for more work.

Furthermore, the attempt by Judge Sotomayor's panel to sweep the case under the rug—first with a summary order, and then withdrawing that and issuing a terse per curiam opinion which did not even mention the plaintiffs' equal-protection claims—was unconscionable. Such dispositions are typically limited to cases that raise unimportant or well-settled matters; the New Haven case was neither. After all, it prompted, sua sponte, an impassioned protest from other Second Circuit judges (led by another Democratic appointee, Jose Cabranes), and was granted review by the Supreme Court,which happens in only a tiny percentage of cases the Court sees.

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And is there some reason to suppose that this distortion of the legal texts involved—and the procedurally dubious disposition of the case—was driven by Judge Sotomayor's personal policy preferences, the definition of judicial activism? Alas, yes.

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

Conclusion

Let me conclude by noting that *Ricci* is not the only civil-rights related case in which Judge Sotomayor reached a dubious conclusion. She has opined in en banc dissents, for example, that the Voting Rights Act may require states to allow prison inmates to vote, and that a witness's identification of an assailant may be unconstitutional racial profiling in violation of the Equal Protection Clause if race is an element of that identification.

Moreover, if a judge is an activist in one area, it is likely that she will be an activist in other areas, too. And, sure enough, the Committee has heard and will hear abundant testimony that the problems with Judge Sotomayor's jurisprudence are not limited to the civil rights area, but extend to property rights, campaign finance, and the Second Amendment, to give just a few examples.

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Finally, let me add a few words about the confirmation process. One often hears that the Senate should defer to the President's choices about who should be "on his team." There may be some truth to that for Executive Branch appointments, but not for the judiciary, for the simple reason that those nominees are not part of the President's team—rather, they are members of a separate branch of government.

Second, this is not a situation where the individual being scrutinized is innocent until proved guilty beyond a reasonable doubt. Something closer to the contrary is the truth: If you have reasonable doubts about the job the nominee will do, then you should not confirm her. This is a lifetime appointment to an extraordinarily powerful position, and it makes no sense to roll the dice in that situation.

Thank you again for the opportunity to testify today, Mr. Chairman, and I look forward to answering any questions you may have.

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[1] Judge Sonia Sotomayor, 2001 Judge Mario G. Olmos Memorial Lecture at the University of California, Berkeley, text reprinted in the New York Times, May 14, 2009.
[2] Washington Post, June 1, 2009, p. A4.
[3] Stuart Taylor, "Grading Sotomayor's Senior Thesis," The National Journal Online, June 2, 2009.
[4] Jess Bravin, "Sotomayor Helped Push Minority Cases," Wall Street Journal, July 2, 2009.
[5] March 24, 1981, Memorandum to PRLDEF Board of Directors.
[6] See, for example, http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/upload/Supplemental-Attachment-2-10-10-80-PRLDEF-Letter.pdf and http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/upload/Supplemental-Attachment-3-3-81-PRLDEF-Document.pdf.
[7] See: http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/upload/Supplemental-Attachment-31-SONYMA-Admin-Personnel-Minutes.pdf.
[8] Op. cit. Olmos Memorial Lecture.
[9] Charlie Savage, "Videos Shed New Light on Sotomayor's Positions," New York Times, June 11, 2009.
[10] Op. cit. Olmos Memorial Lecture.
[11] National Science Foundation, Science and Engineering Degrees by Race/Ethnicity of Recipients 1989-1997. The percentage represents U.S. citizens and permanent residents only by race/ethnicity and does not include those foreign students who are on temporary student visas.
[12] James Oliphant et al., "Sotomayor Embracing Affirmative Action, Then and Now," Los Angeles Times, June 15, 2009.
[13] February 25, 2005, Duke University Law School forum.
[14] Op. cit. Olmos Memorial Lecture.
[15] "Halfway to the Supremes," The Washington Times, June 19, 2009, editorial quoting 1996 Suffolk U.L. Rev.

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WILLIAM JEFFERSON CLINTON

July 14, 2009

The Honorable Patrick J. Leahy
Chairman, United States Senate Judiciary Committee
433 Russell Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

I write respectfully to urge the Senate's speedy confirmation of the Honorable Sonia Sotomayor as Associate Justice of the Supreme Court of the United States.

I had the privilege to name Judge Sotomayor to a position in the Federal Judiciary. On that occasion, she was a trailblazer as the first Latina nominated to a U.S. Circuit Court. As the first Hispanic nominee to the U.S. Supreme Court, Judge Sotomayor once again breaks new ground. If confirmed, Justice Sotomayor will be the second jurist in history nominated to three judgeships by three different Presidents. I am very proud of our nation at this auspicious moment.

It is my hope that Judge Sotomayor will join the Supreme Court, where she can make a unique contribution through her experience as a state prosecutor and a trial judge. Her compelling life story, being raised by a single mother of modest means who instilled in her the values of hard work and educational achievement, is the true embodiment of the American Dream.

I congratulate President Obama for selecting an eminently qualified nominee and encourage the Senate to recognize Judge Sotomayor's outstanding qualifications and experiences, which make her worthy of the honored role of Associate Justice of the Supreme Court of the United States.

Sincerely,

Bill Clinton

cc: The Honorable Jeff Sessions
Ranking Member, United States Senate Judiciary Committee

THE CLUB FOR GROWTH

July 14, 2009

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman and Ranking Member:

I write to express our concern regarding Judge Sonia Sotomayor's views on property rights and to urge all members of the Judiciary Committee to fully explore Judge Sotomayor's views and record to ensure she would not erode property ownership rights that are central to our freedoms and our economic system.

We were greatly troubled by the Second Circuit's 2006 decision in Didden v. Village of Port Chester. Judge Sotomayor sat on the panel that issued the unsigned opinion in this case. In Didden, the plaintiff property owners filed an action alleging that the Village of Port Chester's condemnation of their private property violated their Fifth Amendment rights. Port Chester had categorized a parcel of land within the village as a "redevelopment district" and had appointed a designated developer with authority to condemn property within the district. The plaintiffs wished to construct a pharmacy on their land, part of which lay within the redevelopment district. However, when they conveyed their plan to the developer, he threatened to condemn the plaintiffs' property if they would not promise to pay him $800,000 or give him a partnership interest in the project. When the plaintiffs refused to comply with the developer's threat, he condemned their property.

Despite obvious signs of corruption and Port Chester's tortured defense that the condemnation amounted to a "public use," the Second Circuit panel denied the plaintiffs' right to recover. Although it dismissed the case on procedural grounds, the court also addressed the merits of the plaintiffs' Fifth and Fourteenth Amendment claims. It stated that "we agree with the district court that [the developer's] voluntary attempt to resolve [the plaintiffs'] demands was neither an unconstitutional exaction in the form of extortion nor an equal protection violation."

The Second Circuit's decision in Didden expanded the government's ability to condemn property for public use even beyond that established by the Supreme Court's horribly misguided decision in Kelo v. City of New London. Despite weakening property rights

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protections by broadly defining "public use," Kelo constrained the government's ability "to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." The circumstances underlying Didden, however, suggest that Port Chester's rationale for condemning the plaintiff's private property was very much a "pretext of a public purpose." The Second Circuit's willingness to abolish nearly all restraints on the government's condemnation power in Didden sets a dangerous precedent for future litigation.

The Second Circuit's tacit approval of such a blatant abuse of government authority and its unwillingness to impose reasonable limits on the Village of Port Chester's condemnation power signify an alarming trend in Fifth Amendment jurisprudence. We are concerned that, if Judge Sotomayor is confirmed to the Supreme Court, she will exercise a similarly dismissive approach to the protection of property rights.

We ask you to very carefully consider Judge Sotomayor's participation in Didden v. Village of Port Chester and question her closely on the meaning of the Fifth Amendment during her confirmation hearing.

Sincerely,

Chris Chocola
President

CC: The Honorable Herb Kohl
The Honorable Orrin G. Hatch
The Honorable Dianne Feinstein
The Honorable Charles E. Grassley
The Honorable Russell D. Feingold
The Honorable Jon Kyl
The Honorable Charles E. Schumer
The Honorable Lindsey Graham
The Honorable Richard J. Durbin
The Honorable John Cornyn
The Honorable Benjamin L. Cardin
The Honorable Tom Coburn
The Honorable Sheldon Whitehouse
The Honorable Amy Klobuchar
The Honorable Edward E. Kaufman
The Honorable Arlen Specter
The Honorable Al Franken

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June 19, 2009

Ken Starr backs Sotomayor court bid

Posted: 03:30 PM ET

From CNN Political Research Director Robert Yoon

LOS ANGELES, California (CNN) — Although several prominent conservatives such as former House Speaker Newt Gingrich and talk show host Rush Limbaugh have been sharply critical of Sonia Sotomayor and her nomination to the Supreme Court, President Obama's first high court pick has won the support of at least one high-profile conservative legal figure: Kenneth Starr, the former federal judge who led the investigation that ultimately lead to the impeachment and trial of President Bill Clinton.

"I'm very much an admirer of her, and I'm supporting the nomination," Starr said Thursday at a law and journalism conference at Loyola Law School in Los Angeles. "I think that's a very wise and sound nomination of our president."

Starr, the former independent counsel for the Whitewater and Monica Lewinsky investigations of the 1990s, told reporters after the event that he has voiced his support to at least two U.S. senators, whom he declined to name, but has not been asked to write an official letter of endorsement.

He also addressed comments that Sotomayor made in a 2001 speech at the University of California at Berkeley, in which she said, "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."

"She has said some things, hasn't she, that suggest, well, we need to pause here, hit the pause button, and let's explore this," he said. "She said what she said, and so that very much merits examination. She didn't say that in a judicial opinion, and that's very important. Let's see what she did in her judicial work, right? What was her formal work as opposed to what does she say in an important setting at Boalt Hall at Berkleley, University of California Berkeley, wherever she may have said this."

Asked by CNN to comment on Sotomayor's 2005 statement that the federal appellate courts, where she has served since 1998, is "where policy is made," Starr suggested that it is at times appropriate for judges to make policy.

"There are times when policy reasons are in fact informing the judicial process and openly so," he said, pointing to family law and to the issuing of injunctions as examples. "In that process in weighing the factors for an injunction, it is well settled that judges are in fact considering policy questions, overtly, with everyone smiling. Think about more daily administrations of the law. Family law issues. We want judges to be thinking about issues of policy and morality and so forth."

Starr served as U.S. Solicitor General under President George H.W. Bush and currently serves as the dean of Pepperdine University Law School.

Filed under: Sonia Sotomayor • Supreme Court

July 09, 2009

Dear Senator,

Concerned Women for America Legislative Action Committee (CWALAC) and its more than half a million members around the country are writing to respectfully ask that you oppose the nomination of Judge Sonia Sotomayor to the United States Supreme Court.

Sonia Sotomayor has lived the American dream. Rising from a poor childhood to being nominated to the U.S. Supreme Court, Judge Sotomayor is a testimony to the opportunities and blessings of America. But as we investigate her record, we are struck by her unwillingness to allow others to have the same opportunities that she has had.

Her record reveals she lacks the primary characteristic required of a judge: impartiality. She has used her position as a judge to deny equal opportunity to people based on their ethnicity. She worked with organizations that aggressively fought against basic human rights for preborn children and ethical rights to ensure women and girls are not coerced into abortion. She has shown disdain for property rights and elevated foreign law as a source of authority.

The U.S. Supreme Court rightfully overturned her audacious ruling that denied qualified firefighters their earned promotions. She did not even provide a legal basis for her decision, instead opting to deny the firefighters' basic rights in a single paragraph. Judge Sotomayor's judicial philosophy reflects her personal bias, as expressed in speeches and the controversial groups to which she has belonged, to discriminate against people based on their ethnicity or sex.

Judge Sotomayor's decisions, writings, and remarks call into question her impartiality, her judicial temperament, and her understanding and commitment to the Constitution. Here are a few examples:

- In a 2005 speech at Duke University Law School, Judge Sotomayor said, "The court of appeals is where policy is made."

- In a 2003 speech at Seton Hall School of Law, Judge Sotomayor said race and gender also influence the facts she *chooses* to see: "I accept the proposition that a difference will be made by the presence of women and people of color on the bench and that my experiences will affect the facts I choose to see as a judge."

CONCERNED WOMEN FOR AMERICA LEGISLATIVE ACTION COMMITTEE
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- In a 2001 symposium at UC Berkeley School of Law, Sotomayor said, "our gender and national origins may and will make a difference in our judging," while criticizing former Justice Sandra Day O'Connor for saying that "a wise old man and wise old woman will reach the same conclusion in deciding cases." Sotomayor went on to say, "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."

- Judge Sotomayor's handling of the *Ricci v. Destefano* case causes great concern. Not only did Sotomayor decide that it was appropriate for the city of New Haven to deny promotions based on race, but she dismissed in one paragraph several complex issues that took the U.S. Supreme Court 93 pages to deal with. The Court reversed Sotomayor in a 5-4 decision, with all justices agreeing that Sotomayor did not act correctly in granting summary judgment for the city.

- Sonia Sotomayor aligned herself with the most extreme abortion positions taken in America. For twelve years (1980-1992), Judge Sotomayor was an influential member of the board of the Puerto Rican Legal Defense and Education Fund who aggressively fought against basic human rights for preborn children and ethical rights to ensure women and girls are not coerced into abortion. They opposed common-sense regulations that protect patients, such as parental notification before a minor undergoes an abortion and ensuring women receive full information about abortion before undergoing the harmful procedure. They also opposed limiting taxpayer funding of groups that commit abortion. Their position is abortion-on-demand, unregulated and taxpayer funded.

- In *Didden v. Village of Port Chester* (2006) Judge Sotomayor's decision dramatically expanded the government's authority to seize land in what's been called an extortion scheme using eminent domain. The Village's chosen land developer demanded $800,000 from a property owner to "go away" or give the developer 50 percent stake in the property. If the owner refused, the developer would have the Village condemn the property. He rejected the demand. The next day the Village condemned the property and handed it to the developer. Judge Sotomayor disposed of the complex constitutional property right issues in a single paragraph in an unsigned, unpublished, summary order.

- Judge Sotomayor has advocated for courts to consider or rely on foreign law, even to interpret our Constitution. The United States of America is a representative form of government, accountable to the citizens of America. Foreign law and opinions do not represent, nor are accountable to, Americans or our Constitution. The vast legal opinions throughout the world run the gamut of ideologies and political systems, including totalitarian, Sharia, monarchies, and countless others. Judge Sotomayor would undoubtedly be drawn to ones that support her own opinions. Yet the responsibility of a judge is to surrender her opinion to the ingenious doctrines of the Constitution. Considering foreign law is a back-door way of justifying one's opinion by seeking non-American sources.

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Sonia Sotomayor has disqualified herself from the U.S. Supreme Court. Her proud insistence on denying equal justice to all is antithetical to our American system. Her unwillingness to provide Constitutional reasoning for her decisions exposes her arrogance and her disrespect for our judicial system and the people whose lives are dramatically impacted by her decisions. She fails even President Obama's controversial "empathy" test of considering how her decisions "affect the daily realities of people's lives, whether they can make a living, and care for their families, whether they feel safe in their homes. ..." Through her work as a judge and in organizations, she has denied people equal opportunity to make a living because of the color of their skin, preborn babies their right to live, women the right not to be exploited by abortionists, and property owners the right of their own property.

Impartiality and sound judicial temperament are essential for a Justice of the Supreme Court. After giving her the benefit of the doubt, an examination of Judge Sotomayor's record of supporting preferences to certain classes of people and denying equal justice to others obliges Concerned Women for America Legislative Action Committee to oppose her nomination to the U.S. Supreme Court.

We urge you to vote against her nomination.

CWALAC members consider this issue a top priority, as its ramifications affect our most basic rights. Therefore, we will be scoring the vote against the nomination of Judge Sonia Sotomayor and reporting back to the members in your state.

"Then I commanded your judges at the time, saying, 'Hear the cases between your brethren, and judge righteously between a man and his brother or the stranger who is with him. You shall not show partiality in judgment; you shall hear the small as well as the great; you shall not be afraid in any man's presence, for judgment is God's."
Deuteronomy 1:16:17

Respectfully,

Wendy Wright

Wendy Wright
President

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BEFORE THE UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

STATEMENT OF DAVID B. CONE

ON THE NOMINATION OF

SONIA SOTOMAYOR

TO BE ASSOCIATE JUSTICE TO THE

UNITED STATES SUPREME COURT

JULY 16, 2009

Thank you Chairman Leahy and also thank you members of the Committee. My name is David Cone. It is indeed an honor to appear before you again, 14 years and 5 months to the day after my first appearance. I realize many people are perhaps surprised a baseball player would be asked to testify about the nomination of a Supreme Court Justice. Probably no one is more surprised than me. But, on behalf of all Major League players, both former and current, we greatly appreciate the opportunity to acknowledge the unique role Judge Sotomayor played in preserving America's pastime.

As you know, I am not a lawyer, much less a Supreme Court scholar. I was a professional baseball player from the time I was drafted out of high school in 1981 until I retired in 2003. I broke into the Majors in 1986. During my career I pitched for my hometown team, the Kansas City Royals, the New York Mets, the Toronto Blue Jays, the Royals again, the Blue Jays again, the New York Yankees, the Boston Red Sox, and

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finally in 2003 the Mets once more. Along the way, I was lucky enough to pitch in 5 All-Star Games and 5 World Series, and was especially fortunate that my team won each of those World Series.

I was also a union member and officer. In 1994 the Executive Board of the Major League Baseball Players Association elected me the MLBPA's alternate American League Player Representative. Then the next year I became the American League Player Representative and remained in that position until 2000.

Being a proud union member came naturally. I was raised in a blue collar family in Kansas City. My father was an active member of the United Steelworkers of America. I watched as that remarkable union fought to get fair contracts for its members. I watched as my dad struggled to provide his children with the opportunity to fulfill their dreams, including mine of becoming a Major League baseball player.

Years later, after I had achieved that dream, I was able to be a part of another remarkable union, the MLBPA. As is well known, Major League baseball has a long history of acrimonious labor relations between owners and players. It was not until the 1970's that the players-- under the leadership and direction of the MLBPA's first Executive Director, the legendary Marvin Miller-- first gained the rights of free agency and salary arbitration. This meant that for the first time ever, players were able to earn what they were worth, and were able to have some choice about where and for what team they played.

The next 20 years were quite tumultuous. In quick succession we endured a spring training lockout in 1976, a short strike in spring training in 1980, a long strike in 1981, a short strike in August of 1985, and another spring training lockout in 1990. To the players, each of these disputes seemed to be grounded in the owners' desires to turn back the clock and roll back the free agency rights that the players had won. Fortunately, due in no small part to the exemplary leadership of Don Fehr, our current Executive Director, we were able to preserve the rights our predecessor had sacrificed so much to obtain.

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But the game may have experienced its darkest hours in 1994 and 1995. The owners announced their intention to obtain a salary cap, an artificial limitation on the amount players could earn. We did not believe that their proposal was fair, and could not accept it. The collective bargaining agreement had expired, and the owners refused to promise that following the season, they would continue to live by the rules of that contract. And so, believing we had no choice, the players went on strike in August of 1994.

To our surprise, the owners felt no urgency to negotiate. Before long, they announced the cancellation of the remainder of the season, which meant that there would be no World Series for the first time ever. For the players and many fans, it was one of the worst days in the game's history.

Discussions with the clubs continued throughout the fall and into the winter but proved fruitless. The owners' position never varied and, to many of us, it was clear they had little or no interest in reaching a new agreement. Still, it was a surprise when, in December 1994, the owners announced that they were unilaterally implementing new rules and conditions of employment. Those new rules included not only the owners' salary cap, but changes which they had never before even discussed, much less negotiated. We soon learned that under the new rules the core rights of free agency and salary arbitration essentially would be eliminated. And, it was announced they were preparing to start the 1995 season with so-called replacement players instead of real Major Leaguers.

Needless to say, we did not think the owners were negotiating in good faith, as they are required to do under federal law. Consequently, the Players Association went to the National Labor Relations Board. The NLRB reviewed our situation and agreed with our complaint. Following its statutory procedures, the Board went to federal court to seek an injunction against the owner's unilateral changes. The United States District Judge who drew the case was Judge Sonia Sotomayor.

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The rest is history, or at least baseball history. Judge Sotomayor found that the owners had engaged in bad faith bargaining. She issued an injunction. Her decision stopped the unilateral imposition of new terms, ended our strike, and got all of us back on the field. The words she wrote cut straight to the heart of the matter:

> "...This strike is about more than just whether the Players and Owners will resolve their differences. It is also about how the principles embodied by federal law operate. In a very real and immediate way, this strike has placed the entire concept of collective bargaining on trial.....Issuing an injunction by Opening Day is important to ensure that the symbolic value of that day is not tainted by an unfair labor practice and the NLRB's inability to take effective steps against its perpetuation."

Obviously I am not a lawyer, but from my years in baseball and my work in the union, I know how complex this case was. I know that Judge Sotomayor had only a few days to read reams of paper, absorb a very detailed set of facts, and sort through numerous intricate arguments, but she clearly understood the issues and what was at stake. She saw how important it was that the sport not resume with the cloud of an unfair labor practice hanging over it. Had the clubs resumed play without real players and then were found to have engaged in unfair labor practices, the damage would have been incalculable. Judge Sotomayor grasped not only the complexity of the case but its importance to our sport.

I should point out that her decision was upheld by a unanimous Circuit Court, a court comprised of judges appointed by different Presidents, from different parties and, as I have been told, of different judicial philosophies.

On the day he announced her appointment, President Obama observed that some have said that Judge Sotomayor saved baseball. Others may think this is an overstatement. But look at it this way: a lot of people, both inside and outside of baseball, tried to settle the dispute. Presidents, special mediators, Secretaries of Labor, members

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of Congress – all tried to help but were not successful. As all of us who were involved in the negotiations ultimately realized, it is difficult to reach an agreement if one side is not interested in finding a compromise.

With one decision, Judge Sotomayor changed the entire dispute. Her ruling rescued the 1995 season and forced the parties to resume real negotiations. It took nearly two years to reach a new agreement. But from that painful experience, after decades of lockouts and strikes, relations between owners and players finally began to change. We were able to reach a new agreement in 2002 without interrupting play, breaking a string of eight consecutive work stoppages. Today, baseball is currently enjoying a run of more than 14 years without interruption, a record that would have been impossible to conceive back in the 1990's.

Judge Sotomayor's dedication and commitment enabled her to correctly and fairly apply the law in our case. Because of her decision, baseball is in far better shape today than it was fifteen years ago. I believe all of us who love the game – players, owners, and fans – are in her debt.

If Judge Sotomayor is confirmed, maybe the rest of the country will realize, as the players did in the 1990, that it can be a good thing to have a judge in district court or a Justice on the United States Supreme Court who recognizes that the law cannot always be separated from the realities involved in the disputes being decided.

Thank you, Mr. Chairman, for this opportunity. I would be happy to answer any questions you or the Committee may have.

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Statement of

The Honorable John Cornyn

United States Senator
Texas
July 13, 2009

Sen. Cornyn's Opening Statement At Sotomayor Confirmation Hearing

WASHINGTON—U.S. Sen. John Cornyn, a member of the Senate Judiciary Committee and former Texas Supreme Court Justice, delivered his opening statement at Judge Sonia Sotomayor's confirmation hearing. Below are his remarks as prepared for delivery.

Judge Sotomayor, let me join my colleagues in extending a warm welcome to you and your family today. You have had a distinguished career as a lawyer and a judge. I enjoyed sitting down with you soon after you were nominated. And I am pleased to be able to welcome you to the Senate – and to give you an opportunity to introduce yourself to the American people.

In the history of the United States, there have been only 110 people who served on the Supreme Court. We should all stop and think about that. In more than 200 years, we have had only 110 Justices.

That means each and every Supreme Court nomination is a historic moment for our Nation. Each Supreme Court nomination is a time for a national conversation about the Supreme Court and its role. We have to ask ourselves: What is the proper direction of the Supreme Court?

To answer that, we need to recall our history. The Framers created a written Constitution to make sure our constitutional rights were fixed and certain. The state conventions who represented "We the People" looked at that written Constitution and decided to adopt it. The idea was that our rights would be written down for all to see.

This framework gave judges a role that is both unique in our form of government, and important. The role of judges was intended to be modest – that is, self-restrained and limited. Judges were not free to invent new rights as they saw fit. They were supposed to enforce what the Constitution's text says to enforce – and to leave the rest to the elected branches and to "We the People."

Over time, however, the Supreme Court has often veered off the course established by the Framers. First, the Supreme Court has invented new rights not clearly rooted in any constitutional text. For example, the Supreme Court has micromanaged the death penalty, creating new rights spun from whole cloth. It has announced constitutional rules governing everything from punitive damages to sexual activity. It has relied on international law that the

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People never adopted.

The Supreme Court has even taken on the job of defining the rules for the game of golf. (If you're curious, the case is PGA Tour v. Martin from 2001). Some people call this "judicial activism." Whatever you call it, it's pretty far from enforcing the written Constitution that the Framers proposed and the people enacted.

As the Supreme Court has invented new constitutional rights – it has often neglected the old ones. This flip side is troubling, too. Many of the original important safeguards on government power have been watered down or even ignored.

Express constitutional limitations like the Takings Clause of the Fifth Amendment, the Commerce Clause limitations in Article I, and the Second Amendment's right to keep and bear arms have been artificially limited, almost like they were written out of the Constitution. Judges just haven't enforced them like the people expected them to.

So the Supreme Court has veered off course in multiple directions. The important question today is, where should the Supreme Court go from here? I think there are two choices.

First, the Supreme Court could try to get us back on course. That is, the Court could renew its respect for our original plan of government – and return us slowly but surely to the written Constitution. The Supreme Court's recent Second Amendment decision in DC v. Heller is a good example of this.

Second, the Court could veer off course once again – and follow its own star. It could continue to depart from the written Constitution. It could further erode the established rights we have in the text of the Constitution. And it could invent even more brand new rights not rooted in the text and not agreed to by the American people.

Judge Sotomayor, the purpose of this hearing is to determine which path you would take if confirmed to the Supreme Court. Would you vote to return to the written Constitution and the laws written by the elected representatives of the people? Or would you take us even further away from the written Constitution and laws legitimated by the consent of the governed?

To help the American people understand which of these paths you would take, we need to know more about your record. We need to know more about the legal reasoning behind some of your opinions on the Second Circuit. And we need to know more about some of your public statements related to your judicial philosophy.

In looking at your opinions on the Second Circuit, we recognize that lower court judges are supposed to be bound by Supreme Court and circuit precedent. To borrow a football analogy, a lower court judge is like the quarterback who executes the plays – not the coach who calls the plays.

That means many of your cases don't tell us much about your judicial philosophy. But a few of your opinions do raise questions – because they suggest the kinds of plays you'd call if you were

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promoted to the coaching staff. These opinions raise the question: would your steer the Court in the wrong direction – by limiting the rights that generations of Americans have regarded as fundamental?

So Americans need to know whether you would limit the scope of the Second Amendment – anc whether we can count on you to uphold one of the fundamental liberties enshrined in our Bill of Rights.

We need to know whether you would limit the scope of the Fifth Amendment – and whether you would expand the definition of "public use" by which government can take private property fron one person and give it to another person.

And we need to know whether you would uphold the plain language of the Equal Protection Clause of the 14th Amendment promising that "No State shall ? deny to any person within its jurisdiction the equal protection of the laws."

Judge Sotomayor: some of your opinions suggest that you would limit some of our basic constitutional rights – and some of your public statements suggest that you would invent rights that do not exist in our written Constitution.

For example, in a 2001 speech, you argued that there is no objectivity in law, but only what you called "a series of perspectives" rooted in the life experience of each judge. In a 2006 speech, you said that judges can and even must change the law – even introducing what you called "radical change" – to meet the needs of an "evolving" society. And in a 2009 speech, you endorsed the use of foreign law in interpreting the Constitution on the grounds that it gives judges "good ideas" that "get their creative juices flowing."

Judge Sotomayor: we thank you for your candor in these speeches. Not every judicial nominee is so open about their judicial philosophy. Yet many Americans wonder what these various statements mean – and what you're trying to get at with these remarks. And many more wonder whether you are the kind of judge who will uphold the written Constitution – or the kind of judg who will veer us even further off course –and towards new rights invented by judges rather than ratified by the people.

Judge Sotomayor: These are some my concerns. I assure you that you will have every opportunity to address these concerns – and make clear which path you would take if you are confirmed to the Supreme Court. I welcome you to these hearings and I look forward to your testimony.

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For more information on Sen. Cornyn's previous statements, floor speeches and his daily questions for Judge Sotomayor, please visit the Supreme Court section of his website – also available by clicking here.

Sen. Cornyn serves on the Finance, Judiciary and Budget Committees. He serves as the top

Republican on the Judiciary Committee's Immigration, Refugees and Border Security subcommittee. He served previously as Texas Attorney General, Texas Supreme Court Justice, and Bexar County District Judge.

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Latino Business Chamber of Greater Los Angeles

June 2, 2009

Mr. Mitch McConnell
United States Senator, State of Kentucky
361-A Russell Senate Office Building
Washington, D.C. 20510

Justice Sotomayor; 47 Million Latinos and a Strong Republican Party

Dear Senators McCain and McConnell,

Both of you have demonstrated a commitment to social and economic justice that if embraced by the Republican Party would enable the GOP to be highly relevant to our nation's 47 million Latinos, including 2.5 million Latino-owned businesses. Unfortunately, many of your colleagues have decided not just to automatically block Judge Sotomayor to the United States Supreme Court, but to attack her on the very grounds that makes the Latino community so proud of her.

Judge Sotomayor's comments that as a Latino woman she would have a potentially richer perspective on which to interpret judicial precedent, is not unique to Judge Sotomayor. As you are aware, Justice Clarence Thomas who was nominated by President George H.W. Bush, made a similar point before the U.S. Senate's Judiciary Committee, that due to his race and poverty of upbringing, he would be a better justice because he has "walked in the shoes of the people who would be affected by what the Court does."

Another justice, appointed by George W. Bush, Samuel Alito, pointed out at his U.S. Senate confirmation hearing, the importance of his being an Italian-American. Justice Alito said "when I get cases about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background, religion or gender, and I do take that into account."

Since no one questions Judge Sotomayor's intellect[i], academic or judicial qualifications, the Hispanic community is likely to believe that Republican opposition is related to her being Hispanic. Similar objections were made regarding the Court's first African-American, Thurgood Marshall. Not too far in the past, criticisms of five present Republican Supreme Court justices could have been made on the grounds that they were Catholic and in four cases because they regularly attended mass (all theses justices were strongly supported by the Republican leadership, they are John G. Roberts, Samuel A. Alito, Antonin Scalia, Clarence Thomas, and Anthony M. Kennedy).

We urge you to help make the Republican Party relevant to the Latino community and ensure that the Latino community will have the same high regard for the Republican Party as it often had for Presidents Ronald Reagan and George W. Bush.

634 S. Spring Street, Suite 818, Los Angeles, CA. 90014
213-347-0008(phone) 213-347-0009 (fax) www.LatinoBusinessChamber.com

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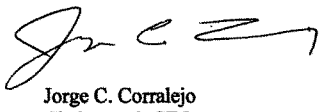
Sincerely,



Jorge C. Corralejo
Chairman & CEO
Latino Business Chamber of Greater Los Angeles

CC: U.S. Senators: Lamar Alexander, Susan Collins, John Cornyn, Lindsay Graham, Judd Gregg, Orrin Hatch, Kay Bailey Hutchinson, Jon Kyl, Patrick Leahy, Richard G. Lugar, Jeff Sessions, & Olympia J. Snowe.
CC: David Axelrod, White House Senior Advisor
CC: Rahm Emanuel, White House Chief of Staff

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[i] As Senator Jeff Sessions recently stated about Judge Sotomayor "She's smart. She's capable.... She's got the background you would look for...almost an ideal mix." Wall Street Journal, June 1, 2009.

C-SPAN®

New C-SPAN Poll:

What Americans Know About the Supreme Court, Judge Sotomayor

(July 10, 2009) - Even if they can not name her directly, two-thirds of Americans in a new C-SPAN poll are aware that Sonia Sotomayor is the first Hispanic ever to be nominated for the High Court.

Results of a survey of 1,002 voters conducted for C-SPAN on July 7th by Penn, Schoen and Berland Associates indicate that 66 percent of those surveyed knew that Judge Sotomayor is the Court's first Latina nominee, and fully 43 percent were able to correctly identify her by name. That's about as many (41 percent) who could cite Sandra Day O' Connor as the first woman to serve on the U.S. Supreme Court. Justice O'Connor served on the Supreme Court for more than 20 years, after being nominated by President Reagan in 1981.

"These are very considerable high awareness numbers. The high awareness is there because people are hungry for more information about the Supreme Court, in some larger sense," pollster Rob Green said on C-SPAN's "Washington Journal" interview program this morning. "People realize on some level how important every nomination is and how important the Court is in their lives."

To that end, a large majority - 61 percent - says it is time for Supreme Court Oral Arguments to be open to television coverage.

See the full interview with Rob Green here: http://www.c-spanarchives.org/library/index.php?main_page=product_video_info&products_id=287590-3. Full results of this survey can be found at C-SPAN's website, www.c-span.org <http://www.c-span.org>. Topline results are as follows:

1. How many Justices sit on the United States Supreme Court?

7: 11%
8: 7%
9: 49%
10: 3%
11: 2%
12: 14%

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2. Can you name any Justices on the U.S Supreme Court?

Yes 46%
- Clarence Thomas 14%
- John G. Roberts 11%
- Ruth Bader Ginsberg 7%
- Antonin Scalia 6%

No 54%

3. Can you name the first woman to serve as Justice on the U.S. Supreme Court?

Yes (Sandra Day O'Connor) 41%
No 59%

4. What is the maximum number of years a Justice can serve on the U.S. Supreme Court?

For life: 76%
Other amounts: 13%

5. Can you identify the individual just named by President Obama to serve on the U.S. Supreme Court?

Yes (Sonia Sotomayor) 43%
No 57%

6. If confirmed, what would be historic about the individual President Obama recently nominated to become a member of the US Supreme Court?

First Hispanic/Latina nominated: 66%
Woman nominated: 3%

7. Can you name any case ever heard by the U.S. Supreme Court?

Yes 56%
Roe v. Wade 45%
Brown v. Board of Education 5%
No 45%

8. Does a jury hear cases before the U.S. Supreme Court?

Yes: 19%
No: 67%

9. How long is the average argument before the U.S. Supreme Court?

30 minutes: 10%
One hour: 9%
90 minutes: 10%
One day: 5%
Two days: 9%
Don't know: 58%

10. The U.S. Supreme Court currently does not allow television coverage of its sessions. Please indicate if you strongly agree, somewhat agree, somewhat disagree or strongly disagree that the U.S. Supreme Court should allow television coverage of its sessions.

Agree: 61%
Disagree: 38%

Survey Metholodogy
Penn, Schoen and Berland Associates, LLC, conducted online interviews on June 7, 2009 among 1,002 2008 general election voters in the United States. The margin of error for the entire sample is +/- 3.1 at the 95% confidence level and larger for subgroups.

About C-SPAN
C-SPAN was created by America's cable companies in 1979 as a public service and programs three public affairs television networks; C-SPAN Radio, a Washington, D.C. radio station distributed by XM Satellite Radio; and a video-rich website. Visit www.c-span.org.

CNC...a human services organization

June 6, 2009

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: Nomination of Judge Sonia Sotomayor to be an Associate Justice of the United States Supreme Court.

Dear Mr. Chairman and Mr. Ranking Member:

The Cuban American National Council, a national Hispanic human services organization headquartered in Florida with offices in New Jersey and Washington DC, wants to express its full support for the nomination and expeditious confirmation of Judge Sonia Sotomayor to be an Associate Justice of the United States Supreme Court.

Judge Sotomayor is a highly qualified, accomplished and experienced nominee. From her humble beginnings in public housing in the Bronx, she went on to graduate summa cum laude from Princeton University and Yale Law School, two of the countries most prestigious and competitive academic institutions. Her extensive judicial experience and long history of fairness and adherence to the law, make her an exemplary candidate to serve on the U.S. Supreme Court.

Many of Judge Sotomayor's opinions reflect a keen understanding of the appropriate limits of the judicial role, and the non-ideological and restrained character of her work has earned her the respect of colleagues and three United States Presidents. New York Second Circuit Judge Gerald Walpin, a New York former federal prosecutor, described Judge Sotomayor as "a nonactivist and judge who does not apply her own views but is bound by law". Judge Sotomayor was named as a U.S. District Court Judge by President George H.W. Bush in 1992 and was confirmed unanimously by the Senate. She was then elevated to her current seat, as a 2nd U.S. Circuit Court of Appeals Judge, by President William Jefferson Clinton. President Barack Obama's nomination of Judge Sotomayor to the Supreme Court represents not only a historical milestone for the entire country, but it is also a testament to her unique judicial abilities and exemplary career.

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...a human services organization

As a Supreme Court Justice, Judge Sotomayor would bring more federal judicial experience to the highest court in the land than any Justice in 100 years, and more overall judicial experience than anyone confirmed for the Court in the past 70 years.

The Cuban American National Council urges the Senate Judiciary Committee to be diligent in its review of Judge Sotomayor's vast record and to act responsibly but expeditiously on this nomination. The Cuban American National Council is confident that the outcome of such a process will be a third Senate confirmation for Judge Sotomayor.

Sincerely,

Guarione M. Diaz
President and CEO

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
120 BROADWAY
NEW YORK, NY 10271

ANDREW M. CUOMO
Attorney General

(212) 416-8050

June 12, 2009

Honorable Patrick Leahy
United States Senate
Committee on the Judiciary
433 Russell Senate Office Building
Washington, DC 20510-4502

Honorable Jeff Sessions
United States Senate
Committee on the Judiciary
335 Russell State Office Building
Washington, DC 20510-0104

Dear Chairman Leahy and Ranking Member Sessions:

I write in strong support of President Barack Obama's nomination of Second Circuit Court of Appeals Judge Sonia Sotomayor to the United States Supreme Court. I firmly believe that Judge Sotomayor's extensive and varied experience makes her the right person, at the right time, for a seat on our nation's highest court.

Judge Sotomayor's credentials speak for themselves. A brilliant and fair minded jurist who combines a sound legal mind with a common touch, her judicial acumen has been noted by presidents of both parties. She began her legal career as an assistant district attorney in the New York County District Attorney's Office, and, following eight years in private practice, was nominated in 1991 by President George H.W. Bush to the United States District Court for the Southern District of New York, becoming the first Hispanic American on that court. In 1997, she was nominated by President Clinton for her current position with the Second Circuit Court of Appeals.

Throughout her nearly two decades on the bench, Judge Sotomayor has authored over 700 opinions in a wide variety of areas of the law. Her opinions make it clear that she is a jurist committed to upholding core constitutional values, deciding cases on narrow grounds, avoiding deciding issues prematurely, and crafting remedies that suit the particular circumstances presented.

However, Judge Sotomayor will bring much more than her impressive judicial background to the Supreme Court. Her real world experiences will provide her with a unique outlook on how Supreme Court decisions impact everyday citizens. Through her affiliation with groups such as the Puerto Rican Legal Defense and Education Fund; the State of New York Mortgage Agency; the Maternity Center Association; the New York City Campaign Finance Board; the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts; and a number of national and local bar associations, Judge Sotomayor has gained a perspective that will serve her well as a member of the Supreme Court.

I am honored to join the long list of those individuals and organizations supporting this nomination and it is without hesitation that I encourage swift confirmation of Judge Sonia Sotomayor as a member of the United States Supreme Court.

Sincerely,

ANDREW M. CUOMO

City of Miami, Florida

MANUEL A. DIAZ
MAYOR

3500 PAN AMERICAN DRIVE
MIAMI, FLORIDA 33133
(305) 250-5300
FAX (305) 854-4001

June 1, 2009

The Honorable Senator Patrick J. Leahy
Chairman, Committee on the Judiciary
433 Russell Senate Office Building
United States Senate
Washington, DC 20510

Dear Chairman Leahy:

As mayor of a large metropolitan city with a diverse population who sees the effect of our judicial system on our citizens every day, I commend President Obama for the nomination of federal appellate Judge Sonia Sotomayor to the U.S. Supreme Court.

Judge Sonia Sotomayor's distinguished thirty-year career and inspiring personal background make her the most capable nominee for our country's highest Court. This historic nomination reaffirms the President's commitment to represent diversity in all sectors of our national government. With Judge Sotomayor's nomination, President Obama achieves not only diversity in background and ethnicity, but also diversity of experience, character and judgment.

During the past three decades, Judge Sotomayor has worked at almost every level of the judicial system, gaining a depth of experience and perspective that will make our Supreme Court a more just and effective body of law. If confirmed, she would bring more experience to the bench than anyone currently serving on the United States Supreme Court had when they were appointed.

Judge Sotomayor's proven professional excellence and her extraordinary story of truly living the American Dream, from public housing to Ivy League graduate and federal circuit court judge, is an inspiration for all Americans.

As the first American of Hispanic heritage to be nominated to the Supreme Court, she represents the largest minority group in the United States, a group whose experiences are close to immigrant life and to the daily struggles of working families. This combination of legal excellence and a deep understanding of the labors of striving Americans is exactly the blend of experience that should have a voice among the justices of the U.S. Supreme Court.

Sincerely,

Manuel A. Diaz

A PROFESSIONAL CORPORATION
1900 MARKET STREET PHILADELPHIA, PA 19103-3508 215.665.2000 800.523.2900 215.665.2013 FAX www.cozen.com

June 3, 2009

Nelson A. Diaz
Direct Phone 215.665.5514
Direct Fax 215.701.2095
ndiaz@cozen.com

The Honorable Harry Reid
Majority Leader
United States Senate
522 Hart Senate Office Building
Washington, DC 20510

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

The Honorable Mitch McConnell
Minority Leader
United States Senate
361-A Russell Senate Office Building
Washington, DC 20510

The Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
335 Russell Senate Office Building
Washington, DC 20510

Dear Majority Leader Reid, Minority Leader McConnell, Chairman Leahy, and Ranking Member Sessions:

As the first Latino Judge, Administrative Judge, Lawyer in Pennsylvania and leader in the national Hispanic community, I write this to offer my wholehearted and undivided support for President Obama's nomination of Judge Sonia Sotomayor to serve on the Supreme Court of the United States. I am willing to offer testimony from the characteristics of a poor Latino boy from Harlem's Public Housing that Judge Sonia Sotomayor brings to our system in promotion of equality of opportunity to all people.

I have served the Federal government under all three Democratic Presidents in my lifetime, Governors, Mayors, and the community. My career has taken me to the pinnacle of success in the law and business. I serve on a Fortune 500 Board of Directors including many other national leadership organizations.

Judge Sotomayor has been a colleague and a friend and we have been able to collaborate and spend time together.

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Judge Sotomayor is a brilliant jurist and has never been involved in any partisan politics. I was the chair of the Hispanic Caucasus of the Democratic Party and founder of Hispanic American Democrats to instill equality in the Democratic Party, also as a national leader I am aware of most of the national partisan Hispanics. You should be aware that people that succeed from the Judge's background and mine are only 10% of the entire mainland Puerto Rican community. You may be aware that only 10% of Latino students, who come from an urban educational system where the Judge and I grew up, get to go on to college. This is the reason that her appointment brings joy and pride to all Latinos and people of color.

Judge Sotomayor will be the only person on the Supreme Court to have trial experience and as a former trial judge, this is an extremely important need on any appellate court. I have reviewed many of her opinions and there is no bias or lack of fairness to rich or poor, religious differences or gender. What she brings is overcoming discrimination as a woman and a Latina into the legal profession. Having been the first to pass the bar in Pennsylvania in 1972 you should be aware that there were only two Latino lawyers in New Jersey and 75 in New York at the time of my graduation in 1972.

Judge Sotomayor also brings her experience as a woman and a New York born Puerto Rican. Puerto Ricans are migrants and not immigrants and have been denied the full rights of enjoying equality of citizenship. She understands the burdens of language and culture that are part of this struggle for equality.

Judge Sotomayor has unbelievable work ethics not only for the court but also for civic and community involvement. Always trying to motivate those less fortunate to pick themselves up by their boot straps and achieve as she becomes the example. We as descendents of Latinos and Puerto Rican are insulted by the recent comments by members of Congress to the fact that there may be a racist position on the part of this eminent, dynamic, intellectual judge. One can only see how the rights of citizenship given in 1917 have been denied and those on the mainland have third class citizenship with all Latinos.

I have witnessed her integrity and can vouch for the fact that she will be an outstanding Supreme Court Justice and roll model for all, especially those who have been neglected in our society. The Judge and I swore to uphold our laws and constitution and neither have ever swayed from this oath or our patriotic duties of being the best Americans we can be.

I unconditionally support her nomination and urge your quick confirmation as the next Associate Justice of the Supreme Court.

DETECTIVES' ENDOWMENT ASSOCIATION, INC.

POLICE DEPARTMENT • CITY OF NEW YORK
26 THOMAS STREET, NEW YORK, NEW YORK 10007 • (212) 587-1000
FAX (212) 732-4863 • E-MAIL info@nycdetectives.org

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FRANK CICCONE *Brooklyn South*
JOHN J. COMER *Queens*
GREGORY W. SILVERMAN *Staten Island*

LOU MATARAZZO *Legislative Director*

The Hon. Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Hon. Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

June 11, 2009

RE: Endorsement for Judge Sonia Sotomayor for the United States Supreme Court

Dear Chairman Leahy and Ranking Members Sessions:

On behalf of the Detectives' Endowment Association (DEA), the labor union representing 15,000 active and retired New York Police Department Detectives, I am contacting you in support of the nomination of Judge Sonia Sotomayor for the United States Supreme Court.

Judge Sotomayor has a long and distinguished career in our judicial system, which started with her work as an Assistant District Attorney in New York City in 1979, a time when crime was extremely high. Her experiences as a prosecutor at the municipal level make her unique amongst the sitting Supreme Court Justices.

Although she left the District Attorney's Office for the private sector in 1984, her decades on the bench convince us that she well understands the issues and challenges faced by our nation's law enforcement officers. Having grown up in the public housing projects of The Bronx, Judge Sotomayor can relate to and understand the concerns and fears of America's inner city residents, who confront crime and its consequences on a daily basis.

Judge Sotomayor is also extremely familiar with labor / management issues, and we believe her decisions regarding the American workplace and organized labor have been fair and balanced.

Judge Sotomayor would bring a refreshing breadth of experience, intelligence, wisdom, and empathy to the highest court in the land.

Therefore, we urge you and your Congressional colleagues to confirm Judge Sonia Sotomayor's nomination to the United States Supreme Court. If you would like any additional comments from our organization, please feel free to contact me at (212) 587-1000.

Sincerely,

Michael J. Palladino
President

MJP/sfk

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56940.465

The Honorable Lurita Doan

13 June 2009

The Honorable Barack Obama
President of the United States of America
1600 Pennsylvania Avenue, NW
Washington, D.C.

Dear Mr. President:

The resignation of Justice Souter from our nation's highest court affords an historic opportunity to appoint a nominee who combines a range of unrivaled traits. Judge Sonia Sotomayor is such a nominee.

Judge Sotomayor's personal and professional experiences make her uniquely sensitive to the concerns of a wide range of Americans. She was raised by a widowed mother in a Bronx housing project and worked hard to graduate *summa cum laude* from Princeton and to become an editor of the Yale Law Journal. For the first four years of her career, Judge Sotomayor prosecuted criminal defendants under Manhattan's legendary District Attorney Robert Morgenthau. She later spent eight years representing businesses at the international firm of Pavia & Harcourt.

Judge Sotomayor's legal career has included not only criminal prosecution and commercial litigation, but also academia and appointment to the federal bench at the age of thirty-eight. For the past ten years, her intellect, integrity, and consensus-building have made her a highly respected jurist on the Second Circuit. This followed a distinguished career as a federal trial judge, during which Judge Sotomayor's pragmatism and resolve brought the national baseball strike to an end that satisfied all parties. She taught for over nine years at the New York University School of Law and at Columbia Law School, and has been a mentor to hundreds of attorneys and students as a member of the Puerto Rican and the Hispanic National Bar Associations. This wealth of experience has impressed upon her both the law's potential, as well as its limits.

Judge Sotomayor is an exceptional candidate who combines superior legal skills with a wide-ranging personal and professional background. For these reasons, I commend your choice of Judge Sotomayor for our country's next Supreme Court Justice.

Sincerely,

Lurita Doan

CC: Mr. Rahm Emanuel
Ms. Valerie Jarrett
Members of the Senate Judiciary Committee

746 WALKER ROAD #16-144 GREAT FALLS, VA 22066 LURITAD@YAHOO.COM

06/15/2009 5:58PM

56940.466

The Honorable Lurita Doan

CC: Hon. Patrick J. Leahy
Hon. Herb Kohl
Hon. Arlen Spector
Hon. Dianne Feinstein
Hon. Orrin G. Hatch
Hon. Russell D. Feingold
Hon. Charles E. Grassley
Hon. Charles E. Schumer
Hon. Jon Kyl
Hon. Richard J. Durbin
Hon. Jeff Sessions
Hon. Benjamin L. Cardin
Hon. Lindsey Graham
Hon. Sheldon Whitehouse
Hon. John Cornyn
Hon. Ron Wyden
Hon. Tom Coburn
Hon. Amy Klobuchar
Hon. Edward Kaufman

746 WALKER ROAD #16-144 GREAT FALLS, VA 22065 LURITAD@YAHOO.COM

06/15/2009 5:58PM

Statement of

The Honorable Richard J. Durbin

United States Senator
Illinois
July 13, 2009

Opening Statement
Senator Dick Durbin
Senate Judiciary Committee
July 13, 2009

Nomination Hearing of Sonia Sotomayor to be Associate Justice of the Supreme Court

Judge Sotomayor, welcome to you and your family. These nomination hearings can be long and painful, but after surviving a broken ankle and individual meetings with 89 members of the United States Senate during the past few weeks, you are already battle-tested.

At the nomination hearing for Justice Ruth Bader Ginsburg in 1993, my friend Senator Paul Simon of Illinois said: "You face a much harsher judge . . . than this Committee and that is the judgment of history. And that judgment is likely to revolve around the question: Did she restrict freedom or did she expand it?"

I asked this question with respect to the nominations of Chief Justice Roberts and Justice Alito, and I think it is an important question to ask about any Supreme Court nominee. The nine men and women on the Supreme Court serve lifetime appointments, and they resolve many of our most significant legal and constitutional issues.

It is the Supreme Court that defines our personal right to privacy and decides the restrictions that can be placed on the most personal aspects of our lives. The Court decides the rights of discrimination victims, immigrants, and consumers. The nine Justices decide whether Congress has the authority to pass laws to protect our civil rights and our environment. They decide what checks will exist on the executive branch in war and in peace.

Because these issues are so important, we need Justices with intelligence; knowledge of the law; the proper judicial temperament and a commitment to impartial justice.

More than that, we need our Supreme Court Justices to have an understanding of the real world and the impact their decisions will have on everyday people. We need Justices whose wisdom comes from life, not just law books.

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Sadly, this important quality seems to be in short supply these days. The current Supreme Court has issued decision after decision in recent years that represent a triumph of ideology over common sense and concern for ordinary Americans.

When Chief Justice Roberts came before this Committee in 2005, he famously said that as a Supreme Court Justice he would be like an umpire, simply calling balls and strikes. We have observed, unfortunately, that it's a little hard to see home plate when you're standing in right field.

If being a Supreme Court Justice were as easy as calling balls and strikes, why have we seen so many 5-4 decisions in recent years? In the last year alone, 23 of the Supreme Court's 74 decisions were decided by a 5-4 vote.

The recent case of Ledbetter v. Goodyear Tire & Rubber Company is the best example of the Supreme Court putting conservative activism over common sense. The question in that case was simple and fundamental: Should women be paid the same as men for the same work?

Lilly Ledbetter was a manager in a Goodyear Tire plant in Alabama. She worked there for 19 years but didn't learn she was being paid less than her male colleagues until the end of her job. She brought a discrimination lawsuit and a jury awarded her a large verdict. But the Supreme Court, in a 5-4 decision, reversed the jury and threw out the verdict. What was the basis of their ruling? They said Lilly Ledbetter filed her discrimination complaint too late. They said her complaint should have been filed within 180 days of the initial act of pay discrimination. That decision defied common sense and the realities of the workplace, where few employees know what their fellow employees are paid. And it contradicted decades of past precedent.

Another recent case, Safford Unified School District v. Redding, involved a 13-year-old girl who was strip-searched at her school based on a false rumor that she was hiding ibuprofen pills. At the oral argument in April, several of the Supreme Court Justices asked questions about the case that revealed a stunning lack of empathy with the 8th grade victim. One of the Justices even suggested that being strip-searched was no different than changing clothes for gym class. Although Justice Ruth Bader Ginsburg helped her eight male colleagues understand why the strip search of a 13-year-old girl was humiliating enough to violate her constitutional rights, a majority of the Justices ruled that the school officials were immune from liability.

In a 5-4 case from 2007, Gonzales v. Carhart, the Supreme Court again overturned past precedent and ruled for the first time that it was permissible to place restrictions on abortion that don't include an exception safeguarding a woman's health.

And in a recent case involving the Louisville and Seattle public school districts, the Supreme Court held 5-4 that voluntary decisions by local governments to consider race as one factor among many in efforts to integrate and diversify their schools are just as unlawful as racist efforts to segregate schools in bygone eras.

These and other decisions demonstrate the need for Supreme Court Justices who understand the real world and the impact their decisions will have on our society.

Judge Sotomayor, you have overcome many obstacles in your life that have given you an understanding of the daily realities and struggles faced by everyday people. You grew up in a public housing complex in the Bronx. You overcame a diagnosis of juvenile diabetes at age 8 and the death of your father, a factory worker, at age 9. Your mother worked two jobs so she could afford to send you and your brother to Catholic schools. And you earned scholarships to Princeton and Yale.

Your first job out of law school was as an assistant district attorney, where you prosecuted violent crimes that have such a devastating impact on our families and communities. You went on to work in a law firm representing corporations, which gave you another valuable perspective on the law and our legal system.

In your 17 years as a federal judge, you have demonstrated an ability to see both sides of every issue. You have earned a reputation as a neutral, open-minded jurist who reveres the law and understands the consequences of your decisions on real people.

Of the 110 individuals who have served as Supreme Court Justices throughout our nation's history, 106 have been white men. Until Thurgood Marshall's appointment to the Supreme Court a generation ago, every Justice throughout our nation's history had been a white male.

President Obama's nomination of you to serve as the first Hispanic and the third woman to serve on the Supreme Court is historic. The President knows and we know that to be the first you must meet a higher standard before you can serve on our nation's top court. The American people through their duly elected Senators will be asked to judge you. We owe it to you and the Constitution to be a fair jury.

EARTHJUSTICE
CENTER FOR BIOLOGICAL DIVERSITY
CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW
CLEAN WATER ACTION
DEFENDERS OF WILDLIFE
ENDANGERED SPECIES COALITION
FRIENDS OF THE EARTH
GREENPEACE USA
INTERNATIONAL FUND FOR ANIMAL WELFARE
LEAGUE OF CONSERVATION VOTERS
NATIONAL AUDUBON SOCIETY
NATIONAL HISPANIC ENVIRONMENTAL COUNCIL
NATIONAL WIDLIFE FEDERATION
NATIVE AMERICAN RIGHTS FUND
SIERRA CLUB
THE WILDERNESS SOCIETY

ADVOCATES FOR THE WEST ♦ AUDUBON SOCIETY OF RHODE ISLAND
CITIZENS FOR THE CHUCKWALLA VALLEY
COLORADO ENVIRONMENTAL COALITION ♦ COLUMBIA RIVERKEEPER
CONSERVATION NORTHWEST ♦ ECOLOGY CENTER
ENDANGERED HABITATS LEAGUE
EPIC- ENVIRONMENTAL PROTECTION INFORMATION CENTER
FRIENDS OF BLACKWATER ♦ FRIENDS OF THE COLUMBIA GORGE
GIFFORD PINCHOT TASK FORCE ♦ GREATER YELLOWSTONE COALITION
HEARTWOOD ♦ HOOSIER ENVIRONMENTAL COUNCIL
IDAHO CONSERVATION LEAGUE ♦ IDAHO RIVERS UNITED
KENTUCKY RESOURCES COUNCIL, INC.
THE LANDS COUNCIL ♦ McKENZIE GUARDIANS
MICHIGAN NATURE ASSOCIATION
MIDWEST ENVIRONMENTAL ADVOCATES
MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY
NEW MEXICO ENVIRONMENTAL LAW CENTER
NORTHERN PLAINS RESOURCE COUNCIL
NORTHWEST ENVIRONMENTAL ADVOCATES
NORTHWEST ENVIRONMENTAL DEFENSE CENTER
OHIO ENVIRONMENTAL COUNCIL ♦ OLYMPIC FOREST COALITION
OREGON CENTER FOR ENVIRONMENTAL HEALTH ♦ OREGON WILD
PENNFUTURE ♦ PUBLIC LANDS WITHOUT LIVESTOCK
SODA MOUNTAIN WILDERNESS COUNCIL
SOUTHERN UTAH WILDERNESS ALLIANCE
VENTURA COASTKEEPER ♦ WATERWATCH OF OREGON
WESTERN ENVIRONMENTAL LAW CENTER
WESTERN NEBRASKA RESOURCES COUNCIL
WESTERN RESOURCE ADVOCATES ♦ WILDEARTH GUARDIANS
WILDLANDS CPR ♦ WISHTOYO FOUNDATION
THE XERCES SOCIETY FOR INVERTEBRATE CONSERVATION

56940.472

July 9, 2009

The Honorable Patrick J. Leahy, Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Jeff Sessions, Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Confirmation of Judge Sonia Sotomayor

Dear Chairman Leahy and Ranking Member Sessions:

We write to express our strong support for confirmation of Judge Sonia Sotomayor as an Associate Justice of the U.S. Supreme Court. Judge Sotomayor is extremely well qualified to serve on the Supreme Court and we endorse her nomination without qualification.

Judge Sotomayor has exemplary academic and legal credentials, a stellar reputation as a New York prosecutor, coupled with several years in a private firm, and an enviable record of public service in both governmental and nonprofit sectors. She has served nearly 11 years on the United States Court of Appeals for the Second Circuit and previously spent several years as a United States District Judge in the Southern District of New York. Her rigorous preparation and thoroughly researched and well-reasoned opinions have earned praise and respect from her fellow judges and legal colleagues.

Despite her long tenure on the federal bench, Judge Sotomayor has sat on relatively few environmental cases. She wrote a notable Clean Water Act decision, methodically analyzing and resolving various conservation, state, and industry challenges to a regulation designed to protect fish from being killed in the cooling water intake structures at large power plants. While a divided Supreme Court reversed one of the more than a dozen rulings in the case, her decision reflects well-researched, thorough, and thoughtful legal analysis that probes the statute, its context, legislative history, and judicial precedent to discern and remain true to congressional intent. The Second Circuit has yet to issue a decision in a public nuisance case brought against utilities for harm caused by power plant greenhouse gas emissions, but observers praised Judge Sotomayor's preparation and deep engagement in the complex issues at oral argument. Beyond the decisions she has written, Judge Sotomayor joined a decision upholding a Vermont law requiring that labels inform consumers that certain products contain mercury and must be disposed of as hazardous waste, although she also joined a Clean Air Act decision that went against environmental litigants. Some conservatives have decried Judge Sotomayor's vote – as part of a *unanimous* Second Circuit panel with two President George W.

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Bush appointed judges– to uphold the district court's dismissal of a case involving a challenge to the taking of property as part of a town's comprehensive redevelopment project. It is difficult, however, to draw any conclusions from that decision other than that Judge Sotomayor carefully follows applicable law and precedent. The two-page, unpublished summary order affirms the trial court's ruling that the case was filed after the statute of limitations had run and states that, even if it were not time-barred, a recent Supreme Court decision obliged the panel to affirm the district court's rejection of the lawsuit. It appears that critics are disputing the Supreme Court precedent, rather than the Second Circuit's adherence to that precedent, which as a lower court, it was obligated to follow.

Judge Sotomayor's record evinces no clear bias in favor of or against environmental claims. Instead, it reflects intellectual rigor, meticulous preparation, and fairness. Her record demonstrates a consistently balanced and thoughtful review of complex legal issues. She has interpreted and applied the laws as Congress intended and safeguarded constitutional rights. She brings a welcome perspective both through her wide-ranging legal work, as well as her humble beginnings and her experience as a Latina. Her impeccable credentials, wealth of experience, and exceptional legal mind will benefit the Court and the nation. We urge her swift confirmation.

Sincerely,

Trip Van Noppen, President
Earthjustice

Kierán Suckling, Executive Director
Center for Biological Diversity

Daniel Magraw, President
Center for International Environmental Law

John DeCock, President
Clean Water Action

Rodger Schlickeisen, President
Defenders of Wildlife

Leda Huta, Executive Director
Endangered Species Coalition

Brent Blackwelder, President
Friends of the Earth

Philip D. Radford, Executive Director
Greenpeace USA

Fred O'Regan, Chief Executive Officer
International Fund for Animal Welfare

Gene Karpinski, President
League of Conservation Voters

John Flicker, President
National Audubon Society

Roger Rivera, President
National Hispanic Environmental Council

Larry Schweiger, President and CEO
National Wildlife Federation

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John E. Echohawk, Executive Director
Native American Rights Fund

Carl Pope, Executive Director
Sierra Club

William Meadows, President
The Wilderness Society

Laird J. Lucas, Executive Director
Advocates for the West

Mike Clark, Executive Director
Greater Yellowstone Coalition

Eugenia Marks, Senior Policy Director
Audubon Society of Rhode Island

Cynthia Sarthou, Executive Director
Gulf Restoration Network

Donna Charpied, Executive Director
Citizens for the Chuckwalla Valley [CA]

Ernie Reed, Council Chair
Heartwood

Elise Jones, Executive Director
Colorado Environmental Coalition

Jesse Kharbanda, Executive Director
Hoosier Environmental Council

Brett VandenHeuvel, Executive Director
Columbia Riverkeeper

Rick Johnson | Executive Director
Idaho Conservation League

Mitch Friedman, Executive Director
Conservation Northwest

Kevin Lewis, Conservation Program Director
Idaho Rivers United

Mike Garfield, Director
Ecology Center

Tom FitzGerald, Director
Kentucky Resources Council, Inc.

Dan Silver, Executive Director
Endangered Habitats League

Kimberly Baker, Forest and Wildlife Protection
Klamath Forest Alliance

Scott Greacen, Executive Director
EPIC- Environmental Protection Information Center

Anne Martin, Conservation Programs Coordinator
The Lands Council

Judith Rodd, Director
Friends of Blackwater

James Baker, President
McKenzie Guardians

Kevin Gorman, Executive Director
Friends of the Columbia Gorge

Jeremy Emmi, Executive Director
Michigan Nature Association

Emily Platt, Executive Director
Gifford Pinchot Task Force

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Karen M. Schapiro, JD, Executive Director
Midwest Environmental Advocates

Paul W. Aasen, Advocacy Director
Minnesota Center for Environmental Advocacy

Douglas Meiklejohn, Executive Director
New Mexico Environmental Law Center

Beth Kaeding, Chair of the Board
Northern Plains Resource Council

Nina Bell, J.D., Executive Director
Northwest Environmental Advocates

Mark Riskedahl, Executive Director
Northwest Environmental Defense Center

Keith Dimoff, Executive Director
Ohio Environmental Council

Bonnie Phillips, Executive Director
Olympic Forest Coalition

Jason Tobin, Program Coordinator
Oregon Center for Environmental Health

Regna Merritt, Executive Director
Oregon Wild

Jan Jarrett, President and CEO
PennFuture

Mike Hudak, Director
Public Lands Without Livestock

Dave Willis, Coordinator
Soda Mountain Wilderness Council

Scott Groene, Executive Director
Southern Utah Wilderness Alliance

Jason Weiner, Associate Director
Ventura Coastkeeper

John DeVoe, Executive Director
WaterWatch of Oregon

Greg Costello, Executive Director
Western Environmental Law Center

Santana Tamarak, Board Chair
Western Nebraska Resources Council

Karin P. Sheldon, Executive Director
Western Resource Advocates

John Horning, Executive Director
WildEarth Guardians

Bethanie Walder,Executive Director
Wildlands CPR

Mati Waiya, Executive Director
Wishtoyo Foundation

Scott Hoffman Black, Executive Director
The Xerces Society for Invertebrate Conservation

C: United States Senators

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Testimony of JoAnne A. Epps

My name is JoAnne Epps. I am the Dean of Temple University Beasley School of Law and Co-Chair of the Committee for the Evaluation of Supreme Court Nominees of the National Association of Women Lawyers ("NAWL"). On behalf of NAWL, I thank you for the opportunity to appear before you today in support of the confirmation of Judge Sotomayor as an Associate Justice of the Supreme Court.

After careful evaluation of Judge Sotomayor's background and qualifications, NAWL has concluded that Judge Sotomayor is highly qualified for this position. She has the intellectual capacity, the appropriate judicial temperament and respect for established law and process needed to be an effective Supreme Court Justice. She is mindful of a range of perspectives that appropriately should be considered in rendering judicial decisions, and if confirmed will clearly demonstrate that highly qualified women have a rightful place at the highest levels of the profession. We therefore encourage your vote in favor of her confirmation.

Founded over 100 years ago, and with thousands of members from all 50 states, NAWL is committed to supporting and advancing the interests of women lawyers and women's legal rights. From campaigning in the early 1900's for women's voting rights and the right of women to serve on juries, to supporting in 2009 the Lilly Ledbetter Fair Pay Act, NAWL has been a supporter of the interests of women. As such, NAWL cares deeply about the composition of the Supreme Court and insuring that it includes the perspectives of all Americans, especially those of women, not just because most of our members are women, but because all of our members care about issues that affect women.

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NAWL's recommendation today is based on the work of NAWL's Committee for the Evaluation of Supreme Court Nominees. In accordance with NAWL procedures, the Committee independently evaluated the qualifications of Judge Sotomayor to serve as an Associate Justice of the Supreme Court. Special emphasis was placed on matters regarding women's rights or that have a special impact on women. The 18 Committee members, appointed by the President of NAWL, include law professors and a law school dean, appellate practitioners and lawyers concentrating in litigation. I co-chaired the committee together with Trish Refo, a partner at Snell and Wilmer in Phoenix, Arizona.

The work of the Committee was divided into two categories. We read a large selection of Judge Sotomayor's opinions, and we interviewed more than fifty people who know Judge Sotomayor in a variety of capacities. Those interviewed included former law clerks, former colleagues, professional acquaintances, former classmates, individuals who appeared before Judge Sotomayor, as well as co-counsel and opposing counsel from when Judge Sotomayor was engaged in the private practice of law. The purpose of the interviews was to obtain information regarding Judge Sotomayor's legal abilities, legal philosophy, and judicial temperament, as well as other issues of importance to NAWL, such as how Judge Sotomayor has treated women, including her female employees and colleagues and, as a judge, those appearing before her. The interviews also sought information on the following topics: Women and the Workplace; Women and the Criminal Justice System; Women and Health Care; Women and Education; Women and Family; Women in the Military; Women and Finance; Women and Retirement; Policies and Laws Impacting Multicultural Women; Enforcement of Statutes regarding Women's Rights; Federal versus State Law Relief; and any other issues with likely impact on women.

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Those interviewed describe Judge Sotomayor as open-minded, but respectful of precedent, which is consistent with her judicial opinions. She is courteous and respectful to all those with whom she has professional interactions, including those who do not occupy positions of status or influence. She has treated litigants, attorneys and court personnel, and, in particular for the Committee's review, women in the courts, with the utmost respect and professionalism in and out of the courtroom. Those who have interacted with Judge Sotomayor in other capacities, both before and after she was appointed to the bench, describe her as a good colleague, a team player, and supportive of institutional goals. This information is important to NAWL, in that it discloses more than a nominee's intellectual capacity and talent as a lawyer or judge; it demonstrates the extent to which the nominee respects the full range of humanity, from whose ranks come the people whose cases the Supreme Court will decide.

Our review of Judge Sotomayor's writing included majority opinions, concurrences, dissents and opinions that she wrote or joined in that were reviewed by the United States Supreme Court. Although some cases were of particular importance to women, the review included a wide range of criminal and civil issues. From that review, NAWL has concluded that Judge Sotomayor has consistently displayed a superior intellectual capacity, a comprehensive understanding of the issues with which she was presented and a thorough and firm grasp of the legal issues that have come before her. She excels in her ability to analyze statutory and case law and her judicial reasoning is supported by sound legal interpretation. A hallmark of her writing is clarity. She is disciplined, thorough and shows no inclination to disregard precedent in order to rule in favor of a particular party.

As a judge, Judge Sotomayor has been sympathetic to litigants coming before her and has

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conscientiously ensured that their claims, particularly of those representing themselves, are carefully considered. Indeed, by focusing on the specific facts of the case, rather than overall ideology, Judge Sotomayor is able to understand how the law impacts the lives of ordinary people and apply the law in its proper context. While Judge Sotomayor is not afraid to disagree with her colleagues if her legal analysis leads her to do so, a strong preference to follow judicial precedent and consistent respect for the rule of law are far more consistent themes. For example, Judge Sotomayor has displayed great knowledge and understanding of the impact of gender and race-based comments and behavior in the workplace, although her sensitivity to the plight of the plaintiffs in these cases did not translate necessarily into findings favoring those individuals, except where a solid basis in law existed to do so. Similarly, in NAWL's view, Judge Sotomayor has firmly demonstrated a lack of gender, racial, ethnic or religious bias, exhibiting instead a firm willingness to maintain an open mind. We wish to emphasize, however, that while we find Judge Sotomayor open-minded regarding issues of importance to women, we do not find her outcome-oriented or otherwise improperly biased on such issues. Rather, she prefers to decide cases on the record before her. She does not, therefore, deserve the label "judicial activist".

Based on its review of both Judge Sotomayor's opinions and those with whom she has had professional contact, NAWL has concluded that Judge Sotomayor is highly qualified to serve as an Associate Justice of the Supreme Court. She is highly intelligent and well-educated, she is mindful of issues of significance to women, and her appointment would advance the very important message that women have a contribution to make at the highest levels of decision-making.

Finally, NAWL supports the confirmation of Judge Sotomayor for the important message

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it conveys. NAWL does not believe Judge Sotomayor should be confirmed solely because she is a woman or a Latina. But the fact is that Judge Sotomayor is, as ultimately we all are, a product of her experiences, and for her those experiences include life as a woman and a Latina. Both perspectives will be welcome additions to the Court's deliberations. As a nation, we have come a long way. But we still have much to do. Women are nearly half of this nation, but a mere 1/9 of the Supreme Court. The disparity of representation is not trivial in effect. In the legal profession, although women have comprised 50% or more of graduating law school classes for more than two decades, they continue to be markedly under-represented in leadership roles in the profession and on the federal bench. As of last year, women were only 16% of equity partners (owners) in this country's largest law firms. 99% of law firms reported that their highest paid lawyer was a man. In 2008, the salaries of women lawyers were just 80.5% of men lawyers' salaries. Just 23% of federal district and circuit judges were women. Women of color face additional barriers, making up just 1.9% of all law firm partners. 19% of this nation's law firms have not one lawyer of color. Your confirmation of Judge Sotomayor will, therefore, send a strong message to law firms, corporations, government and academia that we must – and can – eliminate the persistent barriers to the advancement of women attorneys. It will reinforce what should be a standard expectation: that women of diverse ethnic backgrounds should, of course, occupy positions of parity with men in the legal and other professions.

As others this week have said, I long for the day when it would not even occur to anyone to mention Judge Sotomayor's gender and ethnicity, those matters having become non-noteworthy. But that time is not yet here. With this vote, you can send a message; no, you *will* send a message. You have the chance to tell everyone, but most especially the wonderful women

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and girls in your life not just that they matter, but that issues of concern to them matter, and that their voices and perspective are important in shaping our world.

Judge Sotomayor is eminently qualified for this position, but not simply because she is a woman. She has the intellectual capacity, the appropriate judicial temperament and respect for established law and process needed to be an effective Supreme Court Justice. She is appropriately mindful of the human component of law. And she symbolizes the triumph of intelligence, hard work and compassion. Accordingly, NAWL strongly supports the confirmation of Judge Sotomayor to be Associate Justice of the United States Supreme Court.

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Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
July 13, 2009

Statement of U.S. Senator Russ Feingold
On the Nomination of Sonia Sotomayor to be an Associate Justice of the Supreme Court of the United States
Senate Judiciary Committee

As Prepared For Delivery

"The Supreme Court plays a unique and central role in the life of our nation. Those who sit as Justices have extraordinary power over some of the most important, and most intimate, aspects of the lives of American citizens. It is therefore not surprising at all that the nomination and confirmation of a Supreme Court Justice is such a widely anticipated and widely covered event. The nine men and women who sit on the court have enormous responsibilities, and those of us tasked with voting on the confirmation of a nominee have a significant responsibility as well. I consider this one of the most consequential things I must do as a United States Senator, and I am honored and humbled to have been given this role by the people of Wisconsin.

"The ultimate responsibility of the Supreme Court is to safeguard the rule of law, which defines us as a nation, and protects us all. In the past eight years, the Supreme Court has played a crucial role in checking some of the previous Administration's most egregious departures from the rule of law. Time after time in cases arising out of actions taken by the administration after September 11, the Court has said 'No. You have gone too far.'

"It said 'No' to the Bush Administration's view that it could set up a law-free zone at Guantanamo Bay. It said 'No' to the administration's view that it could hold a citizen in the United States incommunicado indefinitely, with no access to a lawyer. It said 'No' to the administration's decision to create military commissions without congressional authorization. And it said 'No' to the administration and to Congress when they tried to strip the constitutional right to habeas corpus from prisoners held at Guantanamo.

"These were courageous decisions, and in my opinion, they were correct decisions. They made plain, as Justice O'Connor wrote in the Hamdi decision in 2004, 'A state of war is not a blank check for the president when it comes to the rights of the nation's citizens.'

"These were also close decisions, some decided by a 5-4 vote. That fact underscores the unparalleled power that each Supreme Court justice has. In my opinion, one of the most

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important qualities that a Supreme Court justice must have is courage: courage to stand up to the president, and to Congress, in order to protect the constitutional rights of the American people and preserve the rule of law.

"I have touched on the crucial recent decisions of the Court in the area of executive power, but we know, of course, that there are countless past Supreme Court decisions that have had a major impact on many aspects of our national life. The Court rejected racial discrimination in education; it guaranteed the principle of 'one person, one vote'; it made sure that even the poorest person accused of a crime in this country can be represented by counsel; it made sure that newspapers can't be sued for libel by public figures for making a mistake; it protected the privacy of telephone conversations from unjustified government eavesdropping; it protected an individual's right to possess a firearm for private use, and it even decided a presidential election. It made these decisions by interpreting and applying open-ended language in our Constitution like 'equal protection of the laws,' 'due process of law,' 'freedom of ? the press,' 'unreasonable searches and seizures,' and 'the right to bear arms.' These momentous decisions were not simply the result of an umpire calling balls and strikes. Easy cases where the law is clear almost never make it to the Supreme Court. The great constitutional issues that the Supreme Court is called upon to decide require much more than mechanical application of universally accepted legal principles.

"That is why Justices need great legal expertise, but they also need wisdom, they need judgment, they need to understand the impact of their decisions on the parties before them and the country around them, from New York City to small towns like Spooner, Wisconsin, and they need a deep appreciation of and dedication to equality, to liberty, to democracy.

"That is why I suggest to everyone watching today that they be a little wary of a phrase they may hear at these hearings – 'judicial activism.' That term really has lost all usefulness, particularly since so many rulings of the conservative majority on the Supreme Court can fairly be described as 'activist' in their disregard for precedent and their willingness to ignore or override the intent of Congress. At this point, perhaps we should all accept that the best definition of a 'judicial activist' is a judge who decides a case in a way you don't like. Each of the decisions I mentioned earlier was undoubtedly criticized by someone at the time it was issued, and maybe even today, as being 'judicial activism.' Yet some of them are among the most revered Supreme Court decisions in modern times.

"Mr. Chairman, every senator is entitled to ask whatever questions he or she wants at these hearings and to look to whatever factors he or she finds significant in evaluating this nominee. I hope Judge Sotomayor will answer all questions as fully as possible. I will have questions of my own on a range of issues. Certainly, with the two most recent Supreme Court nominations, senators asked tough questions and sought as much information from the nominees as we possibly could get. I expect nothing less from my colleagues in these hearings. I'm glad, however, that Judge Sotomayor will finally have an opportunity to answer some of the unsubstantiated charges that have been made against her.

"One attack that I find particularly shocking is the suggestion that she will be biased against some litigants because of her racial and ethnic heritage. This charge is not based on anything in

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her judicial record because there is absolutely nothing in the hundreds of opinions she has written to support it. That long record – which is obviously the most relevant evidence we have to evaluate her – demonstrates a cautious and careful approach to judging. Instead, a few lines from a 2001 speech, taken out of context, have prompted some to charge that she is a racist. I believe that no one who reads the whole Berkeley speech could honestly come to that conclusion. The speech is actually a remarkably thoughtful attempt to grapple with a difficult issue not often discussed by judges – how do a judge's personal background and experiences affect her judging. And Judge Sotomayor concludes her speech by saying the following:

'I am reminded each day that I render decisions that affect people concretely and that I owe them constant and complete vigilance in checking my assumptions, presumptions and perspectives and ensuring that to the extent that my limited abilities and capabilities permit me, that I reevaluate them and change as circumstances and cases before me require.'

"Mr. Chairman, those are the words of a thoughtful, humble, and self-aware judge striving to do her very best to administer impartial justice for all Americans, from New York City to Spooner, Wisconsin. It seems to me that is a quality we want in our judges.

"Judge Sotomayor is living proof that this country is moving in the right direction on the issue of race, that doors of opportunity are finally starting to open to all of our citizens. Just as the election of President Obama gave new hope and encouragement to African American children all over this country, Judge Sotomayor's nomination will inspire countless Hispanic American children to study harder and dream higher, and that is something we should all celebrate.

"Let me again welcome and congratulate the nominee. I look forward to learning in these hearings whether she has the knowledge, the wisdom, the judgment, the integrity, and yes, the courage, to serve with distinction on our nation's highest court. Thank you Mr. Chairman."

Statement of

The Honorable Dianne Feinstein

United States Senator
California
July 13, 2009

Statement of Senator Feinstein at Senate Judiciary Committee Confirmation Hearing on Supreme Court Nominee Sonia Sotomayor

Washington, DC – U.S. Senator Dianne Feinstein (D-Calif.) praised Supreme Court nominee Sonia Sotomayor's "deep and broad experience in the law" during opening remarks delivered at today's Senate Judiciary Committee confirmation hearing.

Following are Senator Feinstein's remarks as delivered:

"Thank you Mr. Chairman. Judge Sotomayor, congratulations on your nomination and welcome to the Senate Judiciary Committee.

I want to start out with a couple of personal words. Your nomination I view with a great sense of personal pride. You are indeed a very special woman. You have overcome adversity and disadvantages. You have grown in strength and determination and you have achieved respect and admiration for what has been a brilliant legal and judicial career.

If confirmed, you will join the Supreme Court with more federal judicial experience than any Justice in the past 100 years. And you bring with you 29 and a half years of varied legal experience to the court. By this standard you are well-qualified.

You have 11 years as a federal appellate court judge. You have participated in 3,000 appeals, authored roughly 400 published opinions. In your six years on the federal court you were the trial judge in approximately 450 cases. For four and a half years, you prosecuted crimes as an assistant district attorney in New York City. You spent eight years litigating business cases at a New York law firm.

What is unique about this broad experience is that you have seen the law truly from all sides.

On the district court you saw firsthand the actual impact of the law on people before you in both civil and criminal cases.

You considered, wrote and joined thousands of opinions clarifying the law and reviewing district court decisions in your time on the appellate court. Your eleven years there were a rigorous training ground for the Supreme Court.

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It is very unique for a judge to have both levels of federal court experience and you will be the only one on the current Supreme Court with this background.

You were a prosecutor who tried murder, robbery and child pornography cases. So you know firsthand the impact of crime on a major metropolis and you have administered justice in the close and personal forum of a trial court.

You also possess a wealth of knowledge in the complicated arena of business law with its contract disputes, patent and copyright issues, and antitrust questions.

And as an associate and partner at a private law firm, you've tried complex civil cases in the areas of real estate, banking and contracts law, as well as intellectual property, which I'm told was a specialty of yours.

So you bring a deep and broad experience in the law to the Supreme Court.

In my 16 and a half years on this committee, I have held that there are certain qualities that a Supreme Court nominee must possess:

• First, broad and relative experience – you satisfy that.

• Second, strong and deep knowledge of the law and the Constitution – you satisfy that.

• Third, a firm commitment to follow the law – and you have, and all of the statistics indicate that.

• Next, a judicial temperament and integrity – and you have both of those.

• Finally, mainstream legal reasoning. And there is everything in your record to indicate that.

Bottom line: I believe your record indicates that you possess all of these qualities.

Over the past years of my service on this committee, I have found it increasingly difficult to know from answers to questions from this dais how a nominee will actually act as a Supreme Court justice, because answers here are often indirect and are increasingly couched in euphemistic phrases.

For example, nominees have often responded to our specific questions with phrases like: 'I have an open mind,' or, 'Yes, that is precedent entitled to respect,' or, 'I have no quarrel with that.'

Of course, these phrases obfuscate and prevent a clear understanding of where a nominee really stands.

For example, several past nominees have been asked about the Casey decision, where the Court held that the government cannot restrict access to abortions that are medically necessary to

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preserve a woman's health.

Some nominees responded by assuring that Roe and Casey were precedents of the Court entitled to great respect. And in one of the hearings, through questioning by Senator Specter, this line of cases was acknowledged to have created a 'super-precedent.'

But once on the Court, the same nominees voted to overturn the key holding in Casey -- that laws restricting a woman's medical care must contain an exception to protect her health.

Their decision did not comport with the answers they gave here, and it disregarded stare decisis and the precedents established in Roe, in Ashcroft, in Casey, in Thornburgh, in Carhart I, and in Ayotte.

'Super precedent' went out the window and women lost a fundamental constitutional protection that had existed for 36 years.

Also, it showed me that Supreme Court justices are much more than umpires calling balls and strikes and that the word activist often is used only to describe opinions of one side.

As a matter of fact, in just two years, these same nominees have either disregarded or overturned precedent in at least eight other cases:

• A case involving assignments to attain racial diversity in school assignments, (Parents Involved in Community Schools v. Seattle School Dist. No. 1).

• A case overruling 70 years of precedent on the Second Amendment and federal gun-control law, (District of Columbia v. Heller).

• A case which increased the burden of proof on older workers to prove age discrimination, (Jack Gross v. FBL Financial Services).

• A case overturning a 1911 decision to allow manufacturers to set minimum prices for their products, (Leegin Creative Leather Products v. PSKS).

• A case overruling two cases from the 1960s on time limits for filing criminal appeals, (Bowles v. Russell).

• A case reversing precedent on the Sixth Amendment right to counsel, (Montejo v. Louisiana).

• A case overturning a prior ruling on regulation of issue ads relating to political campaigns, (FEC v. Wisconsin Right to Life).

• And a case disregarding prior law and creating a new standard that limits when cities can replace civil service exams that they believe may have discriminated against a group of workers, (Ricci v. DeStefano).

So I do not believe that Supreme Court justices are merely umpires calling balls and strikes. Rather I believe that they make the decisions of individuals who bring to the court their own experiences and philosophies.

Judge Sotomayor, I believe you are a warm and intelligent woman. I believe that you are well-studied and experienced in the law, with some 17 years of federal court experience involving 3,000 appeals and 450 trial cases.

So I believe you too will bring your experiences and philosophies to this highest court and I believe that will do only one thing – and that is to strengthen this high institution of our great country.

Thank you Mr. Chairman."

Statement of Richard J. Feldman, Esq.

On Judge Sonia Sotomayor's Nomination to the United States Supreme Court July 16, 2009

Chairman Leahy and Members of the Senate Judiciary Committee:

It is a pleasure to submit this testimony today in support of President Obama's choice for the United States Supreme Court, Judge Sonia Sotomayor of the Second Circuit Court of Appeals.

I will address the issue of firearm civil rights, a field I have dedicated my career to protecting and preserving.

By way of reference, I served as the Northeast political and legislative representative for the National Rifle Association in the mid 1980's and for almost a decade as the Executive Director of the American Shooting Sports Council, the firearm industry's legislative trade group from 1990 until 1999.

Swirling about Judge Sotomayor's nomination is an all too predictable controversy generated by the organized gun community whose underlying motivations and relationships are detailed in my recent book, Ricochet Confessions of a Gun Lobbyist, (Wiley, 2007).

It's a controversy fed by fundraiser rhetoric and press release hyperbole being cranked out by the consultants and senior leaders of the gun lobby. Of course, it is always possible that their litany of allegations may be correct, since none of us knows the future, but her critics would have to be mind readers capable of probing her innermost thoughts and personal opinions to credibly make those claims based upon the evidence available to all of us.

No evidence exists that supports the characterization of Judge Sotomayor as an "anti-gun radical. " The *Maloney v Cuomo* decision that has been cited as proof of her anti-gun bias upheld the conviction of a New York resident for possession of nunchakus. The three-judge panel (including Sotomayor) issued a unanimous decision that states, "It is settled law, however, that the

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Second Amendment applies only to limitations the federal government seeks to impose on this right." That decision followed established precedent in stating that the Second Amendment, as interpreted in *Heller,* is not applicable against the State of New York.

Members of the Committee, as unhappy as I am with this as the state of the law as interpreted today in America, and as much as I would like to see the Supreme Court revisit *Presser, Cruikshank* and *Miller*, the *Maloney* court followed established precedent as they were required to do. The mandates of the principle of stare decisis dictated the outcome of the Maloney case.

Judge Frank Easterbrook, Chief Judge of the 7th Circuit Court of Appeals, an individual with impeccable intellectual and conservative judicial credentials, supported the Maloney decision. Last month, in the *NRA v. City of Chicago* Judge Easterbrook stated, "We agree with *Maloney*," and further noted, "that *Cruikshank* is open to reexamination by the Justices themselves when the time comes".

Judge Easterbrook found that the *Maloney* decision made the same exact point that, "the Court of Appeals should follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions."

I've spent twenty-five years defending the rights of American citizens to keep and bear arms, and I can state without reservation that neither the *Maloney* decision nor the words of Judge Easterbrook demonstrate bias against the right of Americans to bear arms.

Both, in fact, endorse the concept of judicial restraint; a concept generally accepted and promoted by conservatives.

An overwhelming majority of gun owners want justices who are intelligent, thoughtful, have integrity and experience, are faithful to the rule of law, and most of all, sensitive to civil rights and liberties as enumerated and provided for in the Constitution, especially in the Bill of Rights. The country needs justices who are attentive to the historical, moral and philosophical rationale for the governing constitutional provisions.

Judge Sotomayor has proven herself to be an individual who supports the Constitution, follows established principles of law, and is a thoughtful and

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restrained jurist. Her adherence to precedent and her recognition of her duties and responsibilities in her role as a Circuit Court judge are compelling evidence that she will interpret and remain faithful to the Constitution and the Bill of Rights.

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COMMONWEALTH OF PUERTO RICO

LUIS G. FORTUÑO
GOVERNOR

May 26, 2009

The Honorable Patrick Leahy
Chairman, Judiciary Committee
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

Dear Mr. Chairman:

I write to express my support for the nomination of Judge Sonia Sotomayor as Associate Justice on the U.S. Supreme Court. Judge Sotomayor's nomination as the first Puerto Rican to serve on the nation's High Court is a powerful recognition of the contributions and capacity of the people of Puerto Rico, as well as the Nation's entire Hispanic-origin population.

As President Obama pointed out upon announcing this nomination, Judge Sotomayor possesses more judicial experience than any of the Court's current justices had upon entering the Nation's highest judicial body. Moreover, throughout her career, Judge Sotomayor has shown herself to be a first rate jurist, approaching the cases before her with an open mind and steadfast commitment to fairness.

It is also important to take note of the fact that in view of her track record of impartiality and her commitment to making decisions based on the law and the Constitution, Judge Sotomayor has enjoyed exceptional bipartisan support throughout her career. As you know, in 1991 President George H.W. Bush

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nominated her to serve as U.S. District Court Judge for the Southern District of New York. Subsequently, in 1998, President Bill Clinton tapped Judge Sotomayor for her current post as Judge of the U.S. Court of Appeals for the Second Circuit.

In light of all these considerations, I urge you and your colleagues to proceed to approve her nomination.

Sincerely,

Luis G. Fortuño
c: Hon. Harry Reid

Statement of

The Honorable Al Franken

United States Senator
Minnesota
July 13, 2009

OPENING STATEMENT ON JUDGE SOTOMAYOR'S
NOMINATION HEARING
Senator Al Franken

Thank you, Mr. Chairman. It is an incredible honor to be here. Less than a week into my term as a United States Senator, my first major responsibility is here, at this historic confirmation hearing.

I am truly humbled to join the Judiciary Committee, which has played, and will continue to play, such an important role in overseeing our nation's system of justice. Chairman Leahy, for several years now I have admired your strength and integrity in leading this Committee. I'm grateful for the warm welcome and consideration you have given me, and I am honored to serve alongside you.
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Ranking Member Sessions, I want you to know that I plan to follow the example of my good friend and predecessor, Paul Wellstone, who was willing and ready to partner with his colleagues across the aisle to do the work of the American people. I look forward to working over the years with you and my other Republican colleagues in the Senate to improve the lives of all Americans.

To all the members of this committee, I know that I have a lot to learn from each of you. Like so many private citizens, I have watched at least part of each and every Supreme Court confirmation hearing since they have been televised. And I would note that this is the first confirmation hearing that Senator Kennedy has not attended since 1965. We miss his presence.

These televised hearings have taught Americans a lot about our Constitution – and the role that the courts play in upholding and defending it. I look forward to listening to your questions and to the issues that you and your constituents care about.

To Judge Sotomayor, welcome. For the next few days, I expert to learn from you as well. You are the most experienced nominee to the Supreme Court in 100 years. And after meeting with you in my office last week, I know that aside from being a fine jurist, you are also an exceptional individual. Your story is inspiring and one in which all Americans should take pride.

As most of you know, this is my fifth day in office. That may mean that I am the most junior

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Senator, but it also means that I am the Senator who has most recently taken the oath of office. Last Tuesday, I swore to "support and defend the Constitution of the United States" and to "bear true faith and allegiance" to it. I take this oath very seriously as we consider Judge Sotomayor's nomination.

I may not be a lawyer, but neither are the overwhelming majority of Americans. Yet all of us, regardless of our backgrounds or professions, have a huge stake in who sits on the Supreme Court and are profoundly affected by its decisions.

I hope to use my time over the next few days to raise issues that concern people in Minnesota and around the country. This hearing will help folks sitting in living rooms and offices in Winona or Duluth or the Twin Cities to get a better idea of what the court is, what it does and what it is supposed to do, and most importantly, how its actions affect the everyday lives of all Americans.

Justice Souter, whom you will replace if you're confirmed, once said: "The first lesson, simple as it is, is that whatever court we're in, whatever we are doing, at the end of our task some human being is going to be affected. Some human life is going to be changed by what we do. And so we had better use every power of our minds and our hearts and our beings to get those rulings right." I believe he had it right.

In the past months, I've spent a lot of time thinking about the court's impact on the lives of Americans and reading and consulting with some of Minnesota's top legal minds. And I believe that the rights of Americans, as citizens and voters, are facing challenges on two separate fronts.

First, I believe the position of Congress with respect to the Courts and the Executive is in jeopardy. Even before I aspired to represent the people of Minnesota in the United States Senate, I believed that the Framers made Congress the first branch of government for a reason. It answers most directly to the people and has the legitimacy to speak for the people in crafting laws to be carried out by the executive branch.

I am wary of judicial activism and I believe in judicial restraint. Except under the most exceptional circumstances, the judicial branch is designed to show deep deference to Congress and not make policy by itself.

Yet looking at recent decisions on voting rights, campaign finance reform, and a number of other topics, it appears that appropriate deference may not have been shown in the past few years -- and there are ominous signs that judicial activism is on the rise in these areas.

I agree with Senator Feingold and Senator Whitehouse that we hear a lot about judicial activism when politicians talk about what kind of judge they want in the Supreme Court. But it seems that their definition of an activist judge is one who votes differently than they would like. Because during the Rhenquist Court, Justice Clarence Thomas voted to overturn federal laws more than Justices Stevens and Breyer combined.

Second, I am concerned that Americans are facing new barriers to defending their individual rights. The Supreme Court is the last court in the land where an individual is promised a level playing field and can seek to right a wrong:

- It is the last place an employee can go if he or she is discriminated against because of age, gender, or color.
- It is the last place a small business owner can go to ensure free and fair competition in the market.
- It is the last place an investor can go to try to recover losses from securities fraud.
- It is the last place a person can go to protect the free flow of information on the internet.
- It is the last place a citizen can go to protect his or her vote.
- It is the last place where a woman can go to protect her reproductive health and rights.

Yet from what I see, on each of those fronts, for each of those rights, the past decade has made it a little bit harder for American citizens to defend themselves.

As I said before, Judge, I'm here to learn from you. I want to learn what you think is the proper relationship between Congress and the Courts, between Congress and the Executive. I want to learn how you go about weighing the rights of the individual, the small consumer or business-owner, and more powerful interests. And I want to hear your views on judicial restraint and activism in the context of important issues like voting rights, open access to the Internet, and campaign finance reform.

We're going to have a lot of time together, so I'm going to start listening. Thank you, Mr. Chairman.

FRC*Action*™
The Legislative Action Arm of FAMILY RESEARCH COUNCIL

Tony Perkins
President

July 14, 2009

Dear Chairman Patrick Leahy and Senate Judiciary Ranking Member Jeff Sessions:

On behalf of FRC Action (FRCA), the legislative arm of the Family Research Council, and the families we represent, I write to you today with serious reservations regarding the nomination of Sonia Sotomayor to the United States Supreme Court.

The Senate Judiciary Committee has the important role of properly vetting any nominee to ensure that the nominee has the requisite competence, temperament, character, knowledge of the law and experience to make a good jurist. The nominee must be committed to making decisions based on the law and the facts of each case. Personal ideological predispositions toward certain results must be set aside, and the nominee must have the ability to faithfully uphold the Constitution recognizing that it is the supreme law and source of authority for all American law, including judicial precedents. A review of Ms. Sotomayor's record shows she is lacking in many of these qualities.

Senators on the committee need to have Ms. Sotomayor address what exactly she meant by some of her more controversial statements, why she tried to suppress her ruling in the Connecticut firefighters' discrimination case and her seeming disregard for U.S. judicial sovereignty. Ms. Sotomayor should also describe the extent of her role in the anti-life work at the Puerto Rican Legal Defense and Education Fund (PRLDEF).

From 1980 to 1992, Judge Sotomayor was an active governing board member of the PRLDEF where she helped to shape the group's controversial legal policy. Just one example of work done while she was there is the brief for *Webster v. Reproductive Health Services,* written in 1989, in which the organization called the right to abortion "precious." Ms. Sotomayor's troubled history as a jurist, an activist and as an attorney have surfaced numerous other concerns on sanctity of life issues, on sovereignty matters, marriage questions and more that makes us question her fitness to serve on our nation's highest court.

Barring significant revelations at her Senate confirmation hearing that change our assessment of her judicial philosophy, Family Research Council Action must stand in opposition to Judge Sotomayor's confirmation. The available evidence reveals Judge Sotomayor to be a judicial activist who does not have a proper understanding of the limited role of judges and the judiciary in our constitutional system.

Sincerely,

Thomas McClusky
Senior Vice President

Cc: U.S. Senate Judiciary members

801 G Street, NW • Washington, D.C. 20001

STATEMENT OF
THE HONORABLE LOUIS J. FREEH
FORMER DIRECTOR OF THE FBI
IN SUPPORT OF THE CONFIRMATION OF JUDGE SONIA SOTOMAYOR
AS ASSOCIATE JUSTICE OF THE U.S. SUPREME COURT
BEFORE THE COMMITTEE ON THE JUDICIARY
OF THE UNITED STATES SENATE
JULY 16, 2009

I am here today with tremendous pride in my former colleague to testify in support of Sonia Sotomayor to be an Associate Justice of the Supreme Court. Judge Sotomayor has the extensive experience and the judicial qualities that make her eminently qualified for this ultimate honor, I wholeheartedly recommend her to this Committee and to the full Senate, and I look forward to watching her take her place on the Nation's highest Court.

I first met Judge Sotomayor in 1992 when she was appointed to the United States District Court for the Southern District of New York. As the then newest judge in the storied Courthouse at Foley Square in lower Manhattan, we followed the tradition of having the newly-minted judge mentored by the last-arriving member of the bench. Despite the questionable wisdom of this practice, I had the privilege of serving as Judge Sotomayor's point of contact for orientation and to help her get underway as she took on a full, complex civil and criminal case docket.

A few weeks of 'New Judges School' sponsored by the Administrative Office of the Courts does not in any meaningful way begin to prepare a new District Judge for the unrelenting rigor of conferences, motions, hearings, applications, trials and other miscellaneous duties---including appeals from the Bankruptcy Court---which instantly construct what often appears to be an overwhelming schedule for a new judge. To make matters more challenging, when I was a new judge the Court followed the tradition of allowing the active judges to select a fixed number of their pending cases for reassignment to the new arrival.

Into this very pressurized and unforgiving environment, where a new judge's every word, decision, writing and question is scrutinized and critiqued by one of

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the harshest, professional audiences imaginable, Judge Sotomayor quickly distinguished herself as a highly competent judge who was open-minded, well-prepared, properly demanding of the lawyers who came before her, fair, honest, diligent in following the law, and with that rare and invaluable combination of legal intellect and 'street smarts.'

As I spent a lot of time reading her opinions, observing her in the courtroom conducting the busy, daily docket of a trial judge, and discussing her cases and complex legal issues, I was greatly impressed with how quickly she mastered and employed the critical skills of her new position.

To me, there is no better measure by which to evaluate a judge than the standards of the former Chief Judge of the U.S. District Court of Minnesota and nationally renowned American jurist, Edward J. Devitt. A former Member of Congress and World War II Navy hero, Judge Devitt was appointed to the federal bench by President Eisenhower and became one of the country's leading trial judges and teacher of judges. A standard Jury Instruction textbook (Devitt and Blackmun) as well as the profession's most coveted award recognizing outstanding judges, the Devitt Award, bears his name.

I recently had the honor of participating in the dedication of a courtroom named for Judge Devitt. The judges and lawyers who spoke in tribute to Judge Devitt very ably and insightfully described the critical characteristics which define and predict great judges. But rather than discuss Judge Devitt's many decisions, particular rulings or the 'sound bite' analyses which could have been parsed from the thousands of complex and fact specific cases which crossed his docket, they focused on those ultimately more profound and priceless judicial qualities which ensure that Article Three judges with lifetime tenure uphold the Rule of Law with fairness, courage and justice for all.

Teaching hundreds of new American judges over several decades, Judge Devitt liked to use a 'nutshell version' for emphasis and because he always got right to the heart of things. So he offered three rules:

"1. judging takes more than mere intelligence;

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2. Always take the bench prepared. Listen well to all sides, stay open as you are listening and recognize any pre-conceptions that you may bring to the matter. Then, make a decision and never look back;

3. Call them as you see them."

Sonia Sotomayor would have gotten an 'A plus' from the "Judge from Central Casting," as Judge Devitt was often called by his peers.

A great part of Judge Devitt's legacy is his famous "Ten Commandments to Guide the New Federal Judge," which he gave me, and which I passed on to Judge Sotomayor:

1. "Be Kind;
2. Be Patient;
3. Be Dignified;
4. Don't Take Yourself Too Seriously;
5. Remember That a Lazy Judge Is a Poor One;
6. Don't Be Dismayed When Reversed;
7. Remember There Are No Unimportant Cases;
8. Don't Impose Long Sentences;
9. Don't Forget Your Common Sense; and
10. Pray For Divine Guidance."

In my brief role as Judge Sotomayor's 'second seat' on the Southern District trial bench, I probably spent more time with her in those first months than any other member of our great Court. And I was delighted to observe and conclude that she exhibited all the desired characteristics that Judge Devitt prescribed for his 'students.'

Since 1992 I have followed Judge Sotomayor's career on the bench both as a trial judge and later as a member of our Second Circuit Court of Appeals. Along with my former colleague judges and lawyers, we have seen her grow and mature into a truly outstanding judge, who embodies all of Judge Devitts's wise counsel and the most prized characteristics of judicial courage, integrity, intelligence and fair adjudication of the Rule of Law.

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Judge Sotomayor's early demonstration of judicial restraint, appropriate deference to the other two Branches of government and her fidelity to upholding the rule of law can perhaps best be seen in a 1998 case. Sitting as a District Judge, she carefully heard a minimum wage lawsuit and, in recognition of the limits of judicial power, she relied on the statutory text and precedent to reach her decision: "The question of whether such a program should be exempted from the minimum wage laws is a policy decision either Congress or the Executive Branch should make."

Judge Sotomayor will bring great legal as well as judicial experience to the Supreme Court and will serve there with distinction in the fine tradition of Judge Devitt. As the only 'trial judge' on the current Court, she will import an immense wealth of experience which comes uniquely from judges who preside over cases with witnesses, juries, real time procedural and evidence rulings and the challenging (and unpredictable) dynamics of a trial courtroom. It will also be a very valuable asset for the Court to have a former criminal prosecutor (it has only one now) who was widely respected by judges, defense attorneys and law enforcement officers.

Most importantly, Judge Sotomayor will continue to exemplify the 'Devitt Rules' we want all our judges to follow, and the courage, integrity and experience required to protect the Rule of Law. The efforts by some to discredit the Judge are far afield from the eminent jurist whom I know, and I hope that no Senator will be misled or motivated by partisan rancor to vote against someone who so fully fits the measure of what we should want in a Supreme Court justice. I hope you will consider her nomination expeditiously so she is confirmed and prepared to participate in the Court's first session on September 9, 2009.

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Remarks of Sandra S. Froman

Before the Senate Judiciary Committee

July 16, 2009

Chairman Leahy and Ranking Member Sessions, thank you for the opportunity to appear before the Judiciary Committee today to discuss the nomination of Judge Sonia Sotomayor, particularly as it relates to her views on the Second Amendment.

Before I begin, let me state that the views I express today are my own and not those of any particular organization. Having said that, I believe my views are shared by Americans from all states and all walks of life who care about preserving our fundamental constitutional liberties for ourselves and future generations, especially the right to keep and bear arms.

It is extremely important that a Supreme Court justice understand and appreciate the origin and meaning of the Second Amendment, a constitutional guarantee permanently enshrined in the Bill of Rights that protects "the right of *the people* to keep and bear Arms." It is a right exercised and valued by almost 90 million American gun owners as well as by tens of millions more who value the right to choose to own a firearm in the future or to enjoy the shooting sports with a friend or family member who owns a gun. It may be considered the ultimate constitutional right because it exists to protect all the others.

Yet Judge Sotomayor's record on the Second Amendment together with her unwillingness or inability as an appellate judge to engage in any analysis of this enumerated right when twice given the opportunity to do so – including most recently after the Supreme Court's landmark decision last year in *District of Columbia v. Heller* – suggest either a lack of understanding of Second Amendment jurisprudence or hostility to the right. Either possibility should be of grave concern to this committee, as it is to me and millions of other gun owners.

Last year, the Supreme Court held in *Heller* that the Second Amendment guarantees to all law-abiding, responsible citizens the individual right to keep and bear their private arms, particularly for self-defense. The Court was closely divided, however. Four of the nine justices dissented, arguing that the Second Amendment does not protect the right of an individual to use firearms for purely private, non-military purposes and endorsed the concept that "legislatures may regulate the civilian use and misuse of firearms so long as they do not interfere with the preservation of a well-regulated militia." The same four justices joined in a separate dissent saying that even if the Second Amendment protects a purely private right to own firearms, the District of Columbia's absolute ban on handguns within the home should be upheld as a "reasonable" restriction. If this had been the majority view, then any gun ban could be upheld, and the Second Amendment would be meaningless.

While on the Second Circuit, Judge Sotomayor revealed her views on the right to keep and bear arms in two cases. In the 2004 case, *United States v. Sanchez-Villar,* Judge Sotomayor and two colleagues dismissed a Second Amendment claim in a footnote holding that "the right to possess a gun is clearly not a fundamental right." They cited an earlier Second Circuit case but provided no reasoning or analysis to support their one-sentence conclusion rejecting the constitutional claim. Imagine if such abrupt treatment was afforded other fundamental rights guaranteed by the Bill of Rights, such as the First, Fourth and Fifth Amendments.

Judge Sotomayor's 2004 ruling might have been overlooked as having been issued before the Supreme Court in *Heller* announced its modern jurisprudence on the Second Amendment. But Judge Sotomayor reiterated her view of the Second Amendment after *Heller.* In *Maloney v. Cuomo,* decided earlier this year, she was on a panel that held that the Second Amendment is not a fundamental right, that it does not apply to the states, and that if an object is "designed primarily as a weapon" that is a sufficient basis for total prohibition even within the home.

The *Maloney* opinion cited the 1886 Supreme Court case of *Presser v. Illinois* as controlling precedent for the proposition that the Second Amendment limits only the federal government and does not limit the states. The panel stated that *Heller* "does not invalidate this longstanding principle," and concluded without analysis that even if *Heller* "might be read to question the continuing validity" of *Presser*, the 1886 case had "direct application" to *Maloney* and must be followed.

Presser and two other cases from the late 1800's, *United States v. Cruikshank* (1876) and *Miller v. Texas* (1894), held that the Second Amendment does not apply to the states. Although the *Cruikshank* line of cases has never been overruled, they were decided before development of modern twentieth century incorporation jurisprudence. Thus, the cases are obsolete and mostly have been rejected by the Court. For example, *Cruikshank* also stated that the First Amendment right of assembly did not apply to the states, which the Court later repudiated. Otherwise, Americans would not have any assembly First Amendment rights against states and local governments, which would then be able to ban church attendance or make it a crime to gather on the steps of the statehouse to criticize government. Indeed, over the past 50 years, the Supreme Court has applied most of the Bill of Rights to the states.

An individual's Second Amendment rights are no less deserving of protection against states and local governments. Although the Supreme Court did not have to decide the incorporation issue in *Heller*, because federal law applies directly in the District of Columbia, the Court warned in a footnote against the application of *Cruikshank* in future Second Amendment cases and specified the type of constitutional analysis that would be expected of lower federal courts presented with the incorporation issue: "With respect to *Cruikshank's* continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases."

The *Maloney* panel was equally dismissive of the Fourteenth Amendment claim, concluding that laws "that do not interfere with fundamental rights" must be upheld if "rationally related to a legitimate state interest." Judge Sotomayor and her panel members conducted no analysis to determine if the right at issue was fundamental but merely assumed it was not. They accepted that a rational basis existed for the statute because there had been testimony at the time the law was enacted that the weapon at issue, a nunchaku, was "designed primarily as a weapon and has no purpose other than to maim or, in some instances, kill," and went on to uphold the statute.

In light of the express warning in *Heller* about *Cruikshank*, Judge Sotomayor's panel in *Maloney* was obligated at a minimum to conduct a proper Fourteenth Amendment due process analysis of Second Amendment incorporation before reaching a conclusion. By failing to do so, the *Maloney* court evaded its judicial responsibilities, offered no guidance to lower federal courts faced with this issue, and provided no assistance in framing the issue for eventual resolution by the Supreme Court of a conflict among the circuits.

In addition, the *Maloney* court's use of the rational basis standard of review to uphold the New York statute's ban on possession of nunchakus in the home, is incorrect in light of *Heller's* holding that the District of Columbia's categorical ban on handguns in one's home would fail under any meaningful standard of review. After *Heller*, it is not proper to apply a rational basis standard to a Second Amendment claim without performing the requisite constitutional analysis to determine whether the right is fundamental, which the *Maloney* court did not do.

While Second Amendment supporters disagree with Judge Sotomayor's substantive views of the Second Amendment, the manner in which she reached her conclusions is of equal or greater concern. When confronted with perhaps the most important question remaining after *Heller* about the right to keep and bear arms – whether the right is fundamental and should be incorporated by the Fourteenth Amendment to constrain the states – Judge Sotomayor dismissed the issue with no substantive analysis. Citing questionable precedent from the 1800's, she did nothing to note over a century of radical changes in constitutional law, nothing to consider the merits of the argument, nothing to comment on the issue's importance.

Whenever a federal appellate judge fails to provide any supporting analysis for his or her conclusion, or to address serious constitutional issues that are compelled by the case, it is legitimate to ask whether the judge reached that conclusion based on fair and impartial application of the Constitution and law to the facts or based on an unstated political or social agenda.

Whether the Second Amendment is incorporated to states and local governments is important because, in addition to federal statutes and regulations, there are tens of thousands of state and local laws regulating firearms that affect American guns owners in their daily lives. Preventing an individual from effectively exercising what the *Heller* Court said was the Second

Amendment's "core lawful purpose of self-defense" is no less dangerous to the individual when accomplished by a state law than by a federal law. And to the extent that the Second Amendment was intended as a "safeguard against tyranny," there is no reason why individuals should not be equally entitled to protection against tyranny by state governments as by the federal government.

Although the Court in *Heller* did not decide whether the Second Amendment is a "fundamental right", the opinion suggests as much, noting that the right to arms was "one of the fundamental rights of Englishmen" from whence our common law derives and that the "inherent right of self-defense has been central to the Second Amendment right." Thus, the right in every sense satisfies the Supreme Court's test in *Duncan v. Louisiana* that to be fundamental, the right must be "necessary to an Anglo-American regime of ordered liberty."

Whether the Second Amendment is a fundamental right is important to deciding whether a meaningful level of scrutiny should be applied to any governmental burden placed on the exercise of the right. It is also critical to answering the incorporation question because the Supreme Court has only incorporated against the states those rights it deems fundamental.

Judge Sotomayor's view that the right to keep and bear arms is not a fundamental right deserving of protection against states and local governments would rob the Second Amendment of any real meaning and would trample on the individual rights of America's nearly 90 million gun owners. Under her view of the Second Amendment, states and local governments could pass any kind of gun prohibition they want, including outright bans on firearms. Under her view, the gun bans in New York City, San Francisco, and Chicago would be upheld under the Constitution. Under her view, it would not violate the Constitution if – as implausible as it seems – the states of Nebraska and Montana decided to ban all guns used for hunting based on environmental concerns, or if the cities of Anchorage and Little Rock decided to ban all handguns within the city limits as a public safety measure. The City of New Orleans' door-to-door confiscation of firearms from law-abiding peaceable citizens that took place in the aftermath of Hurricane Katrina would be constitutional under Judge Sotomayor's view of the Second Amendment.

The lack of any serious constitutional analysis by Judge Sotomayor in the *Maloney* and *Sanchez-Villar* decisions is even more egregious when you compare them to the recent Ninth Circuit and Seventh Circuit cases that reached opposite views on Second Amendment incorporation.

In *Nordyke v. King*, the Ninth Circuit engaged in a detailed analysis of this question, concluding that the *Cruikshank* line of cases only prevented incorporation through the Privileges or Immunities Clause. The Ninth Circuit held that it was free to consider incorporation through the Due Process Clause and did so, concluding that the Second Amendment does apply to the states.

The Seventh Circuit, in *NRA v. Chicago*, reached the opposite conclusion on incorporation of the Second Amendment based on what it felt was controlling precedent of the *Cruikshank* line of cases from the 1800's, but not before discussing the question in depth, exploring the legal issues and explaining its conclusion in a nine-page opinion.

Against the backdrop of *Heller*, *NRA v. Chicago* and *Nordyke v. King*, Judge Sotomayor's two Second Amendment decisions raise questions not only about her substantive views of this enumerated right but about her willingness to engage in the rigorous constitutional analysis expected of a Supreme Court justice.

Today the Second Amendment survives by a single vote in the Supreme Court. Both its application to the states and whether there will be a meaningfully strict standard of review remain to be decided by the High Court. America has almost 90 million gun owners who value their Second Amendment rights. Those Americans deserve to have a justice who will interpret the Second Amendment in a fair and impartial manner consistent with the Amendment's text and intent. Judge Sotomayor has already revealed her views on these issues, and they are contrary to the language and purpose of the Second Amendment.

Regarding the Second Amendment, Judge Sotomayor's supporters say she will follow precedent. But this is no answer. If that means Judge Sotomayor will adhere to the *Cruikshank* line of cases, as she did in *Maloney*, then she would join the side of those justices who would hold that the Second Amendment applies only to the federal government, leaving cities and states free to completely ban firearms for any reason, or that the Second Amendment is not a fundamental right, which would allow cities and states to ban firearms if there is any "rational basis" for doing so. And in *Maloney*, Judge Sotomayor ignored precedent when she applied the rational basis test to uphold the New York statute banning nunchakus – after the Supreme Court in *Heller* stated that rational basis is not a sufficiently rigorous standard of scrutiny to apply to enumerated constitutional rights, such as the Second Amendment.

An appellate judge—and especially a Supreme Court justice—must write well-crafted opinions that fully and impartially explore the Constitution and statutes, and which are worthy of respect from those of us who must live by their decisions. While important in every case, this is particularly so in cases involving enumerated constitutional rights central to the freedom upon which this country was founded.

In the aftermath of *Heller*, there will be many gun-rights cases over the next thirty years, and whoever becomes the newest Supreme Court Justice will likely have a hand in deciding them all. This formative period of developing Second Amendment jurisprudence is when the right to keep and bear arms is most vulnerable.

The Second Amendment survives today by a single vote in the Supreme Court. But the next justice will have an impact beyond a single vote because his or her views will also affect the dynamic of the Court. The next justice will serve for life and that person's influence and legacy

will affect us all for generations to come. American gun owners, together with all Americans who revere the Constitution, deserve to have a Supreme Court justice who will interpret the Second Amendment fully and fairly in a manner consistent with its text and meaning.

A supermajority of Americans believe in an individual, private right to keep and bear arms. As a result, political candidates hostile to Second Amendment rights are often defeated at the ballot box. Gun prohibition activists are now looking to the courts and they support judges whom they believe will rule in favor of more limitations on firearms ownership and use. The President who nominated Judge Sotomayor has expressed support for the City of Chicago's gun ban, which is being challenged in *NRA v. Chicago*, a case that is headed toward the Supreme Court. Seating a justice on the Supreme Court who does not believe that the Second Amendment is a fundamental right deserving of protection against infringement by cities and states could do far more damage to the right to keep and bear arms than any legislation passed by Congress.

Based on her record and her treatment of the Second Amendment, I respectfully urge the Senate not to confirm Judge Sotomayor.

Prepared Testimony of

Michael J. Garcia

Former United States Attorney
for the Southern District of New York

for the hearing entitled

"The Nomination of Sonia Sotomayor
to be an Associate Justice
of the Supreme Court of the United States"

before the

Committee on the Judiciary

United States Senate

July 17, 2009

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It is an honor to appear in support of Judge Sotomayor's nomination to the Supreme Court. It struck me in preparing to testify today that my experience practicing before Judge Sotomayor provided clear bookends to my career as federal prosecutor. As a junior Assistant United States Attorney, I had one of my first trials in her courtroom: as the United States Attorney for the Southern District of New York, I argued before her in my last appearance representing the government.

I have known Judge Sotomayor since 1994, when as a prosecutor fairly new to the office, I tried a narcotics case in her courtroom. Judge Sotomayor was a relatively new appointee to the federal bench at that time and I remember a sense of curiosity in the office about how she would conduct criminal trials, as it is my recollection that this was one of her first. That question was quickly answered: she conducted that trial fairly, ran a tight ship in the courtroom, displayed courtesy and professionalism to both parties at all times, and showed a keen grasp of all the evidentiary and other legal issues that arose during the course of the two-week proceeding.

It was not a simple case. The defendant was charged with running a massive heroin distribution operation in upper Manhattan. The government called a number of witnesses, including two individuals who had participated in the conspiracy and later cooperated with the authorities, as well as a number of civilian and law enforcement witnesses. Substantial evidence, including weapons and other items seized during raids by the Bureau of Alcohol, Tobacco and Firearms, was introduced through those witnesses.

Judge Sotomayor maintained perfect control of the courtroom while ensuring that the defendant received a fair trial and was afforded all of his constitutional rights. She made timely but deliberate and careful rulings on all the issues. Whether she ruled for the government or not, I felt that our arguments were given a fair hearing in every instance.

The judge demonstrated a striking command of the applicable criminal law. I remember on the eve of the jury charge, Judge Sotomayor brought up a very recent ruling by the Supreme Court. She informed us that she did not think the ruling would effect her instructions but she asked that we get back to her with our view by the next morning. After several hours of catch-up analysis that night, both the prosecution and the defense agreed.

Ultimately, the defendant was convicted of conspiracy to distribute large quantities of heroin. After the verdict, the judge called both parties in to thank us for our efforts and professionalism, a much-appreciated courtesy.

That was one of my first trials as a prosecutor. 14 years later, in June 2008, I again found myself appearing in front of Judge Sotomayor, this time she was a seasoned

judge on the Court of Appeals for the Second Circuit and I was the United States Attorney for the Southern District of New York.

The case was a government appeal involving the brutal beating of a restrained prisoner -- after the attack, the prisoner was in a coma for a year before dying. The government's conviction of the guard responsible for the attack had been overturned by the trial judge on a number of grounds that we felt misinterpreted the proof and misapplied the relevant legal standards.

I did not try the case, but given the crime involved and the trial court's decision, I believed it was important for the U.S. Attorney to appear and argue the matter on behalf of the government. I spent a great deal of time preparing for that argument. As I began to speak, it became immediately apparent that so had Judge Sotomayor.

Judge Sotomayor closely questioned both parties on the law and its application to the facts of the case. She was demanding. It was clear she wanted detailed answers to her probing questions. Again I saw a careful and deliberate judge seeking to make the right ruling and affording the parties the opportunity to make their case.

It was a challenging argument on important issues in a case involving a very serious crime. As I left the courtroom, I had no idea how the court would come out. A few months later, Judge Sotomayor, writing for a unanimous court, reversed the district court and reinstated the jury's guilty verdict.

Judge Sotomayor's detailed opinion demonstrated careful study of the factual record and the applicable law, carefully setting out and adhering to the appropriate standard of review. It was concise, well-reasoned and to the point.

Though 14 years passed between those two appearances in front of Judge Sotomayor, some things remained constant. The judge was prepared and knew the law. She demanded preparation and professionalism from the parties. She gave us a fair hearing and listened to our arguments. Her rulings were well-reasoned and supported by the applicable law as applied to the facts at hand.

I hope this testimony in support of Judge Sotomayor's nomination, from the perspective of someone who has appeared in her courtroom, is helpful to the committee and I would be happy to answer any questions you may have.

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June 1, 2009

The Honorable Patrick J. Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington DC 20510

President
Katherine González-Valentín

Vice-President
Carlos A. Valdejully

Past-President
Ricardo F. Casellas

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Ricardo Ortiz

Re: *Nomination of Judge Sonia Sotomayor to the United States Supreme Court*

Dear Chairman Leahy:

On May 26, 2009, President Barack Obama nominated Judge Sonia Sotomayor to fill the vacancy left by Justice David H. Souter in the United States Supreme Court.

The Hon. Raymond L. Acosta Puerto Rico Chapter of the Federal Bar Association has issued the enclosed resolution supporting Judge Sotomayor's nomination and endorsing her as qualified in every respect to fill this important position.

In sharing our background, please, note that the Federal Bar Association is a professional organization for private and government lawyers and judges that has been established for over 80 years with a membership of about 16,000 federal practitioners and over 900 members of the bench. The FBA is dedicated to the advancement of the science of jurisprudence and to promoting the welfare, interests, education and professional development of all attorneys involved in federal practice. The Hon. Raymond L. Acosta Puerto Rico Chapter is one of the largest and most distinguished chapters of the Federal Bar Association.

We greatly appreciate your consideration of our resolution, and respectfully request that you include it in the candidate's Senate Judiciary Committee evaluation file.

Respectfully,

Katherine González-Valentín
President

c: The Hon. Harry M. Reid
United States Senate Majority Leader

The Hon. A. Mitchell McConnell
United States Senate Minority Leader

The Hon. Luis G. Fortuño
Governor of Puerto Rico

The Hon. Pedro Pierluisi
Resident Commissioner of Puerto Rico

JENNIFFER A. GONZÁLEZ-COLÓN
SPEAKER

June 9, 2009

By fax 202-224-9516

Hon. Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman:

I am the Vice Chair of Puerto Rico's Republican Party as well as the Speaker of the territory's House of Representatives. I am writing to convey the views of many of your fellow citizens -- particularly the four million in Puerto Rico who are not represented in the Senate -- regarding the nomination of Judge Sonia Sotomayor to the Supreme Court of the United States.

Puerto Ricans are naturally delighted that Judge Sotomayor is of Puerto Rican parentage and a woman but we, as well as tens of millions of other citizens of Latino heritage, are more pertinently elated that she is such an outstanding choice, with brilliant academic credentials and more federal judicial experience than any Justice in the past decades.

Some statements that have been made about the nomination are, therefore, troubling. The initial labeling of Judge Sotomayor as a "racist" took out of context an artful sentence in a thoughtful presentation on why there should be greater diversity in a federal judiciary that has had a paucity of minorities -- particularly Latinos -- and women. It ignored the fact that her "hope that a wise Latina woman ... would more often than not reach a better conclusion than a white male" was made in conjunction with a recollection that some of the most respected white male Justices in history had voted to uphold sex and race discrimination but, also, a recognition that white males are capable "of understanding the values and needs of people from a different group" and had struck down discriminatory law.

In making the case for greater diversity on the federal bench, Judge Sotomayor additionally stressed that she strives for the greatest objectivity humanly possible in administering the law. Her record bears that out: as a judge, she has not sided with

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claims of discrimination four-fifths of the time. And in the New Haven firefighters' promotion exams case, she joined the two other appellate judges in upholding the district court's opinion in favor of the city's decision in a difficult dilemma and following precedent of the circuit.

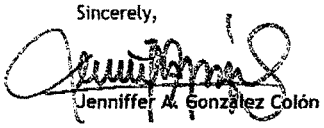
Further, the point of her case for greater diversity within the federal judiciary is one to which Republicans have subscribed in the past. The appointments of Justices Sandra Day O'Connor and Clarence Thomas - among others - recognized that different backgrounds enhance understanding of situations and application of the law. Justice Samuel Alito made a similar point when he was being confirmed.

Senators have an obligation to thoroughly review the nomination that I respect and honor. But I am also concerned that a few statements about the consideration of Judge Sotomayor have given an impression that some want to act in a pointless, dilatory manner as opposed to giving the nomination the detailed but expeditious consideration it deserves.

Even more disconcerting is the proposal to have the confirmation process used to provoke a broader partisan and political debate and promote a judicial philosophy. The process should, of course, be limited to considering the nominee on her merits. All senators should now ensure this. In any case, Judge Sotomayor is by no means a good cause for such a debate. Leading business publications have called her "mainstream". Just Tuesday, her joining a unanimous panel in ruling on a gun law case was mirrored by the opinions of two of the leading conservatives in another circuit.

I would not ask a senator to support the appointment of Judge Sotomayor because she is of Puerto Rico heritage, Hispanic, or woman or to forgo a careful examination of her. I only ask that she be considered promptly and fairly and with a stick focus on her nomination. I trust that when senators have reviewed that individual, her judicial record, and the information, they will reach the conclusion that Judge Sotomayor has extraordinary intelligence and judgment, the appropriate temperament for a Supreme Court Justice, and an absolute dedication to and understanding of the Constitution. She will also bring to the Court the added value of her individuality and experiences as a Hispanic and a woman that we should all celebate.

Sincerely,



Jenniffer A. González Colón

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Statement of

The Honorable Charles Grassley

United States Senator
Iowa
July 13, 2009

Prepared Statement of Senator Chuck Grassley
Senate Committee on the Judiciary
Nomination Hearing of Sonia Sotomayor
to be an Associate Justice on the United States Supreme Court
Monday, July 13, 2009

Judge Sotomayor, congratulations on your nomination to be an Associate Justice on the Supreme Court of the United States. Welcome to the Judiciary Committee. I extend a warm welcome to your family and friends. They must all be very proud of your nomination, and rightfully so.

Judge Sotomayor, you have a distinguished legal and judicial record. No doubt it's one we'd expect of any individual nominated to be a Supreme Court Justice. You made your start from very humble beginnings. You overcame substantial obstacles and went on to excel at some of the nation's top schools. You became an Assistant District Attorney and successful private practice attorney in New York City. You've been on the federal bench as a district court and appellate court judge since 1992. These are all impressive legal accomplishments which certainly qualify you as Supreme Court material.

However, an impressive legal record and a superior intellect are not the only criteria we consider. To be truly qualified, the nominee must understand the proper role of a judge in society. That is, we want to be absolutely certain that the nominee will faithfully interpret the law and Constitution without personal bias or prejudice. This is the most critical qualification of a Supreme Court Justice – the capacity to set aside one's own feelings so he or she can blindly and dispassionately administer equal justice for all.

So the Senate has a constitutional responsibility of "advise and consent" to confirm intelligent, experienced individuals anchored in the Constitution, not individuals who will pursue personal and political agendas from the bench. Judge Sotomayor, you are nominated to the highest court of the land which has the final say on the law. As such, it's even more important for the Senate to ascertain whether you can resist the temptation to mold the Constitution to your own personal beliefs and preferences.

It's even more important for the Senate to ascertain whether you can dispense justice without bias or prejudice. Supreme Court Justices sit on the highest court of the land, so they aren't as constrained to follow precedent to the same extent as district or circuit judges.

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There is a proper role of a judge in our system of limited government and checks and balances. Our democratic system of government demands that judges not take on the role of policy makers. That's a role properly reserved to legislators. The Supreme Court is meant to be a legal institution, not a political one. But some individuals and groups don't see it that way. They see the Supreme Court as ground zero for their political and social battles. They want Justices to implement their political and social agenda through the judicial process. That's not what our great American tradition envisioned – those battles are appropriately fought in the legislative branch. So it's incredibly important that we confirm the right kind of person to be a Supreme Court Justice.

Supreme Court nominees should respect the constitutional separation of powers. They should understand that the touchstone of being a good judge is the exercise of judicial restraint. Good judges understand that their job is not to impose their own personal opinions of "right" and "wrong." They know their job is to say what the law "is," rather than what they personally think it "ought to be." Good judges understand that they must meticulously apply the law and the Constitution, even if the results they reach are unpopular. Good judges know that the Constitution and the laws constrain judges every bit as much as they constrain legislators, executives and citizens. Good judges not only understand these fundamental principles, they live and breathe them.

President Obama said that he would nominate judges based on their ability to "empathize" in general and with certain groups in particular. This "empathy" standard is troubling to me. In fact, I'm concerned that judging based on 'empathy" is really just legislating from the bench.

The Constitution requires that judges be free from personal politics, feelings and preferences. President Obama's "empathy" standard appears to encourage judges to make use of their personal politics, feelings and preferences. This is contrary to what most of us understand to be the role of the judiciary.

Judge Sotomayor, President Obama clearly believes you measure up to his "empathy" standard. That worries me. I've reviewed your record and have concerns about your judicial philosophy. For example, in one speech, you doubted that a judge could ever be truly impartial. In another speech, you argued it'd be a "disservice both to the law and society" for judges to disregard personal views shaped by one's "differences as women or men of color." In yet another speech, you proclaimed that the court of appeals is where "policy is made." Your "wise Latina" comment starkly contradicts a statement by Justice O'Connor that "a wise old woman and a wise old man would eventually reach the same conclusion in a case." These statements go directly to your views of how a judge should use his or her background and experiences when deciding cases. Unfortunately, I fear they don't comport with what I and many others believe is the proper role of a judge or an appropriate judicial method.

The American legal system requires that judges check their biases, personal preferences and politics at the door of the courthouse. Lady Justice stands before the Supreme Court with a blindfold holding the scales of justice. Just like Lady Justice, judges and Justices must wear blindfolds when they interpret the Constitution and administer justice.

Judge Sotomayor, I'll be asking you about your ability to wear that judicial blindfold. I'll be asking you about your ability to decide cases in an impartial manner and in accordance with the law and Constitution. I'll be asking you about your judicial philosophy, whether you allow biases and personal preferences to dictate your judicial method.

Ideally, the Supreme Court shouldn't be made up of men and women who are on the side of one special group or issue. Rather, the Supreme Court should be made up of men and women who are on the side of the law and the Constitution. I'm looking to support a restrained jurist committed to the rule of law and the Constitution. I'm not looking to support a creative jurist who will allow his or her background and personal preferences to decide cases.

Judge Sotomayor, the Senate needs to do its job and conduct a comprehensive and careful review of your record and qualifications. You are nominated to a lifetime position on the highest court. The Senate has a tremendous responsibility to confirm an individual who has superior intellectual abilities, solid legal expertise, and an even judicial demeanor and temperament. Above all, we have a tremendous responsibility to confirm an individual who truly understands the proper role of a Justice.

I'll be asking questions about your judicial qualifications. However, I'm also committed to giving you a fair and respectful hearing, as is appropriate of all Supreme Court nominees.

Again, Judge Sotomayor, I congratulate you on your nomination.

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

HEARINGS ON THE NOMINATION OF SONIA SOTOMAYOR TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

July 13-17, 2009

TESTIMONY OF STEPHEN P. HALBROOK[1]

Legitimate concerns exist about the selection of Judge Sonia Sotomayor for Justice on the U.S. Supreme Court with regard to the interests of the tens of millions of Americans who exercise Second Amendment rights. As an appellate judge, she participated in rendering decisions which expressed little regard for the constitutional right of the people to keep and bear arms.

On the U.S. Court of Appeals for the Second Circuit, Judge Sotomayor joined in two *per curiam* opinions that are adverse to Second Amendment interests. These opinions held that the Second Amendment does not protect a fundamental right, that the right does not apply to the States through the Fourteenth Amendment, and that one may be searched and arrested for the "crime" of mere possession of a firearm – the core right protected by the Second Amendment. Since a *per curiam* opinion is unsigned and is agreed to by a three-judge panel, Judge Sotomayor's role in

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[1]Stephen P. Halbrook is author of the new book *The Founders' Second Amendment*. He filed an amici curiae brief on behalf of 55 Senators, the Senate President, and 250 Representatives in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). He argued and won three Supreme Court cases on firearm law issues, including *Castillo v. U.S.*, *Printz v. U.S.*, and *U.S. v. Thompson/Center Arms*, and is outside counsel for the National Rifle Association. His other books include *Freedmen, the 14th Amendment, & the Right to Bear Arms*; *Firearms Law Deskbook*; *That Every Man be Armed*; and *A Right to Bear Arms*. He received his J.D. from Georgetown University Law Center and Ph.D. from Florida State University; was an assistant professor of philosophy at George Mason University, Howard University, and Tuskegee Institute; and is a Research Fellow with the Independent Institute. Contact information: 3925 Chain Bridge Road, Suite 403, Fairfax, Virginia 22030, (703) 352-7276, SHalbrook@stephenhalbrook.com. Website: www.stephenhalbrook.com.

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generating these opinions is unknown.

However, in another case, Judge Sotomayor dissented from an *en banc* opinion on the basis that judges should not pursue policy preferences by disparate sentences under the federal Gun Control Act. Her approach in that case, although it did not involve law-abiding gun owners, expressed a sense of fairness in deciding issues under the nation's firearm laws.

Maloney v. Cuomo: Refusing to Consider Modern Supreme Court Precedent on Whether the Second Amendment Applies to the States Through the Fourteenth Amendment

Maloney v. Cuomo, 554 F.3d 56, 58 (2nd Cir. 2009) (*per curiam*), in which Judge Sotomayor joined, devoted a single paragraph to hold that a State prohibition on possession of a type of arm does not give rise to a cognizable claim under the Second Amendment. The court acknowledged that the Second Amendment "confers an individual right on citizens to keep and bear arms." *Id.*, citing *District of Columbia v. Heller*, 128 S. Ct. 2783, 2799 (2008). However, "the Second Amendment applies only to limitations the federal government seeks to impose on this right." *Id.* at 58-59, citing *Presser v. Illinois,* 116 U.S. 252, 265 (1886), and *Bach v. Pataki,* 408 F.3d 75, 84, 86 (2d Cir. 2005), *cert. denied,* 546 U.S. 1174 (2006).

Yet *Presser* held only that the Second Amendment does not apply *directly* to the States. For that proposition it relied on *United States v. Cruikshank*, 92 U.S. 542, 552-53 (1876), which in turn was based on the pre-Fourteenth Amendment decision in *Barron v. Mayor of Baltimore*, 7 Pet. 243, 8 L. Ed. 672 (1833). While holding that neither the First nor Second Amendments applied directly to the States, *Cruikshank* and *Presser* did not consider whether those amendments applied to the States through the Fourteenth Amendment. Those cases were followed by *Miller v. Texas*, 153 U.S. 535, 538 (1894), which refused to consider whether the Second and Fourth Amendments apply to

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the States through the Privileges or Immunities Clause of the Fourteenth Amendment because the issue was not raised in the trial court.

To date, the Supreme Court has never ruled on whether the Second Amendment applies to the States through the Fourteenth Amendment. Yet the Second Circuit in *Maloney*, and before that in *Bach*, relied on *Presser* despite *Presser* being silent on the issue of whether the Second Amendment is incorporated into the Fourteenth Amendment so as to apply to the States.

The Supreme Court provided guidance in *Heller*, 128 S. Ct. 2813 n.23, as follows: "With respect to *Cruikshank's* continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." These "later cases," decided in the twentieth century, held most Bill of Rights guarantees to be incorporated through the Due Process Clause of the Fourteenth Amendment against State violation.[2]

While *Bach* was decided before *Heller*, *Maloney* was decided after, yet the latter refers to the above footnote 23 in *Heller* only for the proposition that "the case did not present the question of whether the Second Amendment applies to the states . . . ." 554 F.3d at 59. It wholly disregarded the admonition in footnote 23 to "engage in the sort of Fourteenth Amendment inquiry *required* by our later cases." It fails to discuss any of these later cases or even to acknowledge the Court's

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[2]Decisions incorporating substantive rights include *Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897) (just compensation); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (free speech and press); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (assembly); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (freedom of religion); *Everson v. Board of Education*, 330 U.S. 1, 8 (1947) (establishment clause); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963) (petition). Some of the leading decisions on procedural rights are *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949), *rev'd. on other grounds, Mapp v. Ohio*, 367 U.S. 643 (1961) (search and seizure); *Duncan v. Louisiana*, 391 U.S. 145, 147-48 (1968) (jury trial); *Benton v. Maryland*, 395 U.S. 784, 794 (1969) (double jeopardy).

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directive. Why?

Maloney proceeds to state that "to the extent that *Heller* might be read to question the continuing validity of this principle, we 'must follow *Presser*'" because it is binding Supreme Court precedent. 554 F.3d at 59. But as stated previously, "following" *Presser* means not applying the Second Amendment directly to the States. It does not mean ignoring the Court's 2008 directive to "engage in the sort of Fourteenth Amendment inquiry required by our later cases."[3] *Heller*, 128 S. Ct. 2813 n.23.

The Ninth Circuit conducted the required analysis and held that the Second Amendment is incorporated into the Fourteenth Amendment. *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009). The Seventh Circuit held that it was bound by *Cruikshank* and *Presser* and failed to engage in what it called "the Court's selective (and subjective) approach to incorporation . . . ." *National Rifle Ass'n v. City of Chicago*, 567 F.3d 856, 858-59 (7th Cir. 2009), *cert. petition filed*, No. 08-1497 (June 3, 2009).[4]

Mr. Maloney has now filed a petition for a writ of certiorari. *Maloney v. Cuomo*, *cert. petition filed*, No. 08-1592 (June 26, 2009). In his petition, Maloney argues that the petition in *NRA*

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[3]*Maloney* rejected a separate Fourteenth Amendment claim on the basis that the law did "not interfere with fundamental rights" and could be upheld under the rational relation test. 554 F.3d at 59. The type of arm the law banned is the nunchaku, which consists of two sticks connected by cord and which *Maloney* characterized as "highly dangerous." *Id.* at 59-60. In addressing the Second Amendment, *Heller* characterized the right as fundamental, rejected the rational relation test, and held that handguns were not the kind of "dangerous and unusual weapons" that could be banned. *Heller*,128 S. Ct. at 2798, 2818 n.27, 2817-18.

[4]As is obvious, other judges in the Second and Seventh Circuits decided the question at issue here the same as did Judge Sotomayor. However, these other judges have not been nominated to be a Justice on the Supreme Court. If they were, the same concerns would be expressed about their decisions, as those decisions failed to follow the Court's admonition in *Heller*.

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v. Chicago should be granted and that the cases should be consolidated. *Maloney* Pet. at 25.[5]

If confirmed, Judge Sotomayor will be faced with serious recusal issues. She was on the panel that decided *Maloney v. Cuomo*. She has acknowledged that "a conflict of interest would arise from any appeal arising from a decision issued by a panel of the Second Circuit that included me as a member," and that in such a circumstance, expects that she "would address the actual or apparent conflict of interest by recusing myself from the case."[6]

Given that Judge Sotomayor would recuse herself from *Maloney* and that *Maloney* seeks consolidation with *NRA v. Chicago*, would she also recuse herself from *NRA v. Chicago*? Would it depend on whether the cases are consolidated? Should the Court grant the writ in *NRA v. Chicago* and either hold or deny the writ in *Maloney*, would the ethical problem be the same, in that the issue in each case is whether the Second Amendment is incorporated into the Fourteenth Amendment? Judge Sotomayor has already decided that issue adversely on the *Maloney* panel.

In sum, Judge Sotomayor participated in deciding an issue now pending before the Supreme Court. She joined in a panel decision holding that persons have no federally-protected right to keep and bear arms free from State infringement. Were she to participate in either the certiorari decision

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[5]The petition states, *id.*:

> Either or both of the pending petitions for certiorari on the Second Amendment incorporation issues arising out of *National Rife Association* would be fitting for this Court to grant because those cases present the same Fourteenth Amendment issues concerning applicability of the Second Amendment to the States invoked in this petition. Indeed, consolidating those cases with this case and granting certiorari over all of them as a unit would put before the Court the fullest possible range of factual and legal settings in which to consider and resolve the burning issue of Second Amendment incorporation.

[6]Questionnaire submitted to Senate Committee on the Judiciary, at 169.

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or the merits decision in *NRA v. Chicago*, she would effectively be deciding whether to affirm or reverse her previous ruling, which is a clear conflict of interest.

***United States v. Sanchez-Villar*: Is Mere Possession of a Firearm Cause for Search and Arrest on the Basis that Keeping Arms is Not a Fundamental Right?**

Judge Sotomayor joined in the panel decision in *United States v. Sanchez-Villar*, 99 Fed.Appx. 256, 258, 2004 WL 962938 (2nd Cir. 2004) (*per curiam*), *vacated & remanded*, *Sanchez-Villar v. United States*, 544 U.S. 1029 (2005) (for further consideration in light of *United States v. Booker*, 543 U.S. 220 (2005)). *Sanchez-Villar* held that mere possession of a firearm – which the Second Amendment guarantees – creates probable cause for a warrantless search, seizure, and arrest. The opinion states: "Under New York law, it is a crime to possess a firearm." *Id.* Having a license is an affirmative defense the person must prove at trial. Since "the officers were lawfully located in a place from which they plainly could see the gun, the officers were justified in seizing it because of its 'immediately apparent' incriminating character." *Id.* The court added about the pro se appellant, who was convicted of being an illegal alien in possession of a firearm:

> We reject Sanchez-Villar's argument that New York's statutory scheme offends the Second Amendment of the United States Constitution. *See* U.S. Const. amend. II; *United States v. Toner,* 728 F.2d 115, 128 (2d Cir. 1984) (stating that "the right to possess a gun is clearly not a fundamental right").

Id. at 258 n.1.

But like *Sanchez-Villar*, *Toner* involved an illegal alien in possession of firearms, not a law-abiding citizen. *Toner* stated about the defendant's equal protection challenge to the ban on firearm possession by an illegal alien:

> He concedes, however, that the statute passes constitutional muster if it rests on a rational basis, a concession which is clearly correct since the right to possess a gun is clearly not a fundamental right, *cf. United States v. Miller,* 307 U.S. 174, 59 S.Ct.

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> 816, 83 L.Ed. 1206 (1939) (in the absence of evidence showing that firearm has "some reasonable relationship to the preservation or efficiency of a well regulated militia," Second Amendment does not guarantee right to keep and bear such a weapon), and since illegal aliens are not a suspect class.

Toner, 728 F.2d at 128.

This statement in *Toner* is a slim reed on which to rely for the proposition that possession of a gun by *anyone* is not a fundamental right. First, this was a concession by the defendant without any reasoned analysis by the court. Second, nothing in the quotation from *Miller* addressed whether the right is fundamental – it spoke only to whether "the *type of weapon at issue* was not eligible for Second Amendment protection . . . . Beyond that, the opinion provided no explanation of the content of the right." *Heller*, 128 S. Ct. at 2814. Indeed, *Miller* never used the term "fundamental right" or any equivalent term, and to the extent any judges went beyond its holding, "they overread *Miller*." *Heller*, 128 S. Ct. at 2815 n.24. Third, given that illegal aliens have no rights under the Second Amendment,[7] it was pure dictum to imply that law-abiding citizens have no fundamental right to possess a firearm.

On that last point, the *Sanchez-Villar* panel ignored an intervening Supreme Court precedent that superseded the *Toner* dictum. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), made clear that Americans at large have Second Amendment rights but that illegal aliens do not:

> "the people" seems to have been a term of art employed in select parts of the Constitution. . . . The Second Amendment protects "the right of the people to keep and bear Arms" . . . . . While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, . . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community. See *United States ex rel. Turner v.*

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[7] *See Heller*, 128 S. Ct. at 2816-17 ("nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill").

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> *Williams*, 194 U.S. 279, 292 (1904) (Excludable alien is not entitled to First Amendment rights, because "he does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law").

Given that language, it was improvident for the panel in *Sanchez-Villar* to state generally that "the right to possess a gun is clearly not a fundamental right." 99 Fed.Appx. at 258. *Heller* has since then dispositively ruled to the contrary: "By the time of the founding, the right to have arms had become fundamental for English subjects." *Id.* at 2798.

Moreover, it seems dubious to suggest that it can be made a crime to exercise a core constitutional right – here, the right to keep arms – and that it is merely an affirmative defense that the defendant has a license. In almost every other State nationwide, it is *not* a crime merely to possess a firearm. A person who is not bothering anyone and who is known to possess a firearm peaceably cannot simply be searched and arrested. Under *Terry v. Ohio*, 392 U.S. 1, 30 (1968), to conduct a patdown search, police must have reason to believe a crime is afoot and that the suspect is armed and dangerous.

Accordingly, the decision in *Sanchez-Villar* raises substantial concerns not only under the Second Amendment, but also the Fourth Amendment. Hopefully Judge Sotomayor will address those concerns.

***United States v. Cavera*: Judges Must Not Follow Policy Preferences**

United States v. Cavera, 550 F.3d 180 (2nd Cir. 2008) (*en banc*), upheld more prison time under the federal Gun Control Act of an army veteran over 70 years old for selling guns across state lines into New York City based on the theory that its strict gun laws created a large black market that required more severe penalties for deterrence. A concurring opinion would allow enhanced prison time based on the theory that guns are more dangerous in cities. *Id.* at 198 (Raggi, J., concurring).

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Judge Sotomayor dissented on the basis that sentencing should be uniform nationwide and should not be based on policy arguments of judges.[8] What she wrote is significant on firearm law issues: "arbitrary and subjective considerations, such as a judge's feelings about a particular type of crime, should not form the basis of a sentence. . . . Yet a serious danger exists that sentencing judges will dress their subjective views in objective trappings, either by using questionable empirical data or by invoking a 'common sense' at odds with reality." *Id.* at 220 (Sotomayor, J., dissenting).

Judge Sotomayor would have held that "the district court's analysis and data are insufficient to support its conclusion that defendant-appellant deserved a severer sentence because firearms trafficking (1) is a more serious crime in densely populated areas, and (2) requires greater deterrence in areas with restrictive gun laws." *Id.* She further wrote that the data "do not show that a gun in New York City is more likely to hurt people than a gun elsewhere." *Id.*

The Second Amendment was not an issue in *Cavera*. However, now that *Heller* has settled that the Second Amendment protects an individual right to keep and bear arms, will Judge Sotomayor decide Second Amendment and firearm law issues with the same approach she took in *Cavera*, to eschew "arbitrary and subjective considerations, such as a judge's feelings about a particular type of crime"? *Heller* itself rejected a judicial "interest-balancing" test to the Second

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[8]Judge Sotomayor wrote, *id.* at 218:

> A judge in Brooklyn who is evaluating the relative dangers of gun trafficking throughout the nation enjoys no institutional advantage over appellate courts or the Sentencing Commission, if only because the judge's experiences are limited to his or her region. A district court strays far from its expertise in varying from the Guidelines based on its disagreement with the Sentencing Commission – whose Congressionally mandated *raison d'être* is "to formulate and constantly refine national sentencing standards," . . . – as to the proper national penal policy in response to regional differences relating to firearms trafficking. (Citation omitted).

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Amendment as follows:

> We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government – even the Third Branch of Government – the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.

Heller, 128 S. Ct. at 2821.

Conclusion

Judge Sotomayor adhered to two *per curiam* decisions which gave short shrift to Second Amendment rights. In *Maloney*, the panel should have followed the admonition in *Heller* that, in evaluating whether the Second Amendment is incorporated into the Fourteenth Amendment, analysis of the Court's modern cases is "required." That issue is now before the Supreme Court in a petition for a writ of certiorari filed by Mr. Maloney and in a separate petition filed by the National Rifle Association in a case arising out of the Seventh Circuit. If confirmed, Judge Sotomayor should recuse herself from consideration of that issue.

In *Sanchez-Villar*, the panel disregarded Supreme Court precedent stating that "persons who are part of [our] national community," but not illegal aliens, have rights under the Second Amendment, and instead opined that "the right to possess a gun is clearly not a fundamental right" for anyone. Serious Second and Fourth Amendment issues are raised by that court's holding that the mere possession of a firearm is probable cause for a search, seizure, and arrest.

By contrast, Judge Sotomayor's rejection of subjective policy preferences regarding firearm laws in *Cavera* is commendable. If confirmed, will she apply the same approach and take Second Amendment rights seriously? The tens of millions of Americans who choose to exercise their right to keep and bear arms anxiously await answers to their concerns.

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Statement of

The Honorable Orrin Hatch

United States Senator
Utah
July 13, 2009

Statement of Senator Orrin G. Hatch

Before the United States Senate Committee on the Judiciary
On the nomination of Judge Sonia Sotomayor to be
Associate Justice of the Supreme Court of the United States

July 13, 2009

Thank you, Mr. Chairman.

This is the twelfth hearing for a Supreme Court nominee in which I have participated, and I am as struck today as I was the first time by the seriousness of our responsibility and its impact on America. I am confident that under this committee's leadership, from both you and the distinguished ranking member, this hearing will be both respectful and substantive.

Judge Sotomayor comes to this committee for the third time, having served on the first two levels of the federal judiciary, and now, being nominated to the third. She has a compelling life story and a strong record of educational and professional achievement. Her nomination speaks to the opportunities that America today provides for men and women of different backgrounds and heritage. The liberty we enjoy here in America makes those opportunities possible and requires our best efforts to protect that liberty. Our liberty rests on the foundation of a written Constitution that limits and separates government power, self-government by the people, and the rule of law. Those principles define the kind of judge our liberty requires, they define the role judges may play in our system of government.

I have described my basic approach to the judicial confirmation process in more detail elsewhere. I ask consent that my article published this year in the Harvard Journal of Law & Public Policy titled The Constitution as the Playbook for Judicial Selection be placed in the record. My approach includes three elements. First, the Senate owes some deference to the President's qualified nominees. Second, a judicial nominee's qualifications include not only legal experience but, more importantly, judicial philosophy. By that I mean a nominee's understanding of the power and proper role of judges in our system of government. Third, this standard must be applied to a nominee's entire record.

I have also found guidance from what may seem to some as an unusual source. On June 8, 2005, then-Senator Barack Obama explained his opposition to the appeals court nomination of Janice Rogers Brown, an African-American woman with a truly compelling life story who then served as a Justice on the California Supreme Court. Senator Obama made three arguments that I find relevant today.

First, he argued that the test of a qualified judicial nominee is whether she can set aside her personal views and, as he put it, "decide each case on the facts and the merits alone?.That is what our Founders intended?.Judicial decisions ultimately have to be based on evidence and on facts. They have to be based on precedent and on law."

Second, Senator Obama extensively reviewed Justice Brown's speeches off the court for clues about what he called her "overarching judicial philosophy." There is even more reason to do so today. This is, after all, a nomination to the Supreme Court of the United States.

Judge Sotomayor, if confirmed, will help change the very precedents that today bind her as a U.S. Circuit Judge. In other words, the judicial position to which she has been nominated is quite different than the judicial position she now occupies.

This makes evidence, outside of her appeals court decisions, regarding her approach to judging more, not less, important. Judge Sotomayor has obviously thought, spoken, and written much on these issues and I think we show respect to her in taking that entire record seriously.

Third, Senator Obama said that while a nominee's race, gender, and life story are important, they cannot distract from the fundamental focus on the kind of judge she will be. He said then, as I have said today, that we should all be grateful for the opportunity that our liberty affords for Americans of different backgrounds.

We should applaud Judge Sotomayor's achievements and service to her community, her profession, and her country. Yet Senator Obama called it "offensive and cynical" to suggest that a nominee's race or gender can give her a pass for her substantive views. He proved it by voting twice to filibuster Judge Janice Rogers Brown's nomination, and then by voting against her confirmation. I share his hope that we have arrived at a point in our country's history where individuals can be examined and even criticized for their views, no matter what their race or gender. If those standards were appropriate when Senator Obama opposed Republican nominees, they should be appropriate now that President Obama is choosing his own nominees.

But today, President Obama says that personal empathy is an essential ingredient in judicial decisions. Today, we are urged to ignore Judge Sotomayor's speeches altogether and focus only on her judicial decisions. I do not believe that we should do that.

I wish that other current standards had been applied to past nominees. Democratic Senators, for example, offer as proof of Judge Sotomayor's moderation that she has agreed with her Republican-appointed Second Circuit colleagues 95 percent of the time. Joined by then-Senator Obama, however, many of those same Democratic Senators voted against Justice Samuel Alito's confirmation even though he had voted with his Democratic-appointed Third Circuit colleagues

99 percent of the time during a much longer appeals court career.

And although Justice Alito also received the ABA's highest rating, Senator Obama joined 24 other Democrats in even voting to filibuster that nomination. And then he joined a total of 42 Democrats in voting against Justice Alito's confirmation. In fact, Senator Obama never voted to confirm a Supreme Court Justice. He even voted against the man who administered the oath of presidential office, Chief Justice John Roberts, another distinguished and well qualified nominee.

If a compelling life story, academic and professional excellence, and a top ABA rating make a convincing confirmation case, Miguel Estrada would be a U.S. Circuit Judge today. He is a brilliant, universally respected lawyer, one of the top Supreme Court practitioners in America. But he was fiercely opposed by groups, and repeatedly filibustered by Democrat Senators, the ones who today say these same factors should count in Judge Sotomayor's favor. Whether I vote for or against Judge Sotomayor, it will be by applying the principles I have laid out, not by using such tactics and standards used against these nominees in the past.

Judicial appointments have become increasingly contentious. Some of the things that have been said about Judge Sotomayor have been intemperate and unfair. There are now newspaper reports that left-wing groups supporting Judge Sotomayor, specifically the extreme-left People for the American Way, are engaged in a smear campaign against the plaintiff in one of her more controversial cases, a man who will be testifying here later in the week. If that is true, and I hope it is not, it is beneath both contempt and the dignity that this process demands.

But there must be a vigorous debate about the kind of judge America needs because nothing less than our liberty is at stake. Must judges set aside, or may judges consider, their personal feelings in deciding cases? Is judicial impartiality a duty or an option? Does the fact that judicial decisions affect so many people's lives require judges to be objective and impartial, or does it allow them to be subjective and sympathetic? Judge Sotomayor's nomination raises these and other important issues and I look forward to a respectful and energetic debate.

The confirmation process in general, and this hearing in particular, must be both dignified and thorough. There are very different and strongly held views about the issues we will explore, in particular, the role that judges should play in our system of government.

The task before us is to determine whether Judge Sonia Sotomayor is qualified, by legal experience and especially by judicial philosophy, to sit on the Supreme Court of the United States. Doing so requires examining her entire record, her speeches and articles as well as her judicial decisions.

We must at the same time be thankful for the opportunity represented by Judge Sotomayor's nomination and focus squarely on whether she will be the kind of judge required by the very liberty that makes that opportunity possible.

Thank you, Mr. Chairman.

REPORT ON THE NOMINATION OF JUDGE SONIA SOTOMAYOR

The Association of the Bar of the City of New York

June 30, 2009

On May 1, 2009, Justice David Souter announced his resignation from the United States Supreme Court. On May 26, President Barack Obama nominated Judge Sonia Sotomayor of the United States Court of Appeals for the Second Circuit to replace Justice Souter. The Association of the Bar of the City of New York City formed a Subcommittee to Evaluate the United States Supreme Court Nominee, which conducted a review of Judge Sotomayor's candidacy and reported to the Executive Committee. The Executive Committee evaluated Judge Sotomayor's nomination under the Association's previously adopted guidelines.

The Association reviewed and analyzed information from a variety of sources: Judge Sotomayor's written opinions from her seventeen years on the circuit court and district court; her speeches and articles; her prior confirmation testimony; comments received from the Association's members and committees; press reports, blogs and commentaries; interviews with her judicial colleagues and numerous practitioners; and an interview with Judge Sotomayor.

The Executive Committee evaluated the extent to which Judge Sotomayor possesses the following eight qualifications: (1) exceptional legal ability; (2) extensive experience and knowledge of the law; (3) outstanding intellectual and analytical talents; (4) maturity of judgment; (5) unquestionable integrity and independence; (6) a temperament reflecting a willingness to search for a fair resolution of each case before the court; (7) a sympathetic understanding of the Court's role under the Constitution in the protection of the personal rights of individuals; and (8) an appreciation for the historic role of the Supreme Court as the final arbiter of the meaning of the United States Constitution, including a sensitivity to the respective powers and reciprocal responsibilities of the Congress and Executive.

The Executive Committee concluded that Judge Sotomayor is extremely well-credentialed to serve on our highest court; that she possesses a formidable intellect and a mature legal mind open to the arguments of others; that she is careful about deciding each case based on the precise facts and legal issues before her; that she understands the human dimensions to her cases, but is also faithful in following the law as it exists; and that she has a healthy respect for the limited role of judges and the balance of powers with the executive and legislative branches. Based on the entirety of its work, the Executive Committee finds Judge Sotomayor Highly Qualified to be an Associate Justice of the United States Supreme Court.

The Executive Committee determined that Judge Sotomayor possesses to an exceptionally high degree the eight qualifications set forth in the Association's criteria. The Executive Committee concluded that Judge Sotomayor has the requisite superior intellectual and legal talents to serve on the Supreme Court of our country; that her experience and performance as both a trial and appellate judge for the last seventeen years provide outstanding credentials for deciding cases in our highest court; that her practice as a public prosecutor and private

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commercial litigator give her a broad understanding of the competing issues frequently implicated in the adversarial process; that her hard-driving work ethic and careful exploration of each case's facts and applicable law reflect a dedicated, cautious temperament committed to deciding each case fairly; and that her opinions evince a mindful respect for individuals' rights under the Constitution, the courts' prescribed role in adjudicating cases, and the powers and prerogatives of the other two branches of government.

The Executive Committee considered various criticisms of Judge Sotomayor in the course of its analysis, including ones related to her remark on a law school panel that the circuit court "is where policy is made", her comment made in several fora about the judging capabilities of a "wise Latina", her fact-based approach to opinion-writing, and her probing style of questioning attorneys who appear before her. After due consideration, the Executive Committee concluded that these issues do not call into question Judge Sotomayor's ability to be an exceptional member of the Supreme Court.

The Association's Ratings and Guidelines

The Association of the Bar is among the oldest bar associations in the United States and at present consists of over twenty-three thousand members, many of whom are from other parts of the country. The Association has been evaluating judicial candidates for nearly 140 years in a non-partisan manner based on the nominees' competence and merit. Although the Association had evaluated a number of Supreme Court candidates over the course of its history, in 1987 it determined to evaluate every candidate nominated to the Supreme Court.

In 2007, the Executive Committee of the Association moved from a two-tier evaluation system in which candidates were found to be either "qualified" or "not qualified", to a three-tier evaluation system. The ratings and the criteria that accompany them are as follows:

> **"Qualified."** The nominee possesses the legal ability, experience, knowledge of the law, intellectual and analytical skills, maturity of judgment, common sense, sensitivity, honesty, integrity, independence, and temperament appropriate to be a Justice of the United States Supreme Court. The nominee also respects precedent, the independence of the judiciary from the other branches of government, and individual rights and liberties.
>
> **"Highly Qualified."** The nominee is qualified, to an exceptionally high degree, such that the nominee is likely to be an outstanding Justice of the United States Supreme Court. This rating should be regarded as an exception, and not the norm, for United States Supreme Court nominees.
>
> **"Not Qualified."** The nominee fails to meet one or more of the qualifications above.

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Summary of Findings

a. Highlights of Judge Sotomayor's Background

While Judge Sotomayor's background has been documented extensively elsewhere, it is useful to offer a brief summary of her life here for the purpose of context. Judge Sotomayor was born on June 25, 1954 in New York, New York to parents from Puerto Rico who had moved to the United States during World War II. She was raised in a public housing project in the South Bronx. Her father, a factory worker with an elementary school education, died when Ms. Sotomayor was nine years old. Her mother raised Judge Sotomayor and her younger brother while working six days a week to support her family. Judge Sotomayor credits her mother with instilling in both of her children a strong commitment to education. Judge Sotomayor internalized this value at a young age and developed a passion for reading. She graduated as the valedictorian of Cardinal Spellman High School and received a scholarship to attend Princeton University.

Judge Sotomayor excelled at Princeton, graduating in 1976 with a B.A., *summa cum laude* and *Phi Beta Kappa*. She was a co-winner of the M. Taylor Senior Pyne Prize for scholastic excellence and service to the University. Judge Sotomayor went on to attend Yale Law School, where she served as an Editor of the Yale Law Journal and as a Managing Editor of the Yale Studies in World Public Order.

Upon graduation from law school in 1979, Judge Sotomayor served as an Assistant District Attorney in the Manhattan District Attorney's Office under Robert M. Morgenthau. During her five years in the District Attorney's office, Judge Sotomayor prosecuted murders, robberies, child abuse, police misconduct, and fraud cases.

In 1984, Judge Sotomayor left the District Attorney's office and entered private practice, joining the firm of Pavia & Harcourt as an associate. She was elected partner in 1988 and developed a practice in general civil litigation with a particular focus on intellectual property. Some of her cases entailed fighting counterfeiters of Fendi designer products.

In October 1992, President George H.W. Bush nominated Judge Sotomayor to serve on the United States District Court for the Southern District of New York. At the time of her appointment, Judge Sotomayor was in her late thirties and was the youngest member of the court. During her six years on the Southern District, Judge Sotomayor presided over nearly 500 cases. In 1998, President Clinton appointed Judge Sotomayor to the United States Court of Appeals for the Second Circuit. She is the only Latina to have served on this court. Since her appointment, Judge Sotomayor has participated in over 3,000 panel decisions, authoring more than 250 published opinions.

Judge Sotomayor has served on the board of directors for numerous non-profit organizations, including Princeton University and the Puerto Rican Legal Defense & Education Fund. She has played an active role in creating a variety of community outreach programs, including the Development School for Youth, a series of workshops facilitated by leaders from both the public and private sectors that teaches inner city high school students how to succeed in

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a work environment. She has also served as an adjunct professor at Columbia Law School and New York University School of Law.

b. Analysis of Judge Sotomayor's Opinions in the Second Circuit

A review was undertaken of more than 250 opinions authored by Judge Sotomayor while serving on the Second Circuit. Her opinions exhibit highly detailed and logical reasoning across the wide range of subject areas that arise in the Second Circuit. The writing style is well-organized, succinct and authoritative but also respectful. Taken together, Judge Sotomayor's Second Circuit opinions offer three significant insights into her judicial philosophy: (1) a firm respect for the doctrines of judicial restraint, separation of powers, and *stare decisis*; (2) an affinity to plain meaning statutory analysis; and (3) a non-ideological and unbiased approach toward judicial decision-making.

There is no indication in the opinions that Judge Sotomayor seeks to exercise discretion to achieve a personally favored outcome or to advance a particular ideology; rather, they appear to reflect a strong determination to understand and apply the law as it exists. While sensitive to individual rights and concerns about racial and other forms of discrimination, Judge Sotomayor seems to take each case as she finds it, and she has no difficulty in ruling against a complainant where the claims of infringement of individual rights or discrimination are not sustainable under the facts or applicable law.

We note that Judge Sotomayor's participation in the *per curiam* opinion issued in *Ricci v. Destefano*, 530 F.3d 87 (2d Cir. 2008), adjudicating a Title VII challenge regarding the test results of an exam issued to firefighters in New Haven, has garnered attention in the press. Judge Sotomayor served on the three-judge panel that initially affirmed dismissal of the firefighters' claims via summary order. The Second Circuit's decision, which was subsequently issued as a *per curiam* opinion, affirmed "for the reasons stated in the thorough, thoughtful and well-reasoned opinion" of the district court. The Second Circuit refused to grant rehearing en banc (7-6) with Judge Sotomayor voting with the majority, and the Supreme Court reversed the Second Circuit decision by a 5-4 vote. It seems to us that Judge Sotomayor's decision and approach in this case were not driven by an ideological motive given her consistently balanced record in discrimination cases.

c. Analysis of Judge Sotomayor's Opinions in the Southern District

A review was undertaken of more than 450 opinions authored by Judge Sotomayor while she served on the Southern District of New York. The judge dealt with various types of cases involving immigration, discrimination, securities, bankruptcy, intellectual property, Section 1983 claims, and employment law, among other fields—including a famous decision in which she granted the players' request for injunctive relief against Major League Baseball owners, ending a long baseball strike. Her district court opinions reflect a methodical approach devoid of unsupported conclusions or rhetorical excess. They are careful and thorough and tend to follow a consistent format: a detailed presentation of facts, followed by a statement of the issues presented and the controlling authority, and finally an application of the governing law to the facts. The opinions generally are dispassionate, clear, and complete—the judge's reasoning and

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chain of thought are not in doubt. They include extensive citations to precedent, which is applied and followed, and demonstrate an ability to draw distinctions. They reflect a careful, hardworking jurist with an intelligent mind, striving to find and apply the proper principles to resolve a particular dispute.

In addition to displaying a vigorous adherence to precedent, Judge Sotomayor's reasoning does not appear to be dictated by any particular agenda or political philosophy. The opinions reflect an intense determination to understand and apply the law as it exists, regardless of the status of the litigants. Judge Sotomayor does not appear to have favored government or private litigants in either criminal or civil settings. In immigration and habeas decisions, she lays out the standard of review, the level of deference owed to findings of administrative agencies, and the controlling legal principles, and then applies the principles to their logical result, often rejecting the immigrant's position. In some cases, Judge Sotomayor appears to have reached her result using what could be considered narrow (or even "strict") statutory construction.

d. Review of Judge Sotomayor's Speeches and Articles

Several of Judge Sotomayor's speeches delivered to law students and prospective law clerks describe the process of deliberation on the circuit court and reflect her intellectual engagement as an appellate judge:

> Unquestionably, three heads are better than one, and it is an extremely gratifying exercise to have three judges dissect a particularly difficult case and resolve it. In the process of coming to a decision, explaining one's rationales to other judges, and listening to their reasoning, an appellate court judge can sometimes be forced to see a case from new and unexpected angles. The insights that one's colleagues bring to the table can also press the other judges to frame the issues in ways that make it much easier to resolve, to harmonize with the existing case law, or to provide clarification in a given area of law.
> - *Remarks at NYLS Law Review Dinner, April 7, 2000*

Some of Judge Sotomayor's past words have created controversy at the outset of the confirmation process and will likely be the subject of further scrutiny as the process continues. Her highly publicized line from the taped Duke Law School Panel that the circuit court "is where policy is made" has been cited by some observers as evidence that she is a judicial activist who will legislate from the bench. Several of her speeches also use the word "policy" in discussing the impact of the circuit courts. A close examination of her speeches amplifies her meaning in using this term. The language appears in her discussion of the differences between the work of the district courts and the circuit courts (and at the Duke Forum she was discussing these same differences for an audience of prospective law clerks). She makes the point that the district court decides only the case before it and the ramifications are generally limited to the parties, but the circuit court's decisions are binding precedent and can have a policy *impact* with far-reaching ramifications. Her reference to "policy" appears to be referring to *precedent*. She is wary of creating precedent (and thereby creating binding legal strictures) without carefully considering the ramifications in other circumstances. She uses similar language in several speeches:

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> Our decisions are, moreover, binding over all the district courts in our circuit and over our own panels, which seek to harmonize the law of the Circuit, in subsequent cases. Thus our decisions affect not only the individual cases before us, but the course of litigation and the outcomes of many similar case pending or to come. This fact has made me much more aware of the *policy impact* of the decisions I have drafted or worked on. I give much more thought to the impact of our holdings on hypothetical factual variations that may arise and that are likely to be controlled by our decision. If our proposed holding would lead to results in other cases which cannot be squared with the language of a statute or its legislative history and purpose, then the analysis and holding will have to be reexamined and either abandoned or narrowed further. In fact, this concern permeates not only opinion drafting but the exhaustive review that most panel members give each others' drafts to ensure we are reconciling our own past precedent, dealing with the Supreme Court case law, and interpreting the law in an intellectually honest way.
> -*Remarks at NYLS Law Review Dinner, April 7, 2000* (emphasis added)

Judge Sotomayor's focus in these speeches is an acknowledgement of the power of binding precedent and the need to be wary of unexamined consequences. Rather than being evidence of judicial activism, her concern over the "policy" impact of decisions appears to reflect a predisposition towards judicial restraint and caution.

Judge Sotomayor has also received attention for her statement, made in a number of forums, that:

> I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life. -*Olmos Lecture at Boalt Hall School of Law, October, 2001.*

Few would quarrel with the notion, argued by Judge Sotomayor in her Olmos Lecture and elsewhere, that a judge's life experience may have some influence on the approach to decision-making. Judge Sotomayor's expression of hope that a wise Latina with certain experience would more often reach a better decision than a white male lacking that experience raised questions about her comparison of decision-makers based in part on their gender, or their ethnic or racial background. We note, however, that on the occasions where Judge Sotomayor has made this type of remark, one of her purposes has been to explore and encourage the advancement of minorities and women within the judiciary branch. Judge Sotomayor also makes the point that the decision-maker's experience or lack of experience ultimately is relevant for the way in which it impacts the deliberative process. In short, her statements seem intended to show her appreciation of the value of diverse life experience that a judge brings to bear in deciding cases. We do not harbor any concern that Judge Sotomayor's remarks reflect any bias or that she intended to suggest that her own experiences should be given undue weight in deciding a case. This conclusion is based on our full examination of her extensive record, including the respect she shows for the deliberative process and for her judicial colleagues of all backgrounds and across the ideological spectrum, a review of her opinions, the remarks of practitioners who have appeared before her, and, significantly, the reviews of her fellow judges. The judges' comments

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are particularly important because they come from colleagues of various genders, ethnicities, and political philosophies, who report that Judge Sotomayor works well with colleagues and takes their views into account in formulating her final position on cases.

Judge Sotomayor's articles offer some important insights into her understanding of the limits of judicial power and her self-reflective approach as a jurist, including her view on the importance of judges being truly impartial. In a foreword to Daniel Terris, Cesare P.R. Romano, and Leigh Swigart's book, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES (2007), Judge Sotomayor discussed the parallel problems facing international and American judges: "[A]ll judges have cases that touch our passions deeply, but we all struggle constantly with remaining impartial...[W]e are also acutely aware of the other dimensions of our roles as judges and...we struggle to find ways to convince our colleagues of our views and to accommodate the needs—and respect the powers—of the other branches of government."

If there is a single theme that runs throughout Judge Sotomayor's varied writing—which includes a student note, a foreword to a book discussing the biographies of judges who serve on international tribunals, and a tribute to the Dean of New York University's School of Law—it is that Judge Sotomayor respects and admires our judicial system and courts, her colleagues and the law. Her writings display an enthusiasm and love for the law, its practice and practitioners.

The Association's Assessment of the Nominee and Conclusions

We find Judge Sotomayor to be a highly qualified candidate for the Supreme Court. She demonstrates a formidable intellect; a diligent and careful approach to legal decision-making; a commitment to unbiased, thoughtful administration of justice; a deep commitment to our judicial system and the counsel and litigants who appear before the court; and an abiding respect for the powers of the legislative and the executive branches of our government. We highlight several of her strengths that we find particularly significant in reaching this determination.

First, Judge Sotomayor has outstanding analytical talents and is extraordinarily engaged in the issues raised by the cases before her. Given the intense analysis and work that goes into cases presented to the Supreme Court, we believe litigants will appreciate Judge Sotomayor's masterful review of the cases before her and the public will be well-served by such an intellectually-engaged, hard-working jurist. Judge Sotomayor's willingness to analyze each issue and argument implicated in a case can only benefit the quality of the Court's decisions.

Second, Judge Sotomayor is a jurist who is mindful of the limits of judicial power and who aspires to create holdings grounded in the facts of the case at bar and the applicable law rather than using cases as platforms for the announcement of broad ideologically driven rules. Her approach reflects a preference for moving the law incrementally, but given her extensive judicial experience on both the circuit and district court levels, we believe that she also will be mindful of the need for the Supreme Court to provide meaningful guidance to the public and lower courts in the important matters that come before the Court.

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Third, we believe Judge Sotomayor's collegiality is an important asset. The strong professional relationships she has built with her colleagues on the bench, no matter their ideological leanings and backgrounds, suggests that should she be confirmed, Judge Sotomayor will establish a similarly collegial rapport with her fellow justices. It appears that Judge Sotomayor's demeanor has won the respect not only of her colleagues, who say that she is talented at collaborating with multiple parties and forging consensus, but also of the vast majority of practitioners who appear before her.

Fourth, we are impressed by Judge Sotomayor's ideological neutrality. Judge Sotomayor's decisions appear intent on reaching the legally correct result in a given case, not advancing an overarching agenda. Parties from across the political spectrum should find in Judge Sotomayor a keen mind that values reason over rhetoric and is open to any argument with a sound foundation in the law. While the Executive Committee believes that Judge Sotomayor's "wise Latina" comments were not well-designed to convey her overall point that a wider array of experiences can lead to a better decision-making process and legal outcome, we have seen no evidence that the judge exhibits biases in her legal reasoning or decisions. Her opinions exhibit an understanding of opposing points of view, but no partiality toward any group. Her colleagues and the vast majority of litigants appearing before her have also found her legal reasoning and interpersonal style to be devoid of bias.

For similar reasons, we also view Judge Sotomayor's fidelity to precedent as one of her greatest strengths. Judge Sotomayor's opinions reflect the work of a jurist who takes case law seriously; they almost uniformly include an exhaustive survey of the relevant legal doctrines before applying the law to the facts of a case in a comprehensive fashion.

Finally, Judge Sotomayor's experience as a district court judge is valuable. Should Judge Sotomayor be confirmed by the Senate, she would be the only sitting justice who has served at the federal district court level. The Executive Committee believes that having this diversity of experience on the Supreme Court bench is desirable. Judge Sotomayor would be able to provide insights as to how a given holding would affect lower court practice, with important consequences for both trial court judges and litigants.

* * *

Based on its review, and considering the Association's guidelines and rating system, and having reflected on the complete factual picture presented by Judge Sotomayor's candidacy, the Executive Committee of the Association of the Bar of the City of New York concludes that Judge Sotomayor is Highly Qualified to serve as an Associate Justice of the United States Supreme Court.

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Brady Campaign
To Prevent Gun Violence
SENSIBLE GUN LAWS SAVE LIVES

July 16, 2009

The Honorable Patrick Leahy, Chairman
The Honorable Jeff Sessions, Ranking Member
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Sessions:

During her Senate confirmation hearings, Judge Sonia Sotomayor has been asked for her views on the Second Amendment. She has given clear and responsible answers, while not pre-judging any issues that may come before her on the Court. We have been impressed with her presentation.

Judge Sotomayor's comments, as well as her judicial opinions in cases involving gun laws show respect for the Constitution, for precedent and for the considered judgments of legislative bodies in protecting communities from gun violence.

Judge Sotomayor's background and her experience as a prosecutor have given her an invaluable understanding of the devastating impact of gun violence on families and communities. Because of her experience enforcing gun laws, she brings to the bench an appreciation of the importance of those laws in protecting our citizens.

The Brady Campaign enthusiastically endorses Judge Sonia Sotomayor for the position of Associate Justice of the United States Supreme Court.

Sincerely,

Paul Helmke
President, Brady Campaign to Prevent Gun Violence

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Leadership Conference on Civil Rights

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STATEMENT OF
WADE HENDERSON, PRESIDENT & CEO,
LEADERSHIP CONFERENCE ON CIVIL RIGHTS

HEARING ON
"THE NOMINATION OF SONIA SOTOMAYOR TO BE AN ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES"

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

JULY 16, 2009

Chairman Leahy, Ranking Member Sessions, and members of the Committee: I am Wade Henderson, President and CEO of the Leadership Conference on Civil Rights (LCCR). I am also honored to serve as the Joseph L. Rauh, Jr. Professor of Public Interest Law at the University of the District of Columbia David A. Clarke School of Law. Thank you for the opportunity to present the views of the Leadership Conference on the nomination of Judge Sonia Sotomayor to the Supreme Court of the United States.

LCCR is the nation's oldest and most diverse coalition of civil and human rights organizations. Founded in 1950 by Arnold Aronson, A. Philip Randolph, and Roy Wilkins, the Leadership Conference seeks to further the goal of equality under law through legislative advocacy and public education. LCCR consists of more than 200 national organizations representing persons of color, women, children, organized labor, persons with disabilities, the elderly, gays and lesbians, and major religious groups. I am privileged to represent the civil and human rights community in submitting testimony for the record to the Committee.

The nomination of Judge Sonia Sotomayor to be an Associate Justice on the United States Supreme Court occurs in the context of several significant milestones in the history of our great nation. Her nomination to be the first Hispanic American on the Supreme Court, and only the third woman to sit on the Court, comes but months after the election of the first African-American President of the United States, Barack Obama, who nominated her to the Court. It also comes shortly after the most successful presidential campaign ever by a woman candidate. While enormous challenges remain in our nation's quest for equal opportunity, these recent events point to a growing consensus in our nation that favors inclusivity in our most vaunted institutions, and speak volumes about the health and vitality of American democracy. The nomination of Judge Sotomayor is thus something that all Americans – regardless of their political ideology – can celebrate with the knowledge that we are continuing to make progress toward becoming a more perfect union.

The selection of a Supreme Court justice demands the utmost attention from the civil rights community. The Supreme Court has been responsible for both some of the greatest triumphs and

some of the greatest setbacks regarding the principle of equality under the law. In courageous decisions like *Brown v. Board of Education*, the Supreme Court stayed true to the Constitution in spite of entrenched public sentiment favoring institutional segregation, and ordered the integration of our nation's schools. But the courage and fidelity to our Constitution that impelled the *Brown* Court's stand against segregation have often been lacking in the high court. In *Dred Scott v. Sandford*, the Supreme Court ruled that African Americans were not entitled to American citizenship; in *Plessy v. Ferguson*, the Supreme Court upheld the doctrine of separate-but-equal, thereby validating a pernicious caste system that would dominate the American South until the *Brown* decision more than a half-century later. For these reasons, civil rights leaders must consider whether a prospective justice is a person who will follow our laws and Constitution bravely and faithfully. Judge Sotomayor's countless qualifications for the Supreme Court, including her long record of careful adherence to our nation's laws, have convinced me that she is highly suited – indeed I can think of no one better-suited – to be the next associate justice of the Supreme Court.

And so LCCR is proud to support this truly historic nomination. In her seventeen years of service to date as a federal trial and appellate judge, and throughout the course of her entire career, Judge Sotomayor has strongly distinguished herself through her outstanding intellectual credentials, her deep respect for the rule of law, and her steadfast dedication to fairness. Her record makes it overwhelmingly clear that she will be an impartial, thoughtful, and highly-respected addition to our nation's highest court. I further believe that Judge Sotomayor's unique life experiences that she will bring to the Court are highly relevant – she was raised in a working-class Puerto Rican family and overcame difficult circumstances, including economic disadvantage as well as diabetes, to become one of the most accomplished jurists in the nation. I believe that her background has made her a more just, fair, and even-handed judge, committed to equal justice for all, and will profoundly enhance the deliberations of the Supreme Court as it continues to tackle our most pressing legal issues in years to come. Moreover, she is the embodiment of the American Dream. Her background and her defiance of the odds will be both a tremendous asset to her and her colleagues on the Supreme Court, as well as a compelling inspiration to others who dream of someday following in her footsteps.

At this point in the nomination process, I could easily skip over many of Judge Sotomayor's qualifications to serve on the Supreme Court, as they are already a matter of public record. But I think they bear repeating. After graduating with top honors from Princeton University, Judge Sotomayor again distinguished herself at Yale Law School, where she was an editor for the prestigious Yale Law Journal. She then spent five years as a criminal prosecutor in Manhattan working for District Attorney Robert Morgenthau. Upon leaving the District Attorney's office, Judge Sotomayor worked for eight years as a corporate litigator with the firm of Pavia & Harcourt, where she gained expertise in a wide range of civil law areas such as contracts and intellectual property, and became a partner in the firm after four years. At the same time, she further diversified her wealth of experience by staying heavily involved in public service work, in both the governmental and nonprofit sectors, including as a board member of the Puerto Rican Legal Defense and Education Fund (now named LatinoJustice PRLDEF). In 1992, on the bipartisan recommendation of her home-state Senators, President George H.W. Bush appointed her as District Judge for the Southern District of New York. In recognition of her outstanding record as a trial judge, President Bill Clinton elevated her to the U.S. Court of Appeals for the

Second Circuit in 1998, where she has participated in thousands of cases and has authored hundreds of opinions.

In all this time, Judge Sotomayor has demonstrated a thorough understanding of a wide range of highly complicated legal issues, and she has earned an overwhelmingly positive reputation for deciding cases based on the careful application of the law to the facts of cases. And she has garnered broad support across partisan and ideological lines, earning glowing praise from colleagues in the judiciary, law enforcement community, academia, public interest sector, and legal profession who know her best.

Since President Obama nominated Judge Sotomayor to the Supreme Court in late May, a number of LCCR member organizations have undertaken extensive reviews of her record on civil rights issues of importance to the communities that we represent. The findings have not surprised us, as they are consistent with her well-established reputation for approaching cases with an open mind, remaining open to persuasion by all sides, painstakingly analyzing the relevant facts and laws, and rendering fair and thoughtful decisions that are firmly grounded in precedent – even when the outcomes are not always those that civil rights plaintiffs would prefer.

Our colleagues at the American Civil Liberties Union (ACLU), for example, found that because Judge Sotomayor's opinions are "so fact-based and rarely stray far from well-established precedents, they are often difficult to characterize as either liberal or conservative."[1] The ACLU also found that "Judge Sotomayor's life experience may have helped her to appreciate the impact of discrimination in the real world, but she has nevertheless rejected discrimination claims that she found were not supported by the facts or the law," and that "she has agreed with the ACLU position in some cases and disagreed in others."[2]

Similarly, our colleagues at the NAACP Legal Defense and Educational Fund, Inc. (LDF) found that Judge Sotomayor "has taken a careful, fact-sensitive approach to reviewing individual claims of employment discrimination. She has also shown appropriate respect for the jury's role in resolving factual disputes. Taken as a whole, her decisions are extremely balanced and show no tendency to favor either side in discrimination cases."[3] As evidence of her impartiality, LDF outlined a number of employment discrimination cases in which "Judge Sotomayor has found that the law, as applied to the facts of the case before her, doomed the plaintiff's case."[4]

I could discuss several more reports from our coalition that echo these findings,[5] but for now, I would like to point to just one more by our colleagues at the Brennan Center for Justice at New

[1] American Civil Liberties Union, "Report of the American Civil Liberties Union on the Nomination of Judge Sonia Sotomayor to be Associate Justice of the United States Supreme Court," June 8, 2009, at 2, available at http://www.aclu.org/pdfs/scotus/sotomayor_report.pdf.
[2] Id. at 3.
[3] NAACP Legal Defense and Educational Fund, Inc., "The Nomination of Judge Sonia Sotomayor to the Supreme Court of the United States," July 10, 2009, at 8-9.
[4] Id. at 10.
[5] See, e.g., Lawyers Committee for Civil Rights Under Law, "Report on the Civil Rights Record of Supreme Court Nominee Judge Sonia Sotomayor," July 9, 2009, available at

York University School of Law. The Brennan Center, taking an innovative approach to analyzing Judge Sotomayor's record, examined 1,194 constitutional cases that were heard by the Second Circuit, and found that Judge Sotomayor has been squarely within the mainstream on the court. Specifically, the Brennan Center's report found that 94 percent of Judge Sotomayor's decisions in constitutional law cases have been unanimous, and that she was in the majority in 98.2 percent of such cases. In nearly 90 percent of cases in which she voted to hold a government action unconstitutional, and in 94 percent of the cases in which she overruled a lower court or government agency, she had the support of at least one Republican-appointed colleague when they were on the same panel.[6]

In short, despite the best efforts of some ideological extremists to tarnish Judge Sotomayor's record through distorted interpretations of a few cherry-picked cases or other elements of her record, the evidence of her impartiality and her mainstream judicial results is overwhelming and cannot be seriously disputed. I should note that those outside of the LCCR coalition have reached similar findings to our own. The *Wall Street Journal*, for example, undertook an analysis that found her to be slightly to the right of Justice Souter on criminal justice cases, which the authors speculated was due to her experience as a prosecutor.[7] The staff of Senator Schumer looked at her immigration rulings and found that in asylum appeals, she sided with the asylee 17 percent of the time, a record that is comparable to other judges on the circuit.[8] And *The Washington Post* found that in discrimination cases, Judge Sotomayor ruled for victims in some cases and against them in others, without any easily discernible pattern[9] – which is a good sign that she handles such appeals on a case-by-case basis, as one should expect in a judge.

We know that Judge Sotomayor may not side with us on every case involving civil or human rights matters. We do not expect that out of her. All we expect, as all Americans should expect, is that she will approach cases with an open mind, and that she gives litigants – on all sides of a case – a fair day in court.

There is no doubt in my mind that our nation is ready for this historic moment, and that Judge Sotomayor is the right person to be the face of it. Having said that, I must note, with dismay, that some individuals appear determined to prevent this moment from arriving at any cost.

Given the lifetime nature of Supreme Court appointments, and the tremendous impact that the Court has on our lives, it is perfectly legitimate for Americans to have strong feelings about individual nominees. Indeed, it is even understandable that some Americans would oppose the confirmation of otherwise-qualified nominees who take a dramatically different approach to the

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http://www.lawyerscommittee.org/admin/site/documents/files/0058.pdf (concluding that Judge Sotomayor "interprets civil rights laws in a manner that provides meaningful protection from discrimination, while being mindful of the need to grant early relief to defendants when the facts and law justify a summary ruling," at 3).

[6] Brennan Center for Justice, "Judge Sotomayor's Record in Constitutional Cases," July 9, 2009, at 10-12,

[7] Jess Bravin and Nathan Koppel, "Nominee's Criminal Rulings Tilt to the Right of Souter," *Wall Street Journal*, June 5, 2009, available at http://online.wsj.com/article/SB124415867263187033.html.

[8] Senator Charles E. Schumer, Press Release: "Schumer Unveils New Analysis Showing Sotomayor's Moderate Record On Immigration Cases; Review of Close to 850 Cases Shows She Ruled Against Asylum Claims 83 Percent of Time," June 9, 2009, available at http://schumer.senate.gov/new_website/record.cfm?id=314152.

[9] Jerry Markon, "Judge's Votes Show No Single Ideology," *The Washington Post*, June 7, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/06/06/AR2009060601966.html.

law than they themselves take. LCCR itself has opposed a small number of judicial nominees in the past, on the basis of their legal ideology, and I accept that some people may not ultimately support the confirmation of Judge Sotomayor.

Having said that, I believe that opposition to any judicial nominee must be principled, intellectually honest, and based upon concerns that can fairly be inferred from the record. Sadly, the hyperbole and histrionics surrounding the Sotomayor nomination are not simply an unseemly display of the partisan rancor that we all must occasionally tolerate in our political system. In this instance, they are also a profound disservice to our nation, given the importance of the debate.

I could spend hours responding to the baseless and dishonest attacks that have been launched against Judge Sotomayor. Some, such as those accusing Judge Sotomayor of racism or questioning her intellectual capability, do not even deserve to be dignified with a lengthy response – but I would simply ask critics such as Rush Limbaugh, Tom Tancredo, Karl Rove, and Newt Gingrich, "Have you no shame; have you no decency?"

There are, however, several attacks that have been made on Judge Sotomayor that I do feel the need to address. One attack that I find particularly beyond the pale, as a civil rights lawyer and advocate myself, targets her past membership on the board of one of LCCR's member organizations, the Puerto Rican Legal Defense and Education Fund (now named LatinoJustice PRLDEF) -- which opponents have falsely characterized as a "radical" organization that has taken "extreme positions" in its legal activities.

Nothing could be further from the truth. LatinoJustice PRLDEF itself is one of the most mainstream and most important defenders of the legal rights of Latino Americans. LatinoJustice PRLDEF is recognized under our tax code as a charitable organization. Like a number of LCCR members that focus primarily on civil rights litigation, it was modeled after and remains allied to this very day with the NAACP Legal Defense and Educational Fund, Inc. (LDF). LDF, of course, was founded by none other than future Supreme Court Justice Thurgood Marshall – and like LDF, LatinoJustice PRLDEF and our other legal defense funds have played an essential role in our coalition's pursuit of equality by acting as private enforcers of civil rights laws, particularly when government bodies have been unable or unwilling to enforce those laws themselves. LatinoJustice PRLDEF is an advocacy organization, and like advocacy groups of all ideological stripes, it presses the legal system to consider new arguments and different approaches to the law in order to advance the cause of many individuals who would otherwise have no voice in our courts. Of course, people are free to disagree with the merits of a position that LatinoJustice PRLDEF or one of our other legal organizations might take in a given case – but it is unfair to suggest that they are taken in bad faith or that they are any different than the strategies of many other advocacy groups. Indeed, those who would slander the organization are ultimately revealing more about themselves, and often their own troubling records on civil rights issues, than they are revealing about their target.

I also want to say a few words about the case of *Ricci v. DeStefano*, which has also been raised by Judge Sotomayor's critics in an utterly dishonest fashion. *Ricci* was undoubtedly a difficult and understandably controversial case. But let's review a few very basic facts. Judge

Sotomayor hardly acted alone, or for that matter, outside of the well-established law on the Second Circuit at the time. Instead, she was on a three-judge panel that ruled unanimously against the plaintiffs – one of whom, incidentally, was Hispanic like Judge Sotomayor. When the Second Circuit was asked to review the case *en banc*, it declined to do so by a seven-to-six margin, again with Judge Sotomayor in the majority – along with a Bush appointee, Judge Barrington D. Parker, whose concurring opinion had far more to say than Judge Sotomayor about why the case should not have been revisited. Indeed, the Supreme Court in its *Ricci* decision frankly acknowledged that it was setting forth a new standard for that type of case, thus making clear that the lower court was simply ruling based on then-existing existing case law, and that the Second Circuit could not have applied the standard the Supreme Court newly set forth in its opinion.

Sotomayor's critics can certainly say, in good faith, that they would have come down on the other side of the case – as LCCR itself has said following the Supreme Court's recent decision to overturn the Second Circuit. But to use a case in which Judge Sotomayor was twice a part of her court's majority, which arrived at its conclusion based on then-existing law, as evidence that she operates out of the judicial mainstream – or as evidence that she is a "judicial activist" or even a racist – simply does not pass the giggle test.

Finally, I would like to address the debate – also an utterly preposterous one – that has been taking place over the concept of empathy. The debate has left me wondering how many of Sotomayor's critics have actually bothered to look up the term in a dictionary, because it appears they have come up with creative new definitions that range from pity to outright prejudice. The Cambridge Dictionary, on the other hand, one of several sources in which I would place far more trust, defines it as "the ability to share someone else's feelings or experiences, by imagining what it would be like to be in their situation."

In other words, it simply means being able to put yourself into someone else's shoes. It is one of the most important traits that human beings should possess if they are to deal with other human beings, including in a court of law. And contrary to what many of Judge Sotomayor's opponents are now claiming, empathy in no way causes one to favor "particular parties or groups over others."[10] Instead, an empathetic judge is one who can identify with an employer as well as an employee, with a consumer as well as a corporate head, and with the victim of a crime as well as the accused.

I am honestly baffled by the manufactured outrage over President Obama's desire to appoint judges who are capable of empathy. His critics certainly did not sound concerned during Justice Samuel Alito's 2006 confirmation hearing, for example, when he explained that "when I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender, and I do take that into account."[11] Similarly, they voiced no dismay when Justice Clarence

[10] Alex Isenstadt, "McConnell: No 'Empathetic' Court Pick," *Politico.com*, May 11, 2009, available at http://www.politico.com/news/stories/0509/22305.html
[11] Senate Committee on the Judiciary, Hearing: Nomination of Judge Samuel A. Alito to the U.S. Supreme Court, 109th Cong. (Jan. 11, 2006).

Thomas proudly described his ability to "walk in the shoes of the people who are affected by what the Court does."[12] To me, the inconsistency is very revealing.

Insofar as Judge Sotomayor is concerned, her record demonstrates what empathy truly means in a judicial setting. Time and time again, she has shown that she is able to recognize that both parties to a dispute can have legitimate points of view, which helps her to fully appreciate the complexities of difficult cases, and to deliver thoughtful decisions that allow litigants to feel, regardless of the outcome, that they received a fair day in court.

In one immigration case, for example, she wrote that she found an immigrant's arguments against deportation were "persuasive" but she ruled that the court had no power to second-guess the Attorney General.[13] In another, in which a New York City police officer was fired for circulating racist flyers, she described his conduct as "patently offensive, hateful, and insulting" – but argued in a dissenting opinion that he was still protected by the First Amendment.[14] And in the much-ballyhooed *Ricci* case, the opinion that she joined noted the plaintiff's "frustration" and his "intensive efforts" to succeed in spite of his disability, even though the panel was forced to conclude that the law wasn't on his side. I would find it hard to say, with a straight face, that these are the opinions of someone who puts ideology or personal feelings above the law.

In closing, Judge Sotomayor has an incredibly compelling personal story and a deep and abiding respect for the Constitution and the rule of law. I look forward to her confirmation to the U.S. Supreme Court, and I hope that it is by a very wide margin. Thank you for having me here today. I look forward to any questions you may have.

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[12] Senate Committee on the Judiciary, Hearing: Nomination of Judge Clarence Thomas to the U.S. Supreme Court, 102nd Cong. (Sept. 12, 1991).
[13] Mendez v. Mukasey, 525 F.3d 216 (2d Cir. 2008), at 221.
[14] Pappas v. Giuliani, 290 F.3d 143 (2d Cir. 2002) at 154.

eHEBC
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June 8, 2009

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Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

Re: Judge Sonia Sotomayor:

Dear Honorable Patrick Leahy:

This letter is written in support of confirming Judge Sonia Sotomayor on the U.S. Supreme Court as nominated by President Obama. We are firmly convinced that Sotomayor will be an enhancement to the Supreme Court and will ultimately serve the American people well. The Supreme Court makes decisions which impact the lives of every American for decades at a minimum if not centuries. The Latino population has contributed considerably to the making of America and is woven throughout the nation with loyal Latinos who have sacrificed their lives for America in practically all of America's wars. Latinos represent a significant number of purple heart heroes in World War II and Vietnam as well as in Iraq. The American cowboy is in part an outgrowth from a rich Hispanic American heritage. American food, culture, land surveying and law all have been influenced by the Hispanic culture. Today, America is composed of a multi-ethnic composition, with Hispanics representing a major portion of that composition.

Latinos have earned their right to be represented at the highest levels of government and deserve every opportunity to advance in every branch of government. Latinos are hard working people, contribute significantly to the economy, pay taxes and serve in the armed forces for the benefit of all Americans. It is time for the Congress to recognize the Hispanic community with the confirmation of Judge Sonia Sotomayor.

I will not speak to her qualifications, as you have more than enough information and data on her capability but I will say that she does have roots in the Latino community which is part of the American fabric. We believe the background and experience she has will give the Supreme Court an added benefit and resource as it grapples with cases which impact American citizens of all persuasions and ethnicities. The strength of this nation is based on the diversity of talent of all of its people. We are extremely excited by the President's nomination of Judge Sotomayor and urge a quick confirmation of a proud American who will give serious and fair deliberations on all the cases which she will be involved in.

Sincerely,

Rodrigo T. Garcia, P.E.

A church-state evaluation of the latest nominee to the U.S. Supreme Court

{ Judge Sonia Sotomayor }

By K. Hollyn Hollman
General Counsel
Baptist Joint Committee for Religious Liberty

With the Senate Judiciary Committee confirmation hearings for Associate Justice nominee Sonia Sotomayor set to begin July 13, the Baptist Joint Committee for Religious Liberty has been examining her church-state record.[1] The U.S. Supreme Court is often closely divided on issues that affect religious liberty, and each new justice has the opportunity to make a significant mark on church-state law. Sotomayor is nominated to replace retiring Justice David Souter, author of many important decisions in favor of religious liberty. From the BJC's perspective, it is important that Souter's replacement is equally capable and likely to uphold principles of "no establishment" and "free exercise" in ways that provide broad religious freedom protection.

Over the past decade, the Court has issued splintered opinions in cases applying the Establishment Clause to allow more government involvement in religion. This includes upholding both government funding of religious institutions through a voucher program and a permanent religious display on government property. In addition, the Court limited the ability of taxpayers to challenge some governmental expenditures that violate the First Amendment. While the Court has properly interpreted federal statutes that protect the free exercise of religion, concerns remain about the strength of statutory and constitutional protections for religious practices.

Sotomayor, if confirmed, would join the Court with considerable experience. In addition to working as a prosecutor and in private practice, Sotomayor has an extensive record as a federal judge, serving more than a decade on the U.S. Court of Appeals for the Second Circuit[2] after six years as a trial judge for the U.S. District Court for the Southern District of New York. According to the White House, she served as a judge in more than 3,400 cases during her tenure on the federal bench.[3] Among the cases over which she presided, there are several that implicate religious liberty protections. While not exhaustive, this report is intended to give an overview of Judge Sotomayor's most significant church-state opinions, evaluating them through the lens of the BJC's support for religious freedom. It is difficult to predict with any certainty how a judge will perform as a justice on the Supreme Court, but we review these cases to highlight the importance of courts in upholding religious liberty, to look for clues about how Sotomayor may approach cases that could come before her if she is confirmed, and to identify areas that deserve attention during the confirmation hearings. We urge the Senate to exercise due diligence to ensure that the nominee is well-suited to uphold the Constitution, including its protection of religious liberty.

Summary

Based on our review of cases in which she authored opinions on religious freedom claims, Sotomayor's record, taken as a whole, is commendable. She has written opinions suggesting a strong willingness to protect free exercise – even in difficult settings such as prisons and in cases where the religious practices of plaintiffs are unfamiliar. She has participated in fewer Establishment Clause cases, but her opinions in that area generally fit within the mainstream of Supreme Court decisions. Moreover, in a couple of cases where the governing case law was not settled, she accurately predicted the Supreme Court's eventual resolution.

BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY

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Free Exercise Cases

The First Amendment's guarantee of the free exercise of religion means generally that government should not interfere with religious practice. The Free Exercise Clause, however, does not protect religious practice in all instances. The BJC believes that government should avoid substantially burdening a person's sincerely held religious beliefs absent an important governmental interest that could not be pursued in a less restrictive manner, and the government should make efforts to accommodate specific religious needs when it is feasible to do so. Until 1990, Supreme Court precedent generally reflected this interpretation of the Free Exercise Clause, requiring the government to pass "strict scrutiny" when it imposed a substantial burden on religious practice. In other words, the government had to show that the burden on religion was justified by a compelling governmental interest that could not otherwise be met.

In 1990, however, the Supreme Court held by a narrow majority in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), that the Free Exercise Clause protects much less, and does not require exceptions to laws that incidentally burden religion.[4] While the Court carved out some situations that were still entitled to a higher level of protection, generally the Court made it more difficult for religious claimants to prevail under the Free Exercise Clause, leaving the law of religious accommodations mainly to the legislative branches. Now, free exercise protection largely depends on the application of the Religious Freedom Restoration Act of 1993 ("RFRA"), the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), and similar statutes at the state level.[5]

Sotomayor has heard several free exercise cases involving constitutional and statutory claims. Although the precise parameters of her free exercise jurisprudence cannot be fully determined from these cases, her opinions largely are in keeping with the BJC's support for robust interpretation of free exercise rights.

In *Ford v. McGinnis*, 352 F.3d 582 (2d Cir. 2003),[6] the Second Circuit considered a case brought by a Muslim prisoner claiming a violation of his rights under the Free Exercise Clause. His claim was based on the denial of a meal, known as the Eid ul Fitr feast, which occurs once a year to celebrate the completion of Ramadan. The prison had scheduled the meal after the period prescribed by Muslim law and tradition to coincide with the prison's weekend family visitation.

The district court agreed with prison officials who argued that the prisoner's claim lacked objective religious significance and was too insignificant to warrant protection. The Second Circuit, in an opinion by Sotomayor, vacated that ruling.

Importantly, her opinion demonstrates that proper analysis of a free exercise claim begins with identification of a sincerely held religious belief, not with whether an asserted belief comports with a faith's "actual requirements." Controlling Supreme Court and Second Circuit cases had rejected "the notion that to claim the protection of the Free Exercise Clause, one must be responding to the commands of a particular religious organization."[7] The question is not whether the belief is objectively reasonable, which would require courts to resolve issues that are beyond their competence, but only "whether a claimant sincerely holds a particular religious belief and whether the belief is religious in nature."[8] Sotomayor wrote, "District courts have no aptitude to pass upon the question of whether particular religious beliefs are wrong or right."[9] Likewise, she rejected the lower court's holding that the denial was a trivial burden on religious exercise because that conclusion rested heavily on Muslim clerics who said the observance of the requested meal was not mandated by the prisoner's religion.[10] Instead, as Sotomayor explained, the inquiry should have been whether participation in the Eid ul Fitr feast was considered important to the claimant's practice of Islam.

Similar concerns appear in a case involving prisoners that Sotomayor decided as a district court judge. In *Campos v. Coughlin*, 854 F. Supp. 194 (S.D.N.Y. 1994), Sotomayor stopped enforcement of new prison directive that prevented prisoners from wearing beads associated with their practice of the Santeria religion, described by the court as a fusion of native African religions and Catholicism.[11]

The case was brought by two New York inmates who had practiced the Santeria religion for many years without interference or incident. At the outset, Sotomayor noted, "This case raises significant constitutional and statutory issues about the protections accorded fundamental First Amendment rights of freedom of religious expres-

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sion in a prison setting. It underscores the complex nature and difficulty of accommodating various religious belief systems and tenets within a prison system, wherein violence is a real and daily threat."[12] She recognized explicitly that the plaintiffs' beliefs, even if unfamiliar, deserve First Amendment protection from overly broad rules that burden the practice of non-mainstream religion.

The plaintiffs challenged a new directive prohibiting prisoners from wearing certain religious articles, including religious beads worn for devotional purposes, unless approved under a lengthy and invasive administrative process not required for other religious requests. Prison officials defended the directive as a protection against gang identification and violence. They said it did not significantly burden the prisoners' free exercise of religion because the new rule still allowed them to possess the beads. According to prison officials, the tenets of Santeria are satisfied by the mere possession of the beads without wearing them.

Again, this case illustrates that the proper initial step is evaluating the sincerity of the religious belief – in this case, the devotional nature of wearing beads. Sotomayor rejected the defendants' challenge to the sincerity of the prisoners' beliefs since it was solely based on the fact that the prisoners had identified their religion as "Catholic" and "Christian," respectively. Citing *Church of Lukumi Babalu Aye* 508 U.S. 520 (1993), in which Santeria was described as including Catholic symbols and participating in Catholic sacraments, and noting the lack of any additional information to suggest the prisoners were not adherents of Santeria, Sotomayor accepted that they were sincere in their religious beliefs.[13]

While recognizing that security and safety in prisons constitute compelling governmental interests, Sotomayor warned that "defendants cannot merely brandish the words 'security' and 'safety' and expect that their actions will automatically be deemed constitutionally permissible conduct."[14] She credited prison administrators' assertion that beads are gang identifiers, but held that the testimony on this point was insufficient to justify the entire scope of the directive. In addition, the prison officials' refusal to consider the prisoners' compromise that they be allowed to wear the beads under clothing showed that the directive did not further the state's interest in the least restrictive manner.[15] Sotomayor noted that any enforcement problem would be the same regardless of what religious symbol was worn under an inmate's shirt, so that no rational distinction could be made between the beads, which were prohibited, and crucifixes, which were not. Given the defendants' failure to cite any attempted or actual illicit use of Santeria beads by prison gang members, Sotomayor granted the prisoners' motion to enjoin enforcement of the directive.

Also noteworthy is *Fifth Avenue Presbyterian Church v. City of New York*, 293 F.3d 570 (2d Cir. 2002), a case in which the BJC and others filed a friend-of-the-court brief in support of a church that provided its property as a place to sleep for "service-resistant" homeless persons. Though not its author, Sotomayor joined the court's opinion upholding the church's free exercise rights. The church was notified by the City of New York that it could no longer allow homeless persons to sleep on the steps, landing area, and adjoining sidewalk of the church's property. The city said that the homeless persons were subject to arrest for noncompliance. The church sued, claiming violation of its rights under the Free Exercise Clause, RLUIPA, and state law, and asked the court to prevent the city from dispersing homeless individuals sleeping on church property. The district court granted the church's request as to the church steps and landing but not on the public sidewalks beside the church. The city appealed, and the Second Circuit affirmed the district court's ruling.

The decision, which includes reasoning similar to that put forth in the BJC brief, explains that the city failed to demonstrate that its interest in preventing the homeless from sleeping on the church's property was sufficiently compelling to trump the church's free exercise rights, and that it did so in a way that was narrowly tailored. The panel found the city's purported interest, enforcing minimum standards for homeless shelters (raised for the first time on appeal), to be insufficient.

Another Sotomayor opinion that demonstrates strong support for free exercise is her dissent in *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2007). In *Hankins*, a minister sued his denomination, claiming that his compulsory retirement at age 70 violated the federal Age Discrimination in Employment Act. The trial court granted summary judgment for the defendant based on the "ministerial exemption," a rule grounded in free exercise concerns that prevents courts from interfering with a church's employment relationships with its ministers. In a 2-1 panel decision, the Second Circuit reversed the lower court, holding that it should

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have applied RFRA to determine whether the Church was exempt from the application of the age discrimination law. The case was remanded to the lower court for further consideration.

A significant point in Sotomayor's dissent was her rejection of the majority's reliance on RFRA. She rebuffed RFRA's application for several reasons, including the fact that the denomination had not invoked it as part of its defense. She also explained the First Amendment basis for keeping the federal government out of disputes between religious organizations and the individuals they choose to hire or dismiss as spiritual leaders, drawing on cases that have prevented state interference with matters of church governance and doctrine.

Establishment Clause Cases

Some of the most contentious and closely-divided Supreme Court cases arise under the Establishment Clause. In these cases, the justices use various tests to determine whether a governmental action unconstitutionally advances religion. For the BJC, Establishment Clause cases raise theological issues as important as the constitutional questions since we believe individuals and communities should not rely on government to promote religion. Even where constitutionally permissible, government promotion inevitably harms religion, encouraging watered-down religious messages, rather than leaving religion to the voluntary efforts of individuals and houses of worship.

Justice Souter was a significant defender of the separation of church and state and wrote several important opinions defending a strong interpretation of the Establishment Clause.[16] Sotomayor's judicial record includes very little in this area, and it appears she has never presided over a case dealing directly with government funding of religious institutions. In two cases, however, she addressed claims related to religious displays on government property, both times upholding the displays over Establishment Clause objections. The BJC does not disagree with the outcome in these cases, which are fact-specific and, unfortunately, reveal little about her overarching view of Establishment Clause jurisprudence. This leaves questions as to the criteria she would employ when deciding different variations of Establishment Clause claims.

As a district court judge, she decided *Flamer v. City of White Plains*, 841 F. Supp. 1365 (S.D.N.Y. 1993), a case that stopped the enforcement of a city resolution barring fixed outdoor displays of religious or political symbols in its city parks. The case was brought by a rabbi whose request to place a menorah in a city park during Hanukkah was denied because of the resolution. The rabbi claimed that the resolution was unconstitutional as a content-based regulation of speech since the park had historically been used for all manner of public demonstrations. His lawsuit asked that the resolution be declared unconstitutional and that he be allowed to display the menorah.

Sotomayor found the parks at issue were traditional public forums and, consequently, any regulation of speech or expressive activity must survive strict scrutiny. She rejected the City's claimed "compelling interest" (a desire to not violate the Establishment Clause) because the U.S. Supreme Court had upheld a similar menorah display in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). She noted further that even if it had been a compelling interest, the resolution was too broad, as it proscribed both religious and political displays, the latter of which are not implicated by the Establishment Clause.

In a later case, Sotomayor wrote the district court opinion in *Mehdi v. United States Postal Service*, 988 F. Supp. 721 (S.D.N.Y. 1997), rejecting the claims of Muslim plaintiffs who challenged the U.S. Postal Service's refusal to display the Star and Crescent alongside Christmas and Hanukkah symbols or to remove any "sectarian symbols from its holiday displays." The plaintiffs acted *pro se* (without counsel) and pursued various overlapping theories of free speech, no establishment, and equal protection. The case illustrates the highly fact-specific analysis that is often required in religious display cases, as well as the complicated doctrine of "forum analysis" in free speech cases.

Sotomayor granted the defendant's motion to dismiss the case. While avoiding a conclusion about all similar facilities, she rejected the plaintiffs' claim because the post office is a nonpublic forum, and the agency's prohibition of seasonal displays by the public was a "reasonable restriction designed to further its business." In many ways Sotomayor's opinion in this case anticipated the Supreme Court's recent ruling in *Pleasant Grove City, Utah, et. al., v. Summum*, 555 U.S. ____ (2009) which unanimously rejected a free speech claim to place a religious monument in a city park where a privately donated monument of the Ten

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Commandments stood. Sotomayor explained, "If the government's speech on its own property by itself turned that property into a public forum, virtually all government facilities would become public fora open for a wide range of expressive activity. The First Amendment does not require this."[17] Instead, she held the government is speaking on its own behalf – essentially in a commercial enterprise – and could restrict public displays.

Conclusion

While Sotomayor's written record raises no red flags, it also fails to provide complete assurance to those who are most concerned about our fragile religious freedom rights. In the free exercise cases, she displays careful attention to protecting religious rights, including in prisons where courts generally give deference to government officials. Likewise, these cases demonstrate an emphasis on the importance of assessing the individual's specific religious claim. This approach illustrates an expansive view of religious freedom that does not depend on the approval of the majority. Her religious display cases demonstrate the fact-sensitive nature of such disputes, but tell us little about where she would draw the line between permissible acknowledgements of religion and unconstitutional displays that send a message of endorsement of religion by the government. Beyond those cases, her record gives little indication of her views of the Supreme Court's various Establishment Clause standards or how she is likely to decide such cases.

Sotomayor's writings include few if any statements articulating how the First Amendment protects religious liberty, promotes the voluntary nature of religion, prevents governmental interference in religion and tends to reduce conflict among religions. Still, her record offers positive signs that she will be a thoughtful, fair-minded jurist in protecting religious freedom.

Endnotes

[1] Although the BJC does not endorse or oppose candidates for office (elected or appointed), we do examine and critique their church-state records.

[2] The Second Circuit has jurisdiction over Connecticut, New York, and Vermont.

[3] This information was in the White House announcement of Sotomayor's nomination on May 26, 2009. Full text is available at http://www.whitehouse.gov/the_press_office/Background-on-Judge-Sonia-Sotomayor/.

[4] Applying a new, narrow interpretation of the Free Exercise Clause, *Smith* held that the Oregon law disqualifying the plaintiffs from unemployment compensation was a neutral law of general applicability and, thus, constitutional. The plaintiffs had been terminated for ingesting peyote, a sacramental act of their Native American religious tradition.

[5] The Baptist Joint Committee chaired a group of more than 50 religious and civil liberty organizations, known collectively as the Coalition for the Free Exercise of Religion, which worked to pass both RFRA and RLUIPA.

[6] In response to the Senate Judiciary Committee's questionnaire, Sotomayor identified this case as one of the ten most significant cases over which she has presided.

[7] *Ford*, 352 F.2nd at 589, quoting *Frazee v. Illinois Dept. of Employment Security*, 489 U.S. 829, 834 (1989).

[8] *Id.* at 590.

[9] *Id.* at 591 n8.

[10] *Id.* at 586-87.

[11] As Sotomayor noted in her opinion, the practice of Santeria was the subject of a Supreme Court case striking down a city ordinance that targeted Santeria's practice of animal sacrifice. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

[12] *Campos*, 854 F. Supp. at 197.

[13] Sotomayor's opinion recalled the Supreme Court's admonition to legislators regarding the Free Exercise Clause: "Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices." *Id.* at 202-203 n1.

[14] *Id.* at 207.

[15] The opinion rejects "distinctions between 'traditional' and 'nontraditional' religions." *Id.* at 208.

[16] For example, in *Lee v. Weisman*, 505 U.S. 577 (1992), Justice Souter wrote separately to make clear his understanding that the Establishment Clause bars favoring religion over irreligion, not just promoting one particular religion over others. Similarly, he opined that actual coercion of religious practice was not a necessary element of an Establishment Clause violation, and that a general endorsement of religion by government would be sufficient. In his dissenting opinion in *Mitchell v. Helms*, Justice Souter explained the Establishment Clause's prohibition on funding religion: "The establishment prohibition of government religious funding serves more than one end. It is meant to guarantee the right of individual conscience against compulsion, to protect the integrity of religion against the corrosion of secular support, and to preserve the unity of political society against the implied exclusion of the less favored and the antagonism of controversy over public support for religious causes." 530 U.S. 793, 868 (2000) (Souter, J., dissenting).

[17] *Mehdi*, 988 F. Supp. at 726.

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Congress of Racial Equality

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July 17, 2009

Hon. Ben Cardin
Member, U.S. Senate
509 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Cardin:

I am writing on behalf of Judge Sonia Maria Sotomayor. Judge Sotomayor currently serves on the United States Court of Appeals for the 2nd Circuit. President Barack Obama has nominated Judge Sotomayor to replace retiring Justice David Souter on the United States Supreme Court. Her appointment to the Supreme Court is being considered by the Senate Judiciary Committee before being presented to the full Senate for a vote. If confirmed, she will be the first Hispanic Supreme Court Justice.

The Congress of Racial Equality had the opportunity to appear before Judge Sotomayor in a civil case several years ago. We found her to be intelligent, knowledgeable of the issues and pertinent laws, focused on the details of the case, and fair and balanced in her rulings. She demonstrated extraordinary judicial temperament and excellent mediation skills in guiding the parties in our case to a just resolution.

Our experience with Judge Sotomayor left us with the sense that some day she would be called upon to serve our country's judicial system in a higher capacity. We are overjoyed and excited that such a day has come and we urge you to accept the nomination and vote to confirm her appointment to the United States Supreme Court as expeditiously as possible.

Her appointment to the Supreme Court will bring the court closer to an accurate representation of the racial profile of our country. Hispanics now comprise close to 15% of the American population. They should have a seat on the nation's highest court and Judge Sotomayor is well suited to serve in that capacity.

Please include our endorsement of Judge Sotomayor in the official record of the Senate Judiciary Committee hearings and publicize it in anyway that you believe will help to guarantee her confirmation and appointment to the United States Supreme Court.

Sincerely,

George Holmes

George W. Holmes
Executive Director & Chief Operating Officer
CORE-Congress of Racial Equality

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Supreme Court Nominee Judge Sonia Sotomayor: Record on LGBT Issues

Introduction

HRC has thoroughly researched the judicial record of Judge Sonia Sotomayor regarding issues of concern to the LGBT community. Although she has not considered many cases related to lesbian, gay, bisexual and transgender ("LGBT") rights, we are encouraged by Judge Sotomayor's record of fair-minded decisions.

Several of Judge Sotomayor's decisions have recognized the constitutional right to privacy, first articulated in *Griswold*, which lays the foundation for acknowledging fundamental rights for LGBT people.[1] Judge Sotomayor has also demonstrated an understanding of the discrimination faced by the LGBT community and has shown a willingness to use existing law to prohibit discrimination. Her judicial opinions evince an understanding that discrimination on the basis of sexual orientation triggers Equal Protection rights.

HRC encourages the Senate Judiciary Committee to thoroughly probe Judge Sotomayor's views on liberty and privacy rights, articulated in cases such as *Griswold, Roe,* and *Lawrence.* We also encourage a robust exploration of Judge Sotomayor's views on Equal Protection, Due Process, and employment discrimination as well as her ability to support full equality under the law for LBGT citizens and their right to marry. In particular and discussed in detail below, Judge Sotomayor's decision in two cases directly related to LGBT issues, *Holmes v. Artuz*[2] and *Miller v. City of New York,*[3] deserve further scrutiny by the Committee.

Employment Discrimination

The right to earn a living is a fundamental and an integral part of the LGBT community's struggle for equality. Although federal nondiscrimination laws protect people from employment discrimination based on race, color, sex, religion, and national origin, the LGBT community is not explicitly protected by federal law.

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[1] *See Haybeck v. Prodigy Services Company*, 944 F. Supp 326 (S.D. N.Y. 1996), (Holding that an employer cannot be held liable for HIV-positive employee's failure to disclose HIV-positive status with customer with which he had consensual, unprotected sex. Sotomayor cites *Griswold* as recognizing a right of privacy, particularly in matters of sexuality) and *N.G. v. State of Connecticut*, 382 F.3d. 225 (2d. Cir. 2004), (Sotomayor dissenting in part from the majority opinion holding some strip searches of the minor children plaintiff's reasonable. Sotomayor finds that the majority opinion too greatly expands existing exceptions to the Fourth Amendment right to privacy).

[2] *Holmes v. Artuz*, 1995 U.S. Dist. LEXIS 15926, 1-2, (S.D.N.Y. 1995)

[3] *Miller v. City of New York*, 2006 U.S. App. LEXIS 10730 (2d. Cir. April 26, 2006).

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In *Miller v. City of New York,*[4] Sotomayor was part of a three judge panel on the United States Court of Appeals for the Second Circuit which overturned the dismissal of a man's employment discrimination claim by summary order. The man, Gregory Miller, sued the City of New York under a variety of theories, including that he was subject to an impermissible hostile work environment under Title VII.

The Second Circuit order points to Miller's sexual orientation as a gay man. According to Miller, his supervisor claimed Miller was not a "real man" and tried to "toughen him up" by assigning Miller work involving heavy lifting. The district court dismissed Miller's claim, finding that Miller did not offer sufficient evidence that he suffered discrimination on the basis of sex, as opposed to sexual orientation.

The Second Circuit disagreed. The Court vacated the district court's dismissal of Miller's hostile work environment claim. While they agreed discrimination on the basis of sexual orientation is not actionable under Title VII, they held that sex stereotyping is actionable as discrimination on the basis of sex. The Court found that Miller had presented enough evidence that he was discriminated against because of his failure to conform to gender norms to proceed with his case.

The ability of the LGBT community to present discrimination claims based on failure to conform to gender norms is crucial to the advancement of federal non-discrimination law. The Court's, and by association, Sotomayor's, ruling continued a line of positive decisions regarding sex stereotyping as a form of sex discrimination. Her decision indicates that she is sensitive to the discrimination faced by the LGBT community and respects the constitutional authority of Congress to provide statutory remedies for discrimination. As such, this case and the theory of sex stereotyping should be included in any line of questioning related to federal non-discrimination law.

Equal Protection and Due Process

In *Holmes v. Artuz*,[5] a gay prisoner who was employed by the prison to serve food sued the prison *pro se* after they removed him from his position because of his sexual orientation. Despite Judge Sotomayor's acknowledgement that a prison inmate has no constitutional right to a specific prison job or to keep that job, Sotomayor denied defendants' motion to dismiss and directed the Pro Se Office to advertise the case for six months to members of the Court's Pro Bono Panel. Sotomayor therefore provided the plaintiff prisoner with another opportunity to make his case, recognizing that the ability of the plaintiff to retain counsel would significant improve the quality of the legal arguments advanced.

Sotomayor also said, "this interval will also allow the Court to await potential guidance from the Supreme Court in *Evans v. Romer* which may elucidate further the equal protection rights of persons with homosexual, lesbian or bisexual orientation."[6] Finally, Sotomayor notes in dicta that the plaintiff's allegation that he was removed from his job because of his sexual orientation may state a federal civil rights claim under Section 1983[7] for violation of his Equal Protection rights.

Her statement regarding Equal Protection rights is all the more telling because of the timing of

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[4] *Id.*
[5] *Holmes v. Artuz*, 1995 U.S. Dist. LEXIS 15926, 1-2, (S.D.N.Y. 1995)
[6] *Id.*
[7] 42 U.S.C. §1983 (LEXIS 2009).

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the case. At the time, *Romer* was before the U.S. Supreme Court. Sotomayor adopts the holding of several other circuits in what eventually becomes the holding in *Romer*; that bare animus directed toward gay individuals is not a legitimate state interest. This case illustrates that Sotomayor has a demonstrated understanding that discrimination on the basis of sexual orientation implicates Equal Protection rights.

Her decision is cited in three district court opinions. In one opinion, *Vega v. Artus*,[8] the District Court for the Northern District of New York cites Sotomayor's opinion and order for the proposition that "sexual orientation has been held to be a basis for an equal protection claim under Section 1983."[9]

The *Holmes* case was the subject of a line of questioning by Senator Ashcroft during her confirmation hearing for the Second Circuit in 1997. Sotomayor gives a response to Senator Ashcroft's loaded question regarding the creation of "special" constitutional rights that reflects her theory of judicial restraint and the proper deference to the role of a District Court judge. Senator Ashcroft presses her to admit she is in favor of "special" rights for "homosexuals." Sotomayor refuses to engage with him. She states that "homosexuals have the same constitutional rights as every citizen of the United States which is not to have government action taken against them arbitrarily and capriciously." She says the Constitution should only be amended sparingly.

Although this is not the strongest statement for LGBT equality, we are aware that it would not have been appropriate for her in a congressional confirmation hearing for a Court of Appeals position to talk about recognizing constitutional rights not yet addressed by the Supreme Court. Her opinion in *Holmes* indicates she does recognize that under the Equal Protection Clause, sexual orientation discrimination cannot be based on pure animus but must be rationally related to a legitimate government purpose. Again, her opinion in *Holmes* is telling because *Romer* had not yet been decided by the Supreme Court.

Senator Sessions later questions her about the fact that she allowed the plaintiff prisoner a chance to find pro bono counsel for his case. She defends her decision and refers again to *Romer*. She reiterates that the Supreme Court was considering an Equal Protection claim that might "elucidate this area." Again, here she is showing deference to the proper role of a District Court judge vis à vis the Supreme Court.

Although her responses were measured, Sotomayor's confirmation testimony deserves further probing. Her testimony underscores the need for the Senate Judiciary Committee to conduct a thorough examination of Sotomayor's record, including her understanding of constitutional rights and the LGBT community.

Conclusion

Sotomayor record on issues of concern to the LGBT community is thin. We are pleased that overall, she has shown a willingness to follow precedent and exercise judicial restraint while using the power of the law to address discrimination. She has ensured that claims of discrimination in both employment and public accommodation cases are fully and fairly adjudicated. Importantly, she recognizes the role that courts play in the lives of every American.

[8] 2009 U.S. Dist. LEXIS 24860 (Mar. 26, 2009).
[9] *Id.* at 209.

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However, her lack of public statements and judicial opinions on issues of vital concern to the LGBT community make it vital that the Senate Judiciary Committee carefully probe Sotomayor' views on Equal Protection and fundamental rights. The Committee must conduct a robust exploration of Sotomayor's judicial philosophy to ensure that she can preside over LGBT rights cases fairly.

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Continuing Relevance of International Law in U.S. Legal System

Human Rights Institute, Columbia Law School[1]
Leitner International Law and the Constitution Initiative, Fordham Law School

Wednesday, July 8, 2009

This memo outlines the continuing relevance of international law in the United States' legal system.

I. Enforceability of Ratified Treaties in U.S. Courts

Traditionally, international treaties bear a presumption of judicial enforceability in the United States. The Supremacy Clause establishes treaties as judicially enforceable and supreme over state law.[2] While the Supreme Court in *Foster v. Neilson* acknowledged the possibility that some treaties would not be judicially enforceable, the Court also recognized the presumption that treaties will generally be judicially enforceable as domestic law where they address private rights.[3]

This well-established presumption of judicial enforceability goes back to the founding era.[4] In the 1796 case *Ware v. Hylton*, Justice Iredell distinguished between "executed" and "executory" treaty provisions: executed provisions were those that "require[d] no further act to be done," while executory provisions required the government to take some action.[5] Justice Iredell went on to explain that "[b]efore adoption of the U.S. Constitution, all such provisions would have taken effect as domestic law *only if* Congress on the American side, or Parliament on the British side, had written them into domestic law."[6] However, after the adoption of the Constitution, such further legislative action was no longer required in the U.S. for a treaty provision dealing with debt collection.[7] In fact, the driving force behind including treaties in the Supremacy Clause of the U.S. Constitution was the fact that under the Articles of Confederation and Continental Congress, "[t]he states' defiance of America's treaty obligations . . . convinced even

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[1] For additional information, please contact Risa Kaufman, Executive Director, Human Rights Institute, Columbia Law School at (212) 854-0706, or risa.kaufman@law.columbia.edu.

[2] "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

[3] 27 U.S. (2 Pet.) 253, 314 (1829).

[4] *See, e.g.*, *Medellin v. Texas*, 128 S.Ct. 1346, 1392-93 (2008) (Breyer, J., dissenting) (offering an Appendix of 29 Supreme Court decisions that considered treaty provisions to be self-executing); *Asakura v. City of Seattle*, 265 U.S. 332 (1924) (invalidating a city ordinance that denied the issue of pawnbroker licenses to non-citizens because it violated a treaty between Japan and the U.S.); *Lessee of Pollard's Heirs v. Kibbe*, 39 U.S. (14 Pet.) 353, 388 (1840) ("[I]t would seem to be settled by the Constitution; for if a treaty made under its authority, is a supreme law of the land, it would be a bold proposition [to assert] that an act of Congress must be first passed in order to give it effect as such."); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (invalidating a Virginia state statute that conflicted with a treaty providing for recovery of Revolutionary War debts).

[5] *Ware*, 3 U.S. (3 Dall.) at 272-73.

[6] *Medellin*, 128 S.Ct. at 1378 (Breyer, J., dissenting) (discussing *Ware*, 3 U.S. (3 Dall.) at 274-77).

[7] *Ware*, 3 U.S. (3 Dall.) at 276-77.

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the most ardent advocates of states' rights at the [Constitutional] Convention that treaties should be the supreme law of the land."[8]

The presumption of enforceability remains unchanged by the Supreme Court's decision in *Medellin v. Texas.* The Court in *Medellin* found insufficient evidence that the 1945 United Nations Charter, the Statute of the International Court of Justice ("ICJ"), and the 1963 Vienna Convention on Consular Relations and its Optional Protocol were intended to render ICJ judgments directly enforceable in the U.S. However, the majority was careful to indicate that this ruling did not prevent other treaties from being judicially enforceable, including those treaties subjecting the U.S. to the decisions of international bodies: "We do not suggest that treaties can never afford binding domestic effect to international tribunal judgments—only that the U.N. Charter, the Optional Protocol, and the ICJ Statute do not do so."[9]

And, while some treaties may not be self-executing in U.S. courts, all ratified treaties remain the "supreme law of the land" and, under international law, impose an international legal obligation, not just a moral obligation on the United States.[10] Moreover, the Executive still has a constitutional duty to "take Care that the Laws be faithfully executed,"[11] and Congress has authority to pass legislation necessary and proper to fulfill treaty obligations.[12] Further, under several ratified treaties, Congress has an obligation to enact legislation that implements these treaty obligations.[13]

II. Customary International Law in U.S. Courts

Customary international law has long been recognized as a form of domestic law in the U.S. and applied by the Supreme Court:

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.[14]

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[8] JERALD A. COMBS, THE JAY TREATY 27-28 (1970). *See also* WALTER STAHR, JOHN JAY 145-222, 271-338 (2005) (examining the history surrounding the American peace treaty with Britain, including the challenges of ratification in the Continental Congress); THE FEDERALIST NO. 64 (John Jay) (defending the treaty power under the Constitution); *cf.* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 29, 389 (Max Farrand ed., rev. ed. 1966) (describing offered supremacy clauses); 3 *id.* at 273, 286 (debating Supremacy Clause). This history is aptly captured in Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833, 844 & n.65 (2007).

[9] *Medellin*, 128 S.Ct. at 1364-65.

[10] Under the Vienna Convention, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331.

[11] U.S. CONST. art. II. sec.3.

[12] Missouri v. Holland, 252 U.S. 416 (1920).

[13] International Covenant on Civil and Political Rights, art. 2(2), Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 4, Dec. 10, 1984, 1465 U.N.T.S 85 (entered into force June 26, 1987).

[14] *The Paquette Habana*, 175 U.S. 677, 700 (1900).

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As Justice Souter expressed in *Sosa v. Alvarez-Machain*: "For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations."[15] *Sosa* reaffirmed the application of customary international law through the Alien Tort Statute.[16]

Customary international law plays a useful gap-filling function in several other important areas of law,[17] including in cases considering piracy,[18] citizenship,[19] admiralty,[20] counterfeiting,[21] and treatment of ambassadors.[22]

III. Resort to International Law in Interpreting Domestic Statutes and Constitutional Provisions

The Supreme Court has long held that the laws of the United States should be construed to be consistent with customary international law whenever possible. In 1804, the *Charming Betsy* case explained that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[23] This canon of construction has since been applied in numerous Supreme Court cases.[24] In the absence of a clear expression of contrary intent, courts will assume that Congress did not intend to supersede customary international law.[25]

Finally, since the beginning of our nation, the Supreme Court has resorted to international law in constitutional interpretation in cases involving individual rights, as well as in other contexts.[26]

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[15] 542 U.S. 692, 729-30 (2004). *See also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) ("[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances."); *The Nereide*, 13 U.S. (9 Cranch) 388 (1815) (Marshall, C.J.) ("[T]he Court is bound by the law of nations which is a part of the law of the land.").

[16] 28 U.S.C. § 1350; *Sosa*, 542 U.S. at 716-25 (reviewing the history of the Alien Tort Statute and the Judiciary Act of 1789 and concluding that "the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations"). For example, the court in *Filartiga v. Pena-Irala* found that torture was prohibited by the law of nations, and it provided relief to family members of a torture victim under the Alien Tort Statute on those grounds. 630 F.2d 876, 883-84 (2d Cir. 1980).

[17] *See generally* Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006).

[18] *See, e.g.*, *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820).

[19] *See, e.g.*, *Shanks v. Dupont*, 28 U.S. (3 Pet.) 242, 248 (1830).

[20] *See, e.g.*, *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 335 (1816); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 475 (1793).

[21] *See, e.g.*, *United States v. Arjona*, 120 U.S. 479 (1887).

[22] *See, e.g.*, *In re Baiz*, 135 U.S. 403, 419 (1890); *Hunter's Lessee*, 14 U.S. (1 Wheat.) at 335; *Chisholm*, 2 U.S. (2 Dall.) at 475.

[23] *Murry v. Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) (Marshall, C.J.)

[24] *See, e.g.*, *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 178 (1993); *Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963); *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953).

[25] "Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded . . . customary international-law . . . ." *Hartford Fire Ins.*, 509 U.S. at 815 (Scalia, J., dissenting).

[26] *See* Cleveland, *supra* note 17. Note that while this memo primarily examines resort to international law—not citation of comparative practices of foreign states—U.S. courts also have a long history of resorting to comparative foreign law as persuasive, not binding, authority. *See, e.g., Roper v. Simmons*, 543 U.S. 551 (2005); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Atkins v. Virginia*, 536 U.S. 304 (2002); Vicki C. Jackson, *Constitutional Law and Transnational Comparisons*, 30 HARV. J.L. & PUB. POL'Y 191 (2006). For the purposes of this memo, it is

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Resort to international law was particularly common at the founding of the nation, and the practice continues to be followed in a variety of areas.[27]

important maintain the distinction between international law and comparative law, as the former is binding in the U.S. under the circumstances discussed in this memo, while comparative law is not.

[27] *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 520, 538 (2004) (recognizing that international law limits the scope of the President's detention power and invoking the Geneva and Hague Conventions); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (citing the Conventions on the Elimination of All Forms of Racial Discrimination and on the Elimination of All Forms of Discrimination against Women in support of proposition that affirmative action programs are encouraged but "must have a logical end point"); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) (Marshall, C.J.) (resorting to international law to interpret Congress's power to regulate commerce); *id.* at 227 (Johnson, J., concurring) ("[T]he definition and limits of [the power to regulate commerce] are to be sought among the features of international law.").

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Senator Patrick Leahy
Chairman, Senate Judiciary Committee
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United States Senate
Washington, DC 20510

June 3, 2009

Re: Confirmation of Judge Sonia Sotomayor

Dear Senator Leahy

I am pleased to write in support of the confirmation of Judge Sonia Sotomayor to the Supreme Court of the United States of America. There is no doubt that President Obama has made a nomination that is both historically significant and profoundly wise. Judge Sotomayor's personal life story and professional accomplishments reflect the best this country has to offer, and her confirmation will go a long way to restoring confidence that appointments to high office will be made in this country on the basis of demonstrated merit, talent, hard work and ethical integrity.

Judge Sotomayor is not by any stretch an unknown figure in the legal academy or the profession. Former students, classmates, professors and her colleagues both old and new know her personal integrity, intellectual brilliance, compassion, energy and courage. Though she is a top graduate with honors from two of the most elite institutions of higher learning in this country, she has moved through this life as a humble, generous and vibrant force for justice and fairness. The outpouring of enthusiasm and support for her confirmation has been deep and broad across all segments of our profession and communities.

It is critically important that the confirmation process remain focused on the merits. Even a brief and cursory review of Judge Sotomayor's appellate opinions demonstrate a fair, balanced, indeed, rather mainstream approach to legal doctrine. Constitutional scholars may not agree with every opinion she has written on the Second Circuit, but Constitutional scholars never agree with each other on every point, and the record as a whole undeniably reflects a careful, thoughtful legal mind intent on faithful application of established precedent. Take, for example, her opinion in *U.S. v. Santa*, 180 F.3d 20 (1999). In that case, Judge Sotomayor upheld a lower court decision denying a motion to suppress evidence of crack cocaine discovered during a search incident to arrest. The arrest itself was based on an arrest warrant that had been previously vacated, but never removed from the New York State Police Information Network ("NYSPIN"), a statewide computer database that contains outstanding warrants.

To be sure the integrity and accuracy of law enforcement databases implicate compelling liberty and privacy interests. The question whether and when the exclusionary rule should be applied to remedy and/or deter violations of constitutional rights as a general matter as well as the more particular issue whether the rule should be applied to suppress evidence obtained in "good faith" reliance on erroneous computer data

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are both issues that continue to vex the Supreme Court, as reflected in the dissenting opinions by Justices Ginsberg and Breyer in the more recent 5-4 decision of *Herring v. United States*, 129 S.Ct. 695 (2009). Although there is no way to predict how Judge Sotomayor would have ruled had she been on the Supreme Court when *Herring* was just recently decided, it is clear from the opinion in *U.S. v. Santa*, that as a Court of Appeals Judge, her decision in *Santa* was controlled by *Arizona v. Evans*, 514 U.S. 1 (1995). The string of errors that resulted in the Village Court's failure to remove the vacated arrest warrant from the police computer database in *Santa* were rightly troubling to the Judge, but *Evans* established a "categorical exception to the exclusionary rule for clerical errors of court employees." The errors made in *Santa* fit squarely within that pre-established framework, and the Judge's careful assessment and application of *Evans* in *Santa*, despite her troubled concerns, reflect a respect for controlling precedent and judicial restraint that are entirely appropriate for judges on our Courts of Appeal.

Indeed, it is precisely her respect for precedent that best reflects her judicial temperament and illustrates the important contribution she will make to restoring our Constitutional doctrine to a fair and balanced expression of the rule of law. Take for instance, her opinion in *Malesko v. Correction Services Corporation*, 229 F.3d 374 (2000). *Malesko* provides a valuable lens into the kind of judging we can expect from Judge Sotomayor after her confirmation to the Supreme Court. Unlike *Santa*, which was controlled by the four corners of *Evans* and therefore called for faithful application of established precedent by the lower appeals court, *Malesko* was a case of first impression in the Second Circuit. Cases of first impression require appellate judges to engage in a kind of analysis that is not directly determined by the "four corners" of a controlling precedent and thus reflect a judge's understanding of the competing interests, policy objectives and fundamental constitutional values that inform an entire area of law from which the judge must craft a new rule of decision for the particular case.

Malesko is an especially significant case because it involves interpretation of the scope of a *Bivens* claim. *Bivens*, 403 U.S. 388 is a 1971 Supreme Court opinion that recognized for the first time an implied private right of action for damages against federal officers alleged to have violated an individual's constitutional rights. It is a critically important vehicle for vindicating constitutional rights in the absence of a Congressionally established remedial scheme. The specific question in *Malesko* was whether an inmate of a privately run correctional facility could bring a *Bivens* action for violation of his constitutional rights against the private corporation running the prison under color of federal law. The inmate in question had a known heart condition, but was nevertheless forced to take the stairs rather than an elevator to his fifth floor room, causing him to sustain injuries when he suffered a heart attack and fell. In reversing the district court's dismissal of the inmate's complaint, Judge Sotomayor engaged in a careful analysis of the analytical inferences that can fairly be drawn from prior precedents on the scope of the *Bivens* claim. Unlike the district court, whose dismissal of the inmate's claim purported to apply the 1994 Supreme Court decision in *FDIC v. Meyer*, 510 U.S. 471, Sotomayor concluded that the *Meyer's* precedent barring *Bivens* claims against federal agencies did not proscribe *Bivens* claims against private corporations acting under color of federal law.

As a matter of precedent, prior to *Meyer*, no Court of Appeals, other than the one under review in *Meyer* itself, had ever implied a *Bivens* action against a federal agency. By contrast, prior to *Meyer* several circuit courts had recognized *Bivens* claims against private corporations engaged in federal action. Thus, in the body of law preceding the Supreme Court's decision in *Meyer*, federal agencies and private corporations had not been treated similarly, and there was therefore no reason to automatically conclude that a Supreme Court decision barring *Bivens* claims against federal agencies would likewise apply to bar such claims against private corporations. On the contrary, there were compelling reasons implicated in the policies and the constitutional values the *Bivens* action was originally established to vindicate from which a lower court could reasonably infer that the proscription barring *Bivens* actions against federal agencies did not apply to claims against private corporations. This is because "the primary goal of *Bivens* was to provide a remedy for victims of constitutional violations by federal agents where no other remedy exists, regardless of whether the official would be deterred in the future from engaging in such conduct." *Malesko*, quoting *Hammons* at 706. With citations to Justice Harlan's concurring opinion in *Bivens*, Sotomayor noted the fundamental unfairness of denying relief to an individual whose constitutional rights have been violated "simply because he cannot show that future lawless conduct will be thereby deterred." *Malesko* quoting *Bivens* at 406 (Harlan, J., concurring). She further noted that the *Meyer* Court's concern that allowing

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Bivens actions against federal agencies might undermine the deterrence purpose of *Bivens* did not apply in cases involving actions against private corporations where one would reasonably expect an "employer facing exposure to such liability would be motivated to prevent unlawful acts by its employees." *Malesko* at 380.

In so holding, Sotomayor's decision in *Malesko* maintained a pre-established symmetry between the liability of federal agents for constitutional torts under *Bivens* and the analogous liability of state agents for constitutional torts under Section 1983. In 1982, the Supreme Court made it clear that private corporations violating constitutional rights under color of state law may be sued under Section 1983. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). Respect for *Biven's* overriding purpose of providing redress for violations of constitutional rights warranted no lesser liability for private corporations violating constitutional rights under color of federal law.

From this analysis, it is abundantly clear that Judge Sotomayor has the intellectual integrity, professional competence and judicial temperament to bring to the Supreme Court a keen understanding of the compelling interests at stake in providing remedies for violations of constitutional law. The notion that constitutional violations have constitutional remedies is a fundamental principle inherent in the very notion of government under the "rule of law." It harkens back to the foundational precedent of *Marbury v. Madison*, where the Supreme Court in 1803 clearly and wisely asserted that the "very essence of civil liberty" consists "in the right of every individual to claim the protection of the laws whenever he receives an injury... The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."

To be sure, *Malesko* is one of the cases in which the Supreme Court has reversed Judge Sotomayor. *Malesko* was reversed in a 5-4 decision authored by then-Chief Justice Rehnquist over the dissenting opinion of Justices Stevens, Souter, Ginsberg and Breyer with a concurring opinion by Justice Scalia. However, a close review of this reasoning in the Supreme Court's opinion suggests that dissenters had the better argument. Against the backdrop of established precedents, and the more reasoned analysis of the dissenters, there is basis for Justice Stevens' objection that "the driving force behind the Court's decision is a disagreement with the holding in *Bivens* itself." *Malesko* at 527-28 (Stevens, J. dissenting). As between Sotomayor's careful analysis of the precedential history and underlying policies of the *Bivens* action and the unreasoned distinctions and bald assertions of disapproval through which Justices Rehnquist and Scalia led a 5-4 majority to curtail this important remedy, Sotomayor demonstrates the kind of judicial temperament that will restore credibility to a struggling Court much to the credit of our system of Constitutional government under the rule of law.

To be sure, there is some tension between Judge Sotomayor's decisions in *Santa* and *Malesko*. Clearly, one might conclude, as Justices Ginsberg, Stevens, Souter and Breyer did in *Herring*, that application of the exclusionary rule to suppress evidence obtained in good faith reliance on erroneous information contained in a law enforcement computer data base might encourage "policymakers and systems managers to monitor the performance of the systems they install and the personnel employed to operate those systems" *Herring* (Ginsberg, J. dissenting) -- in the same way Sotomayor concluded that *Bivens* liability might encourage private companies "to be motivated to prevent unlawful acts by its employees." *Malesko* at 380. Clearly, one might also conclude that an individual subject to unlawful arrest should not be denied a remedy "simply because he cannot show that future lawless conduct will be thereby deterred." *Bivens* (Harlan, J. concurring) quoted in *Malesko*. Nevertheless, a fair analysis of this tension must take into account the very different contexts in which the Judge decided *Santa*, a case subject to the controlling precedent of a superior court, and *Malesko*, a case of first impression. Viewed in this light, the tension between her decisions in these cases is the best evidence of a judicial temperament that is both humble in its respect for the authority of controlling precedent and wise in its assessment of policies and values that our Constitutional jurisprudence must be made to uphold going forward.

Based on the record of her opinions in these and other cases in Constitutional law, as well as her impressive record of professional accomplishments and personal achievement, I have no doubt that she will make a first rate Justice. I applaud her nomination and support her confirmation as not only the first Latina Justice

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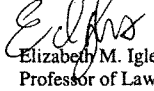
on this high court, but as living evidence that decisions regarding positions of high office in this country will be made on the merits under Obama Administration.

If I can be of any further assistance, do not hesitate to contact me.

Sincerely,



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June 18, 2009

Re: Confirmation of Judge Sotomayor

Dear Senator Leahy,

I am pleased to supplement my letter of June 3, 2009 in support of Judge Sotomayor's confimation to the Supreme Court of the United States of America with the following review of the Judge's methods of legal reasoning in the areas of 4th Amendment and Section 1983 Civil Rights Law. This letter reviews three representative examples of Judge Sotomayor's opinions at the intersection of civil rights and 4th Amendment jurisprudence. These cases in chronological order are *Anthony v. City of New York*, 339 F.3d 129 (2d Cir. 2003) in which Sotomayor wrote the court's unanimous opinion; *N.G. v. State of Connecticut*, 382 F.3d 225 (2d Cir. 2004) in which the Judge concurred in part and dissented in part; and *Walczyk v. Rio*, 496 F.3d 139 (2d Cir. 2007) where she concurred in the outcome, but wrote separately to address issues arising from the court's qualified immunity analysis. Each of these three cases dealt with Section 1983 civil rights actions predicated upon claims that the government action at issue violated the plaintiff's constitutional rights under the 4th Amendment. As such, they provide particularly useful vehicles for understanding Judge Sotomayor's approach to legal reasoning, generally, and the 4th Amendment in particular. This is because Section 1983 provides an alternative to the exclusionary rule as a means of enforcing substantive 4th Amendment rights.

The exclusionary rule has been a controversial mechanism for remedying constitutional violations because it fails to vindicate constitutional rights that produce no evidence of crime and the remedy it *does* provide is limited to the exclusion of evidence relevant to the truth-finding function of the criminal trial. As a result, concerns about the evidentiary impact of the exclusionary rule can have a restrictive impact on judicial interpretation of substantive 4th Amendment rights. By contrast, Section 1983 offers a remedial vehicle that relies on monetary damages and injunctive relief rather than the exclusion of evidence. It is thus available to a broader class of persons, including those who are injured by police or government misconduct that produces no evidence of criminal activity. In Section 1983 cases, the individual's interest in obtaining legal enforcement of her constitutional rights at times raises countervailing concerns about the distributive impact of awarding large monetary damages against municipalities, as well as concerns about fairness to individual police officers and government actors who cannot be expected to "keep abreast of every development in the case law or to recognize every implication of legal precedent for police conduct that courts have not previously considered." Walczyk, 496 F. 3d at 167 (Sotomayor concurring).

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Because of the compelling interests at stake in the enforcement of fundamental 4th Amendment rights to freedom from unreasonable searches and seizures and the fact that real life cases present an infinite and often unpredictable arrangement of particular circumstances, government practices, and evolving policies, this area of law often enough challenges judges to decide cases not governed by the four corners of established precedent. Judicious interpretation is critically important, and the excellence of a judge's interpretative efforts depends on producing a just outcome in the particular case through the articulation of generally applicable rules that successfully balance the competing interests in a fair and reasonable manner for a sustainable future set of similar cases within a framework that reconciles pre-existing precedential authorities. In this way, judicial excellence produces justice in the particular case and contributes to the intelligibility of law through the extension and reconciliation of prior precedents in new situations.

Measured against this standard of judicial excellence, a careful analysis of Judge Sotomayor's opinions in these cases provides ample evidence of a fair and reasonable legal mind, whose judicial philosophy cannot in any way be characterized as being either "pro-police" or "pro-claimant/defendant." Her decisions reflect a very close reading of, and fidelity to, pre-existing precedents informed by rigorous attention to the factual circumstances and evidentiary record against which she evaluates the applicability of invoked precedents to the particular case at hand. Her opinions reflect judicial empathy for the suffering of claimants injured by government misconduct, moderated by concern for the interests of other parties likely to be affected by a finding or denial of liability, both in the particular case and over the range of cases that forseeably might be governed by the constitutional rule articulated in the case.

Anthony v. City of New York is a 2003 decision in which Judge Sotomayor wrote the opinion for a unanimous decision by a three judge panel of the Second Circuit. The case involved a Section 1983 civil rights action by a disabled woman with Down Syndrome, who was seized and involuntarily hospitalized in a psychiatric ward by officers responding to a 911 call from the apartment the woman shared with her sister. The lawsuit alleged four different violations of the 4th Amendment, challenging the constitutionality of the officers' warrantless entry into her apartment, the warrantless seizure of her person without probable cause to believe she was a danger to herself or to others, as well as the constitutionality of the hospital's involuntary detention and forced urine analysis.

The Judge affirmed the lower court's holding that the officers' warrantless entry into the woman's home was supported by exigent circumstances insofar as the police were responding to "a plea for help from a terrified woman who claimed to be under attack." Exigent circumstances are a well settled exception to the 4th Amendment's requirement that entry and search of a person's home must be supported by a warrant based on probable cause. In affirming the lower court's dismissal of her search and seizure claims against the hospital for the forcibly administered blood and urine analyses and her involuntary confinement, the Judge also applied well settled precedents upholding the constitutionality of warrantless blood and urine tests as reasonable searches when justified by "special needs" beyond generalized law enforcement purposes. In this case, the district court had found that the tests were not conducted for the general law enforcement purpose of obtaining evidence of crime, but rather because the delusional and paranoid behavior the woman exhibited to the hospital staff required testing to enable the staff to diagnosis and treat her condition. Her behavior also justified her involuntary confinement because it provided reasonable grounds for the hospital staff to believe she was a danger to herself or to others. Id. at 142.

Turning to the issues arising from the officers' warrantless seizure, the Judge noted that a warrantless seizure for purposes of involuntary hospitalization "may only be made upon probable cause, that is, only if there are reasonable grounds for believing that the person seized is dangerous to herself or to others." In this case, there was conflicting evidence as to the woman's behavior prior to the officers' seizure. Read in the light most favorable to the plaintiff, the evidence credited by the Judge indicated that the woman was sitting calmly and quietly in the apartment while the police conducted the search and attempted to contact her legal guardian. In light of this evidence, there was certainly justification from which a lower court could have found that the officers' decision - to nevertheless handcuff and transport this disabled woman to involuntary confinement in a psychiatric ward - violated her clearly established right to be free from unreasonable seizure.

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The Judge declined to reach this issue. Instead the Judge turned to the doctrine of qualified immunity and held that even if the seizure may have violated the woman's 4th Amendment rights for lack of the requisite probable cause, the police officers who executed the seizure were shielded from liability in their individual capacities under the doctrine of qualified immunity which prevents liability where the police officer's conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

The Judge's reasoning in this case relies on a previously articulated framework for qualified immunity which established a two-pronged analysis in which the "clearly established" nature of the right, in this case, the right not to be seized absent probable cause to believe one is a danger to self or others, is insufficient to defeat the defense of qualified immunity. Officers confronting liability in their individual capacities are entitled to immunity from liability if (1) their conduct does not violate clearly established constitutional rights, or (2) it was objectively reasonable for them to believe their acts did not violate those rights. *Anthony* at 138.

In this case, absent a procedurally inappropriate crediting of testimony unfavorable to the plaintiff, it might reasonably have been decided that the seizure violated the woman's clearly established right. Certainly, mentally disabled persons have a clearly established right not be seized and involuntarily hospitalized by officers responding to their 911 calls for assistance if there is no probable cause to believe that they are a danger to themselves or others. Thus the qualified immunity defense succeeded in this case not because the woman's rights were not clearly established, but because of the Judge's determination that it was objectively reasonable for the officers to execute the seizure in compliance with an order of a superior officer to seize the woman and remove her to the hospital. "Plausible instructions from a superior or fellow officer support qualified immunity where, viewed objectively in light of the surrounding circumstances, they could lead a reasonable officer to conclude that the necessary legal justification for his actions exists." *Id.*

N.G. v. State of Connecticut is a Section 1983 case decided the year after Anthony. In this case, the parents of two minor girls brought a Section 1983 class action lawsuit challenging the constitutionality of the juvenile strip search policies in use at Connecticut's juvenile detention centers as violations of the minors' 4th Amendment rights. The lawsuit sought damages on behalf of juvenile status offenders such as runaways and truants, juveniles arrested for non-criminal offenses, and juveniles charged with minor offenses. The case reviewed the constitutionality of three categories of juvenile strip searches pursuant to which detained children were strip searched under the detention center's policy: (1) strip searches conducted after transfer from one detention center to another – which the court declared unconstitutional; (2) strip searches based upon reasonable suspicion – which the court upheld; and (3) suspicionless strip searches upon "initial intake" regardless of the reason for the child's detention – which the court also upheld. Judge Sotomayor concurred with the court's opinion in all but the last.

The two children whose parents brought the class action were juvenile status offenders detained under a provision of Connecticut law authorizing detention of juveniles adjudicated to be members of "families with service needs." Plaintiff S.C. was fourteen years old at the time of her "initial intake." She had a history of mental illness, suicide attempts, self-mutilation, sexual activity with older men, drug and alcohol abuse, and drug peddling. She was subject to detention for failure to comply with a court order to stay at home or at institutions where she had been placed. From her initial intake in July 2000 to January 2001, she was strip searched pursuant to each of the three categories for a total of eight strip searches in a six month period. Plaintiff T.W. was thirteen years old at the time of her initial intake. She had a history of truancy, and possible mental health issues. She was strip searched twice, the first time when the superior court ordered her detention for failure comply with a court order to attend the seventh grade and the second time when she was transferred from the first detention center to another.

At issue was the scope of an exception to the 4th Amendment's requirement of a warrant and probable cause. The "special needs" exception is a judicially crafted exception to the requirement that searches be conducted pursuant to judicially authorized warrants based on probable cause. It has previously been recognized in situations when the government asserts "special needs" independent of the generalized law enforcement interest in discovering evidence of criminal activity. Because this exception is based on the

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reasonableness of dispensing with the warrant and/or probable cause requirement in the particular situation under review, determining the limits and scope of the exception requires careful balancing of the compelling interests at stake.

In affirming the constitutionality of suspicionless strip searches conducted upon "initial intake" into the State's detention centers, the majority acknowledged the admittedly compelling interest in protecting psychologically vulnerable children from the foreseeable harm caused by searches uniformly understood to be particularly intrusive, humiliating and traumatic. They nevertheless concluded that this interest was outweighed by the state's interest in protecting children from the harm they could inflict upon themselves or each other by undiscovered contraband concealed on their person upon intake into a juvenile detention center. The majority further reasoned that the state's interest in detecting child abuse and deterring future attempts to smuggle concealed contraband provided additional justifications outweighing the interest in protecting children from the concededly more severely adverse psychological effect such strip searches were likely to have on children, than adults, who under established precedents could not constitutionally be strip searched absent individualized suspicion.

Judge Sotomayor's dissent is exemplary in its reasoned assessment of the competing interests, factual record, and prior precedents. First, the Judge concedes that the government's special needs are more compelling in the context of juvenile detention centers, than other contexts where the "special needs" doctrine has not authorized strip searches absent individualized suspicion. Indeed, her holding is a narrow one that does not establish a blanket prohibition against strip searching juveniles on initial intake into a detention center, but would restrict such searches to instances in which there is individualized reasonable suspicion. Her holding is animated, on the one hand, by the intense intrusion reflected in the particular facts of the case, which only the Judge found sufficiently compelling to recount:

> The case before us presents facts that provoke all of our typical concerns about strip searches. The detention facility officers on numerous occasions ordered appellants - troubled adolescent girls facing no criminal charges-to remove all of their clothes and underwear. The officials inspected the girls' naked bodies front and back, and had them lift their breasts and spread out folds of fat. The young girls described the process as embarrassing and humiliating. Indeed, T.W. cried throughout one of her searches. During one of S.C.'s searches, two other detainees were present. The juvenile detention facilities perform similar searches on every girl who enters, notwithstanding the fact that many of them - indeed, most of them - have been victims of abuse or neglect, and may be more vulnerable mentally and emotionally than other youths their age. *N.G.* at 239

This attention to the record evidence of the girls' particular experiences reflects an appropriate degree of judicial empathy, not evident in the more abstract concessions through which the majority acknowledges – only to discount – the particular vulnerabilities of minor girls to the extreme humiliation strip searches are known to impose on anyone subjected to them. The Judge's objection to the state's policy of conducting suspicionless strip searches of all juveniles admitted to the juvenile detention centers in favor of a narrower authority to conduct such searches based on individualized reasonable suspicion reflects a careful balancing in which the Judge's obvious empathy for the girls' suffering is balanced against her assessment of the government's special needs to ensure the safety of all of the children admitted to the state's detention center.

Turning to the interests the state asserts, and the majority accepts, as a basis for its "special need" to conduct the suspicionless strip searches at issue, Judge Sotomayor examines the weight of the state's asserted interests through a careful review of the evidence and concludes after rigorous examination of the factual record that there is *simply no evidence* to suggest that the government's interest in detecting contraband, deterrence or detecting child abuse is sufficient to justify "a highly degrading, intrusive strip search absent any individualized suspicion that the particular individual ordered to disrobe possesses contraband." *N.G.* at 244. This conclusion is **not based** on a personally subjective value determination that the juvenile's dignity and privacy interests outweigh the state's detection and deterrence interests, but rather on the unremarkable grounds that the state's own record evidence provides no factual basis for believing that suspicionless strip searches will advance these interests, and plenty of reason to believe they

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have not and will not, notwithstanding the adverse psychological effects they have and will most certainly produce in the children subjected to them. Given the lack of evidentiary support that suspicionless strip searches *actually* advance the state's asserted interests in detection and deterrence, the Judge was surely correct to conclude that these interests cannot reasonably outweigh the dignity and privacy interests such searches concededly infringe.

Judge Sotomayor's highly reasonable dissent from the majority's factually unsupported assertion that suspicionless strip searches advance the state's interest in detection and deterrence is further buttressed by her analysis of the relevant precedents. This analysis illustrates a method of legal reasoning that is relentlessly faithful to the integrity of judicial precedential analysis even as it is attentive to doctrinal gaps in pre-existing precedents and faithful to the policy objectives and constitutional values that should inform the legal analysis through which existing precedents are extended to cover these gaps. For example, the Judge takes issue with the fact that the majority's opinion neglects to discuss closely analogous precedents that cut against its holding even as it asserts the special "pertinence" of a case the Judge persuasively argues is not "pertinent at all."

The cases neglected by the majority include three cases in which the Second Circuit refused to allow suspicionless strip searches of students by teachers, prison correction officers pursuant to a random strip search policy designed to advance the government's compelling interest in maintaining prison security, internal order and discipline, and people entering our national borders. *Id.* at 240-41. In none of these cases did the government's special needs justify eliminating the requirement of individualized suspicion, and while the precedents were not directly on point, being strip search cases, the three cases are at least arguably more analogous to the girls' case, than the majority's "especially pertinent" precedent, which had nothing to do with the constitutionality of strip searches, but instead involved "blood tests of convicted adult sex offenders held in prison." *Id.* at 241, criticizing the majority's reliance on *Roe v. Marchotte,* discussed at 231. Indeed, the Judge notes that the Second Circuit has never before found that a strip search in the absence of any individualized suspicion was reasonable, *Id.* at 239, and her dissent in this case provides a reasoned basis for refusing to extend the "special needs" doctrine to allow such searches against particularly vulnerable children based on no factual evidence that such searches actually advance the state's asserted interests.

Precedential analysis proceeds through a process of analogical reasoning, which requires judges to fairly identify the factors that warrant the application of a particular precedent to a factual situation that is similar in some ways and different in others. This process of culling through similarities and differences is an analytical challenge that cannot be effectively performed without a fair and careful assessment of the objectives and values that link the doctrinal ruling to the specific facts of the case. The notion that the constitutionality of a strip search is more fairly assessed through an examination of prior precedents dealing with strip searches, rather than those dealing with drug tests, is eminently reasonable and fair.

Similarly, it is undeniably superior to ground constitutional rulings on the empirical reality revealed by an evidentiary record than to ground such rulings on unsubstantiated assumptions that the strip search of a child is the kind of "search a reasonable guardian ... might undertake." *Id.* at 236. As a method of legal reasoning, judicial attention to record evidence and empirical reality ensures that constitutional doctrine is informed by a reality-based assessment of its impact on real interests and practices, rather than those assumed for the purposes of justifying a doctrinal outcome. Without this reality check, judges are freed from the constraints of fact and can justify any doctrinal outcome on the basis of unverified assumptions about the benefits it will confer or the harms it will prevent. Judge Sotomayor's method of legal reasoning demonstrates a willingness to be checked by reality and governed by precedent -- in a way that the majority's opinion, from which she dissents in this case, unfortunately does not.

Walczyk v. Rio is a 2007 decision in which a panel of the Second Circuit took up a Section 1983 civil rights action in which a suspect raised various constitutional challenges, the most pertinent to this analysis being his allegation that the police officers' failure to disclose that the suspect had not lived in his mother's home for over seven years deprived the warrant issued to search her residence of probable cause. Judge Sotomayor concurred in the court's resolution of all of the 4th Amendment issues in the case, but wrote separately to express her disagreement with the qualified immunity analysis the court applied to determine

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whether the failure to disclose this and other facts constituted material omissions in violation of the suspect's clearly established right to be free of searches not based on probable cause.

In performing its analysis of the qualified immunity defense, the majority in *Walczyk* concluded that the officers might still be entitled to qualified immunity notwithstanding the court's determination that the search warrant issued to search the mother's residence was not supported by probable cause. This is because under the majority's analysis, the violation of a clearly established constitutional right, such as the right to be free of searches not supported by probable cause, will not deprive an officer of qualified immunity "if he can establish that there was arguable probable cause." *Id.* at 163. "Arguable probable cause exists if either (a) it was objectively reasonable for the officer to believe that probable cause existed, or (b) officers of reasonable competence could disagree on whether the probable cause test was met." *Id.*

In her concurring opinion Sotomayor takes issue with the majority's qualified immunity analysis:

> The portion of the majority's qualified immunity discussion that I find objectionable reads as follows: "If the right at issue was not clearly established by then existing precedent, then qualified immunity shields the defendant. Even if the right at issue was clearly established in certain respects, however, an officer is still entitled to qualified immunity if 'officers of reasonable competence could disagree' on the legality of the action at issue in its particular factual context." Maj. Op. at 154 (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)). These two sentences and the citation to *Malley* reveal the two flaws I see in this circuit's approach to qualified immunity. First, our approach splits the single question of whether a right is "clearly established" into two distinct steps, contrary to Supreme Court precedent. Second, we demand a consensus among all hypothetical reasonable officers that the challenged conduct was unconstitutional, rather than positing an objective standard of reasonableness to which defendant officers should be held, as the Supreme Court has repeatedly instructed us to do. *Id.* at 165-66

The remarkable thing about this concurrence is that it appears to repudiate the framework the Judge herself applied in *Anthony v. City of New York*, when she dismissed the 4th Amendment claim of the mentally disabled woman who was involuntarily hospitalized in a psychiatric ward by the officers responding to her 911 emergency call. In that case, the facts most favorable to the plaintiff provided grounds for concluding that the officers violated her clearly established right to be free of warrantless seizure from her home in the absence of probable cause to believe she was a danger to herself or to others. In that case, the Judge concluded that the officers were nevertheless entitled to qualified immunity under the two prong test attributed to *Malley v. Briggs*. *See Anthony*, 339 F.3d at 138.

To be sure, the Judge is certainly right to conclude, as she did in her *Walczyk* concurrence, that "by splitting the 'relevant dispositive inquiry' in two, [the majority's approach] erect[s] an additional hurdle to civil rights claims against public officials that has no basis in Supreme Court precedents." *Walczyck*, 496 F.3d at 166. It is also a fair reading of the Supreme Court's precedents up to then to conclude that "the Supreme Court does not follow this "clearly established" inquiry with a second ad hoc inquiry into the reasonableness of the officer's conduct. Once we determine whether the right at issue was clearly established for the particular context that the officer faced, the qualified immunity inquiry is complete." *Id.* at 166-7. This apparent change in the Judge's approach to the qualified immunity doctrine cannot by any stretch be attributed to a pro-defendant/client bias insofar as she agrees with the majority that "questions of disputed fact preclude judicial resolution of whether the officers are entitled to qualified immunity for their search of [the mother's] house", and the Judge herself recognizes that the distinction she is drawing is "a fine one." *Id.* at 168.

She is correct, however, to say that it has real consequences, if not in the case at bar, then in future cases such as *Anthony v. City of New York*, where the officers' treatment of the plaintiff not only violated a clearly established right, but the officers' failure to reflect the standards of treatment taught in the City's training programs for handling non-violent disabled persons might arguably be found to be objectively unreasonable. As such, the Judge's concurrence in *Walczyk* reflects perhaps an evolution in the Judge's

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understanding of the restrictive consequences the qualified immunity doctrine may have if it operates to shield misconduct that unduly undermines the enforcement of clearly established constitutional rights.

Based on the foregoing analysis, Judge Sotomayor's judicial philosophy in the area of 4th Amendment jurisprudence cannot fairly be categorized in simplistic pro-state or pro-individual terms. This is because its primary focus is a reasoned application of existing precedent, informed by rigorous analogical reasoning, evidentiary scrutiny and ever more profound reflection on the policy objectives and constitutional values at stake in the articulation of constitutional doctrine. This rich and complex analysis likewise cannot be reduced to simplistic classifications based on whether the outcome allows liability or denies it. In *N.G.*, this is evidenced by the fact that the Judge's determination that the state's policy of performing suspicionless strip searches upon initial intake into the juvenile detention centers did not mean that the state might not justify strip searches, including the searches of the girls in the case, based on individualized suspicion. It is similarly evidenced by the fact that the Judge's objections to the qualified immunity analysis performed in *Walczyk* do not lead her to an outcome different from the majority's in that case, though the approach she articulates in her *Walczyk* concurrence might perhaps have produced a different, and arguably fairer, outcome had she used that approach in *Anthony v. City of New York.*

In sum, based on a careful analysis of these and other constitutional law decisions Judge Sotomayor has delivered over the years, I am pleased to submit this case review as a supplement my letter of June 3 in support of her nomination and confirmation to the Supreme Court of the United States of America. As I indicated in that letter, and reaffirm through this supplemental review of her appellate work product, there is no doubt that President Obama has nominated a candidate whose intellectual integrity, professional competence and manifest record of judicious temperament will make her a very fine Associate Justice. If I can be of any further assistance, please do not hesitate to contact me.

Sincerely,

Elizabeth M. Iglesias
Professor of Law & Director

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Tim Jeffries
Scottsdale, Arizona

Witness Panel IV scheduled for Thursday, July 16, 2009
Opposition to Judge Sotomayor's Nomination to the U.S. Supreme Court
Personal Testimony to the United States Senate Judiciary Committee

Honorable Chairman and Esteemed Members of the Senate Judiciary Committee,

My name is Tim Jeffries. I live in Scottsdale, Arizona with my wonderful wife and youngest daughter. I appreciate the humbling invitation to provide my personal testimony in opposition to the Honorable Judge Sotomayor's appointment to the U.S. Supreme Court. The views I express here today are my own and not the views of any organization I may reference.

By way of introduction, I come from a blue-collar family of plumbers, truck drivers, police officers and military veterans. My father's grandfather served in the Union Army during the Civil War and later rode for the Pony Express. My mother's grandparents emigrated from Portugal to America in the early 1900's with no money in their pockets and no English in their vocabularies. I earned an undergraduate degree from Santa Clara University, and an MBA from Duke University. In addition to my various business endeavors, I serve on several noble, non-profit boards, e.g. Parents of Murdered Children (POMC), the National Organization for Victims Assistance (NOVA), and the Arizona Voice for Crime Victims.

Similar to thousands of other simple, hard-working Americans, my involvement in the crime victims' support movement was borne from unimaginable tragedy. On November 3, 1981, my beloved older brother, Michael, was kidnapped, beaten, tortured and murdered by a transient gang of street criminals in Colorado Springs, Colorado. The two murderers stabbed my dear, defenseless brother 65 times, and ultimately killed Michael by slashing his throat and crushing his skull with the heel of a remorseless, blood-soaked boot.

Based on Federal Crime Statistics, approximately 17,000 people are murdered every year in America. On average, someone is murdered every 31 minutes, and more people are murdered every 10 weeks in America than were brutally and horribly murdered on September 11, 2001.

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Tim Jeffries
Scottsdale, Arizona

Witness Panel IV scheduled for Thursday, July 16, 2009
Opposition to Judge Sotomayor's Nomination to the U.S. Supreme Court
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Tragically, approximately 115,000 people have been murdered in America since September 11th. This gut-wrenching level of murder in America exceeds the approx. population of Santa Clara, California, or Gresham, Oregon, or Peoria, Illinois, or Allentown, Pennsylvania.

Further compounding this epic national crisis, other violent crimes are committed at an appalling rate in America. Based on the "Crime Clock" produced by the Office for Victims of Crime (OVC) in the U.S. Department of Justice, someone is raped every 1.9 minutes in America. Someone is subjected to aggravated assault every 36.9 seconds in America. And, an instance of child abuse or neglect is reported every 34.9 seconds in America.

Making matters worse, this breathtaking spectrum of heinous violence in America does not receive the consistent political action it warrants and the constant media focus it deserves. The true horror and verifiable existence of evil in our country are often minimized, if not trivialized, with well-intentioned yet sadly misguided equivocations about the troubled lives of guilty criminals and their various personal circumstances. Unfortunately, based on public statements, Judge Sotomayor has repeatedly offered misplaced sympathy for criminals despite the fact that justice exists to protect the innocent and punish the guilty.

On April 20, 1999, at the Columbia Law School Public Service Dinner, Judge Sotomayor stated, "It is all too easy as a prosecutor to feel the pain and suffering of victims and to forget that defendants, despite whatever illegal act they have committed, however despicable their acts may have been, the defendants are human beings who have families and people who care for and love them."

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On January 17, 1995, upon receiving the Hogan-Morgenthau Award, Judge Sotomayor stated, "...the end result of legal process is to find a winner. However, for every winner there is a loser, and often the loser is himself or herself a victim of the ills of our society."

On July 12, 1993, at the Federal sentencing hearing for a convicted cocaine dealer, Judge Sotomayor apologized to the cocaine dealer for having to send him to Federal prison. She stated the mandatory five year sentence was "a great tragedy for our country." She also stated she hoped the cocaine dealer "will appreciate that we all understand that you were...a victim of the economic necessities of our society, but unfortunately there are laws I must impose."

In a memorandum dated March 24, 1981, Judge Sotomayor and two colleagues from the Puerto Rican Legal Defense and Education Fund (PRLDEF) strongly opposed "the restoration of the Death Penalty in the State of New York," and concluded that the death penalty for murderers "creates inhuman psychological burdens for the offender and his/her family."

Having viewed the autopsy photos of my massacred brother and heard the heart-breaking stories of thousands of victims and survivors of violent crimes in America, I believe Judge Sotomayor's sympathy for criminals at the expense of the "burdens" carried by crime victims is unworthy of our nation's highest court where public safety and protection of the innocent should be paramount. This is particularly important because the most horrific crimes in America disproportionately impact the poor, disadvantaged and defenseless. These are the very innocent people who actually need government's protection, support, and clear-minded distinction between innocent and guilty, right and wrong, good and evil.

Sadly, the U.S. Supreme Court is one public institution that has often undermined, rather than aided, the effort to control violent crime in America. At times, animated by a misguided

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sympathy for criminals and their troubled lives, the Supreme Court has fashioned legal technicalities that have often undermined the prosecution of violent criminals. In essence, the Supreme Court has waged a legal war of attrition against the death penalty, creating new rules that generate endless appeals and place too much emphasis on the convicted murderer's background rather than the heinous crime of which the killer has been convicted.

Amazingly, a high number of the U.S. Supreme Court's recent decisions in favor of law enforcement and public safety have been decided by only a 5 to 4 vote. For example, in 2002, the Supreme Court upheld the State of California's "Three Strikes Law" by a mere 5 to 4 vote. In recent years, the majority of the Supreme Court cases upholding a death sentence have also been decided by a slim 5 to 4 margin. With the change in one vote, it is quite possible the Supreme Court could make it virtually impossible to enforce the death penalty for even the most brutal and villainous murders. The Supreme Court could prevent the great states in our union from locking up repeat felony offenders, and allow an array of violent criminals to walk free on mind-numbing legal technicalities. Without a doubt, every vote on the Supreme Court counts.

Whereas Judge Sotomayor's biography is admirable and compelling, I am troubled she has regularly offered well-intentioned yet misguided sympathy to criminals without notable deference to the pain, suffering and "burdens" of crime victims. I believe Judge Sotomayor's public statements regarding the sympathetic treatment of criminals show where her true empathy resides and should disqualify her from further consideration for our nation's highest court.

I can assure you countless simple, hardworking Americans such as me are tired of the partisan acrimony on regular display in our nation's capitol. Support for public safety and crime victims should be compelling non-partisan issues in our country. Despite the pressures you must

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confront during your deliberations, I believe these personal observations based on the Judge Sotomayor's public statements should serve as contributing and motivating factors for your non-partisan vote in opposition to her appointment to the U.S. Supreme Court.

Based on Federal Crime Statistics, approx. 50 people will be murdered in America today. 760 people will be raped in America today. 2,340 people will be subjected to aggravated assault in America today. 2,480 instances of child abuse or neglect will be reported in America today. I beseech you to recognize these are not simply statistics. These are victims of violent crimes with "burdens" they will carry for the rest of their lives. These are the innocent people worthy of our empathy. These are the people who cry for justice to protect the innocent and punish the guilty.

In closing, when I informed my wonderful mother her first-born child, our dear Michael, had been brutally and horribly murdered she cried from a place a man simply does not possess. I offer this personal testimony in thanksgiving for the gentle, loving strength she has provided me despite the enormous "burdens" she continues to carry. In addition, I humbly request you say a prayer for my mother on Tuesday, July 21, 2009, when we will attend yet another parole hearing for one of my brother's murderers at the Sterling Correctional Facility in Sterling, Colorado.

God bless you. God bless Judge Sotomayor. And, God bless America.

I would be honored to answer any questions you have at this time.

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Statement of

The Honorable Ted Kaufman

United States Senator
Delaware
July 13, 2009

Kaufman Opening Statement at Supreme Court Nomination Hearing of Judge Sonia Sotomayor

Welcome, Judge Sotomayor, and welcome also to your family and friends. Like my colleagues, I want to congratulate you on your nomination.

We are now beginning the end of an extraordinarily important process. Short of voting to go to war, the Senate's constitutional obligation to "advise and consent" on Supreme Court nominees is probably our most important responsibility.

Supreme Court justices serve for life, and once the Senate confirms a nominee, she is likely to be affecting the law and American lives much longer than many of the Senators who confirmed her.

The "advise and consent" process for this nomination began after Justice Souter announced his intent to resign and President Obama consulted with members of both parties before making his selection. It has continued since then, with help from an extensive public debate amongst analysts and commentators, scholars and activists, both in the traditional press and in the blogosphere.

This public vetting process, while not always accurate or temperate, is extremely valuable both to the Senate and to the public. One of the great benefits of a free society is our ability, collectively, to delve deeply into an extensive public record. We've seen a wide-ranging discussion of the issues, in which anyone can help dissect and debate even the most minute legal issue and personal expressions of opinion.

In another, less public part of the process, Judge Sotomayor has met with close to 90 percent of the Senate. Those meetings, too, are extremely useful. I know I learned a great deal in my meeting, and I'm confident that my colleagues did as well.

For me, the critical criteria for judging a Supreme Court nominee are the following: A first-rate intellect, significant experience, unquestioned integrity, absolute commitment to the rule of law, unwavering dedication to being fair and open-minded, and the ability to appreciate the impact of court decisions on the lives of ordinary people. Based on what we've learned so far, this is an impressive nominee.

Judge Sotomayor, I am confident that this hearing will give this committee, and the rest of the

Senate, the information we need to complete our constitutional duty. As senators, I believe we each owe you a decision based upon your record and your answers to our questions. That decision should not turn on empty code words like "judicial activist," or on charges of guilt by association, or on any litmus test. Instead, we should focus on your record and your responses, and determine whether you have the qualities that will enable you to serve well all Americans, and the rule of law, on our nation's highest court.

As my colleagues already have noted, your rise from humble beginnings to extraordinary academic and legal achievement is an inspiration to us all. And I note that you would bring more federal judicial experience to the Supreme Court than any justice in over 100 years.

You also have incredibly valuable practice experience, not only as a prosecutor but also as a commercial litigator. In terms of your judicial record, you appear to have been careful, thoughtful, and open-minded. In fact, what strikes me most about your record is that it seems to reveal no biases. You appear to take each case as it comes, without predilection, giving full consideration to the arguments of both sides before reaching a decision.

When Justice Souter announced his retirement in May, I suggested that the Court would benefit from a broader range of experience among its members. My concern at the time wasn't the relative lack of women or racial or ethnic minorities on the Court, though that deficit is glaring. I was pointing to the fact that most of the current Justices, whether they be black or white, women or men, share roughly the same life experiences.

I am heartened by what you would bring to the Court, based on your upbringing, your story of achievement in the face of adversity, your professional experience as a prosecutor and commercial litigator, and, yes, the prospect of your being the first Latina to sit on the high court.

Though the Supreme Court is not a representative body, we should hold as an ideal that it broadly reflect the citizens it serves. Diversity serves many goals. Outside the courtroom, it better equips our institutions to understand more of the viewpoints and backgrounds that comprise our pluralistic society. Moreover, a growing body of social research suggests that groups with diverse experiences and backgrounds simply come to the right outcome more often than do non-diverse groups that may be just as talented. I believe a diverse Court will function better as well.

Another concern I have about the current Supreme Court is its handling of business cases. Too often it seems to disregard settled law and congressional policy choices.

Based on my education, experience, and inclination, I am not anti-business. But whether it's preempting state consumer protection laws, striking down punitive damages awards, restricting access to the courts, or overruling 96 years of pro-consumer antitrust law, today's court gives me the impression that in business cases the working majority is outcome-oriented and therefore too one-sided.

Given our current economic crisis, and the failures of regulation and enforcement that led to that crisis, that bias is particularly troubling. Congress can and will enact a dramatically improved

regulatory system.

The President can and will make sure that the relevant enforcement agencies are populated with smart, motivated, and effective agents. But a Supreme Court resistant to federal government involvement in and regulation of markets could undermine those efforts.

A judge, or a court, has to call the game the same way for all sides. Fundamental fairness requires that in the courtroom, everyone comes to the plate with the same count of no balls and no strikes.

One of the aspirations of the American judicial system is that it is a place where the powerless have a chance for justice on a level playing field with the powerful. We need Justices on the Supreme Court who not only understand that aspiration, but also are committed to making it a reality.

Because of the importance of business cases before the Supreme Court, I plan to spend some time asking you about your experience as a commercial litigator, your handling of business cases as a trial judge and on the court of appeals, and your approach to business cases generally. From what I've seen in your record, you seem to call these cases right down the middle, without any bias or agenda. That is very important to me.

Very soon, those of us up here will be done talking, and you'll have the chance to testify, and then to answer our questions.

I look forward to your testimony.

Mr. Chairman, members of the Committee, I am Peter N. Kirsanow, a member of the U.S. Commission on Civil Rights and a partner in the labor and employment practice group of the Cleveland, Ohio law firm of Benesch Friedlander Coplan & Aronoff. I am appearing in my personal capacity.

The Commission on Civil Rights was established by the Civil Rights Act of 1957 to study and collect information relating to discrimination or denial of equal protection laws under the constitution because of color, race, religion, sex, age, disability or national origin; appraise the laws and policies of the federal government relating to discrimination or denials of equal protection and serve as a national clearinghouse of information relating to discrimination or denials of equal protection on the basis of protected classifications.

In furtherance of the clearinghouse function, and with the help of my assistants, I have examined civil rights opinions that Judge Sotomayor drafted as a circuit judge. Our examination indicates that Judge Sotomayor's approach to civil rights cases frequently is inconsistent with generally accepted textual interpretation of the relevant constitutional and statutory provisions as well as governing precedent. Rather than confining herself to the adjudication of the cases before her, in several significant cases Judge Sotomayor instead attempts to step outside the judicial role and employ policy preferences. No case better illustrates the problems with this approach than *Ricci v. de Stefano*, the New Haven firefighters case that has drawn much scrutiny from the media. I will focus my remarks today on why Judge Sotomayor's chosen approach raises troubling questions about how a Justice Sotomayor might address similar issues. I will also briefly address two of Judge Sotomayor's civil rights-related dissents, *Brown v. City of Oneonta* and *Hayden v. Pataki*, that also illustrate Sotomayor's tendency to legislate from the bench.

Like many cities, New Haven uses competitive examinations to identify the best qualified municipal employees for promotions. The city's charter establishes this merit system for promotion.[1] New Haven hired Industrial/Organization Solutions ("IOS") -- an Illinois firm that specializes in designing entry-level and promotional examinations for police and fire departments – to design a promotional test for its firefighters.[2] IOS conducted extensive job analyses to identify the tasks, knowledge, and skills necessary for effective performance in the captain and lieutenant roles.[3] IOS's representatives interviewed current New Haven captains, lieutenants, and their supervisors.[4] They rode along in the fire trucks with on-duty officers.[5] Most importantly, at every stage of their analysis, IOS deliberately oversampled minority firefighters to ensure that their exam questions would not give an unfair advantage to white candidates.[6]

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[1] Ricci, 557 U.S. – (2009)(slip opinion 1).
[2] Id. at 4. IOS has also designed examinations for fire departments in communities similar to New Haven, including Orange County, Florida; Lansing, Michigan; and San Jose, California. Slip opinion at 9.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*

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IOS also developed oral examinations, all of which were administered by firefighters senior in rank to those being tested. Again to avoid giving unfair advantages to white candidates, sixty-six percent of the assessors were racial minorities.[7] Each of the nine three member panels also contained two minority members.[8]

Many candidates spent months preparing for the test. Frank Ricci – the named plaintiff in this lawsuit, who is here to testify today – stated at a Civil Service Board meeting that the test questions were based on the Department's own rules and procedures and on nationally recognized materials that presented "accepted standards" for firefighting.[9] Ricci told the CSB that he has "severe learning disabilities," including dyslexia, and that he spent more than $1,000 to purchase study materials and pay his neighbor to read them on tape so that he could give the test his best shot.[10] Ricci spent eight to thirteen hours a day preparing for the exam.[11]

In spite of these extensive attempts to ensure the test's racial neutrality, no blacks or Hispanics performed well enough on the exams to receive an immediate promotion to lieutenant.[12] Nine candidates – seven whites and two Hispanics – were eligible for immediate promotions to captain.[13] A vociferous political debate broke out in the community over what to do with the test results.[14] Ultimately, New Haven sided with the protesters. The white and Hispanic firefighters who would have received promotions sued, claiming that the city had discriminated against them on the basis of race, in violation of Title VII and the Equal Protection Clause of the Fourteenth Amendment.[15] The District Court sided with the city, claiming that the city's actions had not been motivated by racial animus because "all applicants took the same test, and the result was the same for all because the test results were discarded and nobody was promoted."[16] Of course, as one of Judge Sotomayor's Second Circuit colleagues pointed out, it is at the very least an open question whether discarding test results to allow candidates of certain racial backgrounds a second chance at the test constitutes racial discrimination.[17]

The plaintiffs appealed, and a Second Circuit panel – including Judge Sotomayor – heard the case. The parties submitted briefs of eighty-six pages each and a six-volume joint appendix of over 1,800 pages. Two *amici* briefs were filed and oral argument lasted over an hour, an atypically long time for the Second Circuit. Seemingly recognizing the importance of the case, Judge Sotomayor herself participated enthusiastically in oral

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[7] *Id.* at 5.
[8] *Id.*
[9] *Id.* at 7.
[10] *Id.*
[11] *Id.*
[12] *Id.* at 5. Subsequent vacancies would have allowed at least three black candidates to be considered for promotion to lieutenant.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] 557 F. Supp. 2d. at 161.
[17] 530 F.3d at 98 (Cabranes, J., dissenting.)

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argument.[18] Her two Second Circuit colleagues barely spoke for the first ten minutes of oral argument while Judge Sotomayor peppered plaintiffs' attorney Karen Torre with questions about the firefighters' 42 U.S.C. 1983 claim.[19] Twenty minutes later, after the attorney representing New Haven stood up to speak, Judge Sotomayor asked him about an Eleventh Circuit case that appeared damaging to the city's case.[20]

Despite all of these signs that Ricci was an important, precedent-setting case, Judge Sotomayor's panel affirmed the District Court's ruling in a one paragraph, unpublished summary order.[21] The federal appellate courts usually use such orders only to dispose of cases that raise no new issues of law. Adam Liptak of the New York Times described the Ricci panel's perfunctory opinion as "baffling."[22] Following the publication of this short opinion, the firefighters appealed to the entire Second Circuit for a rehearing *en banc*, which was denied. In a dissent from this denial of rehearing, Judge Cabranes, a Clinton appointee who is widely regarded as a political moderate, criticized Sotomayor's summary handling of the case: [23]

> This appeal raises important questions of first impression in our circuit – and indeed, in the nation – regarding the application of the Fourteenth Amendment's Equal Protection Clause and Title VII's prohibition on discriminatory employment practices… The use of *per curiam* opinions of this sort, adopting in full the reasoning of the district court without further elaboration, is normally reserved for cases that prevent straightforward questions that do not require explanation or elaboration by the Court of Appeals. The questions in this appeal cannot be classified as such, as they are indisputably complex and far from well-settled… I respectfully dissent from that decision, without expressing a view on the merits of the questions presented by this appeal, in the hope that the

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[18] *See* "Sotomayor Tape Reveals Views on Ricci v. de Stefano Discrimination Case," Wall Street Journal Law Blog, *available at* http://blogs.wsj.com/washwire/2009/05/29/sotomayor-tape-reveals-views-on-ricci-v-destefano-discrimination-case/ (last accessed July 12, 2009). Audio recording of oral argument available at http://online.wsj.com/public/resources/media/052909usca.mp3 (last accessed July 12, 2009).

[19] *Id.*

[20] *Id.*

[21] 530 F. 3d 88. The panel later withdrew that order and issued in its place a nearly identical, one paragraph *per curiam* opinion.

[22] Adam Liptak, "News Analysis: Nominee's Rulings Exhaustive But Often Narrow," The New York Times, May 26, 2009, available at http://www.nytimes.com/2009/05/27/us/politics/27judge.html?_r=1.

[23] See, e.g., Luisa Savage, "2nd Circuit's Jose Cabranes Offers Bipartisan Appeal," *The New York Sun*, June 10, 2005. See also Mary B.W. Tabor, "Opportunities Knocks Put Judge High On List," The New York Times, May 9, 1994 (*available at* http://www.nytimes.com/1994/05/09/nyregion/opportunities-knocks-put-judge-high-on-lists.html) (last accessed July 9, 2009).

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> Supreme Court will resolve the issues of great significance raised by this case.[24]

Cabranes noted that the Judge Sotomayor panel's opinion contains "no reference whatsoever to the constitutional claims at the core of the case"[25] and further commented that "a casual reader of the opinion could be excused for wondering whether a learning disability played at least as much of a role in this case as the alleged racial discrimination."[26] He concluded that the Sotomayor panel's "perfunctory disposition" of Ricci's claim "rests uneasily with the weighty issues presented by this appeal."[27]

Just as Judge Cabranes hoped might happen, the Supreme Court agreed to hear the case. Notably, not a single current Supreme Court justice agreed with Sotomayor that summary judgment for the city was appropriate. Writing for the majority, Justice Kennedy concluded that race-based actions like New Haven's are impermissible under Title VII unless an employer can demonstrate a strong basis in evidence that, had it not taken the action, it would have been liable under a disparate impact theory.[28] New Haven could not meet that threshold standard and thus violated Title VII by throwing out the tests.[29] Even the four justices who dissented thought that the case should be remanded back to the district court for trial. None thought, as Sotomayor did, that summary judgment for New Haven was appropriate.[30]

Indeed, Judge Sotomayor's chosen approach in *Ricci* would give employers license to adhere to strict racial quotas and engage in racial bean counting. As Justice Kennedy observed, New Haven decided not to promote white firefighters because of race; it rejected the test results solely because its highest scoring candidates were white.[31] The question was not whether that conduct was racially discriminatory – clearly it was – but whether New Haven had any lawful justification for this race-based action.[32] But, as the Supreme Court noted in earlier cases, allowing employers to take race-based action based on mere good faith fears of disparate impact litigation would encourage race-based action at the slightest hint of disparate impact.[33] Judge Sotomayor's approach could allow employers to reject the results of an employment examination whenever those results did not yield the desired racial balance – or, to put it another way, failed to satisfy a racial quota.[34] Judge Sotomayor's interpretation is thus fundamentally at odds with the purpose

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[24] *Ricci v. de Stefano*, 530 F.3d 88, 93 (2nd Cir. 2008).
[25] *Id.* at 96.
[26] *Id.*
[27] *Id.*
[28] *Id.* at 2.
[29] *Id.*, 2-3.
[30] Four justices – Breyer, Ginsburg, Souter, and Stevens – dissented from the majority opinion and joined in a dissent written by Justice Ginsburg. In footnote 10 of this dissent, Justice Ginsburg observes, "The lower courts focused on respondents' intent rather than on whether respondents in fact had good cause to act. [Citations omitted.] Ordinarily, a remand for fresh consideration would be in order." Dissent at 26.
[31] Slip opinion at 20.
[32] *Id.*
[33] *Id.* at 22, *citing Watson v. Fort Bank & Trust*, 487 U.S. 977, 983 (1988).
[34] See, e.g., Cabranes' dissent in *Ricci*, 530 F.3d at 98.

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of Title VII, which is "to promote hiring on the basis of job qualifications, rather than on the basis of race or color."[35]

Other Second Circuit race-related decisions in which Judge Sotomayor participated indicate the same troubling tendency to reach a desired policy outcome. For example, Judge Sotomayor joined an opinion dissenting from the denial of rehearing en banc in *Brown v. Oneonta* that set forth what one of her Second Circuit colleagues called "novel equal protection theories that ... would severely impact police protection."[36]

In *Brown*, a seventy-seven-year old woman, resident of the small upstate New York town of Oneonta, reported to the police that a young black man broke into her house and assaulted her with a knife.[37] The police used dogs to trace the attacker's scent to the nearby State University of Oneonta.[38] They obtained a list of black male students enrolled at the university and attempted to find and question them.[39] In the days following the assault, the police also conducted a sweep of Oneonta for the perpetrator, in which they stopped young black men on the street for questioning and looked at their hands for cuts.[40] Some of the young black men sued Oneonta, claiming that these questionings violated their Equal Protection rights because they were singled out for questioning based on their race.[41] A Second Circuit panel concluded that, because the young men were questioned on "the altogether legitimate basis of their resemblance of a physical resemblance given by the victim of a crime," the police had not violated their Equal Protection rights.[42] Judge Sotomayor disagreed with this holding and joined in a dissent authored by Judge Calabresi, which drew blistering criticism from Chief Judge Walker.[43] According to Walker, the dissenters had chosen to advance theories of the sort "common to the pages of an academic journal" that would, if actually put into practice, greatly hinder police investigations:

> The dissenters propose that when the police have been given a description of a criminal perpetrator by the victim that includes the perpetrator's race, their subsequent investigation to find that perpetrator may constitute a suspect racial classification under the equal protection clause. . . . Judge Calabresi believes that equal protection review arises . . . when the police ignore the non-racial components of the provided description and question persons who, except for the racial descriptor, do not fit the description provided.

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[35] Slip opinion at 22.
[36] 235 F.3d 769
[37] 221 F.3d 329.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] 235 F.3d 769

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> The fact that no legal opinion, concurrence, dissent (or other judicial pronouncement) has ever intimated, much less proposed, any such rules of equal protection confirms a strong intuition of their non-viability. But, for the benefit of anyone who in the future may be undeterred by the inability of these theories to attract judicial recognition, their practical difficulties and analytical defects should be recognized.[44]

Judge Sotomayor employed equally troubling reasoning in her dissent in *Hayden v. Pataki,* in which the plaintiffs challenged the disenfranchisement of felons under the Voting Rights. Fellow Clinton appointee Judge Cabranes wrote a thirty-six page, carefully reasoned opinion that explained that felons had not been denied the right to vote because of invidious discrimination based on their race, but rather because they were in prison.[45] Cabranes looked at the relevant text of the Fourteenth Amendment, the history of the relevant statutory provisions, and at the long history of felon disenfranchisement in New York and in nearly every other American state.[46] He noted that felons have been unable to vote in New York since 1820, just as they are unable to vote today in all but two American states. [47]He also carefully analyzed relevant precedents from the Second and its sister circuits, including an Eleventh Circuit en banc opinion that also found that the Voting Rights Act does not prohibit felon disenfranchisement.[48] Finally, he noted that the case posed "a complex and difficult question that, absent Congressional clarification, will only be definitively resolved by the Supreme Court."[49]

Judge Sotomayor, on the other hand, did not find this case particularly complex or difficult. In a three paragraph dissent eerily reminiscent of her brief *per curiam* opinion in *Ricci*, Judge Sotomayor categorically stated, "I fear that the many pages of the majority opinion and concurrences — and the many pages of the dissent that are necessary to explain why they are wrong—may give the impression that this case is in some way complex. It is not."[50] Without further addressing Judge Cabranes's lengthy analysis, Judge Sotomayor concluded, "The majority's "wealth of persuasive evidence" that Congress intended felony disenfranchisement laws to be immune from scrutiny under § 2 of the Act, Maj. Op. at 322, includes not a single legislator actually saying so"[51]

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[44] *Id.*
[45] 449 F.3d 305.
[46] *Id.*
[47] *Id.* at 312.
[48] *Johnson v. Gov. of State of Florida*, 405 F.3d 1214 (11th Cir. 2005) (en banc). *But see Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003), in which a panel of the Ninth Circuit. *See also* [cite], in which Judge Alex Kozinski and six other Ninth Circuit judges dissented vociferously from a request for en banc review by the Ninth Circuit.
[49] *Id.* at 305.
[50] *Id.* at 368.
[51] *Id.*

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Another of Judge Sotomayor's Second Circuit colleagues, Judge Raggi, eloquently highlighted the problems with Sotomayor's proposed approach to the Voting Rights Act:

> Plaintiffs and supporting *amici* submit that New York's practice of prisoner disenfranchisement violates the VRA because there is a gross racial disparity in the state prison population. If permitted to pursue their claim, they seek to show that this disparity is a product of pervasive racism infecting every part of the New York criminal justice system, from stop and frisk determinations by police officers on the street, to charging decisions by prosecutors, to detention and sentencing rulings by state court judges. In short, plaintiffs propose to use the VRA to indict the New York criminal justice system for racism.
>
> So employed, the VRA would not only significantly intrude on, but also seriously disrupt, the orderly administration of criminal justice in New York, obviously a matter of legitimate state interest. Plaintiffs' suit would effectively impugn the constitutionality of countless state convictions without necessarily proving that any one prosecution or sentence was, in fact, discriminatory. Equally disturbing, the state's criminal justice system could be adjudged discriminatory without New York being required to release, retry, or resentence a single prisoner. New York would just have to give prisoners the vote. Such a result would undoubtedly undermine public confidence in all state criminal proceedings at the same time that it bred cynicism toward federal law for responding to such a serious problem with so ill-fitting a remedy.[52]

Other prominent commentators have attempted to study Judge Sotomayor's race cases and have come to different conclusions. Prominent lawyer Tom Goldstein, for example, has conducted a study that might seem to suggest that Judge Sotomayor's civil rights jurisprudence is unremarkable. But Goldstein's study ultimately raises more questions than it answers. By Goldstein's count, Judge Sotomayor decided 97 race-related while on the Second Circuit.[53] Goldstein has never explained how he defined race-related for purposes of the study, which in and of itself raises questions: perhaps using a slightly different definition of "race related" would have yielded different results. According to Goldstein's calculations, Judge Sotomayor rejected discrimination in 78 cases and agreed with the claim of discrimination 10 times.[54] (The other eight cases involved other kinds of claims or dispositions.) Goldstein thus asserts that Judge Sotomayor rejected discrimination related claims by a margin of 8 to 1. But this statistic provides no definitive information on whether Judge Sotomayor's approach is within the

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[52] *Id.* at 340.
[53] Tom Goldstein, "Judge Sotomayor and Race: Results from the Full Data Set," Supreme Court of the United States Blog, May 29, 2009, *available at* http://www.scotusblog.com/wp/judge-sotomayor-and-race-results-from-the-full-data-set/ Last accessed July 9, 2009.
[54] *Id.*

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mainstream. As University of Minnesota law professor and Goldstein's fellow SCOTUSblog contributor, David Stras writes:

> The only way to know for sure [if Sotomayor's race-related decisions fall out of the judicial mainstream] is if we compare her dispositions to the disposition rates of other judges, both within and beyond her circuit. For instance, it is possible that claims of discrimination are upheld at a rate of only 5% by the average circuit judge in the federal judiciary, in which [sic] there could be an argument that Judge Sotomayor tends to uphold claims of discrimination, on average, twice as often as her colleagues. (By the way, I certainly do not expect Tom to conduct this type of inquiry as this is the type of paper that can take an academic a year or more to produce. What is more helpful is to actually read those opinions, as Tom suggests in another post.[55] (emphasis added)

Goldstein's review of Judge Sotomayor's cases appears to exclude *en banc* reviews and dissents.[56] Such omissions may be significant because Judge Sotomayor adopted equally troubling positions in both *en banc* reviews and dissents, including the dissents discussed above in *Hayden v. Pataki* and in *Brown v. Oneonta.*

President Obama has reported that one particular line in his 2004 speech at the Democratic National Convention – "There is not a black America and white America and Latino America and Asian America – there is the United States of America"[57] – especially resonated with the voters whom he later met on the campaign trail. In the President's words, this line helped voters:

> capture a vision of America finally freed from the past of Jim Crow and slavery, Japanese internment camps and Mexican braceros, workplace tensions and cultural conflict--an America that fulfills Dr. King's promise that we be judged not by the color of our skin but by the content of our character.[58]

The President himself embraces this vision of a post-racial America:

> I have no choice but to believe this vision. As the child of a

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[55] David Stras, "The Politics of the Sotomayor Nomination," *Supreme Court of the United States Blog*, May 31, 2009, *available at* http://www.scotusblog.com/wp/the-politics-of-the-sotomayor-nomination/) (last visited July 9, 2009).

[56] *See* Ed Whelan, "Goldstein on Judge Sotomayor and Race," Bench Memos, June 2, 2009, *available at* http://bench.nationalreview.com/post/?q=NGYzNmU1ZmQ2YzEzY2MxMTcxYzcyOTk4YzFhZjU4Yjc= (last accessed July 9, 2009).

[57] Barack Obama, THE AUDACITY OF HOPE, 231

[58] Id.

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> black man and white woman, born in the melting pot of Hawaii, with a sister who is half-Indonesian, but who is usually mistaken for Mexican, and a brother-in-law and niece of Chinese descent, with some relatives who resemble Margaret Thatcher and others who could pass for Bernie Mac, I never had the option of restricting my loyalties on the basis of race or measuring my worth on the basis of tribe.[59]

Given that many Americans voted for the President hoping that he would usher in a new era of racial harmony, I respectfully submit that it is important for the Committee to consider whether a nominee to the Supreme Court shares this vision of a post-racial America. Judge Sotomayor's interpretive doctrine would allow cities to impose quotas and engage in racial bean counting. She is willing to strike down facially neutral, deeply rooted bans on felon voting. Judge Sotomayor would even adopt novel theories of equal protection that would make it more difficult for the police to keep ordinary citizens safe from violent crime.

It's respectfully submitted that a nominee's interpretive doctrine should be evaluated for whether it would be likely to produce results contrary to the color-blind ideal and result in a legal regime that 45 years after passage of the Civil Rights Act, would increasingly count by race.

Thank you for giving me the opportunity to testify today.

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[59] *Id.*

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Statement of

The Honorable Amy Klobuchar

United States Senator
Minnesota
July 13, 2009

SENATOR AMY KLOBUCHAR
OPENING STATEMENT
SUPREME COURT CONFIRMATION HEARING FOR JUDGE SONIA SOTOMAYOR

Welcome, Judge Sotomayor.

It's a pleasure to see you again today, and I enjoyed the meeting we had in my office a few weeks ago. We had a good conversation – although you did confess to me that when you once visited Minnesota in June, you felt the need to bring a winter parka. I'll try not to hold that against you this week!
I know you have lots of family and friends with you today, supporting you during this important hearing, and we welcome them too. In particular, it's been an honor for me to see your mom here.

When President Obama first announced your nomination, I loved the story about how your mom had saved up money to buy you and your brother the only set of encyclopedias in the neighborhood. It reminded me of when my parents bought a set of Encyclopedia Britannicas in the seventies that always occupied a hallowed place in our hallway. For me, those encyclopedias were a window on the world and a gateway to learning, as they clearly were for you.

From the time you were nine years old, your mom raised you and your brother on her own. She struggled to buy those encyclopedias on her nurse's salary, but she did it because she believed deeply in the value of education.

You went on to be the valedictorian of your high school class, to graduate at the top of your class in college and to attend law school.

After that – and this is an experience we have in common – you became a local prosecutor. Most of my questions during this hearing will be about opinions you've authored and work you've done in the criminal area. I believe having judges with real world, frontline experience as a prosecutor is a good thing.

When I think about the inspiring journey of your life, I'm reminded of other Supreme Court Justices who came from – and I'll use your own words here, Judge – "very modest and challenging circumstances."

I think about Justice O'Connor, who lived the first years of her life on a ranch in rural Arizona with no running water, no indoor plumbing, and no electricity. By sheer necessity, she learned to mend fences, ride horses, brand cattle, fire a rifle and drive a truck before she turned thirteen.

I also think about Justice Thurgood Marshall, who was the great-grandson of a slave.

His mother was a teacher; while his father worked as a Pullman car waiter before becoming a steward at an all-white country club.
Justice Marshall waited tables to help put himself through college, and his mother had to pawn her wedding and engagement rings to pay his entrance fees at Howard University Law School here in Washington.

And then there's Justice Blackmun, who grew up in a St. Paul working-class neighborhood in my home state of Minnesota.

He was able to attend Harvard College only because he received a scholarship at the last minute from the Harvard Club of Minnesota. Once there, he worked as a tutor and as a janitor to help pay expenses.

Through four years of college and three years of law school, his family never had enough money to bring him home to Minnesota for Christmas.

Each of these very different Justices grew up with their own, very different "challenging circumstances."

No one can doubt that, for each one of these Justices, their life experiences shaped the work they did on the Supreme Court.

This should be unremarkable. And, in fact it's completely appropriate. After all, our own Committee demonstrates the value that comes from members who have different backgrounds and perspectives.

For instance, at the same time my accomplished colleague Senator Whitehouse, who was the son of a renowned diplomat, grew up in Laos and Cambodia during the time of the Vietnam War – I was working as a carhop at the A&W Root Beer stand in the suburbs in Minnesota.

And while Senator Hatch is a famed gospel music songwriter, Senator Leahy is such a devoted fan of the Grateful Dead that he once had trouble taking a call from the President of the United States because in fact the Chairman was onstage at a Grateful Dead concert.

We've been tremendously blessed on this Committee with the gift of having members with different backgrounds and different experiences – just as different experiences are a gift for any court in this land. So when one of my colleagues questioned whether you, Judge Sotomayor, would be a justice "for all of us, or just for some of us," I couldn't help but remember something that Hubert Humphrey once said: America is "all the richer for the many different and distinctive

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strands of which it is woven."

Along those lines, Judge Sotomayor, you are only the third woman in history to come before this Committee as a Supreme Court nominee. And as you can see there are currently only two women, my distinguished colleague Senator Feinstein and myself, on this Committee.

So, I think it's worth remembering that when Justice O'Connor graduated from law school, the only offers she got from law firms were for legal secretary positions. Justice O'Connor – who graduated third in her class at Stanford Law School – saw her accomplishments reduced to one question: "Can she type?"

Justice Ginsburg faced similar obstacles.

When she entered Harvard Law School, she was one of only nine women in a class of more than 500. One professor actually demanded that she justify why she deserved a seat that could have gone to a man. Later, she was passed over for a prestigious clerkship despite her impressive credentials.

Nonetheless, both of them persevered – and they certainly prevailed. Their undeniable merits triumphed over those who sought to deny them opportunity.

The women who came before you to be considered by this Committee helped blaze a trail, and although your record stands on its own, you are also standing on their shoulders – another woman with an opportunity to be a Justice "for all of us."

And as Justice Ginsburg's recent comments regarding the strip search of a 13-year-old girl indicate – as well as her dissent in Lilly Ledbetter's equal pay case – being a Justice "for all of us" may mean bringing some real world practical experience into the courthouse.

As we consider your nomination, we know that you are more than the sum of your professional experiences. Still, you bring one of the most wide-ranging legal resumes to this position: local prosecutor, civil litigator, trial judge and appellate judge.

Straight out of law school, you went to work as a prosecutor in the Manhattan District Attorney's Office – and you ended up staying there for five years.

When you're a prosecutor, the law ceases to be an abstract subject and becomes all too real. It's not just a dusty book in your basement.

You see firsthand, every day, how the law has a very real impact on the lives of real people – whether it's crime victims and their families, or defendants and their families, or the neighborhoods where people live.

It also has a big impact on the individual prosecutor.

No matter how many years may pass, you never forget some of the very difficult cases. For you,

Judge, we know this includes the case of a serial burglar-turned-killer (the "Tarzan Murderer").

For me, there will always be the case of Tyesha Edwards, an 11-year-old girl with an unforgettable smile who was at home doing her homework at the kitchen table when she was struck and killed by a stray bullet from a gang shooting out on the street.

As a prosecutor, you don't just have to know the law . . . you have to know people.

So, Judge, I'm interested in talking to you more about what you learned from that job, and how that job shaped your legal career and your approach to judging.

I'm also interested in learning more about your views on some criminal law issues. I want to explore your views on the Fourth Amendment, the meaning of the Confrontation Clause, and sentencing law and policy.

I'd like to know in criminal cases as well as civil cases how you would balance the text of statutes and the Constitution with pragmatic considerations based on your real-world experience. It seems to me, in cases like Falso, Santa, and Howard, that you had a keen understanding of the real-world implications of your decisions. I often get concerned that those pragmatic experiences are missing in judicial decision-making, especially when I look at the recent Supreme Court case in which the majority broadly interpreted the Confrontation Clause to include crime lab workers. I agree with the four dissenting Justices that the ruling "has vast potential to disrupt criminal procedures that already give ample protections against the misuse of scientific evidence."

Your old boss, Manhattan District Attorney Robert Morgenthau, called you a "fearless and effective" prosecutor.

This is how he put it once in an interview:

"We want people with good judgment, because a lot of the job of a [prosecutor] is making decisions. . . . I also want to see some signs of humility in anybody that I hire. We're giving young lawyers a lot of power, and we want to make sure that they're going to use that power with good sense and without arrogance."

These are among the very same qualities that I'm looking for in a Supreme Court Justice.

I, too, am looking for a person with good judgment –someone with intellectual curiosity and independence, but who also understands that her judicial decisions affect real people.

With that, I think, comes a second essential quality: Humility.

I'm looking for a Justice who appreciates the awesome responsibility that she will be given, if confirmed. A Justice who understands the gravity of the office and who respects the very different roles that the Constitution provides for each of the three branches of government.

Finally, a good prosecutor knows that her job is to enforce the law without fear or favor.

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Likewise, a Supreme Court Justice must interpret the laws without fear or favor.

And I believe your background and experiences, including your understanding of law enforcement, will help you to always remember that the cases you hear involve real people – with real problems – looking for real remedies. With excellent judgment and a sense of humility, I believe you can be a Justice "for all of us." Thank you.

Statement of

The Honorable Herb Kohl

United States Senator
Wisconsin
July 13, 2009

Judge Sotomayor, let me also extend my welcome to you this morning and to your family. You are to be congratulated on your nomination.

Your nomination is a reflection of who we are as a country and it represents an American success story that we can all be proud of. Your academic and professional accomplishments - as prosecutor, private practitioner, trial judge and appellate judge - are exemplary. And as a judge, you have brought a richness of experience to the bench and to the judiciary which has been an inspiration for so many.

Today, we begin a process through which the Senate engages in its Constitutional role to "advise and consent" on your nomination. This week's hearing is the only opportunity we, and the American people, will have to learn about your judicial philosophy, your temperament, and your motivations before you put on the black robe and are heard from only in your judicial opinions.

The President has asked us to entrust you with an immense amount of power. Power which, by design, is free from political constraints, unchecked by the people, and unaccountable to Congress, except in the most extreme circumstances.

Our democracy, our rights, and everything we hold dear about America are built on the foundation of our Constitution. For more than 200 years, the Court has interpreted the meaning of the Constitution and in doing so guaranteed our most cherished rights. The right to equal education regardless of race. The right to an attorney and a fair trial for the accused. The right to personal privacy. The right to speak, vote and worship without interference from the government. Should you be confirmed, you and your colleagues will decide the future scope of our rights and the breadth of our freedoms. Your decisions will shape the fabric of American society for years to come.

That is why it is so important that over the course of the next few days, we gain a good understanding of what is in your heart and your mind. We don't have a right to know in advance how you will rule on cases which will come before you. But we need – and we deserve – to know what you think about fundamental issues such as civil rights, privacy, property rights, the separation of church and state, and civil liberties, to name a few.
Some believe that the confirmation process has become thoroughly scripted, and that nominees are far too careful in cloaking their answers to important questions in generalities and with caveats about future cases. I recognize this concern, but I also hope that you recognize our desire

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to have a frank discussion with you about substantive issues.

These are not just concepts for law books. They are issues Americans care about. As crime plagues our communities, we navigate the balance between individual rights and the duty of law enforcement to protect and maintain order. As families struggle to make ends meet in these difficult times, we question the permissible role for government in helping get the economy back on track. As we continue to strive for equal rights in our schools and workplaces, we debate the tension between admissions policies and hiring practices that acknowledge diversity and those that attempt to be color-blind.

These issues invite all Americans to struggle with the dilemmas of democracy and the great questions of our Constitution. If we discuss them with candor, I believe we will have a conversation that the American people will profit from.

When considering Supreme Court nominees over the years, I have judged each one with a test of judicial excellence.

First, judicial excellence means the competence, character, and temperament that we expect of a Supreme Court Justice. He or she must have a keen understanding of the law, and the ability to explain it in ways that both the litigants and the American people will understand and respect, even if they disagree with the outcome.

Second, I look for a nominee to have the sense of values which form the core of our political and economic system. No one, including the President, has the right to require ideological purity from a member of the Supreme Court. But we do have a right to require that the nominee accept both the basic principles of the Constitution and its core values implanted in society.

Third, we want a nominee with a sense of compassion. This is a quality that I have considered with the last 6 Supreme Court Justices. Compassion does not mean bias or lack of impartiality. It is meant to remind us that the law is more than an intellectual game, and more than a mental exercise.

As Justice Black said, "The courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered or because they are non-conforming victims of prejudice and public excitement."

A Supreme Court Justice must be able to recognize that real people, with real problems are affected by the decisions rendered by the court. They must have a connection with and an understanding of the problems that people struggle with on a daily basis. Justice, after all, may be blind, but it should not be deaf.

As Justice Thomas told us at his confirmation hearing, it is important that a justice, "can walk in the shoes of the people who are affected by what the Court does." I believe this comment embodies what President Obama intended when he said he wanted a nominee with "an understanding of how the world works and how ordinary people live."

Your critics are concerned that your background will inappropriately impact your decision-making. But, it is impossible for any of us to remove ourselves from our life story with all of the twists and turns that make us who we are.

As you have acknowledged, "My experiences in life unquestionably shape my attitudes." And, I hope that we on this Committee can appreciate and relate to ourselves what you said next, "but I am cognizant enough that mine is not the only experience." You will have an opportunity before this Committee to assure us that your life experiences will impact but not overwhelm your duty to follow the law and Constitution.

After your confirmation to the Court of Appeals in 1998, you said about the discussions at your confirmation hearing, "So long as people of good will are participating in the process and attempting to be balanced in their approach, then the system will remain healthy." I hope our process will include a healthy level of balanced and respectful debate and I look forward to the opportunity to learn more about you and what sort of justice you aspire to be.

Confirmation Hearings for the Appointment of Sonia Sotomayor to the Supreme Court of the United States of America

Hearings before the Judiciary Committee of the United States Senate, July 13-17, 2009

Testimony of David B. Kopel
Research Director, Independence Institute, Golden, Colorado
Associate Policy Analyst, Cato Institute, Washington, D.C.

The case of *Sonia Sotomayor versus The Second Amendment* is not yet found in the record of Supreme Court decisions. Yet if Judge Sotomayor is confirmed to the Supreme Court, the opinions of the newest Justice may soon begin to tell the story of a Justice with disregard for the exercise of constitutional rights by tens of millions of Americans.

In *Maloney v. Cuomo*, Judge Sotomayor ruled that the peaceful ownership of arms by citizens is not a fundamental right. Her ruling was supported by no legal analysis. Rather, it was a pure declaration.

New York State is the only state in the union which completely prohibits the peaceful possession of nunchaku. After President Nixon's opening to China in the early 1970s, many Americans became interested in learning to practice the traditional martial arts of China and East Asia. At the same time, "kung fu" movies enjoyed a brief period of popularity, and some xenophobes began trying to suppress the martial arts. Unfortunately, legislators in New York State succumbed to the xenophobia, and outlawed nunchaku.[1]

By definition, any "martial art" involves training in some form of combat. The martial art may be "empty-handed", such as akido, judo, or kung-fu. Or it may use an arm, such as kyudo (Japanese archery) or nunchaku.[2]

In a colloquy with Senator Hatch on July 14, Judge Sotomayor said that there was a rational basis for the ban because nunchaku could injure or kill someone.[3] The same point could just as accurately be made about

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[1] During the same 1974-75 period, Massachusetts severely restricted nunchaku, but did not prohibit possession in the home, which was the type of possession at issue in *Maloney*. California and Arizona restricted possession and use to martial arts exhibitions or academies. Many other states have restrictions on carrying nunchaku in public places, or in school zones, but these laws simply treat nunchaku like many other arms, such as knives or blunt weapons.

[2] *See* David B. Kopel, *Self-defense in Asian Religions*, 2 LIBERTY LAW REVIEW 79 (2007).

[3]

> And -- and when the sticks are swung, which is what you do with them, if there's anybody near you, you're going to be seriously injured, because that swinging mechanism can break arms, it can bust someone's skull...

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bows and arrows, swords, or guns. All of them are weapons, and all of them can be used for sporting purposes, or for legitimate self-defense.

Judge Sotomayor's approach would allow states to ban archery equipment with no more basis than the declaring the obvious: that bows are weapons. Even if there were no issue of fundamental rights in this case, Justice Sotomayor's application of the rational basis test was shallow and insufficiently reasoned, and it was contrary to Supreme Court precedent showing that the rational basis test is supposed to involve a genuine inquiry, not a mere repetition of a few statements made by prejudiced people who imposed the law.[4]

The plaintiff in *Maloney* had argued that (even putting aside the Second Amendment) the New York prohibition violated his rights under the Fourteenth Amendment.[5] As Judge Sotomayor correctly recognized, resolution of this claim required deciding whether Mr. Maloney had been deprived of a fundamental right.

Whatever the situation regarding Circuit or Supreme Court precedent on the Second Amendment, there was no controlling precedent on whether Mr. Maloney's activity involved an unenumerated right protected by the Fourteenth Amendment. Accordingly, Judge Sotomayor and her fellow *Maloney* panelists should have provided a reasoned decision on the issue. Alternatively, the panel might have declined to decide the fundamental rights issue, while issuing an opinion holding that, even if right in general were fundamental, the right to Maloney's particular arm (nunchaku) is not.

Instead, the panel simply stated a general rule about the Fourteenth Amendment: "Legislative acts that do not interfere with fundamental rights or single out suspect classifications carry with them a strong presumption of constitutionality and must be upheld if 'rationally related to a legitimate state interest.'"

The quoted language came from *Beatie v. City of New York*, 123 F.3d 707 (2d. Cir. 1997), an unsuccessful challenge to the City government's severe restrictions on cigar smoking. *Beatie* itself was quoting the Supreme Court's *Cleburne v. Cleburne Living Center*.

The *Maloney* court's approach was evasive and disingenuous. Stating the test is not the same as applying the test. Pursuant to *Beatie*

HATCH: Sure.

SOTOMAYOR: ... it can cause not only serious, but fatal damage. So to the extent that a state government would choose to address this issue of the danger of that instrument by prohibiting its possession in the way New York did, the question before our court -- because the Second Amendment has not been incorporated against the state -- was, did the state have a rational basis for prohibiting the possession of this kind of instrument?

[4] *See, e.g., Cleburne v. Cleburne Living Center*, 472 U.S. 432 (1985) (rejecting the claim that the mentally retarded a protected class for Equal Protection purposes, while finding that that a city's ban on a group home for the mentally retarded was irrational because it was based on prejudice and irrational fears).

[5] The brief pointed in various cases in which the Supreme Court had protected unenumerated rights, such as *Meyer v. Nebraska* (right to educate one's children), *Griswold v. Connecticut* (right of married couples to use birth control).

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and *Cleburne*, there is a two-part test:

1. Does the legislative act interfere with a fundamental right or single out a suspect classification?

2. If not, is there a rational basis for the law?

The cigar aficionado Mr. Beatie had conceded point 1, but had argued that there was no rational basis for the anti-cigar law; so the *Beatie* court analyzed only the second point, and decided that there was a rational basis. Mr. Maloney, in contrast, had argued energetically and extensively that New York state's ban on nunchuku violated his fundamental rights.

Yet Judges Sotomayor, Pooler, and Katzman simply presumed--with no legal reasoning--that his use of arms in the home is not a fundamental right.[6]

The 2009 *Maloney* case was not the first time Judge Sotomayor had written about arms and fundamental rights. In the 2004 case of *United States v. Sanchez-Villar*, she used some dicta from an older case in order to claim that "the right to possess a gun is clearly not a fundamental right."[7] That older case was *United States v. Toner*.[8]

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[6] Judges Pooler and Katxman were appointed by Republicans. The fact does not excuse Judge Sotomayor's actions in the case. Judges who have been appointed by Republicans or Democrats alike may be hostile to constitutional rights, particularly if the right is one which is disfavored by the elite classes in the state where the judge comes from. Certainly if Judges Pooler or Katzman were ever to be considered for confirmation to another position of responsibility, their conduct in *Maloney* should be subject to the same kind of examination has Judge Sotomayor's has been.

[7] *United States v. Sanchez-Villar*, 99 Fed.Appx. 256, 2004 WL 962938 (2d. Cir. 2004)(Summary Order of Judges Sack, Sotomayor & Kaplan), judgment vacated, *Sanchez-Villar v. United States*, 544 U.S. 1029 (2005)(for further consideration in light of the 2005 *Booker* decision on sentencing).

[8] *United States v. Toner*, 728 F.2d 115 (2d Cir., 1984).

Vincent Toner and Colm Murphy were convicted of attempting to purchase unregistered machine guns for the purpose of smuggling them to Northern Ireland, on behalf of misnamed Irish National Liberation Army. To their surprise, the purported middleman in the deal turned out to be an FBI informant.

On appeal, Murphy challenged, inter alia, the federal statute prohibiting illegal aliens from possessing firearms. He argued that since American citizens can possess firearms, the statute prohibiting illegal aliens from doing so was a denial of equal protection. The court's analysis of the issue is as follows:

> Murphy was convicted under Count Four of violating 18 U.S.C.App. § 1202(a)(5) (1976), which makes it a felony for an illegal alien to receive, possess or transport "in commerce or affecting commerce ... any firearm." Because receiving, possessing or transporting firearms in interstate commerce is not in and of itself a crime, United *States v. Bass*, 404 U.S. at 339 n. 4, 92 S.Ct. at 518 n. 4, and because being an illegal alien is not in and of itself a crime, Murphy argues that his Fifth Amendment right to equal protection of the law is violated by section 1202(a)(5). He concedes, however, that the statute passes constitutional muster if it rests on a rational basis, a concession which is clearly correct since the right to possess a gun is clearly not a fundamental right, cf. *United States v. Miller*, 307

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Post-*Heller*, the *Toner* dicta about arms was obviously invalid, since it was based on a misinterpretation of the Supreme Court's 1939 case *United States v. Miller*. So when the *Maloney* case came to the Second Circuit, Judge Sotomayor could not, and did not, cite *Toner*. As a result, there was no case law from the Second Circuit or from the Supreme Court to support the proposition that peaceful possession of arms is not a fundamental right as an unemerated Fourteenth Amendment right..

Testifying before this Committee on July 14, Judge Sotomayor provided further examples of her troubling attitude to the right to arms. She told Senator Hatch that the *Heller* decision had authorized gun control laws which could pass the "rational basis" test.[9] To the contrary, the *Heller* decision had explicitly rejected the weak standard of review which Justice Breyer had argued for in his dissent.[10]

Yet bereft of support from precedent or dicta, Judge Sotomayor simply presumed--on the basis of no legal analysis--that arms possession is not a fundamental right under the Fourteenth Amendment.

U.S. 174, 59 S.Ct. 816, 83 L.Ed. 1206 (1939) (in the absence of evidence showing that firearm has "some reasonable relationship to the preservation or efficiency of a well regulated militia," Second Amendment does not guarantee right to keep and bear such a weapon), and since illegal aliens are not a suspect class. The *Toner* court then provided reasons why there is a rational basis for treating illegal aliens differently, in regards to arms possession.

It is questionable whether *Toner*'s language about fundamental rights created a controlling precedent; the issue was not even contested before the court, as appellant Murphy had conceded that no fundamental right was involved. However, *Toner* provided, at the least, some usable dicta, which Judge Sotomayor and the other two judges in her panel quoted in their Summary Order in *Sanchez-Villar* in 2004.

In 2008, the Supreme Court authoritatively ruled that the Second Circuit's 1984 reading of *Miller* was entirely wrong. In *District of Columbia v. Heller*, the majority opinion chastised lower court judges who had "overread Miller" and criticized Justice Stevens for wanting to defer to "their erroneous reliance" on interpretations similar to the one proffered by the Second Circuit in *Toner*.

The *Heller* decision stated that "*Miller* did not hold that and cannot possibly be read to have held" that only arms possession by the militia is protected by the Second Amendment. Quoting the exact sentence of *Miller* which had been quoted in *Toner*, the Heller decision explained that this sentence demonstrated *Miller*'s correct meaning: "it was that *the type of weapon at issue* was not eligible for Second Amendment protection." Thus, "We therefore read *Miller* to say only that the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns."

Post-*Heller*, *Toner*'s assertion that there is no fundamental right to possess a firearm was invalid. The assertion in *Toner* was based on solely on an interpretation of *Miller*, and the Supreme Court has unambiguously stated that the interpretation was wrong.

[9] "But even Justice Scalia, in the majority opinion in Heller, recognized that that was a rational basis regulation for a state under all circumstances, whether or not there was a Second Amendment right."

[10] To be precise, the Breyer dissent had argued for a "reasonableness" standard. This would be somewhat stronger than mere "rational basis." *A foriori*, the rejection of "reasonableness" also rejected "rational basis."

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Both Judge Sotomayor[11] and some of her advocates have pointed to the Seventh Circuit's decision in *NRA v. Chicago* as retrospectively validating her actions in *Maloney*. The argument is unpersuasive. Both the *Maloney* and the *NRA* courts cited 19th century precedents which had said that the Fourteenth Amendment's "privileges or immunities" clause did not make the Second Amendment enforceable against the states. However, as the *Heller* decision itself had pointed out, those cases "did not engage the sort of 14th Amendment inquiry required by our later cases." In particular, the later cases require an analysis under a separate provision of the Fourteenth Amendment, the "due process" clause.

Notably, the Seventh Circuit addressed this very issue, and provided a detailed argument for why the existence of modern incorporation under the due process clause would not change the result in the case at bar.[12]

In contrast, Judge Sotomayor's per curiam opinion in *Maloney* did not even acknowledge the existence of the issue.

Various talking heads have made the argument that since *Maloney* and *NRA* reached the same result, and since two of the judges in *NRA v. Chicago* were Republican appointees who are often called "conservatives", then the *Maloney* opinion must be alright.

This argument is valid only if one presumes that conservatives

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[1111] In response to a question from Senator Hatch, July 14, 2009.

[12] Even so, the Seventh Circuit panel was clearly straining to reach the result it did. Exemplifying what Justice Brennan had (in another context) described as "arrogance cloaked as humility," the panel claimed that it was merely obeying the rule that lower courts should not presume that a still-valid Supreme Court precedent is going to be overruled. As the key illustration, the panel pointed to the history of the 1997 Supreme Court decision in *State Oil Co. v. Khan*, which overruled the 1968 Supreme Court decision *Albrecht v. Herald Co.* In *Albrecht*, the Court had interpreted section 1 of the Sherman Antitrust Act, which forbids "Every contract, combination ... or conspiracy, in restraint of trade, " to mean that manufacturers are forbidden to set maximum prices that their retailers can charge. (This is called "vertical price fixing.") By 1996, economists had proven—and several Supreme Court cases had seemed to agree—that *Albrecht*'s rationale was entirely wrong. Yet *Albrecht* had not been overruled, and so the 7th Circuit obeyed it.

When the Supreme Court in *State Oil Co. v. Khan* overruled *Albrecht* in 1997, the Supreme Court praised the 7th Circuit for having adhered to *Albrecht*, since *Albrecht* had not yet been overruled, even though almost everyone had correctly predicted that its days were numbered.

In the handgun ban case, the 7th Circuit panel congratulates itself for its treatment of *Albrecht*, and said that a similar approach is required on the question of whether states must respect the Right to Keep and Bear Arms.

The panel's claim, however, is founded on a rather obvious logical error. *Albrecht*'s 1968 judicial rule against vertical price fixing was an interpretation of one phrase in one federal statute, and the 1997 *State Oil* case was a reinterpretation of that very same phrase.

However, the plaintiffs in *NRA v. Chicago* were asking the court to rule on a constitutional provision that none of the 19th century cases had addressed. The 19th century cases had decided that the Second Amendment does not, by its own force, apply to the states, and that the right to arms is not protected by the "privileges or immunities" clause of the 14th Amendment. However, none of the three cases involved a decision about incorporation under the "due process" clause.

Contrary to what the 7th Circuit panel implied, the fact that the Supreme Court rejects a claim based on one constitutional clause does not prevent a lower court from ruling in favor of a claim based on a separate constitutional clause. For example, if a local government does something concerning religion, and the Supreme Court rules that the government action does not violate the First Amendment clause which forbids a government "establishment of religion," then the plaintiff can file another lawsuit alleging that the very same government action violates the separate clause in the First Amendment that forbids "prohibiting the free exercise" of religion.

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and/or Republican appointees always meet the standard of strong protectiveness for constitutional rights which should be required for any Supreme Court nominee.

In the case of the *NRA v. Chicago* judges, that standard was plainly not met. The Seventh Circuit judges actually made the policy argument that the Second Amendment should not be incorporated because incorporation would prevent states from outlawing self-defense by people who are attacked in their own homes.[13]

A wise judge demonstrates and builds respect for the rule of law by writing opinions which carefully examine the relevant legal issues, and which provide careful written explanations for the judge's decisions on those issues.

Judge Sotomayor's record on arms rights cases has been the opposite. Her glib and dismissive attitude towards the right is manifest in her decisions, and has been further demonstrated by her testimony before this Committee. In Sonia Sotomayor's America, the peaceful citizens who possess firearms, bows, or martial arts instruments have no rights which a state is bound to respect, and those citizens are not even worthy of a serious explanation as to why.

[13] "Suppose a state were to decide that people cornered in their homes must surrender rather than fight back—in other words, that burglars should be deterred by the criminal law rather than self help. That decision would imply that no one is entitled to keep a handgun at home for self-defense, because self-defense would itself be a crime, and *Heller* concluded that the Second Amendment protects only the interests of law-abiding citizens ...Our hypothetical is not as far-fetched as it sounds."

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Statement of

The Honorable Jon Kyl

United States Senator
Arizona
July 13, 2009

Kyl Opening Statement at Sotomayor Hearing

"Many of Judge Sotomayor's public statements suggest that she may, indeed, allow, and even embrace, decision-making based on her biases and prejudices"

WASHINGTON, D.C. –The U.S. Senate Judiciary Committee today began confirmation hearings on Judge Sonia Sotomayor, who was nominated to serve as an Associate Justice of the U.S. Supreme Court. U.S. Senate Republican Whip Jon Kyl, a member of the Judiciary Committee, delivered the following opening statement:
"I would hope every American is proud that a Hispanic woman has been nominated to sit on the Supreme Court. In fulfilling our advise and consent role, of course, we must evaluate Judge Sotomayor's fitness to serve on the merits, not on the basis of her ethnicity.

"With a background that creates a prima facie case for confirmation, the primary question I believe Judge Sotomayor must address in this hearing is her understanding of the role of an appellate judge. From what she has said, she appears to believe that her role is not constrained to objectively decide who wins based on the weight of the law, but who, in her opinion, should win. The factors that will influence her decisions apparently include her 'gender and Latina heritage' and foreign legal concepts that get her 'creative juices going.'

"What is the traditional basis for judging in America? For 220 years, presidents and the Senate have focused on appointing and confirming judges and justices who are committed to putting aside their biases and prejudices and applying law to fairly and impartially resolve disputes between parties.
"This principle is universally recognized and shared by judges across the ideological spectrum. For instance, Judge Richard Paez of the Ninth Circuit – with whom I disagree on a number of issues –explained this in the same venue where, less than 24 hours earlier, Judge Sotomayor made her now-famous remarks about a 'wise Latina woman' making better decisions than other judges. Judge Paez described the instructions that he gave to jurors who were about to hear a case. 'As jurors,' he said, 'recognize that you might have some bias, or prejudice. Recognize that it exists, and determine whether you can control it so that you can judge the case fairly. Because if you cannot—if you cannot set aside those prejudices, biases and passions—then you should not sit on the case.'

"And then Judge Paez said: 'The same principle applies to judges. We take an oath of office. At

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the federal level, it is a very interesting oath. It says, in part, that you promise or swear to do justice to both the poor and the rich. The first time I heard this oath, I was startled by its significance. I have my oath hanging on the wall in the office to remind me of my obligations. And so, although I am a Latino judge and there is no question about that—I am viewed as a Latino judge—as I judge cases, I try to judge them fairly. I try to remain faithful to my oath.'

"What Judge Paez said has been the standard for 220 years—it correctly describes the fundamental and proper role for a judge.

"Unfortunately, a very important person has decided it is time for change—time for a new kind of judge; one who will apply a different standard of judging, including employment of his or her empathy for one of the parties to the dispute. That person is President Obama; and the question before us is whether his first nominee to the Supreme Court follows his new model of judging or the traditional model articulated by Judge Paez.

"President Obama, in opposing the nomination of Chief Justice Roberts, said that 'while adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before a court . . . —what matters on the Supreme Court is those 5 percent of cases that are truly difficult. . . . In those 5 percent of hard cases, the constitutional text will not be directly on point. The language of the statute will not be perfectly clear. Legal process alone will not lead you to a rule of decision.'

"How does President Obama propose judges deal with these hard cases? Does he want them to use judicial precedent, canons of construction, and other accepted tools of interpretation that judges have used for centuries? No, President Obama says that 'in those difficult cases, the critical ingredient is supplied by what is in the judge's heart.'

"Of course, every person should have empathy, and in certain situations, such as sentencing, it may not be wrong for judges to be empathetic. The problem arises when empathy and other biases or prejudices that are 'in the judge's heart' become 'the critical ingredient' to deciding cases. As Judge Paez explained, a judge's prejudices, biases, and passions should not be embraced—they must be 'set aside' so that a judge can render an impartial decision as required by the judicial oath and as parties before the court expect.

"I respectfully submit that President Obama is simply outside the mainstream in his statements about how judges should decide cases. I practiced law for almost 20 years before every level of state and federal court, including the U.S. Supreme Court, and never once did I hear a lawyer argue that he had no legal basis to sustain his client's position, so that he had to ask the judge to go with his 'gut' or 'heart.' If judges routinely started ruling on the basis of their personal feelings, however well-intentioned, the entire legitimacy of the judicial system would be jeopardized.

"The question for this committee is whether Judge Sotomayor agrees with President Obama's theory of judging or whether she will faithfully interpret the laws and Constitution and take seriously the oath of her prospective office.

"Many of Judge Sotomayor's public statements suggest that she may, indeed, allow, and even embrace, decision-making based on her biases and prejudices.

"The 'wise Latina woman' quote, which I referred to earlier, suggests that Judge Sotomayor

endorses the view that a judge should allow her gender-, ethnic-, and experience-based biases to guide her when rendering judicial opinions. This is in stark contrast to Judge Paez's view that these factors should be 'set aside.'

"In the same lecture, Judge Sotomayor posits that 'there is no objective stance but only a series of perspectives—no neutrality, no escape from choice in judging' and claims that '[t]he aspiration to impartiality is just that—it's an aspiration because it denies the fact that we are by our experiences making different choices than others.' No neutrality, no impartiality in judging? Yet, isn't that what the judicial oath explicitly requires?

"And according to Judge Sotomayor, 'Personal experiences affect the facts that judges choose to see. . . . I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage.'

"Judge Sotomayor clearly rejected the notion that judges should strive for an impartial brand of justice. She has already 'accepted' that her gender and Latina heritage will affect the outcome of her cases.

This is a serious issue, and it's not the only indication that Judge Sotomayor has an expansive view of what a judge may appropriately consider. In a speech to the Puerto Rican ACLU, Judge Sotomayor endorsed the idea that American judges should use 'good ideas' found in foreign law so that America does not 'lose influence in the world.'

"As I've explained on the floor of the Senate, the laws and practices of foreign nations are simply irrelevant to interpreting the will of the American people as expressed through our Constitution.

Additionally, the vast expanse of foreign judicial opinions and practices from which one might draw simply gives activist judges cover for promoting their personal preferences instead of the law. You can, therefore, understand my concern when I hear Judge Sotomayor say that unless judges take it upon themselves to borrow ideas from foreign jurisdictions, America is 'going to lose influence in the world.' That's not a judge's concern.

"Some people will suggest that we shouldn't read too much into Judge Sotomayor's speeches and articles—that the focus should instead be on her judicial decisions. I agree that her judicial record is an important component of our evaluation, and I look forward to hearing why, for instance, the Supreme Court has reversed or vacated 80 percent of her opinions that have reached that body, by a total vote count of 52 to 19.

"But we cannot simply brush aside her extrajudicial statements. Until now, Judge Sotomayor has been operating under the restraining influence of a higher authority—the Supreme Court. If confirmed, there will be no such restraint that would prevent her from—to paraphrase President Obama—deciding cases based on her heart-felt views. Before we can faithfully discharge our duty to advise and consent, we must be confident that Judge Sotomayor is absolutely committed to setting aside her biases and impartially deciding cases based upon the rule of law."

Sen. Jon Kyl is the Senate Republican Whip and serves on the Senate Finance and Judiciary committees. Visit his website at www.kyl.senate.gov.

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THE ETHICS & RELIGIOUS LIBERTY COMMISSION
OF THE SOUTHERN BAPTIST CONVENTION

Richard Land, D.Phil.(Oxon.), President

July 14, 2009

The Honorable Patrick J. Leahy, Chairman
Senate Judiciary Committee
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

The Honorable Jeff Sessions, Ranking Member
Senate Judiciary Committee
United States Senate
335 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Sessions:

This week, the Senate Judiciary Committee begins its confirmation hearings for Judge Sonia Sotomayor. We are deeply troubled by many aspects of Judge Sotomayor's record. While we could identify a number of factors that concern us, we describe below those that are the most troubling.

Judge Sotomayor does not appear to share the pro-life values of nearly all Southern Baptists and of most Americans. Recent polling reveals that the majority of Americans are pro-life. Her lack of rulings on major sanctity of life issues makes it more difficult to determine how she would rule on sanctity issues, but her association with the Puerto Rican Legal Defense and Education Fund raises serious questions about her commitment to pro-life values. She served on the Board of this organization, including as Vice President and Chair of the litigation committee. During that time, the Fund filed briefs in at least six prominent court cases in support of abortion rights.

While Judge Sotomayor has ruled favorably on abortion-related cases at times, we note that her rulings on race-related issues reveal a much more ideologically rigid attitude toward race. Her ruling in *Ricci v. DeStefano* is indefensible. We support full racial equality, and therefore support efforts that create equal opportunity for all races. However, we oppose policies that discriminate against some races in order to achieve a predetermined racial outcome. Racial discrimination is wrong in any circumstance.

We are also disturbed by Judge Sotomayor's lack of respect for private property rights. Her ruling in *Didden v. Village of Port Chester* demonstrates a willingness to ignore the Constitution's Fifth Amendment protection of private property. While the *Kelo* case was certainly precedential in her panel's ruling, the Supreme Court stated in their majority opinion that municipalities could not take private property under "the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." Judge Sotomayor was either unaware of this qualification or chose to ignore it.

Judge Sotomayor has often ruled very responsibly, but the rate at which she has been overruled by the U.S. Supreme Court reveals that she should not be in a position where her decisions cannot be subjected to review. She is out of the mainstream of the American public and too often of the very Court for which she is being considered. We urge you to do all you can to bring out all the facts about Judge Sotomayor during her confirmation hearings, and if these troubling issues remain, to vote against her confirmation.

Sincerely,

Richard D. Land

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LATINOJustice PRLDEF

Former LatinoJustice PRLDEF Board Member Judge Sonia Sotomayor Nominated to the U.S. Supreme Court

We congratulate former board member and present Federal Appeals Court Judge Sonia Sotomayor in being nominated to the U.S. Supreme Court.

The LatinoJustice PRLDEF family rejoices and congratulates President Obama for making the historic decision to nominate the first Latina to the Supreme Court. The president has not only chosen a well-qualified and respected judge who will be a great asset to the court and our nation – but with his first opportunity to nominate a Supreme Court Justice, the president brings the Hispanic community into the exclusive chambers of the highest court in the land.

"Sonia is a member of our family and spent more than a decade providing leadership to our organization, said Cesar Perales, LatinoJustice PRLDEF President and General Counsel. "We profited firsthand from her probing mind as well as her thoughtfulness beyond her extraordinary intellect. She is a most practical person who found solutions to complex issues."

Judge Sotomayor's nomination comes at a time when the Hispanic community is at the heart of a number of highly politicized issues and attacks on our civil liberties. LatinoJustice PRLDEF recently has fought battles against anti-immigration ordinances, a rash of hate crimes against Latinos and attempts to police the use of Spanish.

As the second largest and fastest growing population in America, with a large pool of qualified individuals to choose from, it was wholly appropriate for the president to nominate a Hispanic.

Although Judge Sotomayor has a stellar judicial record, many of her supporters are expecting a fight from the right and from conservatives.

"We are prepared to engage those who would unfairly tarnish her reputation," Perales said. "The nation needs to know that LatinoJustice PRLDEF will come to her defense."

The Latino community will be looking to the Senate to proceed with the confirmation process in a fair and timely manner.

We expect that senators from both parties should treat Judge Sotomayor with the respect she deserves, examine her record thoughtfully, and perform their constitutional duty without undue delay or obstruction.

LatinoJustice PRLDEF has organized a Task Force made up of exemplary lawyers and academics to conduct a review of the nominee's published papers and decisions.

LatinoJustice PRLDEF, established in 1972, has won landmark civil rights cases in education, housing, voting, migrant, immigrant, employment and other civil rights. PRLDEF has fought for the right of non-English speaking students to get a good education, against housing discrimination in city-owned apartments, and to open up employment opportunities for all citizens.

June 1, 2009

The Honorable Harry Reid
Majority Leader
United States Senate
522 Hart Senate Office Building
Washington, DC 20510

The Honorable Mitch McConnell
Minority Leader
United States Senate
361-A Russell Senate Office Building
Washington, DC 20510

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

The Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
335 Russell Senate Office Building
Washington, DC 20510

Dear Majority Leader Reid, Minority Leader McConnell, Chairman Leahy, and Ranking Member Sessions:

As former law clerks to the Honorable Sonia Sotomayor, we write this letter to offer our enthusiastic and wholehearted support for President Obama's nomination of Judge Sotomayor to serve on the Supreme Court of the United States. Our group includes federal prosecutors and other government lawyers; private law firm partners and in-house corporate counsel; and legal academics and public interest lawyers. Although our professional experiences are diverse, we are united in our strong belief that Judge Sotomayor is a brilliant and first-rate judge who is an ideal selection for our nation's highest court.

Judge Sotomayor's professional qualifications are indisputably stellar. If confirmed, Judge Sotomayor would bring more federal judicial experience to the Supreme Court than any Supreme Court Justice in a century. Judge Sotomayor's three-decade career as a big-city prosecutor, corporate litigator, federal trial judge, and federal appellate judge has equipped her with a wide range of experience in nearly every area of law and uniquely qualifies her for this position.

As former law clerks to Judge Sotomayor, each of us can attest to her intellectual prowess, extraordinary work ethic, and commitment to the rule of law. Working for Judge Sotomayor is an awe-inspiring experience. We each had the privilege of working closely with her as she confronted, and resolved, incredibly complex and intellectually demanding legal challenges. Judge Sotomayor approaches each case with an open mind and arrives at her decision only after carefully considering all of the pertinent facts and applicable rules of law. She brings to each case not only her formidable intellect, but also her practical judgment, honed from years of real-world law practice and experience solving difficult problems as a federal district court and appellate judge. Numerous commentators have remarked upon Judge Sotomayor's wealth of judicial experience. This experience is clear whenever she takes the bench. Judge Sotomayor is thoughtful, engaged, and well-prepared during oral argument, showing an extraordinary grasp of the factual details and legal nuances of her cases. She is a judge who is tough and fair, yet highly respectful of her colleagues in the judiciary (including those with whom she sometimes disagrees) and the litigants appearing before her. Nor does she ever lose sight of the real-world impact of her decisions. Our view of Judge Sotomayor mirrors her reputation among her colleagues on the bench and among members of the bar who have practiced before her, who widely respect her intellectual dynamism, collegiality, and balanced, fair jurisprudence.

Judge Sotomayor's compelling life story has by now been widely reported. For those of us who know her well, she is truly an inspiration, and we know that she will serve as a superb role model for countless young people. While never forgetting her beginnings, Judge Sotomayor has achieved so much in the best American tradition – through extraordinary talent and tireless hard work. Whether prosecuting felonies as a district attorney, litigating complex commercial disputes as a law firm partner, or sitting as a trial or appellate judge, she has always shown a commitment to understanding the concerns of individuals from all walks of life, and to ensuring that all Americans have access to justice.

Judge Sotomayor's personal dynamism is also legendary. She teaches at New York's top law schools, participates in charitable and community events, and maintains legions of friendships. She is a wonderful colleague admired by her fellow judges, and is a committed mentor to her clerks. As former law clerks, we feel especially privileged to be part of her extended "family." Judge Sotomayor has officiated at our weddings, celebrated the births of our children, and has cheered us on to achieve personal and professional success.

Judge Sotomayor is an extraordinary judge and an extraordinary woman. Her combination of intellect, integrity, and vast experience will make her an outstanding Supreme Court Justice. We unconditionally support her nomination and urge you to confirm her as the next Associate Justice of the Supreme Court.

Respectfully Submitted,

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/s/ Adam Abensohn
Adam Abensohn
Clerk for Judge Sotomayor, 1996-97, 1998-99

/s/ Alison Nodvin Barkoff
Alison Nodvin Barkoff
Clerk for Judge Sotomayor, 2000-01

/s/ Julie H. Becker
Julie H. Becker
Clerk for Judge Sotomayor, 1999-2000

/s/ Edward J.W. Blatnik
Edward J. W. Blatnik
Clerk for Judge Sotomayor, 2000-01

/s/ Hannah Y.S. Chanoine
Hannah Shay Chanoine
Clerk for Judge Sotomayor, 2004-05

/s/ Kevin E. Collins
Kevin E. Collins
Clerk for Judge Sotomayor, 2002-03

/s/ Melissa Lynn Elstein
Melissa Lynn Elstein
Clerk for Judge Sotomayor, 1998-99

/s/ Tracy M. Flynn
Tracy M. Flynn
Clerk for Judge Sotomayor, 1994-95

/s/ Kimberly A. Gahan
Kimberly A. Gahan
Clerk for Judge Sotomayor, 2007-08

/s/ Jessica Hertz
Jessica Hertz
Clerk for Judge Sotomayor, 2007-08

/s/ Robin Kar
Robin Kar
Clerk for Judge Sotomayor, 1998-99

/s/ Curtis A. Kin
Curtis A. Kin
Clerk for Judge Sotomayor, 1999-2000

/s/ Andrew B. Ayers
Andrew B. Ayers
Clerk for Judge Sotomayor, 2005-06

/s/ David A. Battat
David A. Battat
Clerk for Judge Sotomayor, 1994-95

/s/ Molly Biklen
Molly Biklen
Clerk for Judge Sotomayor, 2005-06

/s/ Charu A. Chandrasekhar
Charu A. Chandrasekhar
Clerk for Judge Sotomayor, 2004-05

s/ Matthew Colangelo
Matthew Colangelo
Clerk for Judge Sotomayor, 2002-03

/s/ Glenn C. Edwards
Glenn C. Edwards
Clerk for Judge Sotomayor, 1997-98, 2001-02

/s/ Joseph Evall
Joseph Evall
Clerk for Judge Sotomayor, 1992-93

/s/ Cary Franklin
Cary Franklin
Clerk for Judge Sotomayor, 2005-06

/s/ Jeff Grossman
Jeff Grossman
Clerk for Judge Sotomayor, 2000-01

/s/ Kathy J. Holub
Kathy J. Holub
Clerk for Judge Sotomayor, 1995-96

/s/ Mike Kavey
Mike Kavey
Clerk for Judge Sotomayor, 2004-05

/s/ Timothy Lambert
Timothy Lambert
Clerk for Judge Sotomayor, 2000-01

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/s/ James R. Levine
James R. Levine
Clerk for Judge Sotomayor, 2001-02

/s/ Julia Tarver Mason
Julia Tarver Mason
Clerk for Judge Sotomayor, 1996-97

/s/ Sarah S. Normand
Sarah S. Normand
Clerk for Judge Sotomayor, 1998-99

/s/ Xavier Romeu-Matta
Xavier Romeu-Matta
Clerk for Judge Sotomayor, 1992-93

/s/ Melissa Murray
Melissa Murray
Clerk for Judge Sotomayor, 2003-04

/s/ David S. Rubenstein
David S. Rubenstein
Clerk for Judge Sotomayor, 2007-08

/s/ Alan E. Schoenfeld
Alan E. Schoenfeld
Clerk for Judge Sotomayor, 2006-07

/s/ Danielle Feldman Tarantolo
Danielle Feldman Tarantolo
Clerk for Judge Sotomayor, 2006-07

/s/ Jeannette Vargas
Jeannette Vargas
Clerk for Judge Sotomayor, 2001-02

/s/ Natalie R. Williams
Natalie R. Williams
Clerk for Judge Sotomayor, 1993-94

/s/ Lisa Zornberg
Lisa Zornberg
Clerk for Judge Sotomayor, 1997-98

/s/ Jack A. Levy
Jack A. Levy
Clerk for Judge Sotomayor, 1999-2000

/s/ Amy Carper Mena
Amy Carper Mena
Clerk for Judge Sotomayor, 2003-04

/s/ Jenny Rivera
Jenny Rivera
Clerk for Judge Sotomayor, 1993-94

/s/ David Moskowitz
David Moskowitz
Clerk for Judge Sotomayor, 2007-08

/s/ Claude Platton
Claude Platton
Clerk for Judge Sotomayor, 2006-07

s/ Rose Saxe
Rose Saxe
Clerk for Judge Sotomayor, 2002-03

/s/ Robert Spoo
Robert Spoo
Clerk for Judge Sotomayor, 2003-04

/s/ Travis J. Tu
Travis J. Tu
Clerk for Judge Sotomayor, 2003-04

/s/ Brent Wible
Brent Wible
Clerk for Judge Sotomayor, 2005-06

/s/ Kyle C. Wong
Kyle C. Wong
Clerk for Judge Sotomayor, 2006-07

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REPORT ON

THE NOMINATION OF

JUDGE SONIA SOTOMAYOR

TO THE SUPREME COURT

OF THE UNITED STATES

LDF

DEFEND EDUCATE EMPOWER

NAACP LEGAL DEFENSE

AND EDUCATIONAL FUND, INC.

July 10, 2009

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I. INTRODUCTION

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is the nation's leading civil rights legal advocacy organization. Initially established in 1940 as the legal arm of the National Association for the Advancement of Colored People under the direction of Thurgood Marshall, LDF has been separate from the NAACP since 1957.

LDF has fought for racial equality and justice as part of a larger mission to ensure that we are an inclusive democracy in which African Americans and other minorities are full and thriving participants. It has been a long and difficult struggle, but one in which we have seen clear progress. The United States has become increasingly aware of the strengths that come from its remarkable diversity. The Supreme Court made this point explicitly in *Grutter v. Bollinger*, when it stated:

> Nothing less than the nation's future depends on leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples.[1]

That statement is about democracy and its requirement of inclusion, and those leaders include the members of our judiciary.

Until relatively recently, our federal judiciary consisted exclusively of white male judges. That is no longer the case, and we are certain that no one today is advocating for a return to an all white male judiciary. Today's courts are strengthened by their diversity—both with respect to gender and with respect to race and ethnicity. To be direct: diversity has made our courts better courts. It should therefore be a cause for celebration when an obviously well-qualified nominee to the Supreme Court would also enhance the diversity of that Court.

For the reasons discussed below, we strongly endorse the nomination of Judge Sonia Sotomayor to serve as an Associate Justice on the Supreme Court. She is one of the most qualified nominees to be considered for the Supreme Court in decades. Indeed, Judge Sotomayor possesses a unique combination of qualities that makes her especially suited to join the Court at this time. As a prosecutor, corporate litigator, trial judge, and appellate judge, Judge Sotomayor has professional experiences that we believe are richer and more diverse than those of most justices in recent history. Her nomination is also rooted in bipartisanship: Judge Sotomayor would be the only justice on the current Court nominated by a president of a different political party from the president who initially nominated her to the bench. And, her confirmation as the first Latina on the Court would inspire confidence and pride among all Americans.

LDF has conducted a review of Judge Sotomayor's judicial record on the district court and appellate court. We have examined cases in a number of civil rights subject areas that are very important to us: employment discrimination, housing, voting rights, access to justice, and criminal justice. This record shows that Judge Sotomayor is a measured, dispassionate jurist who faithfully adheres to precedent and who meticulously applies the law to the facts before the court. In her written opinions on the appellate court, she carefully and even painstakingly

[1] Grutter v. Bollinger, 539 U.S. 306, 324 (2003) (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978)) (internal quotation marks omitted).

reviews the record on appeal; her litigation background is apparent from her practical approach to pre-trial and trial proceedings. She does not appear driven by personal ideology but, as she told the Senate Judiciary Committee during her confirmation to the Second Circuit, by the principled belief that "judges should seek only to resolve the specific grievance, ripe for resolution, of the parties before the court and within the law as written and interpreted in precedents."[2]

II. ANOTHER MOMENT IN HISTORY

"I believe it is the right thing to do, the right time to do it, the right man, and the right place."[3] These words were spoken by President Lyndon B. Johnson, forty-two years ago as he nominated Thurgood Marshall to the Supreme Court. Viewed then and now through the lens of history, the appointment of the first African American to the Supreme Court at the crest of the civil rights movement was one of the boldest nominations ever made by a president.

At the time, there were only three African-American circuit court judges[4] and six African-American district court judges[5] in the entire country. African Americans had barely gained access to the ballot, could only recently challenge discrimination in employment and public accommodations, and had yet to secure the right to fair housing. With Marshall's appointment, millions of Americans, who were still effectively disenfranchised and still relegated to second-class status, suddenly and rather improbably could see an African American on the highest court in the land. It was a picture made even more encouraging because the nominee was the lawyer most responsible for legal challenges to racial segregation over the previous three decades.

Marshall was one of the most qualified persons ever nominated to the Supreme Court. As Solicitor General, he had argued 19 cases before the Court, and as head of LDF, he had argued 32 cases. Despite his unimpeachable credentials, Marshall faced thunderous attacks on his character, his qualifications, and a record which opponents described as that of a "judicial activist."[6] As Yale Law Professor Stephen Carter recounted, "In the 1960s, racial segregation was legally dead, but politically and ideologically, it was very much alive. When Lyndon Johnson nominated his friend Marshall for the Supreme Court in 1967, segregationists saw a chance to release the pent-up venom from years of courtroom defeats. And so they did."[7] Segregationist senators led the charge at Marshall's confirmation hearing, alleging Communist connections and asking him, for example, to identify the members of the committee that had

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[2] *Confirmation Hearings on the Nomination of Sonia Sotomayor to be Judge on the Second Circuit Court of Appeals: Hearings Before the S. Comm. on the Judiciary*, 105th Cong. 499 (1998) (questionnaire of Judge Sonia Sotomayor).

[3] *Negro Justice*, TIME, June 23, 1967.

[4] William Hastie was appointed to the Third Circuit in 1949; Wade McCree was appointed to the Sixth Circuit in 1966; and Spottswood Robinson III was appointed to the District of Columbia Circuit in 1966. Fed. Jud. Ctr., Biographical Directory of Federal Judges (2009), http://www.fjc.gov/history/home.nsf (follow "Judges of the United States Courts" hyperlink).

[5] James Parsons was appointed to the Northern District of Illinois in 1961; A. Leon Higginbotham, Jr., was appointed to the Eastern District of Pennsylvania in 1964; William Bryant was appointed to the District Court for the District of Columbia in 1965; Constance Baker Motley was appointed to the Southern District of New York in 1966; Aubrey Robinson was appointed to the District Court for the District of Columbia in 1966; and Joseph Waddy was appointed to the District Court for the District of Columbia in 1967. *Id.*

[6] Fred P. Graham, *Senate Confirms Marshall as the First Negro Justice*, N.Y. TIMES, Aug. 31, 1967, at 1.

[7] Stephen L. Carter, *Thurgood Marshall: A Remembrance*, 47 OKLA. L. REV. 5, 7 (1994).

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drafted the Fourteenth Amendment.[8] As Professor Carter has documented, "although nominees have always been asked about such matters as prior experience or controversies in their backgrounds, no nominee before Marshall was questioned so closely about constitutional interpretation, including his views on major precedents."[9] These critics were overshadowed, however, when the Senate voted overwhelmingly to confirm Marshall, 69 to 11.[10]

Forty-two years later, President Barack Obama, whose presidency is itself historic, offers a nominee who would make a similar, indelible mark on the Supreme Court. Judge Sotomayor would be the first Hispanic and the third woman ever to serve on the Court. As the organization headed for two decades by Thurgood Marshall, LDF understands perhaps better than most the pride and admiration surrounding this momentous nomination. Thankfully, our country is in a very different place when it comes to race relations. Racial and ethnic minorities are embedded deeply within the fabric of our society in ways that few could anticipate in the 1960s. Yet, even with the election of President Barack Obama, the color line persists. And so, while the Sotomayor nomination provides a welcome occasion to celebrate, it also provides an opportunity to reflect on how far we still have to go in our collective pursuit of racial justice. Most encouragingly, the prospect of Justice Sotomayor promises further advancement on the path towards racial justice.

III. A LIFETIME OF EXPERIENCE

In describing Thurgood Marshall's qualifications for the Supreme Court in 1967, Michigan Senator Philip Hart stated that there had never before been a Supreme Court nominee "whose qualifications are so dramatically and compellingly established."[11] Justice Marshall's experiences as Solicitor General, a court of appeals judge, and the leading legal advocate for racial justice of his generation made him eminently qualified to serve as a justice of the Supreme Court. The compassion and empathy he gained from those experiences, as well as from growing up as an African American in segregated America, made his service so important.

One of the most famous sayings in American legal history is Justice Oliver Wendell Holmes' maxim that "[t]he life of the law has not been logic, it has been experience."[12] Present-day justices agree that their own life experiences are something they necessarily bring to their positions on the Court. At his confirmation hearing, Chief Justice John Roberts commented: "I wasn't raised in different circumstances and would have different experiences if I were. If you look at the Supreme Court, the people on there come from widely different backgrounds and experiences and I think that's a healthy thing."[13] And at Justice Samuel Alito's confirmation hearing, he discussed being shaped by his family's immigrant background:

> [W]hen a case comes before me involving ... someone who is an immigrant ... I can't help but think of my own ancestors.... And so it's my job to apply the law. It's not my job to change the law or to bend the law to achieve any results, but I

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[8] *Id.* at 8.
[9] Stephen L. Carter, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS 64 (1995).
[10] Graham, *supra* n.6, at 1.
[11] *The First Negro Justice*, TIME, Sept. 8, 1967.
[12] O.W. HOLMES, THE COMMON LAW 1 (1881).
[13] *Confirmation Hearing on the Nomination of John G. Roberts, Jr., to be Chief Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 388 (2005) (statement of Judge John G. Roberts, Jr.).

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> have to, when I look at those cases, I have to say to myself, and I do say to myself, this could be your grandfather. This could be your grandmother. They were not citizens at one time and they were people who came to this country.
>
> When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender, and I do take that into account. When I have a case involving someone who's been subjected to discrimination because of disability, I have to think of people who I've known and admired very greatly who had disabilities and I've watched them struggle to overcome the barriers that society puts up, often just because it doesn't think of what it's doing, the barriers that it puts up to them. So those are some of the experiences that have shaped me as a person.[14]

One of Thurgood Marshall's most lasting legacies on the Supreme Court is the perspective he brought and shared as an African American and as a litigator who spent decades in the trenches of the civil rights movement. Justice Anthony Kennedy has commented: "It is not settled what formal role the element of compassion should play in constitutional and common law judicial decisionmaking, but the compassion of Thurgood Marshall is Exhibit A for the proposition that judicial reason cannot be divorced from the life experience of judges."[15] Justice Byron White has written:

> I doubt we were prepared for the impact his presence would have on all of us. While every new Justice makes the Court a somewhat different institution, Thurgood brought to the conference table years of experience in an area that was of vital importance to our work, experience that none of us could claim to match. ... He characteristically would tell us things that we knew but would rather forget; and he told us much that we did not know due to the limitations of our own experience.[16]

And, in a particularly moving tribute, Justice Sandra Day O'Connor has said:

> Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective. His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to help heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection. His was the mouth of a man who knew the anguish of the silenced and gave them a voice.
>
> At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences,

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[14] *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 475 (2006) (statement of Judge Samuel A. Alito, Jr.).
[15] Anthony Kennedy, *The Voice of Thurgood Marshall*, 44 Stan. L. Rev. 1221, 1221-22 (1992).
[16] Byron White, *A Tribute to Thurgood Marshall*, 44 Stan. L. Rev. 1215, 1215-16 (1992).

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> constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.[17]

Like Justice Marshall, Judge Sotomayor brings stellar qualifications as a nominee, including a wide variety of legal experience. Coincidentally, both Marshall and Sotomayor served on the Second Circuit; Marshall was the last judge from the Second Circuit to serve on the Supreme Court.

Much has been said about Judge Sotomayor's seventeen years of federal judicial experience—the most such experience of any justice in the past century.[18] This is an extremely compelling aspect of her record. Judge Sotomayor has served for eleven years on the U.S. Court of Appeals for the Second Circuit, one of the most demanding appellate courts in the country and where she has participated in over 3000 decisions. In addition, Judge Sotomayor served for six years as a district court judge in one of the busiest and most well-respected federal courts, the Southern District of New York. There, she presided over a number of high profile cases, including one which ended the baseball strike in 1995. Importantly, she would replace Justice David Souter as the only justice on the Supreme Court with experience as a trial judge.

As a consequence of her long tenure on both the appellate and trial bench, Judge Sotomayor is certain to have developed a deep appreciation of the importance of providing clear, workable guidance and standards to judges and litigants. She will know how a decision of the Supreme Court will affect the day-to-day mechanics of courtroom and litigation proceedings. As a trial judge who has participated in numerous criminal trials and sentencing proceedings, Judge Sotomayor will also have a real sense of the factors that judges and juries weigh in reaching verdicts and determining remedies. She will also likely have an instinctive appreciation of the critical credibility issues and litigation strategies that are involved in district court proceedings.

If confirmed, Judge Sotomayor would also bring to the Court the background of a seasoned litigator. In our view, this is an important and often underappreciated qualification. It was through his years of experience litigating cases throughout the country that Justice Marshall gained the insights that informed his contributions to the Court as a justice. At the time he nominated Judge Sotomayor, President Obama stated that he had searched for a nominee with experience: "It is experience that can give a person a common touch and a sense of compassion, an understanding of how the world works and how ordinary people live."[19] As a litigator, Judge Sotomayor practiced in both state and federal courts, and her positions allowed her to become immersed in both civil and criminal law. Although she undoubtedly gained great perspective about the legal system as a jurist, we are convinced it is her litigation experience that gives her the best insight into the impact of the justice system on litigants and their families.

Judge Sotomayor practiced law for thirteen years.[20] Her first job as a prosecutor in the highly respected Manhattan District Attorney's Office gave her a vivid perspective from the

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[17] Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L. Rev. 1217, 1217 (1992).

[18] *See, e.g.*, Harry Reid, Op-Ed., *Life Experience Not at Odds with Judicial Ability*, MIAMI HERALD, June 9, 2009, at A13.

[19] President Barack Obama, Nomination of Judge Sonia Sotomayor to be Associate Justice on the United States Supreme Court (May 26, 2009) (transcript available at http://www.npr.org/templates/story/story.php?storyID=104542818).

[20] SONIA SOTOMAYOR, RESPONSES TO SENATE JUDICIARY COMMITTEE QUESTIONNAIRE 2-3 (2009), *available at* http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/Sonia-Sotomayor-Questionnaire.cfm (hereinafter QUESTIONNAIRE RESPONSES).

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front lines of the criminal justice system. She was hired when District Attorney Robert Morgenthau asked Second Circuit Judge Jose Cabranes (then-counsel to Yale University and a professor at the Law School) for recommendations for new attorneys. Cabranes responded: "I have one student. I don't think she's ever thought about being an assistant D.A., but I think she'd be very good. Her name is Sonia Sotomayor."[21] Judge Sotomayor reportedly accepted the job because she wanted "real-life experience" and relished the opportunity to try cases immediately. By all accounts, she excelled in the position, which typically involved managing 80 to 100 cases at a time. She was described as a "no-nonsense," "intense, chain-smoking prosecutor known for working into the night."[22] Her prosecutions ran the gamut, beginning with shoplifting and minor assault cases before moving on to felony prosecutions, including child pornography cases. The senior lawyer on her first murder case recalled that "[s]he had that uncanny ability of putting together a complicated set of facts and distilling them into a very simple story that would resonate with the jury."[23]

From there, Judge Sotomayor entered private practice, spending eight years as an associate and partner at a business law firm, Pavia & Harcourt, in New York City. Most of her experience came in the form of commercial litigation, which complements her years working in the criminal justice system. She engaged in all facets of commercial law, including real estate, employment, banking, contract, intellectual property law, and export commodity trading.[24] Her practice was almost exclusively devoted to federal court litigation, again complementing her background as a prosecutor in state court. Significantly, no sitting justice today has litigation experience in such diverse areas of the law.

In addition to her career as a lawyer and judge, Judge Sotomayor has had a variety of experiences gained through a lifetime of public service. These include her membership on the Board of Directors of the Puerto Rican Legal Defense & Education Fund, currently known as LatinoJustice PRLDEF ("PRLDEF"). Again, this aspect of Judge Sotomayor's background is strikingly similar to the career path of Justice Marshall, who headed LDF—the first "Legal Defense Fund"—for twenty-one years. Marshall founded LDF in 1940 in order to provide legal representation to racial minorities in civil rights cases. It was the first public interest law firm, necessary because few lawyers were willing and able to take civil rights cases, both because of their unpopularity and because of the shortage of African-American lawyers—African Americans were not allowed even to attend law school in many states. Congress's recognition in the 1960s civil rights statutes of the "private attorney general" concept further enabled LDF to pursue private litigation to advance the public interest.[25] After a quarter of a century of LDF success, members of the Latino community and philanthropists, assisted by LDF, founded the Mexican American Legal Defense & Education Fund ("MALDEF") in 1967, which uses the LDF model to pursue equal opportunity for Mexican Americans through litigation, advocacy, and education. Several other organizations, such as PRLDEF, the Asian American Legal Defense and Education Fund, the Women's Legal Defense Fund, and the Lambda Legal Defense and Education Fund would follow, all using the LDF model.

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[21] *All Things Considered: Sotomayor's Real-World Schooling in Law and Order* (NPR radio broadcast June 23, 2009).
[22] Joe Stephens & Del Quentin Wilbur, *Gritty First Job Shaped Nominee*, WASH. POST, June 4, 2009, at A01.
[23] *Sotomayor's Real-World Schooling in Law and Order*, *supra*, n.21.
[24] QUESTIONNAIRE RESPONSES at 145.
[25] *See* Newman v. Piggie Park Enterprises, 390 U.S. 400, 401-02 (1968).

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PRLDEF was founded in 1972. As PRLDEF recalls on its website, "Puerto Ricans had no voice and were almost totally excluded from participating in public life. From the courts to town councils, from boardrooms to classrooms, Puerto Ricans were simply invisible."[26] Its first Board of Directors was comprised of legal luminaries such as New York Senator Jacob Javits, former U.S. Attorney General Nicholas Katzenbach, former New York Attorney General Robert Abrams, and New York District Attorney Robert Morgenthau. During the 1970s, PRLDEF brought precedent-setting education cases on behalf of Puerto Rican students, confronted discrimination against Latinos in public employment, fought for bilingual ballots in school board elections, obtained housing for Latino apartment applicants faced with discrimination, and secured protections for migrant farm laborers. When Judge Sotomayor joined its Board of Directors in 1980, PRLDEF was not yet a decade old, but it was already a well-respected legal organization.

Judge Sotomayor served on PRLDEF's Board for twelve years, resigning in 1992 upon her appointment by President George H.W. Bush to the federal bench. She held positions of First Vice President and Chair of the Litigation and Education Committees, but never participated in any PRLDEF litigation herself. As Board members recently clarified in a letter to the Senate Judiciary Committee, neither the Board as a whole nor individual members select litigation to be undertaken or control ongoing litigation; instead, the Board is limited to an advisory role on the direction of overall policy, along with its fundraising and other duties.[27] To this day, PRLDEF continues to challenge entrenched discrimination affecting the Latino community, and is known as the "leading advocate for Latinos in New York and the Northeast."[28] Its program on promoting diversity within the legal profession is legendary: it operates mentor and training programs and is responsible for encouraging thousands of Latino students to become lawyers and judges. For nearly four decades, LDF has proudly stood side-by-side with PRLDEF as it has sought, through the courts and public education, to promote equal opportunity for Latinos in every facet of society. For all of these reasons, Judge Sotomayor's past affiliation with PRLDEF is something of which we should all be very proud.

Judge Sotomayor's rich and varied background provides her with an extraordinary set of life experiences to bring to the Supreme Court. These experiences include her professional positions but they also include the fact of her Puerto Rican heritage, her growing up in public housing in the South Bronx, her struggle with diabetes since age eight, and her excelling as an undergraduate and law student at the nation's finest universities. No one can or should expect that judges check their personal backgrounds at the courthouse door. Indeed, such a feat would be impossible. This is not to suggest that individualized life experiences should govern or even influence one's decision-making as a judge. It is merely a recognition that these experiences cannot somehow be divorced from the person charged with upholding her oath to "solemnly swear (or affirm) that [she] will administer justice without respect to persons, and do equal right to the poor and to the rich, and . . . faithfully and impartially discharge and perform all the duties incumbent upon [her] as Associate Justice of the United States Supreme Court under the Constitution and laws of the United States."[29]

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[26] PRLDEF, Our Founding, http://www.prldef.org/about/about.html (last visited July 9, 2009).
[27] Letter from former PRLDEF Board Members to the Hon. Jeff Sessions, Ranking Member, S. Judiciary Comm. (July 7, 2009) (on file with author).
[28] Latino Justice PRLDEF, Home Page, http://www.prldef.org/index.html (last visited July 10, 2009).
[29] 28 U.S.C. § 453 (2009).

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IV. EMPLOYMENT DISCRIMINATION

Employment discrimination claims make up the largest category of civil rights cases in federal court. As a result, the Supreme Court is frequently asked to decide the scope of the federal laws governing employment discrimination—in the last term alone, employment-related cases occupied over a tenth of the Court's docket, and the majority of those cases involved discrimination.[30] Thus, as a Justice on the Court, Judge Sotomayor will play a key role in determining the extent of workplace protections for current and future generations.

Unfortunately, the federal courts have become increasingly hostile places for workers attempting to vindicate their rights under federal anti-discrimination laws. A recent study by two Cornell Law School professors found that employment discrimination plaintiffs fare much worse than other plaintiffs in both the federal trial and appellate courts.[31] At the appellate level, plaintiffs who have won at trial have an extremely disproportionate chance of seeing their wins reversed: the federal appeals courts reverse 41.1% of plaintiffs' victories, but only 8.7% of defendants' victories.[32] In other words, employment discrimination plaintiffs are five times more likely than defendants to have verdicts in their favor reversed on appeal—an incredible statistic given that the critical questions in employment discrimination cases are fact-driven, and that appellate judges normally defer to factual findings made by a jury or trial judge. At trial, plaintiffs win before juries at roughly similar rates in employment discrimination and other types of cases (37.6% and 44.4%, respectively)—yet judges rule in plaintiffs' favor at trial in employment cases far less often than in other cases (19.6% versus 45.5%).[33] As the authors suggest, these trends have made workers increasingly reluctant to bring discrimination cases in federal court: the number of employment discrimination cases fell by 37% from 1999 to 2007, a huge decline (and one which did not occur in other types of cases).[34]

The lesson of the Cornell study is simple: it is imperative that persons bringing employment discrimination claims in federal court have their cases heard before fair and impartial judges, who are not predisposed to decide cases against them. We believe that Judge Sotomayor is precisely that type of jurist. Her record on employment discrimination cases reveals a balanced approach, where decision-making is based not on ideology but on the application of the law to the particular facts at hand. Below, we discuss Judge Sotomayor's record based on a sampling of her decisions, primarily drawn from race discrimination cases.

Individual Cases

As an appellate judge, Judge Sotomayor has taken a careful, fact-sensitive approach to reviewing individual claims of employment discrimination. She has also shown appropriate

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[30] The Court issued seventy-five merits opinions during its October 2008 Term. Nine were employment-related cases: five of those were employment discrimination cases (Crawford v. Metropolitan Government of Nashville & Davidson County; 14 Penn Plaza LLC v. Pyett; AT&T Corp. v. Hulteen; Gross v. FBL Financial Services, Inc.; and Ricci v. DeStefano) and four dealt with other workplace issues (Locke v. Karass; Ysursa v. Pocatello Education Ass'n; CSX Transportation, Inc. v. Hensley; and Atlantic Sounding Co. v. Townsend).

[31] Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse*, 3 Harv. L. & Pol'y Rev. 103 (2009).

[32] *Id.* at 110. There is also a gap in the relative reversal rates for plaintiffs and defendants in non-jobs cases, but it is much smaller (35.1% and 14.7%, respectively). *Id.* at 111 n.21.

[33] *Id.* at 130 display 2.

[34] *Id.* at 117.

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respect for the jury's role in resolving factual disputes. Taken as a whole, her decisions are extremely balanced and show no tendency to favor either side in discrimination cases

Judge Sotomayor has joined a number of decisions in which the panel, after close examination of the facts and the law, reversed summary judgment in whole or in part and remanded for a jury trial. For example, in *Duzant v. Electric Boat Corp.*,[35] Judge Sotomayor joined an order vacating summary judgment and remanding for trial on plaintiff's claim that he was denied overtime based on his race. The plaintiff, a designer of piping systems, offered evidence that all other designers in his department were given an average of 240 overtime hours annually, while he—the only African American in the department—received none. Although the employer claimed that the plaintiff was not offered overtime because he did a different type of design work than the others, the plaintiff provided evidence that this was not true. He also provided other evidence of possible racial animus—that his supervisor tracked him more closely than her other subordinates, and that she had reprimanded him for speaking with another African-American employee. The panel held that given the conflicting evidence, the proper course was to allow a jury to hear the case and determine whether it was racial animus or legitimate factors that precluded the plaintiff from obtaining overtime hours.[36]

In *Williams v. Consolidated Edison Corp. of New York*,[37] Judge Sotomayor joined an order affirming summary judgment against an African-American female plaintiff on her race discrimination and retaliation claims, but vacating summary judgment and remanding for trial on the plaintiff's hostile work environment claim. The panel held that a reasonable fact-finder could find that Williams demonstrated a hostile work environment, based on evidence that she and co-workers were repeatedly subjected to racial and sexual epithets, along with other forms of harassment and discrimination.[38] The panel also stated that there was a genuine factual dispute regarding Con Ed's liability for the hostile work environment, because Williams offered evidence indicating that Con Ed was aware of the incidents and failed to take prompt, appropriate remedial action.[39]

Judge Sotomayor's balanced approach and close scrutiny of the facts are evident in the decision she wrote in *Cruz v. Coach Stores, Inc.*[40] The decision began by affirming the dismissal of several of the plaintiff's discrimination and retaliation claims. Judge Sotomayor wrote that the plaintiff failed to sufficiently plead a claim that her employer discriminated against her in refusing to promote her, because she did not allege that she was qualified for and had applied for the relevant position. Nor did the plaintiff adequately allege a retaliatory termination claim.[41] The decision also affirmed summary judgment on the plaintiff's termination and disparate impact claims. However, the panel reversed as to Cruz's hostile work environment claim, finding that she had supplied enough evidence of harassment that a reasonable jury could find in her favor. Judge Sotomayor described evidence that Cruz's supervisor subjected her "to blatant racial epithets on a regular if not constant basis" and to physically threatening behavior based on her

[35] 81 F. App'x 370 (2d Cir. 2003).
[36] *Id.* at 372.
[37] 255 F. App'x 546 (2d Cir. 2007).
[38] *Id.* at 549-50.
[39] *Id.* at 550-51.
[40] 202 F.3d 560 (2d Cir. 2000).
[41] *Id.* at 566.

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sex. Judge Sotomayor also pointed out that the race and sex harassment that Cruz experienced might be mutually reinforcing, an often overlooked point.[42]

Where Judge Sotomayor has found that the law, as applied to the facts of the case before her, doomed the plaintiff's case, she has affirmed dismissal or summary judgment against the plaintiff. In *Williams v. R.H. Donnelley, Corp.*,[43] she wrote an opinion affirming summary judgment for the employer in a race discrimination case. The plaintiff, who alleged that the employer refused to promote or transfer her for discriminatory reasons, had failed to prove that she was qualified for the promotions. Further, the employer's refusal to grant her a lateral transfer (which was arguably a demotion) was not an actionable "adverse employment action." Similarly, in *Norville v. Staten Island University Hospital*,[44] Judge Sotomayor wrote for the panel, concluding that judgment as a matter of law was properly granted to the defendant on the plaintiff's race discrimination claim, as the plaintiff had failed to show that similarly situated white employees were treated more favorably. In *Washington v. County of Rockland*,[45] she authored an opinion affirming the lower court's rejection of several African-American correction officers' claims that they were discriminatorily targeted for disciplinary proceedings. The officers had not met applicable filing deadlines for their discrimination claims and had failed to show that there was any continuing violation that would have extended the time for filing. In *Moore v. Consolidated Edison Co. of New York*,[46] Judge Sotomayor wrote a decision upholding a refusal to enter a preliminary injunction in favor of the plaintiff, who had requested that her employer be enjoined from terminating her in retaliation for her discrimination suit. The panel agreed with the lower court's conclusion that the plaintiff had not shown a risk of irreparable harm if the injunction were not granted: while money damages might not always be a sufficient remedy for a retaliatory termination—for example, in cases where fear of being treated similarly would deter other employees in the company from opposing discrimination—the plaintiff had not shown that there was any such risk of intimidation or deterrence of others in her case.

Earlier, as a district court judge, Judge Sotomayor followed a similar path, allowing individual plaintiffs a chance to try potentially meritorious claims to a jury if the facts merited it. For example, in *Cartagena v. Ogden Services Corp.*,[47] Judge Sotomayor denied the defendant's motion for summary judgment based on evidence that the plaintiff's supervisor made repeated discriminatory remarks to him in the six months preceding his termination. In *Mitchell v. Reich*,[48] she denied the employer's motion for judgment on the pleadings, ruling that the pro se plaintiff's complaint sufficiently alleged that the employer retaliated against him for previous discrimination claims and "should not be barred at this early stage of the litigation." In *Gilani v. National Ass'n of Securities Dealers*,[49] she dismissed the plaintiff's federal race discrimination claims on procedural grounds, but held that his retaliation claims and state law discrimination claims could go forward. And, in *Black v. New York University Medical Center*,[50] Judge

[42] *Id.* at 572.
[43] 368 F.3d 123 (2d Cir. 2004).
[44] 196 F.3d 89 (2d Cir. 1999).
[45] 373 F.3d 310 (2d Cir. 2004).
[46] 409 F.3d 506 (2d Cir. 2005).
[47] 995 F. Supp. 459 (S.D.N.Y. 1998).
[48] No. 93 Civ. 2206, 1994 U.S. Dist. LEXIS 11712 (S.D.N.Y. Aug. 18, 1994), *aff'd*, No. 95-6196, 1996 U.S. App. LEXIS 3045 (2d Cir. Jan. 24, 1996).
[49] No. 96 Civ. 8070, 1997 U.S. Dist. LEXIS 12287 (S.D.N.Y. Aug. 18, 1997).
[50] No. 94 Civ. 9074, 1996 U.S. Dist. LEXIS 7178 (S.D.N.Y. May 23, 1996).

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Sotomayor found that the plaintiff had satisfied time limitations for filing her gender discrimination claim, because her pro se complaint had adequately alleged an ongoing discriminatory policy or practice. She also allowed the plaintiff an opportunity to amend her Equal Pay Act claim to include sufficient specific facts to show that men doing substantially similar work to her own were paid more on account of their gender.

On the other hand, when it was clear that discrimination plaintiffs did not meet procedural requirements, Judge Sotomayor applied the law and dismissed their cases. For example, in *McNeill v. St. Barnabas Hospital*,[51] she granted the defendant's motion for summary judgment on the plaintiff's race discrimination and retaliation claims. The claims were untimely, and the plaintiff had failed to provide any evidence that the defendant was motivated by a desire to retaliate against her.

Broader Challenges

In cases dealing with broader challenges to employment practices, Judge Sotomayor has also taken a restrained, careful approach. In *Malave v. Potter*,[52] she joined an opinion vacating a district court's grant of summary judgment on an employee's claim that the Postal Service's promotion practices had an illegal disparate impact on Hispanics. The lower court had mistakenly required the plaintiff to prove underrepresentation based on the number of Hispanics applying for the promotional positions, even though no such data existed. The appellate court noted that, under Supreme Court and circuit precedent, the appropriate population for comparison could be either the applicant pool or the eligible labor pool, depending on various factors; on remand the lower court was to focus on whether the expert evidence "utilized the best and most appropriate available labor pool information."[53]

In other disparate impact cases, Judge Sotomayor has taken a similarly even-handed approach. In *Atkins v. Westchester County Department of Social Service*,[54] a case involving a challenge to a social service agency's promotional exam for managerial positions, she joined a panel decision affirming summary judgment for the employer, because the plaintiffs failed to show any statistically significant disparity between the white and black applicants' exam scores. In *Amador v. City of Hartford*,[55] she joined an order vacating the lower court's grant of summary judgment for the employer. The plaintiffs were eighteen male police officers who alleged gender bias in their department's promotional process. They specifically challenged the department's decision to send all female applicants for promotion to the only oral examination panel that included a female examiner, because it had become known after the fact that the panel gave higher average scores than the other three panels. The court remanded for the lower court to reconsider whether the express gender classification of the applicants qualified as actionable discrimination.[56]

In another recent case involving the disparate impact standard, *Ricci v. DeStefano*, Judge Sotomayor once again demonstrated her respect for precedent. *Ricci* involved a decision by the City of New Haven to temporarily suspend promotions within its fire department after it

[51] No. 94 Civ. 6215, 1997 U.S. Dist. LEXIS 18606 (S.D.N.Y. Nov. 19, 1997).
[52] 320 F.3d 321 (2d Cir. 2003).
[53] *Id.* at 326-27.
[54] 31 F. App'x 52 (2d Cir. 2002).
[55] 21 F. App'x 68 (2d Cir. 2001).
[56] *Id.* at 69-70.

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identified serious concerns regarding the fairness of the process for African-American and Latino employees. Based on the examination results, no African Americans would have been eligible to fill any of the available positions. In addition to the significant adverse impact on minority candidates, public hearings raised serious questions regarding whether the tests actually selected the most qualified candidates. The City decided to evaluate other promotional processes that could select captains and lieutenants more fairly and effectively, in light of its obligation under Title VII of the Civil Rights Act of 1964 to avoid employment practices with an illegal disparate impact. In response, the City was sued by white firefighters claiming that the City's actions discriminated against them. The district court granted summary judgment for the City, holding that the City's actions taken to comply with Title VII did not qualify as intentional discrimination.[57] Judge Sotomayor joined an opinion affirming and adopting the district court's reasoning.[58]

The Supreme Court reversed the *Ricci* panel's decision by a narrow majority on June 29.[59] (LDF filed an amicus brief in *Ricci* urging affirmance.) The Court adopted a new standard for judging the validity of a public employer's response to potential disparate impact liability, and, applying that standard, granted summary judgment to the white firefighters. As most commentators have agreed, the Court's reversal in no way reflects on Judge Sotomayor's decision to join the opinion affirming the district court: unlike the Supreme Court, the panel on which Judge Sotomayor sat was bound to follow precedent from the Supreme Court and the Second Circuit, and it correctly applied that precedent in affirming the lower court.

V. EDUCATION

Education is the foundation of our democratic society. As Judge Sotomayor's own journey exemplifies, education provides the means by which students of all backgrounds can succeed and meaningfully participate in American civic, political, and economic life. Today, our education system is in crisis; nearly half of the students attending the nation's largest school districts do not graduate from high school. The high school completion rates are even lower among African-American and Latino students, who too often attend schools that fail to provide the basic education necessary for students to have a chance to succeed in life. For more than six decades, LDF has worked to dismantle barriers in public education and ensure equal educational opportunity for all students and has been involved in the litigation of numerous education cases in the Supreme Court, including *Brown v. Board of Education*,[60] *Grutter v. Bollinger*,[61] *Missouri v. Jenkins*,[62] and *Freeman v. Pitts*.[63]

Judge Sotomayor's education-related jurisprudence has not been extensive. Her opinions in the handful of education-related cases in which she participated, however, clearly demonstrate her overall commitment to ensuring that educational institutions are open and accessible to all students and treat students fairly and with respect. Students are "entitled to an equal opportunity

[57] Ricci v. DeStefano, 554 F. Supp. 2d 142 (D. Conn. 2006).
[58] Ricci v. DeStefano, 530 F.3d 87 (2d Cir. 2008) (per curiam).
[59] Ricci v. DeStefano, Nos. 07-1428, 08-328, __ S. Ct. __ (June 29, 2009).
[60] 347 U.S. 483 (1954).
[61] 539 U.S. 306 (2003).
[62] 515 U.S. 70 (1995).
[63] 503 U.S. 467 (1992).

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to learn."[64] Judge Sotomayor demonstrates she is acutely aware of the obstacles and discriminatory practices that students have faced within the educational system and the need to examine the totality of the circumstances in addressing claims of discrimination or exclusion.

In *Gant v. Wallingford Board of Education*, Judge Sotomayor dissented in part from a ruling upholding summary judgment against an African American first-grade student who claimed he was demoted to kindergarten because of his race. Upon a thorough and comprehensive review of the record and taking account of the totality of the circumstances, Judge Sotomayor noted, "the treatment this lone black child encountered during his brief time in [first grade was] not merely 'arguably unusual' or 'indisputably discretionary,' but unprecedented and contrary to the school's established policies."[65] She concluded that the "unprecedented nature of his transfer and the disparate treatment of similarly situated white students"—combined with the showing of pretext—supported an inference of racial discrimination.[66]

In *Tolbert v. Queens College*,[67] Judge Sotomayor voted to reverse and remand a district court's decision to set aside a jury verdict and punitive damages for an African-American student who claimed he was denied his master's degree on the basis of race. Judge Sotomayor ruled that when the evidence was viewed in the light most favorable to the student, as the law required, there was a sufficient basis on which the jury could have found discrimination, i.e., that the college "had intentionally injected consideration of ethnicity into its exam-grading decisions and applied a more rigorous standard to Tolbert than to students of other ethnicit[ies]."[68]

Judge Sotomayor has also sought to protect equal educational opportunity and vindicate the rights of students with disabilities under the Individuals with Disabilities Education Act ("IDEA"). In *Frank G. v. Board of Education of Hyde Park*,[69] Judge Sotomayor held that a family could be reimbursed for private school tuition for a child with disabilities even if that child had never received such services from his or her district public school. (In a separate case this term, *Forest Grove School District v. T.A.*,[70] the Supreme Court came to the same conclusion.)

VI. VOTING RIGHTS

Since its inception, LDF has been committed to securing and protecting minority voting rights. Over the last several decades, LDF has conducted extensive litigation both enforcing and defending the provisions of the Voting Rights Act of 1965, and other federal voting rights laws. Through this litigation, LDF has developed significant expertise regarding the important role played by the Voting Rights Act to ensure minority voters' access to the polls. As the Court

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[64] Gant v. Wallingford Bd. of Educ., 195 F.3d 134, 153 (2d Cir. 1999) (Sotomayor, J., dissenting).
[65] *Id.* at 151.
[66] *Id.* at 152.
[67] 242 F.3d 58 (2d Cir. 2001).
[68] *Id.* at 73-74.
[69] 459 F.3d 356 (2d Cir. 2006).
[70] 557 U.S. ___ (2009); *see also* Connecticut Office of Protection & Advocacy v. Hartford Bd. of Educ., 464 F.3d 229 (2d Cir. 2006) (upholding the authority of Connecticut's Office of Protection and Advocacy for Persons with Disabilities to access and monitor a school for students with serious emotional disabilities after widespread complaints of abuse and neglect).

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observed in *Yick Wo v. Hopkins*, the right to vote is fundamental because it is "preservative of all rights."[71]

The Supreme Court's role in interpreting the Voting Rights Act, and the Fourteenth and Fifteenth Amendments, is of paramount importance. Over the last two terms, for example, the Supreme Court has heard a number of critical cases concerning the scope and constitutionality of various provisions of the Voting Rights Act of 1965, including *Northwest Austin Municipal Utility District Number One v. Holder*,[72] *Bartlett v. Strickland*,[73] and *Crawford v. Marion County Election Board*.[74] All of these cases bear directly on the protections afforded to minority voters under our nation's most historic and effective federal civil rights law: the Voting Rights Act of 1965.

Judge Sotomayor's participation in *Hayden v. Pataki*,[75] which was decided en banc, offers a key insight into her handling of matters concerning voting rights and political participation. From *Hayden v. Pataki* and several other election law cases in which she has participated, we can discern an evenhanded commitment to interpreting and enforcing the constitutional and statutory provisions that protect the right to vote. In *Hayden v. Pataki*, the Second Circuit considered whether state felon disenfranchisement statutes constituted the kind of "voting qualification or prerequisite" that could be subject to challenge under Section 2 of the Voting Rights Act. The litigants in the case argued that New York's felon disenfranchisement statutes resulted in a disproportionate denial of the right to vote to African-American and Latino citizens with felony convictions in violation of Section 2 of the Act. LDF, along with the Community Service Society (CSS), presented oral argument before an en banc panel of judges on the Second Circuit.

In *Hayden v. Pataki*, Judge Sotomayor dissented from the ruling of the en banc court, which held that the prohibition against discriminatory qualifications and prerequisites found in Section 2 of the Voting Rights Act did not extend to state felon disenfranchisement statutes. The court's reasoning was based, in part, on its view that Congress did not explicitly consider felon disenfranchisement laws despite recognition that "Congress intended 'to give the Act the broadest possible scope.'"[76] Judge Sotomayor wrote separately to underscore the canon of statutory interpretation that guided her view of the case. In particular, Judge Sotomayor observed that a "plain" reading of the Voting Rights Act subjects felony disenfranchisement and all other voting qualifications to its coverage. Judge Sotomayor noted:

> It is plain to anyone reading the Voting Rights Act that it applies to all "voting qualification[s]." And it is equally plain that § 5-106 disqualifies a group of people from voting. These two propositions should constitute the entirety of our

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[71] 118 U.S. 356, 370 (1886).

[72] ___ S. Ct. ___, 2009 WL 1738645 (June 22, 2009) (adopting expanded interpretation of Section 4 "bailout" provision but declining to reach question concerning the constitutionality of Section 5 of the Voting Rights Act).

[73] 556 U.S. 1, ___ (2009) (plurality opinion) (finding that Section 2 of the Voting Rights Act does not require the creation of districts that are less than 50 percent minority in population but observing that "Passage of the Voting Rights Act of 1965 was an important step in the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote").

[74] 128 S. Ct. 1610 (Apr. 28, 2008) (rejecting challenge brought pursuant to Section 2 of the Voting Rights Act to Indiana government-issued voter identification requirement).

[75] 449 F.3d 302 (2d Cir. 2006) (en banc).

[76] *Id.* at 318 (citing Allen v. State Bd. of Elections, 393 U.S. 544, 567 (1969)).

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> analysis. Section 2 of the Act by its unambiguous terms subjects felony disenfranchisement and all other voting qualifications to its coverage.
>
> The duty of a judge is to follow the law, not to question its plain terms. I do not believe that Congress wishes us to disregard the plain language of any statute or to invent exceptions to the statutes it has created. The majority's "wealth of persuasive evidence" that Congress intended felony disenfranchisement laws to be immune from scrutiny under § 2 of the Act includes not a single legislator actually saying so. But even if Congress had doubts about the wisdom of subjecting felony disenfranchisement laws to the results test of § 2, I trust that Congress would prefer to make any needed changes itself, rather than have courts do so for it.[77]

Lending further insight into her views on the proper interpretation and scope of the Voting Rights Act is Judge Barrington Parker's dissent in *Hayden v. Pataki*, which Judge Sotomayor joined. Judge Parker's dissent embraced the broad powers of Congress, afforded by the Reconstruction Era amendments, to ban racial discrimination in our political processes.[78] In particular, Judge Parker observed that "[Section] 2 of the Fourteenth Amendment—which expressly contemplated and essentially sanctioned racially discriminatory voting qualifications—in no way diminishes Congress's power to enforce the Fifteenth Amendment."[79] The dissenting opinion also noted that "the scope of Congress's enforcement authority is at its zenith when protecting against [race discrimination],"[80] and that "the country's long and persistent history of discrimination gives Congress much greater latitude in fashioning appropriate remedies for racial discrimination in voting. . . ."[81]

In addition to *Hayden v. Pataki*, Judge Sotomayor has also participated in a number of cases that make clear her ability to appropriately balance federal and state interests in the election law context. For example, in *Gelb v. Board of Elections*,[82] a case concerning the obligation of a board of elections to provide ballot space for write-in voting in contested primary elections, Judge Sotomayor observed that, while voting rights are of fundamental significance, states retain authority to enact certain regulations that affect an individual's right to vote and associate for political ends in order to ensure an honest and orderly election. Her reasoning was guided by recognition of the critical importance of the right to vote as she observed that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."[83]

In *Rivera-Powell v. New York City Board of Elections*,[84] a prospective judicial candidate and her supporters appealed a lower court's ruling dismissing claims brought against the New York City Board of Elections, alleging improper removal from the primary ballot. Judge Sotomayor affirmed the lower court's ruling finding that the candidate received adequate due

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[77] *Id.* at 367-68 (Sotomayor, J., dissenting) (internal citations omitted).
[78] *Id* at 343-62 (Parker, J., dissenting).
[79] *Id.* at 350.
[80] *Id.* at 359.
[81] *Id.* at 361.
[82] 888 F. Supp. 509 (S.D.N.Y. 1995).
[83] *Id.* at 515 (citing Wesberry v. Sanders, 376 U.S. 1, 17 (1964)).
[84] 470 F.3d 458 (2d Cir. 2006).

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process before removal from the ballot and that removal of the candidate did not violate the candidate's First or Fourteenth Amendment rights. Judge Sotomayor observed that "[f]ederal court intervention in garden variety state election disputes is inappropriate."[85] Judge Sotomayor also rejected the candidate's equal protection claim of race-based discrimination, finding the allegations to be "conclusory in nature and lacking evidence of intentional discrimination."[86]

VII. DISCRIMINATION IN HOUSING AND ACCOMMODATIONS

For decades, LDF has sought to promote equal housing opportunity through challenges to racially restrictive covenants, blockbusting, exclusionary zoning, racial steering, and predatory lending. Last year, LDF issued a report lamenting the slow progress of our nation in achieving racially integrated housing forty years after the passage of the Fair Housing Act of 1968, and offering creative suggestions for future work in fair housing.[87] As our nation's public schools become increasingly resegregated, it is imperative that we continue to rely on strong enforcement of our federal fair housing statutes to ensure that everyone has the choice to live, work, and be educated in more racially and culturally diverse neighborhoods.

Judge Sotomayor has had few opportunities to rule on cases involving fair housing laws. In her only case addressing an individual fair housing violation, her decision reveals a practical, careful application of the law. In *Boykin v. Keycorp*,[88] Judge Sotomayor authored an opinion tolling the statute of limitations under the Fair Housing Act. An African-American woman had alleged lending discrimination after a bank denied her home equity loan application pertaining to property she owned and rented in a predominantly minority neighborhood. The plaintiff had filed a complaint with the United States Department of Housing & Urban Development ("HUD"), thereby initiating the administrative process that tolls the time for filing a complaint in federal court. HUD then referred the complaint to a state agency pursuant to the Fair Housing Act; the agency investigated the matter and issued a finding of "no probable cause" to the plaintiff.[89] Thereafter, HUD itself notified the plaintiff that the matter was closed. The plaintiff filed a federal lawsuit within two years after receiving the later notice from HUD. The district court dismissed the suit, concluding that the claims were untimely since they were tolled only by the state administrative proceeding.

In a lengthy opinion, Judge Sotomayor vacated the ruling and held that the administrative proceeding terminated upon HUD's notification to the plaintiff, thereby allowing the plaintiff to file suit. She painstakingly reviewed HUD's practice in this area, noting the absence of regulations on this question, and found it unreasonable.[90] "We hold that when a complainant receives a final letter from a HUD regional office, stating that HUD has closed its investigation based on notification that the certified agency to which the complaint was referred has closed its investigation, we will consider the administrative proceeding to have been 'pending,' and the filing limitation tolled, until the date of the final letter."[91]

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[85] *Id.* at 469.
[86] *Id.* at 470.
[87] NATIONAL COMMISSION ON FAIR HOUSING AND EQUAL OPPORTUNITY, THE FUTURE OF FAIR HOUSING (2008), *available at* http://www.naacpldf.org/content/pdf/housing_discrimination/fair_housing_report.pdf.
[88] 521 F.3d 202 (2d Cir. 2008).
[89] *Id.* at 205.
[90] *Id.* at 207-11.
[91] *Id.* at 211.

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Judge Sotomayor also joined a panel opinion in *United States v. Secretary of HUD*,[92] which affirmed a district court's modification of a consent decree stemming from the famous Yonkers desegregation case. In *United States v. Yonkers Board of Education*,[93] Judge Leonard Sand had found that the City of Yonkers intentionally segregated its public housing and public schools by directing its subsidized housing to predominantly minority neighborhoods. For years thereafter, the City resisted implementing the court's desegregation orders. The subsequent case, *Secretary of HUD*, arose when the City appealed the entry of a modified decree as an unconstitutional race-conscious remedy. Judge Sotomayor joined Judge Guido Calabresi's opinion, holding that the decree's modification was sufficiently narrowly tailored to respond to the City's failure to meet integrative housing goals. The panel wrote: "In spite of fifteen years of remedial efforts encompassing four race-neutral remedial regimes . . . and at least partly because of the active and passive resistance to integration displayed by the City, Yonkers public housing remains substantially segregated even today."[94]

Although Judge Sotomayor does not appear to have presided over any traditional public accommodations cases under Title II of the Civil Rights Act of 1964, she did hear a case involving discrimination in airline travel, *King v. American Airlines*.[95] There, she authored an opinion rejecting claims under 42 U.S.C. § 1981 and the Federal Aviation Act by African-American passengers who alleged they were bumped from an international flight because of their race. In affirming the district court's dismissal of the claims, Judge Sotomayor held that discrimination claims that arise in the course of embarking on an aircraft are preempted by the Warsaw Convention, which established a comprehensive liability system to govern claims involving international air travel. On this basis, the claims must be filed within the Convention's two-year limitations period; since the plaintiffs filed their claims within just under three years of the allegedly discriminatory incident, they were not timely.

VIII. ACCESS TO JUSTICE

Judge Sotomayor has distinguished herself as a jurist who understands the importance of meaningful access to courts. Having sat as a trial judge, her jurisprudence reflects a nuanced understanding of the rulings district court judges make on dispositive motions.

Her opinions convey a keen understanding of the importance of judicial review and the obstacles that prevent cases from being heard. They are also remarkable for their balanced approach, reflecting appropriate judicial restraint, careful analysis of the facts at hand, and a respect for the principle of *stare decisis*. Judge Sotomayor has neither gone out of her way to erect insurmountable procedural bars to plaintiffs seeking relief, nor has she engaged in results-oriented decision-making that ignores jurisdictional prerequisites and binding precedent. This measured approach has led to reasonable and equitable results, seen in rulings that bar some claims while allowing others. And Judge Sotomayor has articulated and reinforced legal standards in a way that is clear and concise.

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[92] 239 F.3d 211 (2d Cir. 2001).
[93] 624 F. Supp. 1276 (S.D.N.Y.).
[94] *Id.* at 219-20.
[95] 284 F.3d 352 (2d Cir. 2002).

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Standing

In cases involving issues of standing and mootness, Judge Sotomayor has routinely declined to adopt either excessively narrow or unnecessarily expansive readings of pleading requirements. A hallmark of her disciplined decision-making is that she has often found standing and then ruled on the merits in favor of the defendants.

In *Lamar Advertising of Penn, LLC v. Town of Orchard Park*,[96] Judge Sotomayor found on behalf of a unanimous court that an outdoor advertising business had standing to bring a facial challenge to a municipal ordinance even though the corporation's First Amendment rights to commercial speech had not yet been denied. She was also careful to order that the plaintiff be permitted to re-plead its complaint on remand in order to address mootness concerns. And in *Brody v. Village of Port Chester*,[97] Judge Sotomayor wrote for another unanimous court in finding that a property owner who was denied due process prior to the exercise of eminent domain satisfied the standing requirement, even though he had failed to specify any additional harm beyond being denied procedural protections to which he was entitled under the Constitution.

Judge Sotomayor is also willing to make difficult judgments and apply prudential standing principles to refrain from addressing matters inappropriate for consideration on the merits. In *New York Civil Liberties Union v. Grandeau*,[98] the court determined that the plaintiff organization's First Amendment free speech claim was not moot under a constitutional analysis; however, it determined that the claim was not yet ripe for judicial review. And in *Center for Reproductive Law and Policy v. Bush*,[99] Judge Sotomayor used varying approaches to resolve the claims in a suit filed by a U.S.-based organization seeking to challenge the executive branch's policy of refusing aid to foreign nonprofits that performed or provided information about abortions. First, the court bypassed a potentially dispositive standing argument in order to reject a First Amendment claim on the merits because the outcome was "foreordained" by a prior decision of the circuit.[100] The court also found that the plaintiff organization had standing to bring an equal protection claim, but rejected that claim on the merits. Finally, the court found that the organization lacked standing to assert a due process challenge to the policy—a ruling based in large part upon the finding that plaintiffs did not assert harm to their own interests, but to those of third parties.

In another prudential standing analysis, Judge Sotomayor joined a unanimous panel in finding that a defendant had standing to challenge an order of removal in the immigration context, but declining to address the merits because the claims would be better resolved at a time closer to petitioner's parole.[101] And in a host of other cases, Judge Sotomayor has demonstrated

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[96] 356 F.3d 365 (2d Cir. 2004).
[97] 345 F.3d 103 (2d Cir. 2003).
[98] 528 F.3d 122 (2d Cir. 2008).
[99] 304 F.3d 183 (2d Cir. 2002).
[100] *Id.* at 187, 195; *cf.* Moore v. Consol. Edison Co. of N.Y., 409 F.3d 506, 511 n.5 (2d Cir. 2005) (declining to address whether prudential limits on standing apply to Title VII sex discrimination claims and instead exercising "hypothetical jurisdiction" and ruling on the merits because plaintiff's claims would fail).
[101] Simmonds v. INS, 326 F.3d 351, 361 (2d Cir. 2003).

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a willingness to dismiss claims in which the pleadings are clearly insufficient to state a claim for relief.[102]

Sovereign Immunity

Judge Sotomayor's few decisions in the area of sovereign immunity have all strictly applied existing precedent, even when written in dissent, and displayed a reluctance to limit states' Eleventh Amendment immunity absent guidance from the Supreme Court. In this area, her adherence to precedent is indicative of a disciplined judicial restraint, placing her squarely in the mainstream.

In *McGinty v. New York*,[103] Judge Sotomayor joined a unanimous panel in rejecting the argument that the Age Discrimination in Employment Act (ADEA) abrogated states' sovereign immunity when a constitutional violation (there, a violation of the Equal Protection Clause) was also alleged,[104] following the Supreme Court's decision in *Kimel v. Florida Board of Regents*.[105] Though this unanimous decision was implicitly overruled by the Supreme Court in *United States v. Georgia*,[106] that decision announced a new rule and thus *McGinty* was a strict application of existing precedent.

In *Burnette v. Carothers*,[107] another unanimous panel rejected the claim that a trio of environmental protection statutes abrogated state sovereign immunity because each statute contained language authorizing suits against governments only "to the extent permitted by the eleventh amendment to the Constitution."[108] Like *McGinty*, this decision also reflects a strict application of Supreme Court precedent—here, the Court's decision in *Seminole Tribe v. Florida*,[109] which held that Congress may only abrogate sovereign immunity pursuant to its powers under Section V of the Fourteenth Amendment, even if it has unequivocally expressed its intent to abrogate the immunity and has acted pursuant to another valid exercise of Congressional power.

And in *Connecticut v. Cahill*,[110] Judge Sotomayor dissented from the majority opinion, which allowed a suit by a state against officers of another state to proceed in federal district court under an argument imported from *Ex parte Young*. Judge Sotomayor would have found that the suit was between two states, thereby implicating sovereign immunity concerns and vesting original jurisdiction in the Supreme Court pursuant to 28 U.S.C. § 1251(a). In her dissent, she criticized the majority for finding that the state was not the real party in interest simply because a state official, and not the state itself, was named as the defendant. Specifically, she accused the majority of "uprooting the doctrine of *Ex parte Young*, from its foundation in the law of

[102] *See, e.g.*, Port Wash. Teachers' Ass'n v. Bd. of Educ., 478 F.3d 494 (2d Cir. 2007) (holding that because a policy stating that school staff members should report student pregnancies was not mandatory, the plaintiffs lacked Article III standing to challenge it); Farrell v. Burke, 449 F.3d 470 (2d Cir. 2006) (dismissing the claims of a parolee who did not establish sufficient injury to confer standing); Perez v. Metropolitan Correctional Center Warden, 5 F. Supp. 2d 208 (S.D.N.Y. 1998), *aff'd* 181 F.3d 83 (2d Cir. 1999).
[103] 251 F.3d 84 (2d Cir. 2001).
[104] *Id.* at 92.
[105] 528 U.S. 62 (2000).
[106] 546 U.S. 151 (2006) (holding that constitutional violations may serve to abrogate sovereign immunity).
[107] 192 F.3d 52 (2d Cir. 1999).
[108] *Id.* at 57.
[109] 517 U.S. 44, 55 (1996).
[110] 217 F.3d 93 (2d Cir. 2000).

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sovereign immunity and artificially transplanting it into the area of Supreme Court jurisdiction."[111] She continued, "[a]lthough recognizing that the doctrine of *Young* is 'not directly applicable' here, . . . the majority fails to acknowledge that the *Young* doctrine is a 'legal fiction' that arose in a narrow context, has been limited continually by the Supreme Court, and, if at all relevant to this case, teaches that federal jurisdiction should not be readily expanded."[112]

Statutes of Limitations

Judge Sotomayor's opinions on statutes of limitations comport with her measured approach in other areas. She has shielded plaintiffs from improper applications of the statues while rejecting the claims of dilatory plaintiffs.

In *Strom v. Siegel Fenchel & Peddy P.C. Profit Sharing Plan*,[113] Judge Sotomayor wrote the majority opinion vacating the district court's partial grant of summary judgment to defendants who argued that the plaintiff's claims were time-barred because she had waived her right to appeal. The plaintiff, a member of a retirement plan, filed suit under the Employee Retirement Income Security Act ("ERISA"), seeking a declaration of her rights to pension benefits and claiming a breach of fiduciary duty by plan administrators. On appeal, Judge Sotomayor found that the plan administrators were precluded from raising a failure-to-exhaust defense because they did not provide the plaintiff with written notice of their decision or a description of the applicable review procedures and time limits. "When a plan assiduously refuses to provide a claimant with information concerning her eligibility or administrative review rights under the plan," Judge Sotomayor held, "any alleged waiver simply cannot be knowing or voluntary."[114]

In *United States v. Lopez*,[115] Judge Sotomayor wrote for a majority finding that an eighteen-month delay in an immigration defendant's efforts to exhaust his administrative remedies was not unreasonable because he had been erroneously told by both the immigration judge and the Board of Immigration Appeals that relief was no longer available and was thereby denied an opportunity to seek judicial review.[116]

In *Brown v. Parkchester South Condominiums*,[117] Judge Sotomayor disagreed with the district court's dismissal of an employment discrimination claim for failure to comply with Title VII's statute of limitations. But instead of usurping the role of the district court, she remanded the case to the district court. Judge Sotomayor found sufficient evidence to warrant a hearing to determine whether the employee's alleged medical condition warranted equitable tolling.

However, in *United States v. Cote*,[118] Judge Sotomayor ruled in favor of the respondent, finding noncoercive the government's offer to pursue lesser charges in exchange for plaintiff's agreement that the running of the statutory limitation period be tolled. The petitioner would have otherwise been vulnerable to prosecution on a capital charge with no statute of limitations, and

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[111] *Id.* at 107 (Sotomayor, J., dissenting).
[112] *Id.* at 106-07.
[113] 497 F.3d 234 (2d Cir. 2007).
[114] *Id.* at 246.
[115] 445 F.3d 90 (2d Cir. 2006).
[116] *Id.* at 93.
[117] 287 F.3d 58 (2d Cir. 2002).
[118] 544 F.3d 88 (2d Cir. 2008).

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he failed to assert a statute of limitations defense at trial.[119] And in *King v. American Airlines*,[120] Judge Sotomayor ruled against African-American plaintiffs who appealed the dismissal of their race discrimination claim against an airline, which the district court had ruled untimely. The plaintiffs—a couple bumped from an international flight originating in the United States, allegedly on the basis of their race—argued that the three-year statute of limitations applicable to 42 U.S.C. § 1981 actions governed their suit. But Judge Sotomayor affirmed the district court, holding that the discrimination claim fell within the scope of an international treaty that preempted federal and state civil rights claims and required the application of the two-year statute of limitations prescribed under the treaty.

Attorneys' Fees

Judge Sotomayor's jurisprudence in attorneys' fees cases again shows her to be a balanced and disciplined jurist. She appears to appreciate that the unavailability of attorneys' fees chills the enforcement of civil rights laws and frustrates attempts by the civil rights bar to fulfill its congressionally-approved role as "private attorneys general." She has often joined majorities to uphold reasonable awards of attorneys' fees. In doing so, she has adopted an appropriately narrow reading of the Supreme Court's decision in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*,[121] which established new rules for determining whether a plaintiff could be considered a "prevailing party" for purposes of such awards. But she has also limited overreaching by plaintiffs' counsel.

In *A.R. ex rel. R.V. v. New York City Department of Education*,[122] Judge Sotomayor joined a unanimous opinion affirming the grant of fee awards by the district court to parents of disabled children who, after administrative due process hearings under the IDEA, secured administrative orders in their favor incorporating the terms of a favorable settlement. The panel reasoned that such an order changes the legal relationship between the parties and is enforceable under 42 U.S.C. § 1983.[123] By making fees available even if a lawsuit is not filed, this decision provides a tremendous incentive to parents to vindicate their children's rights through administrative hearings.[124] And in *National Helicopter Corp. v. City of New York*,[125] then-District Judge Sotomayor deemed the plaintiff to be a "prevailing party" even though it ultimately succeeded on fewer than half of its claims. Judge Sotomayor also declined to adopt the defendant's theory that fees were inappropriate under 42 U.S.C. § 1988 because the only basis for the plaintiff's partial relief was the Supremacy Clause, which is unenforceable under 42 U.S.C. § 1983.

In a number of other cases, Judge Sotomayor has limited fee awards.[126] Again demonstrating her balanced approach, Judge Sotomayor has also joined majority opinions in other cases holding that fees were unavailable.[127]

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[119] *Id.* at 103.
[120] 284 F.3d 352 (2d Cir. 2002).
[121] 532 U.S. 598 (2001).
[122] 407 F.3d 65 (2d Cir. 2005).
[123] *Id.* at 76.
[124] *Cf.* Mr. L. v. Sloan, 449 F.3d 405 (2d Cir. 2006) (excluding from the reach of *A.R. ex rel. R.V.* those cases in which a settlement agreement is reached privately, without changing the legal relationship of the parties).
[125] No. 96-3574 (SS), 1999 WL 562031, at *1 (S.D.N.Y. July 30, 1999).
[126] *See, e.g.*, B. ex rel. M.B. v. East Granby Bd. of Educ., 2006 U.S. App. LEXIS 27014 (2d Cir. 2006) (vacating in part a district court's award of attorneys' fees in an IDEA claim because the due process hearing officer lacked

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IX. CRIMINAL JUSTICE

One of LDF's primary missions is ensuring the fair and equitable treatment of African Americans within the criminal justice system. Issues such as defendants' rights to appeal their constitutional claims to federal courts through habeas proceedings, the right to jury selection procedures free from racial discrimination, and the protection of an individual's right to be free of unreasonable searches and seizures, are at the core of the protections due to criminal defendants, and of LDF's advocacy in the criminal justice arena.

Each year, the Supreme Court is the final arbiter of many matters of critical importance to criminal defendants. In its 2008 Term, the Court considered, among other things, the scope of the Fourth Amendment's exclusionary rule,[128] the right of inmates to obtain post-conviction analysis of DNA evidence,[129] the right to a speedy trial,[130] the conditions under which the government may conduct a warrantless search,[131] and the circumstances under which an individual is entitled to the protections attached to the Sixth Amendment right to counsel.[132] If appointed to the bench, Judge Sotomayor would have the opportunity to join her fellow justices in shaping the scope of criminal law and procedures for many years to come.

LDF has examined Judge Sotomayor's circuit court record in cases involving jury discrimination, habeas corpus, civil rights prosecutions, and Fourth and Sixth Amendment issues. While we do not necessarily agree with the rulings in all of the cases discussed below, we nonetheless believe her overall record supports her nomination.

Discrimination in Jury Selection

In its landmark *Batson v. Kentucky*[133] decision, the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits the use of peremptory strikes to remove jurors on the basis of race. The Court held that "[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure,"[134] and that "[a] person's race simply is unrelated to his fitness as a juror."[135] In 1991, the Court clarified aspects of its *Batson* ruling in

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jurisdiction to award fees and had miscalculated the same, and remanding to the district court for proper calculation); Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp., 418 F.3d 168 (2d Cir. 2005) (limiting a fee award based upon the language of the plaintiff's retainer agreement and finding unenforceable language in the agreement that attempted to calculate client's liabilities to counsel based on what client could secure as reimbursement for those liabilities in a contractual indemnity action).

[127] *See, e.g.*, Vultaggio v. Bd. of Regents, 343 F.3d 598 (2d Cir. 2003) (per curiam) (holding that plaintiffs who engage in complaint resolution procedures are not entitled to awards of attorneys' fees because such actions were not identified in the IDEA); Garcia v. Yonkers Sch. Dist., 561 F.3d 97 (2d Cir. 2009) (holding that the plaintiffs were not "prevailing parties" under *Buckhannon* because verbal comments from the bench suggesting the possible entry of an order favorable to plaintiffs were insufficient to change the legal relationship between the parties).

[128] Herring v. United States, 129 S.Ct. 695 (2009).

[129] Dist. Att'y's Office of Third Jud. Dist. v. Osborne, 129 S. Ct. 488 (2008).

[130] Vermont v. Brillon, 129 S.Ct. 1283 (2009).

[131] Pearson v. Callahan, 129 S.Ct. 808 (2009); Arizona v. Gant, 129 S. Ct. 1710 (2009).

[132] Montejo v. Louisiana, 129 S.Ct. 2079 (2009).

[133] 476 U.S. 79 (1986).

[134] *Id.* at 86.

[135] *Id.* at 87 (citation omitted).

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Powers v. Ohio.[136] In *Powers*, the Court held that "a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded jurors share the same race."[137] In so holding, the Court noted that despite the many cases it had heard raising the issue of racial discrimination in jury selection, it had "not questioned the premise that racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts."[138]

A review of the *Batson* decisions for which Judge Sotomayor has authored opinions or sat on the panel reveals a commitment to the core principle of *Batson*, as well as to the procedural protections surrounding a defendant's right to bring such challenges through habeas proceedings.

In *Galarza v. Keane*,[139] Judge Sotomayor wrote for the majority in a case questioning whether a defendant had properly preserved his *Batson* challenge for federal habeas review where a trial court had explicitly ruled on only two of the defendant's five *Batson* challenges, and the defendant failed to object. At trial, the petitioner, Galarza, made a *Batson* objection after the prosecutor used peremptory strikes to remove five Hispanic members of the jury venire.[140] In rejecting Galarza's *Batson* challenge the trial court only discussed and credited the prosecution's race-neutral reasons for two of the strikes.[141] Galarza did not object to the trial court's incomplete *Batson* ruling. The state appellate court rejected Galarza's appeal on the merits.[142] On habeas review, the magistrate judge and district court found that Galarza had waived his *Batson* claims by failing to properly pursue them during voir dire, and, in the alternative, found that the trial court had credited the prosecutor's race-neutral explanations for the strikes.[143]

The most important aspect of the Second Circuit opinion authored by Judge Sotomayor is the court's ruling regarding the application of a state procedural bar. Although Judge Walker, writing in dissent, would have found that Galarza's failure to object to the trial court's incomplete factual finding was "fatal to his claim,"[144] Judge Sotomayor's majority decision countered that "in order for federal habeas review to be procedurally barred, a state court must actually have relied on a procedural bar as an independent basis for its disposition of the case, and the state court's reliance on state law must be unambiguous and clear from the face of the opinion."[145] The majority found that the state appellate court had ruled on the merits of the *Batson* claim, and did not in fact apply or reference such a procedural bar.[146] However, the majority held that even assuming the appellate court had made an ambiguous reference to such a bar, "the dissent's analysis would require us to disregard our established precedent that such an ambiguity is insufficient to preclude our review of a habeas petition."[147] The court concluded that "we decline to create a procedural requirement that a party must repeat his or her *Batson*

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[136] 499 U.S. 400 (1991).
[137] *Id.* at 402.
[138] *Id.*
[139] 252 F.3d 630 (2d Cir. 2001).
[140] *Id.* at 633-34.
[141] *Id.* at 634.
[142] *Id.*
[143] *Id.* at 634-35.
[144] *Id.* at 642.
[145] *Id.* at 637.
[146] *Id.*
[147] *Id.*

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challenges three times at trial in order to avoid a procedural bar."[148] Because the trial court had failed to issue a complete *Batson* ruling, the court remanded the case to the district court to determine whether to expand the record or return the matter to the state court for reconsideration.[149]

Although the panel ultimately rejected the petitioner's *Batson* challenge in *Green v. Travis*,[150] the decision demonstrates Judge Sotomayor's straightforward application of federal precedent to reverse a state court finding that the defendant had not made a prima facie case of a *Batson* violation. In *Green*, the defendant alleged at trial that *Batson* was violated by the removal of African-Americans and Hispanics from his jury, stating that although the jurors in question were of "different genders and different Hispanic race and the black race [sic] ... I believe that the People are discriminating on race, which is absolutely forbidden to be done."[151] The state appellate court held that "the defendant failed to establish a prima facie case that the prosecutor's peremptory challenges were employed for discriminatory purposes because 'minorities' in general do not constitute a cognizable racial group."[152] On habeas review before the Second Circuit, the state urged adoption of this standard. Judge Sotomayor's decision pointedly disagreed with the state and the appellate court's analysis. Writing for the unanimous panel, she noted that *Batson* held that a defendant seeking to establish a prima facie case of discrimination in the peremptory exercise of petit jury strikes "first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges *to remove from the venire members of the defendant's race*."[153] However, she noted that:

> The Supreme Court's subsequent decision in *Powers v. Ohio*, 499 U.S. 400 (1991), dramatically lessened the import of *Batson*'s "cognizable racial group" language....*Powers* makes clear that the only continuing relevance of *Batson*'s "cognizable racial group" language is the requirement that a defendant alleging purposeful racial discrimination in the exercise of peremptory strikes must demonstrate that a peremptorily excused venireperson was challenged by reason of being a member of *some* "cognizable racial group."[154]

The court concluded by stating that it "is indisputable that one venireperson cannot be excluded from a jury on account of race. *A fortiori*, several venirepersons of different races cannot be excluded from a jury on account of race."[155] Nevertheless, turning to the merits, the panel rejected the *Batson* claim.

In *United States v. Bryce*,[156] co-authored by Judges Jacobs and Sotomayor, the panel applied *Batson* to uphold the district court's determination that the prosecutor had offered a valid race-neutral reason when the prosecutor explained that the reason for striking a 19-year-old

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[148] *Id.* at 638.
[149] *Id.* at 640.
[150] 414 F.3d 288 (2d Cir. 2005).
[151] *Id.* at 291-92.
[152] *Id.* at 292.
[153] *Id.* at 296-97 (internal quotation and citation omitted).
[154] *Id.* at 297-98.
[155] *Id.* at 298.
[156] 208 F.3d 346 (2d Cir. 1999).

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African-American potential juror was the juror's lack of life experience, and the prosecutor also struck all other jurors younger than age 41.[157]

In two cases, Judge Sotomayor joined panel decisions reversing the district court's grant of a writ of habeas corpus on a petitioner's *Batson* claims. In *Rodriguez v. Schriver*,[158] the state appellate court had held that the petitioner's *Batson* challenge was unpreserved for appellate review under New York's contemporaneous objection requirement because after the prosecutor provided race-neutral reasons for striking four Hispanic jurors at trial, Rodriguez had not alleged that the reasons were pretexts, indicating only that the prosecutor had "challenged every single Hispanic on the record."[159] The district court disagreed with the state appellate court's analysis, finding that the prosecutor's strike of one of the four Hispanic jurors as to whom the *Batson* claim was raised was not race neutral for purposes of *Batson*'s second step.[160] On review, the Second Circuit held, however, that the prosecutor's strike of juror Gomez because he was from Santo Domingo was not "inherently discriminatory" considering the other facts presented in the case.[161] The panel therefore held that an adequate state procedural bar applied and reversed the district court's grant of the writ of habeas corpus.

In the unpublished case of *Hunter v. Miller*,[162] the district court had granted a writ of habeas corpus after finding that "the trial court precluded petitioner from developing the record to support his *Batson* claim, first by hearing petitioner's challenge off the record and second, through his hasty denial of that claim, by intimidating petitioner's attorney from making his record or raising additional *Batson* challenges later in the jury selection process."[163] In a summary order, the Second Circuit found nothing in the record to support the intimidation finding, and noted that while it was "deeply troubled" by the state trial court practice of going off-the-record during jury selection, the petitioner's attorney had neither objected to this procedure nor raised a challenge to make a record.[164]

Habeas

According to a study by the National Center for State Courts, each year, state prisoners file more than 18,000 cases seeking habeas relief, which amounts to one out of every 14 civil cases filed in federal district courts.[165] Between her service on the district court and as a circuit court judge, Judge Sotomayor has extensive experience with habeas cases. In each of the published decisions Judge Sotomayor has authored where the habeas issue was resolved by the decision, the panel has denied the petition.

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[157] *See id.* at 350 n.3.
[158] 392 F.3d 505 (2d Cir. 2004).
[159] *Id.* at 508-10.
[160] *Id.* at 509.
[161] *Id.* at 510-11.
[162] 144 F. App'x 202 (2d Cir. 2005).
[163] *Id.* at 203.
[164] *Id.*
[165] NANCY J. KING, ET AL., NAT'L CTR. FOR STATE COURTS, FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, at 3 (National Center for State Court, Aug. 2007), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/219558.pdf.

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In *Doe v. Menefee*,[166] over a lengthy dissent by Judge Pooler, Judge Sotomayor rejected a district court's finding that petitioner Doe had presented a credible claim of actual innocence, and affirmed the district court's ultimate denial of his habeas petition. Doe, who had been convicted of second-degree sodomy, sought to file a petition for habeas corpus after Antiterrorism and Effective Death Penalty Act of 1996's ("AEDPA") limitation period had run. Although the case raised the question of whether AEDPA's statute of limitations can be tolled by credible claims of actual innocence, the panel did not reach the question because it held that such a credible claim had not been presented. Judge Pooler, in dissent, criticized the majority for "second guess[ing] the trial judge's credibility findings where no compelling extrinsic or other evidence compels a different conclusion."[167]

In *Gilchrist v. O'Keefe*,[168] the court examined a habeas case raising the question of the scope of the Sixth Amendment right to counsel. Judge Sotomayor wrote for a unanimous panel to hold that the state court's decision to deprive an indigent defendant of counsel at his sentencing hearing after the defendant punched his appointed attorney in the ear and ruptured his eardrum was neither contrary to nor an unreasonable application of clearly established federal law for purposes of the court's habeas review. In coming to this conclusion, the panel noted that the Supreme Court precedents of *Illinois v. Allen*[169] and *Taylor v. United States*[170] stand for the principle that fundamental rights can be forfeited, and held that in the instant case, the state court's determination that the defendant had forfeited the right to counsel, rather than waived that right, was not unreasonable.

In *Brown v. Miller*[171] the defendant argued that the procedure by which he was sentenced as a persistent felony offender violated his right to a jury trial under the Sixth Amendment. The state appellate court found that the claim was procedurally barred under its precedent in *People v. Rosen*,[172] which involved a decision about whether a defendant had a valid federal *Apprendi* claim. The Second Circuit held that, "[b]ecause the Appellate Division in this case relied on *Rosen* ... [t]he procedural ruling based on state law was therefore interwoven with the court's rejection of the federal law claim on the merits and does not bar federal habeas review."[173] However, the panel ultimately rejected the habeas petition, finding that the state court's ruling had not constituted an unreasonable application of federal law.

In *Campusano v. U.S.*,[174] the court faced the question whether an attorney can be ineffective for failing to file an appeal where the petitioner waived his right to appeal in a plea agreement. Judge Sotomayor, writing for a unanimous panel, held that "where counsel does not file a requested notice of appeal and fails to file an adequate *Anders* brief [requesting withdrawal but referring to anything in the record that might support an appeal], courts may not dismiss the hypothetical appeal as frivolous on collateral review."[175] The panel thus remanded to the district court for an evaluation of whether the petitioner instructed his attorney to file an appeal,

[166] 391 F.3d 147 (2d Cir. 2004).
[167] *Id.* at 178 (Pooler, J., dissenting).
[168] 260 F.3d 87 (2d Cir. 2001).
[169] 397 U.S. 337 (1970).
[170] 414 U.S. 17 (1973).
[171] 451 F.3d 54 (2d Cir. 2006).
[172] 96 N.Y.2d 329 (2001).
[173] *Brown*, 451 F.3d at 57 (citation and quotation marks omitted).
[174] 442 F.3d 770 (2d Cir. 2006).
[175] *Id.* at 775.

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instructing that he should be allowed a direct appeal if the district court answered this question in the affirmative.

Civil Rights Actions in the Criminal Context

Judge Sotomayor has authored a number of decisions in civil rights actions sounding in the criminal context. In *United States v. Cote*,[176] Judge Sotomayor wrote for a unanimous panel to reverse a district court's entry of acquittal in a case where a prison security guard was charged with depriving an inmate of his civil rights under 18 U.S.C. § 242. The statute makes willfully depriving a person of his or her constitutional or federal rights a criminal violation when the official is acting under color of law. After conducting a lengthy examination of the facts of the case, Judge Sotomayor concluded that the district court had abused its discretion in discrediting testimony supporting the conviction, including testimony from three inmates who were eyewitnesses to the offense and a neurosurgeon who had examined the deceased inmate.

In *Smith v. Edwards*,[177] Judge Sotomayor wrote for the panel to reverse a district court's refusal to dismiss plaintiff's 42 U.S.C. § 1983 claim against a police officer and the town of Fairfield, CT, alleging unlawful arrest and a failure to train. The officer had filed a probable cause affidavit and obtained an arrest warrant based on his investigation of allegations that plaintiff had sexually abused his daughter. The charges were subsequently dismissed, and the plaintiff sued, alleging that the officer withheld material information from the magistrate. The Second Circuit found, however, that there was no evidence that the additional information would have been critical to the magistrate's evaluation of probable cause for purposes of issuing the warrant, and remanded the case for dismissal of the plaintiff's federal claims.

In *Amaker v. Foley*,[178] a state inmate brought a 42 U.S.C. § 1983 action against correctional officers alleging race discrimination. The district court entered summary judgment for the officers because the inmate failed to file opposition papers to the summary judgment motion. Judge Sotomayor, writing for a unanimous panel, reversed. The court held that the district court's judgment was, "inconsistent with Federal Rule of Civil Procedure 56 because a court cannot relieve the moving party of its initial burden of production under that rule."[179] The court noted that, "[t]he district court granted summary judgment solely for failure to file opposing papers and did not, as required, assess whether the defendants had met their burden to demonstrate that summary judgment was appropriate."[180]

In *Brown v. City of Oneonta, New York*,[181] Judge Sotomayor joined Judge Calabresi's dissent from a denial of rehearing en banc in a case in which the Second Circuit denied African-American citizens' racial discrimination claims under 42 U.S.C. §§ 1981, 1985, 1985(3), and 1986, and the Equal Protection Clause of the Fourteenth Amendment. The citizens filed these claims after, in their town of predominantly white citizens, police attempted to locate and question all African-American males in the town based upon the description of a crime suspect. The dissent noted that police in effect created their own racial classification by questioning every black male student, and at least one black woman, along with every non-white person in the city

[176] 544 F.3d 88 (2d Cir. 2008).
[177] 175 F.3d 99 (2d Cir. 1999).
[178] 274 F.3d 677 (2d Cir. 2001).
[179] *Id.* at 681.
[180] *Id.*
[181] 235 F.3d 769 (2d Cir. 2000).

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regardless of age or sex, despite the victim's description, which included mention of a cut on the assailant's hands.

Fourth Amendment

While on the Second Circuit, Judge Sotomayor has issued dissents from two cases about whether the Fourth Amendment permits strip searches in the absence of individualized suspicion. In *N.G. and S.G. v. Connecticut*,[182] Judge Sotomayor dissented from the panel decision upholding Connecticut's blanket strip search policy for juveniles' initial entries into juvenile detention facilities absent any individualized suspicion and where the juveniles in question had not been accused of committing a crime. Detailing the trauma and humiliation the young female plaintiffs had experienced, she noted that courts "should be especially wary of strip searches of children, since youth 'is a time and condition of life when a person may be most susceptible to influence and to psychological damage.'"[183] Similarly, in *Kelsey v. County of Schoharie*,[184] Judge Sotomayor dissented from a panel decision upholding a county jail's "clothing exchange" procedure, whereby male inmates who were not expected to make bail had to change out of their street clothes and into jail-issued clothing, in view of officers and without any reasonable suspicion. Citing to the *N.G.* decision, she observed that "insofar as the majority suggests that 'brief[]' exposure of one's private parts does not implicate the Fourth Amendment ... our precedent does not support the notion that a search need be prolonged or thorough to be termed a 'strip search.'"[185]

Judge Sotomayor has also authored a number of notable decisions regarding the Fourth Amendment's exclusionary rule. In *United States v. Santa*[186] and *United States v. Falso*[187] Judge Sotomayor wrote opinions in cases involving exceptions to this rule. In *Santa*, Judge Sotomayor applied the Supreme Court's decision in *Arizona v. Evans*[188] to a case in which officers arrested defendant Santa based upon a warrant that, due to the errors of court employees, remained in the police database despite having been vacated. Santa was convicted of possession with intent to distribute after three grams of cocaine were discovered on his person during the arrest. Writing for a unanimous panel, Judge Sotomayor held that the arresting officers' reliance on the statewide computer database was objectively reasonable.[189] The Supreme Court endorsed this position in its ruling in *Herring v. United States*[190] last term.

In *Falso*, Chief Judge Jacobs dissented from Judge Sotomayor's decision extending the good-faith exception to the exclusionary rule to a situation where the officer who swore out an affidavit supporting a warrant for which there was not probable cause was the same officer who executed the warrant. Following the denial of defendant Falso's motion to suppress evidence seized from his home, he was convicted of numerous crimes related to child pornography. On

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[182] 382 F.3d 225 (2d Cir. 2004).
[183] *Id.* at 239 (Sotomayor, J., dissenting) (quoting Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)).
[184] 567 F.3d 54 (2d Cir. 2009).
[185] *Id.* at 68 (Sotomayor, J., dissenting) (citing N.G., 382 F.3d at 228 n.4).
[186] 180 F.3d 20 (2d Cir. 1999).
[187] 544 F.3d 110 (2d Cir. 2008).
[188] 514 U.S. 1 (1995) (holding that evidence is not excludable under the Fourth Amendment where law enforcement officers act in reliance upon police records containing erroneous information due to the clerical errors of court employees).
[189] *Santa*, 180 F.3d at 27-30.
[190] 129 S.Ct. 695 (2009).

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appeal, he claimed that the search warrant was not supported by probable cause. Judge Sotomayor agreed that there was insufficient probable cause to search Falso's home. However, the panel held that the good-faith exception to the exclusionary rule outlined in *United States v. Leon*[191] applied "to evidence seized 'in objectively reasonable reliance on' a warrant issued by a detached and neutral magistrate judge, even where the warrant is subsequently deemed invalid," and thus to Falso's situation.[192] In dissent, Chief Judge Jacobs wrote that, in his assessment, the good-faith exception could not apply, because the affidavit was "recklessly misleading (at best),"[193] and the officer who swore out the affidavit also executed it. Under such circumstances, the officer could "hardly claim good-faith reliance on a warrant issued by a judge who was misdirected by the officer himself[.]"[194]

Judge Sotomayor also expanded upon the application of the exclusionary rule in *United States v. Howard*.[195] In that case, she ruled that the automobile exception to the Fourth Amendment's warrant requirement applied even though the defendants had been lured away from their cars by state troopers at the time of the searches.[196] Judge Sotomayor held that the exception applies "[e]ven where there is little practical likelihood that the vehicle will be driven away," as long as the "possibility exists."[197]

X. CONCLUSION

It is LDF's assessment that Judge Sotomayor's personal and professional background, and her years of experience in government, private practice, and on the bench, make her an ideal nominee to serve as the 111th Justice of the United States Supreme Court. As reflected in the body of decisions we have reviewed here, Judge Sotomayor applies a detailed, considered evaluation of the matters that come before her, delving into the law and facts in a manner consistent with controlling precedent. While maintaining a jurisprudence that is detached from ideological concerns, Judge Sotomayor has nevertheless demonstrated a sense of understanding about how judicial decisions impact the real-life experiences of everyday people. It is her rigorous intellect coupled with this common touch that we believe makes Judge Sotomayor precisely the type of justice needed for these times, when, despite the progress that has been made on civil rights issues, there is still much to accomplish. We are thus pleased to strongly support President Obama's nomination of Judge Sonia Sotomayor to serve as the next justice of the United States Supreme Court.

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[191] 468 U.S. 897 (1984).
[192] *Falso*, 544 F.3d at 125 (citation omitted).
[193] *Id.* at 132 (Jacobs, C.J., dissenting).
[194] *Id.* at 136 (Jacobs, C.J., dissenting).
[195] 489 F.3d 484 (2d Cir. 2007).
[196] *Id.* at 492-94.
[197] *Id.* at 493.

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Hon. Patrick J. Leahy
Chairman, U.S. Senate Committee on the Judiciary
433 Russell Senate Office Building
Washington, D.C. 20510

Hon. Jefferson B. Sessions
Ranking Member, U.S. Senate Committee on the Judiciary
335 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Sessions:

We the undersigned professors of law write in support of the confirmation of Judge Sonia Sotomayor as an Associate Justice of the United States Supreme Court.

As a federal judge at both the trial and appellate levels, Judge Sotomayor has distinguished herself as a brilliant, careful, fair-minded jurist whose rulings exhibit unfailing adherence to the rule of law. Her opinions reflect careful attention to the facts of each case and a reading of the law that demonstrates fidelity to the text of statutes and the Constitution. She pays close attention to precedent and has proper respect for the role of courts and the other branches of government in our society. She has not been reluctant to protect core constitutional values and has shown a commitment to providing equal justice for all who come before her.

Judge Sotomayor's stellar academic record at Princeton and Yale Law School is testament to her intellect and hard work, and is especially impressive in light of her rise from modest circumstances. That she went on to serve as an Assistant District Attorney for New York County speaks volumes about her strength of character and commitment to the rule of law. When in private practice as a corporate litigator in New York, she was deeply engaged in public activities, including service on the New York Mortgage Agency and the New York City Campaign Finance Board, as well as serving on the Board of Directors of the Puerto Rican Legal Defense and Education Fund.

Her career won bi-partisan respect, which led to her becoming a U.S. District Court judge (nominated by President George H.W. Bush on the recommendation of Senator Daniel Patrick Moynihan, and confirmed by a majority Democratic Senate in 1992). Her performance on the district court solidified Judge Sotomayor's support, and in 1998 she was elevated to the Second Circuit (nominated by President Bill Clinton and confirmed by a majority Republican Senate).

Judge Sotomayor will bring to the Supreme Court an extraordinary personal story, academic qualifications, remarkable professional accomplishments and much needed ethnic and gender diversity. We are confident that Judge Sotomayor's intelligence, her character forged by her extraordinary background and experience, and her profound respect for the law and the craft of judging make her an exceptionally well-qualified nominee to the Supreme Court and we urge her speedy confirmation.

Sincerely,

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Ellen	Katz	University of Michigan Law School	MI
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Paul D.	Reingold	University of Michigan Law School	MI
Vivek S.	Sankaran	University of Michigan Law School	MI
David A.	Santacroce	University of Michigan Law School	MI
Margo	Schlanger	University of Michigan Law School	MI
Anne	Schroth	University of Michigan Law School	MI
Kimberly	Thomas	University of Michigan Law School	MI
David M.	Uhlmann	University of Michigan Law School	MI
Mark	Van Putten	University of Michigan Law School	MI
Frank	Vandervort	University of Michigan Law School	MI
Mark D.	West	University of Michigan Law School	MI
Robert	Ackerman	Wayne State University School of Law	MI
Tom	Romero	Hamline University School of Law	MN
Beverly	Balos	University of Minnesota Law School	MN
Carol	Chomsky	University of Minnesota Law School	MN
Mary	Fellows	University of Minnesota Law School	MN
Peter	Erlinder	William Mitchell College of Law	MN
Barbara	Gilchrist	Saint Louis University School of Law	MO
Jasmine	Abdel-khalik	University of Missouri-Kansas City School of Law	MO
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Gregg	Kettles	Mississippi College School of Law	MS

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George	Cochran	University of Mississippi School of Law	MS
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Matthew	Hall	University of Mississippi School of Law	MS
Cynthia	Ford	University of Montana School of Law	MT
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Cynthia	Adcock	Charlotte School of Law	NC
Katharine	Bartlett	Duke Law School	NC
Sara Sun	Beale	Duke Law School	NC
Guy-Uriel	Charles	Duke Law School	NC
Doriane Lambelet	Coleman	Duke Law School	NC
James E.	Coleman	Duke Law School	NC
Andrew H.	Foster	Duke Law School	NC
James	Fuller	Duke Law School	NC
Paul	Haagen	Duke Law School	NC
Ryke	Longest	Duke Law School	NC
Carolyn	McAllaster	Duke Law School	NC
Thomas	Metzloff	Duke Law School	NC
Ralf	Michaels	Duke Law School	NC
Theresa A.	Newman	Duke Law School	NC
Michelle	Nowlin	Duke Law School	NC
Jedediah	Purdy	Duke Law School	NC
Allison	Rice	Duke Law School	NC
Richard L.	Schmalbeck	Duke Law School	NC
Neil	Siegel	Duke Law School	NC
Neil	Vidmar	Duke Law School	NC
Jane	Wettach	Duke Law School	NC
Catherine	Dunham	Elon University School of Law	NC
Eric	Fink	Elon University School of Law	NC
George	Johnson, Jr.	Elon University School of Law	NC
Catherine	Wasson	Elon University School of Law	NC
David	Green	North Carolina Central University School of Law	NC
Susan	Hauser	North Carolina Central University School of Law	NC
Deria	Hayes	North Carolina Central University School of Law	NC
Irving	Joyner	North Carolina Central University School of Law	NC
Reginald	Mombrun	North Carolina Central University School of Law	NC
Frances	Solari	North Carolina Central University School of Law	NC
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Tamar R.	Birckhead	University of North Carolina School of Law	NC
Kenneth	Broun	University of North Carolina School of Law	NC
Caroline N.	Brown	University of North Carolina School of Law	NC
Patricia	Bryan	University of North Carolina School of Law	NC
Maxine	Eichner	University of North Carolina School of Law	NC
Laura N.	Gasaway	University of North Carolina School of Law	NC
Paul	Hardin	University of North Carolina School of Law	NC
Thomas	Hazen	University of North Carolina School of Law	NC
Joseph E.	Kennedy	University of North Carolina School of Law	NC
William P.	Marshall	University of North Carolina School of Law	NC
Steven	Melamut	University of North Carolina School of Law	NC
Robert P.	Mosteller	University of North Carolina School of Law	NC
Eric	Muller	University of North Carolina School of Law	NC
Daniel H.	Pollitt	University of North Carolina School of Law	NC
Beth	Posner	University of North Carolina School of Law	NC
Richard	Rosen	University of North Carolina School of Law	NC

William	Turnier	University of North Carolina School of Law	NC
Judith	Wegner	University of North Carolina School of Law	NC
A. Mark	Weisburd	University of North Carolina School of Law	NC
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Chris	Coughlin	Wake Forest School of Law	NC
Michael Kent	Curtis	Wake Forest School of Law	NC
Timothy	Davis	Wake Forest School of Law	NC
Shannon	Gilreath	Wake Forest School of Law	NC
Mark	Hall	Wake Forest School of Law	NC
John	Knox	Wake Forest School of Law	NC
John	Korzen	Wake Forest School of Law	NC
Blake D.	Morant	Wake Forest School of Law	NC
J. Wilson	Parker	Wake Forest School of Law	NC
Kami	Simmons	Wake Forest School of Law	NC
Margaret	Taylor	Wake Forest School of Law	NC
Kirsten	Dauphinais	University of North Dakota School of Law	ND
Gregory	Gordon	University of North Dakota School of Law	ND
Christine	Venter	University of North Dakota School of Law	ND
Marvin	Ammori	University of Nebraska - Lincoln College of Law	NE
Eric	Berger	University of Nebraska - Lincoln College of Law	NE
Sandra	Zellmer	University of Nebraska - Lincoln College of Law	NE
Ann	Freedman	Rutgers School of Law - Camden	NJ
Beth	Stephens	Rutgers School of Law - Camden	NJ
Saul	Mendlovitz	Rutgers School of Law-Newark	NJ
James	Pope	Rutgers School of Law-Newark	NJ
Paul	Tractenberg	Rutgers School of Law-Newark	NJ
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Marina	Lao	Seton Hall University School of Law	NJ
Solangel	Maldonado	Seton Hall University School of Law	NJ
Alice	Ristroph	Seton Hall University School of Law	NJ
Sherri	Burr	University of New Mexico School of Law	NM
Laura	Gomez	University of New Mexico School of Law	NM
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Stacy	Caplow	Brooklyn Law School	NY
William	Hellerstein	Brooklyn Law School	NY
Minna	Kotkin	Brooklyn Law School	NY
Bailey	Kuklin	Brooklyn Law School	NY
Elizabeth	Schneider	Brooklyn Law School	NY
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Janet	Calvo	City University of New York School of Law	NY
Frank	Deale	City University of New York School of Law	NY
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Stephen	Loffredo	City University of New York School of Law	NY
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Merrick	Rossein	City University of New York School of Law	NY
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Sarah	Valentine	City University of New York School of Law	NY
Vivian	Berger	Columbia Law School	NY
Jagdish	Bhagwati	Columbia Law School	NY
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Jack	Greenberg	Columbia Law School	NY
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Lance	Liebman	Columbia Law School	NY
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George	Conk	Fordham University School of Law	NY
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Sheila	Foster	Fordham University School of Law	NY
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Joseph	Perillo	Fordham University School of Law	NY
Catherine	Powell	Fordham University School of Law	NY
Martha	Rayner	Fordham University School of Law	NY
Terry	Smith	Fordham University School of Law	NY
Gemma	Solimene	Fordham University School of Law	NY
Olivier	Sylvain	Fordham University School of Law	NY
Rachel	Vorspan	Fordham University School of Law	NY
Nora	Demleitner	Hofstra University Law School	NY
Janet	Dolgin	Hofstra University Law School	NY
Eric	Freedman	Hofstra University Law School	NY
Monroe	Freedman	Hofstra University Law School	NY
Elizabeth	King	Hofstra University Law School	NY
David	Rubenstein	Hofstra University Law School	NY
Norman	Silber	Hofstra University Law School	NY
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Claudia	Angelos	New York University School of Law	NY
Derrick	Bell	New York University School of Law	NY
Sarah	Burns	New York University School of Law	NY
Paul	Chevigny	New York University School of Law	NY
Noel B.	Cunningham	New York University School of Law	NY
Harvey P.	Dale	New York University School of Law	NY
Peggy Cooper	Davis	New York University School of Law	NY
Rochelle	Dreyfuss	New York University School of Law	NY

Cynthia	Estlund	New York University School of Law	NY
Eleanor	Fox	New York University School of Law	NY
Paula	Galowitz	New York University School of Law	NY
David	Garland	New York University School of Law	NY
Helen	Hershkoff	New York University School of Law	NY
Randy	Hertz	New York University School of Law	NY
Arthur	Leonard	New York University School of Law	NY
Deborah	Malamud	New York University School of Law	NY
Carlin	Meyer	New York University School of Law	NY
Arthur	Miller	New York University School of Law	NY
Nancy	Morawetz	New York University School of Law	NY
Smita	Narula	New York University School of Law	NY
William E.	Nelson	New York University School of Law	NY
Bert	Neuborne	New York University School of Law	NY
Richard	Revesz	New York University School of Law	NY
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Helen	Scott	New York University School of Law	NY
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Kenji	Yoshino	New York University School of Law	NY
Adam	Zimmerman	New York University School of Law	NY
Diane Leenheer	Zimmerman	New York University School of Law	NY
Barbara	Atwell	Pace Law School	NY
Jeffrey	Miller	Pace Law School	NY
Richard	Ottinger	Pace Law School	NY
Ann	Powers	Pace Law School	NY
Michelle	Simon	Pace Law School	NY
Lydie	Pierre-Louis	St. John's University School of Law	NY
Paula	Johnson	Syracuse University College of Law	NY
LaVonda	Reed-Huff	Syracuse University College of Law	NY
Harold	Abramson	Touro Law Center	NY
Fabio	Arcila, Jr.	Touro Law Center	NY
Peter	Davis	Touro Law Center	NY
Thomas	Schweitzer	Touro Law Center	NY
Hazel	Weiser	Touro Law Center (former)	NY
Howard	Glickstein	Touro Law School	NY
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Kathleen	Carrick	Case Western Reserve University	OH
Laura	Chisolm	Case Western Reserve University	OH
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Jim	Brudney	The Ohio State University Moritz College of Law	OH
Martha	Chamallas	The Ohio State University Moritz College of Law	OH
Christopher	Fairman	The Ohio State University Moritz College of Law	OH
Lawrence	Herman	The Ohio State University Moritz College of Law	OH
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Malina	Coleman	University of Akron School of Law	OH
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Margery B.	Koosed	University of Akron School of Law	OH
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Kalyani	Robbins	University of Akron School of Law	OH
Marianna	Bettman	University of Cincinnati College of Law	OH
Jenny	Carroll	University of Cincinnati College of Law	OH
Mark	Godsey	University of Cincinnati College of Law	OH
Emily	Houh	University of Cincinnati College of Law	OH
Kristin	Kalsem	University of Cincinnati College of Law	OH
Bert	Lockwood	University of Cincinnati College of Law	OH
Adam	Steinman	University of Cincinnati College of Law	OH
Verna	Williams	University of Cincinnati College of Law	OH
Thaddeus	Hoffmeister	University of Dayton School of Law	OH
Pamela	Laufer-Ukeles	University of Dayton School of Law	OH
Sheila	Miller	University of Dayton School of Law	OH
Vernellia	Randall	University of Dayton School of Law	OH
Jeffrey	Kass	University of Toledo College of Law	OH
Nicole	Porter	University of Toledo College of Law	OH
Rebecca	Zietlow	University of Toledo College of Law	OH
Patience	Crowder	University of Tulsa College of Law	OK
Lyn	Entzeroth	University of Tulsa College of Law	OK
Elizabeth	McCormick	University of Tulsa College of Law	OK
Rennard J.	Strickland	University of Oklahoma; University of Oregon	OK,

			OR
Michael C.	Blumm	Lewis & Clark Law School	OR
Maggie	Finnerty	Lewis & Clark Law School	OR
Jennifer J.	Johnson	Lewis & Clark Law School	OR
Stephen	Kanter	Lewis & Clark Law School	OR
Robert	Klonoff	Lewis & Clark Law School	OR
Susan F.	Mandiberg	Lewis & Clark Law School	OR
Melissa	Powers	Lewis & Clark Law School	OR
Steven	Bender	University of Oregon	OR
Andrea	Coles-Bjerre	University of Oregon	OR
Ibrahim	Gassama	University of Oregon	OR
Maurice	Holland	University of Oregon	OR
Roberta F.	Mann	University of Oregon	OR
Michelle	McKinley	University of Oregon	OR
Michael	Moffitt	University of Oregon	OR
James	O'Fallon	University of Oregon	OR
Ofer	Raban	University of Oregon	OR
Eugene	Scoles	University of Oregon	OR
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Mary	Wood	University of Oregon	OR
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Kim Diana	Connolly	University of South Carolina School of Law	SC
Thomas	Crocker	University of South Carolina School of Law	SC
Nathan	Crystal	University of South Carolina School of Law	SC
Lisa	Eichhorn	University of South Carolina School of Law	SC
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Mark	Osler	Baylor Law School	TX
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Helen	Jenkins	South Texas College of Law	TX
Andrew	Miller	South Texas College of Law	TX
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John	Attanasio	Southern Methodist University Dedman School of Law	TX
Nathan	Cortez	Southern Methodist University Dedman School of Law	TX
Linda	Eads	Southern Methodist University Dedman School of Law	TX
Joseph	Norton	Southern Methodist University Dedman School of Law	TX
Daniel	Shuman	Southern Methodist University Dedman School of Law	TX
Mary	Spector	Southern Methodist University Dedman School of Law	TX
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John	Lunstroth	University of Houston Law Center	TX
Jordan	Paust	University of Houston Law Center	TX
Jim	Perdue	University of Houston Law Center	TX
Jeffrey	Abramson	University of Texas at Austin	TX
David	Adelman	University of Texas at Austin	TX
David	Anderson	University of Texas at Austin	TX
Norma	Cantu	University of Texas at Austin	TX
Micahel	Churgin	University of Texas at Austin	TX
Jeff	Civins	University of Texas at Austin	TX
Julius	Getman	University of Texas at Austin	TX
Denise	Gilman	University of Texas at Austin	TX
Patricia	Hansen	University of Texas at Austin	TX
Barbara	Hines	University of Texas at Austin	TX
Derek	Jinks	University of Texas at Austin	TX
Susan	Klein	University of Texas at Austin	TX
Maurie	Levinson	University of Texas at Austin	TX
Sanford	Levinson	University of Texas at Austin	TX
Jeana	Lungwitz	University of Texas at Austin	TX
Harry	Martin	University of Texas at Austin	TX
Robert	Peroni	University of Texas at Austin	TX
Daniel	Rodriguez	University of Texas at Austin	TX
William	Sage	University of Texas at Austin	TX
Michael	Sturley	University of Texas at Austin	TX
Gerald	Torres	University of Texas at Austin	TX
Louise	Weinberg	University of Texas at Austin	TX
Zipporah B.	Wiseman	University of Texas at Austin	TX
Jim	Backman	Brigham Young University Law School	UT
David	Dominguez	Brigham Young University Law School	UT
Frederick	Gedicks	Brigham Young University Law School	UT
D. Carolina	Núñez	Brigham Young University Law School	UT
Robert W.	Adler	University of Utah S.J. Quinney College of Law	UT
Reyes	Aguilar	University of Utah S.J. Quinney College of Law	UT
Jensie L.	Anderson	University of Utah S.J. Quinney College of Law	UT
Hiram E.	Chodosh	University of Utah S.J. Quinney College of Law	UT
Robert	Flores	University of Utah S.J. Quinney College of Law	UT
Leslie Pickering	Francis	University of Utah S.J. Quinney College of Law	UT
Erika	George	University of Utah S.J. Quinney College of Law	UT
James R.	Holbrook	University of Utah S.J. Quinney College of Law	UT
Laura	Kessler	University of Utah S.J. Quinney College of Law	UT
Terry S.	Kogan	University of Utah S.J. Quinney College of Law	UT
William J.	Lockhart	University of Utah S.J. Quinney College of Law	UT
Chibli	Mallat	University of Utah S.J. Quinney College of Law	UT
John	Martinez	University of Utah S.J. Quinney College of Law	UT
Scott M.	Matheson, Jr.	University of Utah S.J. Quinney College of Law	UT

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Daniel	Medwed	University of Utah S.J. Quinney College of Law	UT
Bonnie	Mitchell	University of Utah S.J. Quinney College of Law	UT
Clifford J.	Rosky	University of Utah S.J. Quinney College of Law	UT
Kerry	Abrams	University of Virginia School of Law	VA
Charles	Barzun	University of Virginia School of Law	VA
Richard J.	Bonnie	University of Virginia School of Law	VA
Josh	Bowers	University of Virginia School of Law	VA
Darryl	Brown	University of Virginia School of Law	VA
Michael P.	Dooley	University of Virginia School of Law	VA
Brandon L.	Garrett	University of Virginia School of Law	VA
Risa	Goluboff	University of Virginia School of Law	VA
Deena R.	Hurwitz	University of Virginia School of Law	VA
Alex M.	Johnson, Jr.	University of Virginia School of Law	VA
Daniel R.	Ortiz	University of Virginia School of Law	VA
Mildred	Robinson	University of Virginia School of Law	VA
George	Rutherglen	University of Virginia School of Law	VA
Robert	Sayler	University of Virginia School of Law	VA
Richard C.	Schragger	University of Virginia School of Law	VA
Molly Bishop	Shadel	University of Virginia School of Law	VA
J.H. (Rip)	Verkerke	University of Virginia School of Law	VA
Thomas R.	White, 3rd	University of Virginia School of Law	VA
Timothy	Jost	Washington and Lee University School of Law	VA
Mary	Natkin	Washington and Lee University School of Law	VA
Hari	Osofsky	Washington and Lee University School of Law	VA
Eric	Kades	William and Mary Law School	VA
Ronald	Rosenberg	William and Mary Law School	VA
Teresa	Clemmer	Vermont Law School	VT
Liz Ryan	Cole	Vermont Law School	VT
Stephanie	Farrior	Vermont Law School	VT
David	Mears	Vermont Law School	VT
Patrick	Parenteau	Vermont Law School	VT
Joan	Vogel	Vermont Law School	VT
George	Critchlow	Gonzaga University School of Law	WA
Mary Pat	Treuthart	Gonzaga University School of Law	WA
Larry	Weiser	Gonzaga University School of Law	WA
Joaquin	Avila	Seattle University School of Law	WA
Richard	Delgado	Seattle University School of Law	WA
Carmen	Gonzalez	Seattle University School of Law	WA
Raven	Lidman	Seattle University School of Law	WA
Tayyab	Mahmud	Seattle University School of Law	WA
Henry W.	McGee, Jr.	Seattle University School of Law	WA
Kellye Y.	Testy	Seattle University School of Law	WA
William	Andersen	University of Washington School of Law	WA
Robert	Aronson	University of Washington School of Law	WA
Roland	Hjorth	University of Washington School of Law	WA
Yong-Sung	Kang	University of Washington School of Law	WA
Richard	Kummert	University of Washington School of Law	WA
Sandra	Madrid	University of Washington School of Law	WA
Anna	Mastroianni	University of Washington School of Law	WA
Lea	Vaughn	University of Washington School of Law	WA
Kali	Murray	Marquette University Law School	WI
Paul	Secunda	Marquette University Law School	WI
Linda	Greene	University of Wisconsin Law School	WI
Alexandra	Huneeus	University of Wisconsin Law School	WI

Heinz	Klug	University of Wisconsin Law School	WI
Neil	Komesar	University of Wisconsin Law School	WI
Richard	Monette	University of Wisconsin Law School	WI
John	Schweitzer	University of Wisconsin Law School	WI
Michael	Smith	University of Wisconsin Law School	WI
Dean	Strang	University of Wisconsin Law School	WI
Andre	Cummings	West Virginia University	WV
Caprice	Roberts	West Virginia University	WV
John	Burman	University of Wyoming College of Law	WY
Michael	Duff	University of Wyoming College of Law	WY
Stephen	Feldman	University of Wyoming College of Law	WY

* School affiliations are listed for identification purposes only, and shall not be construed as the endorsement of any institution.

Count of School		
State	School	Total
AL	Faulkner University Jones School of Law	2
	Samford University Cumberland School of Law	1
	University of Alabama School of Law	9
AL Total		12
AR	University of Arkansas at Little Rock, William H. Bowen School of Law	10
	University of Arkansas School of Law	3
AR Total		13
AZ	Arizona State University Sandra Day O'Connor College of Law	12
	Phoenix School of Law	10
	University of Arizona Rogers College of Law	11
AZ Total		33
CA	California Western School of Law	1
	Golden Gate University School of Law	4
	Humphreys College Laurence Drivon School of Law	1
	Loyola Law School	2
	Pepperdine University School of Law	2
	Santa Clara University School of Law	3
	Southwestern Law School	3
	Stanford Law School	28
	Stanford Law School (former)	2
	Thomas Jefferson School of Law	2
	UC Berkeley School of Law	19
	UC Davis School of Law	13
	UC Hastings College of the Law	7
	UCLA School of Law	6
	University of Southern California Gould School of Law	8
	Whittier Law School	3
	University of the Pacific, McGeorge School of Law	3
	UC Irvine School of Law	2
	University of San Francisco School of Law	4
CA Total		113
CO	University of Colorado Law School	1
	University of Denver Sturm College of Law	5
CO Total		6
CT	Quinnipiac University School of Law	2
	University of Connecticut School of Law	13
	Yale Law School	22

FL	Barry University Dwayne O. Andreas School of Law	2
	Florida A&M University College of Law	3
	Florida Coastal School of Law	9
	Florida International University College of Law	6
	Florida State University College of Law	5
	NOVA Southeastern University Law Center	7
	Stetson University College of Law	6
	University of Florida, Levin College of Law	10
	University of Miami School of Law	8
FL Total		56
GA	Atlanta's John Marshall Law School	7
	Emory University School of Law	4
	Georgia State University College of Law	22
	Mercer University School of Law	3
	University of Georgia School of Law	16
GA Total		52
HI	University of Hawaii at Manoa William S. Richardson School of Law	3
HI Total		3
IA	Drake University Law School	10
	University of Iowa College of Law	21
IA Total		31
IA; CA	University of Iowa; Santa Clara University School of Law	1
IA; CA Total		1
ID	University of Idaho College of Law	3
ID Total		3
IL	DePaul University College of Law	3
	Loyola University Chicago School of Law	2
	Northern Illinois University	1
	Northwestern University School of Law	9
	Northwestern University; University of Chicago	1
	University of Chicago Law School	12
IL Total		28
IN	Indiana University Maurer School of Law	8
	Indiana University School of Law - Indianapolis	20
	Indiana University School of Law, Indianapolis	2
	Notre Dame Law School	13
	Valparaiso University School of Law	9
IN Total		52
KS	Kansas University School of Law	2
	Washburn University School of Law	2
KS Total		4

	Boston University School of Law	1
	Harvard Law School	23
	Northeastern University School of Law	7
	Suffolk University Law School	8
	Western New England College School of Law	3
MA Total		44
MD	University of Baltimore School of Law	19
	University of Maryland School of Law	15
MD Total		34
ME	University of Maine School of Law	15
ME Total		15
MI	Thomas M. Cooley Law School	1
	University of Michigan Law School	28
	Wayne State University School of Law	1
MI Total		30
MN	Hamline University School of Law	1
	University of Minnesota Law School	3
	William Mitchell College of Law	1
MN Total		5
MO	University of Missouri-Kansas City School of Law	1
	Washington University in St. Louis School of Law	1
	Saint Louis University School of Law	1
MO Total		3
MS	Mississippi College School of Law	1
	University of Mississippi School of Law	3
MS Total		4
MT	University of Montana School of Law	1
MT Total		1
NC	Campbell University Norman Adrian Wiggins School of Law	1
	Charlotte School of Law	1
	Duke Law School	20
	Elon University School of Law	4
	North Carolina Central University School of Law	7
	University of North Carolina School of Law	20
	Wake Forest School of Law	11
NC Total		64
ND	University of North Dakota School of Law	3
ND Total		3
NE	University of Nebraska - Lincoln College of Law	3
NE Total		3
NJ	Rutgers School of Law - Camden	2

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	City University of New York School of Law	11
	Columbia Law School	27
	Cornell University Law School	12
	Fordham University School of Law	26
	Hofstra University Law School	7
	New York Law School	1
	New York University School of Law	34
	Pace Law School	5
	St. John's University School of Law	1
	Touro Law Center	4
	Touro Law School	2
	University at Buffalo Law School	1
	Touro Law Center (former)	1
	Syracuse University College of Law	2
NY Total		143
OH	Capital University Law School	4
	Case Western Reserve University	14
	Cleveland State University Cleveland-Marshall College of Law	11
	The Ohio State University Moritz College of Law	9
	University of Akron School of Law	9
	University of Cincinnati College of Law	8
	University of Dayton School of Law	4
	University of Toledo College of Law	3
OH Total		62
OK	University of Tulsa College of Law	3
OK Total		3
OK, OR	University of Oklahoma; University of Oregon	1
OK, OR Total		1
OR	Lewis & Clark Law School	7
	University of Oregon	13
	Willamette University College of Law	6
	University of Oregon	1
OR Total		27
PA	Temple University Beasley School of Law	11
	The Pennsylvania State University	2
	University of Pennsylvania Law School	15
	University of Pennsylvania Wharton School	1
	University of Pittsburgh School of Law	4
	Villanova University School of Law	1
	Widener Law	1
PA Total		35

TX	Baylor Law School	3
	South Texas College of Law	8
	Southern Methodist University Dedman School of Law	10
	St. Mary's University	3
	Texas Southern University Thurgood Marshall School of Law	3
	Texas Wesleyan University School of Law	3
	University of Houston Law Center	6
	University of Texas at Austin	23
TX Total		59
UT	Brigham Young University Law School	4
	University of Utah S.J. Quinney College of Law	17
UT Total		21
VA	University of Virginia School of Law	18
	Washington and Lee University School of Law	3
	William and Mary Law School	2
VA Total		23
VT	Vermont Law School	6
VT Total		6
WA	Gonzaga University School of Law	3
	Seattle University School of Law	7
	University of Washington School of Law	8
WA Total		18
WI	Marquette University Law School	2
	University of Wisconsin Law School	8
WI Total		10
WV	West Virginia University	2
WV Total		2
WY	University of Wyoming College of Law	3
WY Total		3
Grand Total		1200

LAWYERS' COMMITTEE FOR
CIVIL RIGHTS
UNDER LAW

1401 New York Avenue, NW
Suite 400
Washington, DC 20005-2124

Tel: 202.662.8600
Fax: 202.783.0857
www.lawyerscommittee.org

July 9, 2009

Chairman Patrick J. Leahy
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510-6275

Co-Chairs
Nicholas T. Christakos
John S. Kiernan
Secretary
Eleanor H. Smith
Treasurer
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Counsel
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Valerie Shea
Michael W. Tyler
Western Region
Paul F. Eckstein
Amos Hatiston
Gregory P. Landis
Chesapeake Region
Michael Chorun
James J. Joseph

Ranking Member, Jeff Sessions
Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators Leahy and Sessions:

As the Co-Chairs of the Lawyers' Committee for Civil Rights Under Law, we submit the attached Statement in Support of the nomination of Judge Sonia Sotomayor as an Associate Justice of the United States Supreme Court. This Statement is presented on behalf of our organization and with the particular support of the identified individual members of the Board of Directors and Trustees, who have joined to highlight their commitment to the Lawyers' Committee's position.

We also enclose an 81 page Report analyzing Judge Sotomayor's record pertaining to constitutional interpretation and civil rights, issues which are of paramount importance to the Lawyers' Committee.

We believe that the members of the Lawyers' Committee who have joined us in support of Judge Sotomayor have done so because the record demonstrates that Judge Sotomayor is well qualified to serve as an Associate Justice, with a record of judicial service characterized by both its longevity and its quality. Judge Sotomayor's record in the area of civil rights reveals a balanced and considered approach to following precedent and safeguarding the protections contained in our nation's Constitution and civil rights statutes. We also believe Judge Sotomayor brings needed diversity to the Court based on her gender, ethnicity and experience as a prosecutor and trial judge.

We urge the members of the Senate Judiciary Committee to recommend Judge Sonia M. Sotomayor for confirmation by the full Senate.

Sincerely,

Nicholas T. Christakos
Co-Chair

John S. Kiernan
Co-Chair

cc: The Senate Judiciary Committee

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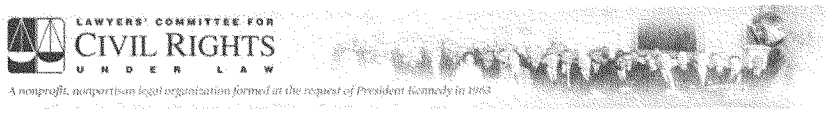

STATEMENT SUPPORTING THE NOMINATION OF

JUDGE SONIA SOTOMAYOR

AS AN

ASSOCIATE JUSTICE OF THE

UNITED STATES SUPREME COURT

The Lawyers' Committee for Civil Rights Under Law, and the undersigned members of its Board of Directors and Trustees, write to support the nomination of Judge Sonia Sotomayor to the Supreme Court of the United States and to urge the Senate to confirm that nomination.

On May 26, 2009, President Barack Obama nominated Judge Sotomayor, who currently serves on the U.S. Court of Appeals for the Second Circuit, to replace retiring Justice David Souter. The last vacancy on the Court occurred in 2005, when Sandra Day O'Connor, the first woman to serve on the Supreme Court, retired. If confirmed, Judge Sotomayor would be the first Hispanic and the third female justice in the 219 year history of the Supreme Court.

Judge Sotomayor has impressive academic and professional credentials. She has had a wide-ranging legal career as a prosecutor, a corporate litigator, and both a district and appellate court judge. These combined experiences would add a perspective not currently available on the Supreme Court. In addition, having sat for six years on the district court and more than ten years on the court of appeals, Judge Sotomayor has more federal judicial experience at the time of her nomination than any Supreme Court nominee in the last hundred years.

This nomination is of special interest to us as directors and trustees of the Lawyers' Committee for Civil Rights Under Law because of our shared goal of promoting equal justice. In recent years, the Supreme Court has issued a number of decisions scaling back the critical protections against discrimination that are afforded by the Constitution and our nation's civil rights laws. This trend underscores the pressing need for a Justice who understands the persistent realities of discrimination and who interprets our civil rights laws as they were intended – to provide meaningful protections.

We believe that the best evidence of Judge Sotomayor's qualifications as a nominee is the judicial opinions she has written over her long career on the bench. Analysis of her opinions in

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civil rights cases and related areas prepared by the Lawyers' Committee forms the primary basis for our support for Judge Sotomayor's nomination. The Lawyers' Committee also examined her speeches and other writings to see whether they contained anything that should disqualify her from serving on the Supreme Court or that might indicate that she has a different judicial philosophy, particularly in the civil rights arena, from that reflected in her judicial opinions. The results of the Lawyers' Committee's analysis are contained in its Report on Judge Sotomayor's nomination.

Based on our review, we conclude that Judge Sotomayor's record in civil rights cases demonstrates careful judicial analysis, with full consideration of the relevant facts and law, accompanied by a sensitivity to civil rights issues that is consonant with constitutional and statutory provisions. We have found nothing in Judge Sotomayor's speeches or non-judicial writings, which appropriately refer to her unique life story and the perspective she has gained from her background, that should disqualify her from serving on the Supreme Court. Our review of her judicial decisions, as well as her speeches and other writings, leads us to conclude that Judge Sotomayor would bring to the Court an appropriate regard for the importance of enforcement of the civil rights protections of the Constitution and federal civil rights laws. We further conclude that her performance as a Court of Appeals judge clearly supports the proposition that she will honor *stare decisis* and adhere to the rule of law.

On the Second Circuit, Judge Sotomayor has heard over 3,000 appeals and has written over 250 signed panel opinions. Her opinions reveal a jurist who follows established precedent yet is willing to raise concerns about the practical impact of that precedent. Her opinions exhibit deference to the discretion of trial judges. Judge Sotomayor's jurisprudence in civil rights cases indicates that she carefully weighs the facts and the law, and her rulings fall within the

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mainstream of existing judicial decisions and legal scholarship. She interprets civil rights laws in a manner that provides meaningful protection from discrimination, while being mindful of the need to grant early relief to defendants when the facts and law justify a summary ruling.

Judge Sotomayor possesses both the exceptional competence necessary to serve on the Court and a profound respect for the importance of protecting the civil rights afforded by the Constitution and the nation's civil rights laws. Additionally, we believe that having a diverse Court is important for our nation. For these reasons, we support the nomination of Judge Sotomayor to the Supreme Court of the United States and urge the Senate to confirm her nomination.

By action of the Executive Committee, this statement has been submitted to members of the Board of Directors and the Board of Trustees of the Lawyers' Committee for Civil Rights Under Law, for the individual signature of subscribing Board members whose names are set forth below. The following individual members of the Boards of Directors and Trustees of the Lawyers' Committee hereby subscribe to the statement.

Atiba D. Adams	Paulette M. Caldwell	Marion Cowell
David R. Andrews	John A. Camp	Nora Cregan
Barbara R. Arnwine	Douglass W. Cassel	Michael Birney de Leeuw
Jeffrey Barist	Michael H. Chanin	Doneene K. Damon
Daniel C. Barr	Nicholas T. Christakos	Armand G. Derfner
Lynne Bernabei	Lisa E. Cleary	John H. Doyle, III
Victoria Bjorklund	Frank M. Conner, III	Paul F. Eckstein
John W. Borkowski	Michael A. Cooper	Robert Ehrenbard
Patricia A. Brannan	Edward Correia	Joseph D. Feaster, Jr.
Steven H. Brose	Peter J. Covington	Fred N. Fishman

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Marc L. Fleischaker
John H. Fleming
Alexander D. Forger
Katherine Forrest
Eleanor M. Fox
Joseph W. Gelb
Peter B. Gelblum
Susan M. Glenn
Jon Greenblatt
Peter R. Haje
Gregory P. Hansel
Conrad K. Harper
Robert E. Harrington
David L. Harris
Mark I. Harrison
Amos Hartston
John E. Hickey
Jerome E. Hyman
Blair M. Jacobs
Malachi B. Jones, Jr.
Michael D. Jones
James P. Joseph
Heather Lamberg Kafele
Stephen Kastenberg
Laura Kaster
Kim M. Keenan
Frederick W. Kanner
Frank Kennamer
Andrew W. Kentz
John S. Kiernan
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Teresa J. Kimker
Adam T. Klein
Alan M. Klinger
Naho Kobayashi
Daniel F. Kolb
Edward Labaton
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Brian K. Landsberg
Michael L. Lehr
Charles T. Lester
Marjorie Press Lindblom
David M. Lipman
Andrew Liu
Jack W. Londen
Robert MacCrate
Cheryl W. Mason
Christopher Mason
Julia Tarver Mason
Gaye A. Massey
Colleen McIntosh
John E. McKeever
Kenneth E. McNeil
Neil V. McKittrick
D. Stuart Meiklejohn
Charles R. Morgan
Robert S. Mucklestone
Robert A. Murphy
Aasia Mustakeem
Karen K. Narasaki
Frederick M. Nicholas
John E. Nolan
John Nonna
Roswell B. Perkins
Bradley S. Phillips
Kit Pierson
Bettina B. Plevan
Robert H. Rawson
William L. Robinson
Guy Rounsaville
Michael L. Rugen
Lowell E. Sachnoff
Gail C. Saracco
John F. Savarese
Jennifer R. Scullion

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Richard T. Seymour	Rodney E. Slater	Michael W. Tyler
Valerie Shea	Eleanor H. Smith	Kenneth Vittor
Jane C. Sherburne	Edward Soto	Joseph F. Wayland
Richard Silberberg	John B. Strasburger	Vaughn C. Williams
Jeffrey Simes	Daniel P. Tokaji	Thomas S. Williamson
Robert Sims	Michael Traynor	Brenda Wright
Marsha E. Simms	Reginald M. Turner	Erika Thomas-Yuille
John S. Skilton	Suzanne E. Turner	

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Support Judge Sonia Sotomayor for the U.S. Supreme Court

July 7, 2009

The Honorable Patrick J. Leahy, Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Jeff Sessions, Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Sessions:

On behalf of the undersigned organizations, we write to express our support for the confirmation of Judge Sonia Sotomayor as Associate Justice of the Supreme Court of the United States. In her seventeen years of service to date as a federal trial and appellate judge, and throughout the course of her entire career, Judge Sotomayor has strongly distinguished herself through her outstanding intellectual credentials and her deep respect for the rule of law, establishing herself beyond question as fully qualified and ready to serve on the Supreme Court.

Judge Sotomayor will be an impartial, thoughtful, and highly-respected addition to the Supreme Court. Her unique personal background is compelling, and will be both a tremendous asset to her on the Court and a historic inspiration to others. Her legal career further demonstrates her qualifications to serve on our nation's highest court. After graduating from Yale Law School, where she served as an editor of the Yale Law Journal, Judge Sotomayor spent five years as a criminal prosecutor in Manhattan. She then spent eight years as a corporate litigator with the firm of Pavia & Harcourt, where she gained expertise in a wide range of civil law areas such as contracts and intellectual property. In 1992, on the bipartisan recommendation of her home-state Senators, President George H.W. Bush appointed her District Judge for the Southern District of New York. In recognition of her outstanding record as a trial judge, President Bill Clinton elevated her to the U.S. Court of Appeals in 1998.

During her long tenure on the federal judiciary, Judge Sotomayor has participated in thousands of cases, and has authored approximately 400 opinions at the appellate level. She has demonstrated a thorough understanding of a wide range of highly complicated legal issues, and has a strong reputation for deciding cases based upon the careful application of the law to the facts of cases. Her record and her inspiring personal story indicate that she understands the judiciary's role in protecting the rights of all Americans, in ensuring equal justice, and in respecting our constitutional values – all within the confines of the law. Moreover, her well-reasoned and pragmatic approach to cases will allow litigants to feel, regardless of the outcome, that they were given a fair day in court.

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Given her stellar record and her reputation for fairness, Judge Sotomayor has garnered broad support across partisan and ideological lines, earning glowing praise from colleagues in the judiciary, law enforcement community, academia, and legal profession who know her best. Her Second Circuit colleague (and also her former law professor) Judge Guido Calabresi describes her as "a marvelous, powerful, profoundly decent person. Very popular on the court because she listens, convinces and can be convinced -- always by good legal argument. She's changed my mind, not an insignificant number of times." Judge Calabresi also discredited concerns about Judge Sotomayor's bench manner, explaining that he compared the substance and tone of her questions with those of his male colleagues and his own questions: "And I must say I found no difference at all." Judge Sotomayor's colleague Judge Roger Miner, speaking of her ideology, argued that "I don't think I'd go as far as to classify her in one camp or another. I think she just deserves the classification of outstanding judge." And New York District Attorney Robert Morgenthau, her first employer out of law school, hailed her for possessing "the wisdom, intelligence, collegiality, and good character needed to fill the position for which she has been nominated."

The undersigned organizations urge you not to be swayed by the efforts of a small number of ideological extremists to tarnish Judge Sotomayor's outstanding reputation as a jurist. These efforts have included blatant mischaracterizations of a handful of her rulings, as well as efforts to smear her as a racist based largely on one line in a speech that critics have taken out of context from the rest of her remarks. The simple fact is that after serving seventeen years on the federal judiciary to date, she has not exhibited any credible evidence whatsoever of having an ideological agenda, and certainly not a racist one. We hope that your committee will strongly reject the efforts at character assassination that have taken place since her nomination.

In short, Judge Sotomayor has an incredibly compelling personal story and a deep respect for the Constitution and the rule of law. Her long and rich experiences as a prosecutor, litigator, and judge match or even exceed those of any of the Justices currently sitting on the Court. Furthermore, she is fair-minded and ethical, and delivers thoughtful rulings in cases that are based upon their merits. For these reasons, the undersigned organizations strongly urge you to vote to confirm Judge Sotomayor. If you have any questions, please feel free to contact Leadership Conference on Civil Rights (LCCR) Counsel Rob Randhava at (202) 466-6058, or LCCR Executive Vice President Nancy Zirkin at (202) 263-2880.

Sincerely,

A. Philip Randolph Institute
ACORN
ADA Watch
Advancement Project
Alliance For Retired Americans
American-Arab Anti-Discrimination Committee (ADC)
American Association for Affirmative Action
American Association of People with Disabilities
American Federation of Government Employees, AFL-CIO
American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)

American Federation of State, County and Municipal Employees
American Federation of Teachers
Americans for Democratic Action, Inc.
Asian American Justice Center
Campaign for America's Future
Center for Inquiry
Center for Responsible Lending
DC Vote
Disability Rights Education and Defense Fund
Hispanic Federation
Immigration Equality
International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW
Japanese American Citizens League
Lawyers' Committee for Civil Rights Under Law
Leadership Conference on Civil Rights
League of United Latin American Citizens
Legal Aid Society-Employment Law Center
Legal Momentum
Mexican American Legal Defense and Educational Fund
NAACP
National Asian Pacific American Bar Association
National Association of Consumer Advocates
National Association of Human Rights Workers
National Black Chamber of Commerce
National Black Justice Coalition
National Coalition for Disability Rights (NCDR)
National Congress of Black Women, Inc.
National Disability Rights Network
National Education Association
National Employment Law Project
National Employment Lawyers Association
National Fair Housing Alliance
National Jewish Democratic Council
National Korean American Service & Education Consortium (NAKASEC)
National Organization for Women
National Minority AIDS Council
National Urban League
NCLR (National Council of La Raza)
People For the American Way
Pride at Work, AFL-CIO
Service Employees International Union (SEIU)
Southeast Asia Resource Action Center (SEARAC)
USAction
U.S. Hispanic Chamber of Commerce
Women Employed

56940.683

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
July 13, 2009

Opening Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Committee On The Judiciary,

Confirmation Hearing On The Nomination Of Judge Sonia Sotomayor
To Be An Associate Justice Of The U.S. Supreme Court

July 13, 2009

As Prepared

Today, we consider the nomination of Judge Sonia Sotomayor to be a Justice of the United States Supreme Court. Our Constitution assigns just 101 of us the responsibility to act on behalf of all 320 million Americans in considering this important appointment. The President has done his part and made an historic nomination. Now it is up to the Senate to do its part on behalf of the American people.

President Obama often quotes Dr. Martin Luther King, Jr.'s insight that "the arc of the moral universe is long, but it bends toward justice." Each generation of Americans has sought that arc toward justice. We have improved upon the foundation of our Constitution through the Bill of Rights, the Civil War amendments, the 19th Amendment's expansion of the right to vote to women, the Civil Rights Act of 1964 and Voting Rights Act of 1965, and the 26th Amendment's extension of the right to vote to young people. These actions have marked progress toward our more perfect union. This nomination can be another step along that path.

Judge Sotomayor's journey to this hearing room is a truly American story. She was raised by her mother, Celina, a nurse, in the South Bronx. Like her mother, Sonia Sotomayor worked hard. She graduated as the valedictorian of her class at Blessed Sacrament and at Cardinal Spellman High School in New York. She was a member of just the third class at Princeton University in which women were included. She continued to work hard, including reading classics that had been unavailable to her when she was younger and arranging tutoring to improve her writing. She graduated summa cum laude, Phi Beta Kappa, and was awarded the M. Taylor Senior Pyne Prize for scholastic excellence and service to the university, an honor awarded for outstanding merit.

After excelling at Princeton she entered Yale Law School, where she was an active member of

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the law school community. Upon graduation, she had many options but chose to serve her community in the New York District Attorney's Office, where she prosecuted murders, robberies, assaults and child pornography.

The first President Bush named her to the Federal bench in 1992, and she served as a trial judge for six years. President Clinton named her to the United States Court of Appeals for the Second Circuit where she has served for more than 10 years. She was confirmed each time by a bipartisan majority of the Senate.

Judge Sotomayor's qualifications are outstanding. She has more Federal court judicial experience than any nominee to the United States Supreme Court in 100 years. She is the first nominee in well over a century to be nominated to three different Federal judgeships by three different Presidents. She is the first nominee in 50 years to be nominated to the Supreme Court after serving as both a Federal trial judge and a Federal appellate judge. She will be the only current Supreme Court Justice to have served as a trial judge. She was a prosecutor and a lawyer in private practice. She will bring a wealth and diversity of experience to the Court. I hope all Americans are encouraged by Judge Sotomayor's achievements and by her nomination to the Nation's highest court. Hers is a success story in which all Americans can take pride.

Those who break barriers often face the added burden of overcoming prejudice. That has been true on the Supreme Court. Thurgood Marshall graduated first in his law school class, was the lead counsel for the NAACP Legal Defense Fund, sat on the United States Court of Appeals for the Second Circuit, and served as the Nation's top lawyer, the Solicitor General of the United States. He won a remarkable 29 out of 32 cases before the Supreme Court. Despite his qualifications and achievements, at his confirmation hearing, he was asked questions designed to embarrass him, questions such as "Are you prejudiced against the white people of the South?"

The confirmation of Justice Louis Brandeis, the first Jewish American to be nominated to the high court, was a struggle rife with anti-Semitism and charges that he was a "radical". The commentary at the time included questions about "the Jewish mind" and how "its operations are complicated by altruism." Likewise, the first Catholic nominee had to overcome the argument that "as a Catholic he would be dominated by the pope."

I trust that all Members of this Committee here today will reject the efforts of partisans and outside pressure groups that have sought to create a caricature of Judge Sotomayor while belittling her record, her achievements and her intelligence. Let no one demean this extraordinary woman, her success, or her understanding of the constitutional duties she has faithfully performed for the last 17 years. I hope all Senators will join together as we did when we considered President Reagan's nomination of Sandra Day O'Connor as the first woman to serve on the Supreme Court and voted unanimously to confirm her.

This hearing is an opportunity for Americans to see and hear Judge Sotomayor for themselves and to consider her qualifications. It is the most transparent confirmation hearing ever held. Judge Sotomayor's decisions and confirmation materials have been posted online and made publicly available. The record is significantly more complete than that available when we considered President Bush's nominations of John Roberts and Samuel Alito just a few years ago.

The Judge's testimony will be carried live on several television stations and live via webcast on the Judiciary Committee website.

My review of her judicial record leads me to conclude that she is a careful and restrained judge with a deep respect for judicial precedent and for the powers of the other branches of the government, including the law-making role of Congress. That conclusion is supported by a number of independent studies that have been made of her record, and shines through in a comprehensive review of her tough and fair record on criminal cases. She has a deep understanding of the real lives of Americans, the duty of law enforcement to help keep Americans safe, and the responsibilities of all to respect the freedoms that define America.

Unfortunately, some have sought to twist her words and her record and to engage in partisan political attacks. Ideological pressure groups have attacked her before the President had even made his selection. They then stepped up their attacks by threatening Republican Senators who do not oppose her.

In truth, we do not have to speculate about what kind of a Justice she will be because we have seen the kind of judge she has been. She is a judge in which all Americans can have confidence. She has been a judge for all Americans and will be a Justice for all Americans.

Our ranking Republican Senator on this Committee reflected on the confirmation process recently, saying: "What I found was that charges come flying in from right and left that are unsupported and false. It's very, very difficult for a nominee to push back. So I think we have a high responsibility to base any criticisms that we have on a fair and honest statement of the facts and that nominees should not be subjected to distortions of their record." I agree. As we proceed, let no one distort Judge Sotomayor's record. Let us be fair to her and to the American people by not misrepresenting her views.

We are a country bound together by our Constitution. It guarantees the promise that ours will be a country based on the rule of law. In her service as a Federal judge, Sonia Sotomayor has kept faith with that promise. She understands that there is not one law for one race or another. There is not one law for one color or another. There is not one law for rich and a different one for poor. There is only one law. She has said that" ultimately and completely" a judge has to follow the law, no matter what their upbringing has been. That is the kind of fair and impartial judging that the American people expect. That is respect for the rule of law. That is the kind of judge she has been. That is the kind of fair and impartial Justice she will be and that the American people deserve.

Judge Sotomayor has been nominated to replace Justice Souter, whose retirement last month has left the Court with only eight Justices. Justice Souter served the Nation with distinction for nearly two decades on the Supreme Court with a commitment to justice, an admiration for the law, and an understanding of the impact of the Court's decisions on the daily lives of ordinary Americans. I believe that Judge Sotomayor will be in this same mold and will serve as a Justice in the manner of Sandra Day O'Connor, committed to the law and not to ideology.

In the weeks and months leading up to this hearing, I have heard the President and Senators from both sides of the aisle make reference to the engraving over the entrance of the Supreme Court. The words engraved in that Vermont marble say: "Equal Justice Under Law." Judge Sotomayor's nomination keeps faith with those words.

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CITY OF COMMERCE

Lilia R. Leo
Councilmembe

June 4, 2009

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

The Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
335 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Sessions:

As a Councilwoman for the City of Commerce, I want to offer my sincere support for President Obama's nomination of Judge Sotomayor to serve on the Supreme Court of the United States. I believe with all my heart that Judge Sotomayor is an ideal selection for our nation's highest court.

Her experience throughout her three-decade career as an attorney, corporate litigator, federal trial judge, and federal appellate judge makes her uniquely qualified for this position.

I admire her work ethic, commitment to the rule of law, sound judgment and common sense. She is a judge with a great insight into the real world who also has an intellectual capacity that has earned her the respect and admiration of her colleagues and staff.

Her life story is well known to most Americans now but it is a story that still rings true for those of us who have shared her dreams and worked to give our children opportunities we didn't have. She is an inspiration. Her combination of intellect, integrity, and experience will make her an outstanding Supreme Court Justice. I am proud to support her nomination and hope you confirm her nomination as the next Associate Justice of the Supreme Court.

Respectfully Submitted,

Councilwoman Lilia R. Leon
City of Commerce

2535 Commerce Way • Commerce, California 90040 • (323) 7[illegible]805 • FAX (323) 726-6231

MAJOR CITIES CHIEFS ASSOCIATION

Atlanta, Georgia
Austin, Texas
Baltimore City, Maryland
Baltimore Co., Maryland
Boston, Massachusetts
Buffalo, New York
Calgary, Alberta
Charlotte-Mecklenburg, North Carolina
Chicago, Illinois
Cincinnati, Ohio
Cleveland, Ohio
Columbus, Ohio
Dallas, Texas
Denver, Colorado
Detroit, Michigan
Edmonton, Alberta
El Paso, Texas
Fairfax County, Virginia
Fort Worth, Texas
Honolulu, Hawaii
Houston, Texas
Indianapolis, Indiana
Jacksonville, Florida
Kansas City, Missouri
Las Vegas Metro, Nevada
Long Beach, California
Los Angeles, California
Los Angeles Co., California
Louisville, Kentucky
Memphis, Tennessee
Miami-Dade, Florida
Milwaukee, Wisconsin
Minneapolis, Minnesota
Montgomery Co., Maryland
Montreal, Quebec
Nashville, Tennessee
Nassau Co., New York
New Orleans, Louisiana
New York City, New York
Newark, New Jersey
Oakland, California
Oklahoma City, Oklahoma
Ottawa, Ontario
Philadelphia, Pennsylvania
Phoenix, Arizona
Pittsburgh, Pennsylvania
Portland, Oregon
Prince George's Co., Maryland
Salt Lake City, Utah
San Antonio, Texas
San Diego, California
San Francisco, California
San Jose, California
Seattle, Washington
St. Louis, Missouri
Suffolk Co., New York
Toronto, Ontario
Tucson, Arizona
Tulsa, Oklahoma
Vancouver, British Columbia
Virginia Beach, Virginia
Washington, DC
Winnipeg, Manitoba

June 7, 2009

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

The Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

Dear Messrs. Leahy and Sessions:

On behalf of the Major Cities Chiefs, representing the 56 largest jurisdictions across the Nation, we are writing to support the nomination of Judge Sonia Sotomayor to the Supreme Court of the United States.

We applaud her distinguished career in public service, a record of achievement that began with her work as a prosecuting attorney. During those early years as an Assistant District Attorney, Sonia Sotomayor earned high marks from law enforcement. She has been praised by those who worked at her side on criminal cases as well as officials who have taken cases to her courtroom in later years.

Her record as a prosecutor and a judge both show a commitment to public safety and sensitivity to the needs of the community. She has made decisions that are both tough and compassionate. Her record shows respect for the laws and cases that enable the police to do their job.

American law enforcement has always looked to you for leadership and we again turn to you to move the nomination of Sonia Sotomayor quickly through the confirmation process.

Sincerely,

William J. Bratton
Chief of Police
President, Major Cities Chiefs

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MALDEF
Mexican American Legal Defense and Educational Fund

National Headquarters
Los Angeles Regional Office
634 S. Spring Street
Los Angeles, CA 90014
Tel: 213.629.2512
Fax: 213.629.0266

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Suite 2500
Atlanta, GA 30303
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Chicago Regional Office
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Suite 700
Chicago, IL 60603
Tel: 312.427.0701
Fax: 312.427.0691

San Antonio Regional Office
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San Antonio, TX 78205
Tel: 210.224.5476
Fax: 210.224.5382

Houston Program Office
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Sacramento Satellite Office
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Fax: 916.443.1541

Washington, D.C. Regional Office
1016 16th Street, NW
Suite 100
Washington, DC 20036
Tel: 202.293.2828
Fax: 202.293.2849

July 16, 2009

The Honorable Patrick J. Leahy, Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Jeff Sessions, Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Sessions:

On behalf of the Mexican American Legal Defense and Educational Fund, (MALDEF) I would like to submit for the Committee's consideration and for the record the attached written testimony in support of the appointment of Judge Sonia Sotomayor to the United States Supreme Court.

Please feel free to contact me should you have any questions or concerns. In the meantime, please accept my gratitude for including MALDEF's statement in this historic record.

Very Truly Yours,

Henry L. Solano
Interim President & General Counsel

Advancing Latino Civil Rights for 40 Years
www.maldef.org

TESTIMONY BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

FOR THE HEARING ON
THE NOMINATION OF SONIA SOTOMAYOR TO BE AN ASSOCIATE JUSTICE OF
THE SUPREME COURT OF THE UNITED STATES

JULY 15, 2009

BY
THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

The Mexican American Legal Defense and Educational Fund (MALDEF) wishes to express for the record its unequivocal support for President Barack Obama's nominee, Judge Sonia Sotomayor, to the United States Supreme Court.

Throughout her career, Judge Sotomayor has proven herself to be a dedicated public servant, a seasoned litigator and a superior legal mind. She will undoubtedly bring a diversity of experience and intellectual perspective to the Court as well as a strict adherence to and respect for legal precedent, as her 17-year jurisprudential record clearly demonstrates.

Judge Sotomayor has garnered unyielding support from law enforcement groups, lawyers, jurists, and academia. The American Bar Association has given Judge Sotomayor its highest rating of "well-qualified." Non-partisan entities such as the Brennan Center for Justice at the New York University School of Law and the Congressional Research Service have studied and scrutinized her lengthy record, determining that she consistently applies the law to the facts of each case and that she is a jurist whose rulings are in the mainstream of the U.S. Court of Appeals for the Second Circuit. This record speaks to the fact that she is anything but an activist judge, as some of her detractors allege, that she does not pre-judge cases, and that she is faithful to the doctrine of stare decisis.

The fact that she has broad and bipartisan support from such key figures as former President George Herbert Walker Bush and former Supreme Court Justice Sandra Day O'Connor speak to a record that is one of a moderate judge. One need only look to a record in which Judge Sotomayor agreed with her Republican-appointed colleagues 97% of the time in criminal appeals and sided with the majority in constitutional cases 98.2% of the time for such examples. She is a jurist who simply cannot be categorized precisely because she has decided cases time and again through considered legal analysis and not based on a personal or political agenda.

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Judge Sotomayor will bring a wealth of experience to the Court. As a criminal prosecutor in one of the most populous cities in our nation, she tried dozens of cases against defendants accused of serious felonies, including murder, robbery, police misconduct and fraud. As a corporate litigator and partner at the law firm of Pavia & Harcourt, she handled cases in the areas of real estate, employment, banking, contracts and intellectual property law.

Former President George Herbert Walker Bush appointed Sonia Sotomayor to the federal district court bench at the age of 38 and she was later appointed by President Clinton to the U.S. Court of Appeals for the Second Circuit where she has served for the past 11 years. The Supreme Court has not had the benefit of an appointee who possesses such a breadth of relevant legal experience in over 70 years and it is this experience that will inform her critical thinking, her ability to grapple with complex legal issues, and her capacity to appreciate that each case consists of a unique set of facts to which the law must be neutrally applied.

As a woman of Puerto Rican descent, Judge Sotomayor has transcended socio-economic barriers, accomplished academic excellence, and attained an enviable set of professional accomplishments. Starting at a young age, she exhibited a drive to succeed in the face of adversity and clarity of focus on her future goals. These qualities landed her at Princeton University, where she graduated summa cum laude, and Yale Law School, where she served as an editor on the Yale Law Review, a distinction reserved for only the top law students.

Judge Sotomayor has also proved to be deeply committed to the community. She has been a lecturer at Columbia Law School and an adjunct professor at the New York University Law School. She has served on the board of the Development School for Youth whose mission is to develop employment skills for inner city youth. She has also served on the Boards of Directors of the New York Mortgage Agency, the New York City Campaign Finance Board and the Puerto Rican Legal Defense and Education Fund.

Judge Sotomayor enjoys an impeccable reputation in the legal community and has exhibited an exemplary judicial temperament during her tenure on the federal bench. She is known to closely study the facts of a case, apply legal theories through careful and considered deliberation and issue even-handed rulings.

Throughout her career, she has remained a dedicated mentor to students and new lawyers of all backgrounds and a champion of the ideals to which we all can aspire, namely a strong work ethic and a commitment to public service. She is a jurist who has tempered her role with the ability and desire to always keep her personal viewpoints and opinions in check, a judge who has the courage to think about and question her own perspectives to ensure that she objectively applies the law to the facts in any given case.

It is with great pride and admiration that MALDEF and the Latino community urges the confirmation of such an exceptional jurist.

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MANA
A National Latina Organization

MANA *de Albuquerque*

June 2, 2009

The Honorable Patrick Leahy
Chairman, Senate Judiciary Committee
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

Dear Senator Leahy,

On behalf of MANA de Albuquerque, its thirty-five members, and it's affiliation with MANA,A National Latina Organization that represents twenty-six Chapters, six Affiliates, and individual members nationwide, I would like to declare my support for the confirmation of Judge Sonia Sotomayor as Justice of the Supreme Court.

The Honorable Sonia Sotomayor has had an exceptional and diverse career that will be an invaluable asset in a role as a Supreme Court Justice. Judge Sotomayor's perseverance, work ethic, veracity, and tested and proven ability to excel demonstrate her strength of character. Her commitment to biparusan, fair decision making, and upholding the law without bias makes Judge Sotomayor a clear choice for Supreme Court Justice.

Judge Sonia Sotomayor's nomination reflects an enormous achievement for the Latina community. She is a woman of astonishing achievement, keen intellect, and integrity. These characteristics will aid her in making just decisions in representing and reflecting the law of the United States of America.

As a member of your constituency, the Latino community, and MANA de Albuquerque, I ask you to support Judge Sonia Sotomayor's expeditious confirmation.

Sincerely,

Lydia Lopez Maestas
President
MANA *de Albuquerque*
P.O. Box 25801
Albuquerque, NM 87125

Founded by Mexican American Women in 1974

June 9, 2009

Honorable Patrick J. Leahy
Chairman, D-Vermont
Senate Judiciary Committee
433 Russell Senate Office Building
United States Senate
Washington, DC 20510

Honorable Jeff Sessions
Ranking Member, R-Alaska
Senate Judiciary Committee
335 Russell Senate Office Building
Washington, DC 20510

Dear Senators Leahy and Sessions,

MANA, A National Latina Organization, with headquarters in Washington, DC, twenty-six chapters nationwide, and six affiliates across the nation expresses wholehearted support for the appointment of the Honorable Sonia Sotomayor to serve as a Supreme Court Justice.

Growing up in the Bronx after her parents moved from Puerto Rico, Sotomayor's mother instilled the value of education early in her life. After graduating valedictorian of at her Catholic high school, Sotomayor went on to Princeton, where she continued to excel. She attended Yale Law School and wrote for the Yale Law Journal.

Judge Sotomayor has had an exceptional and diverse career that will be an invaluable asset in a role as a Supreme Court Justice. She began her career as an assistant district attorney in the state of New York. Later, she worked in private practice as a corporate litigator, dealing with cases for both American and foreign clients. In 1992 she served as a federal judge for the U.S. District Court, having been nominated by President George H.W. Bush. In this position she was the youngest judge in the Southern District of New York and the first Hispanic federal judge in New York. During that time she supported claims to freedom of religious expression under the First Amendment. She continued in that position until her appointment as appellate judge by President William Jefferson Clinton in 1998.

1146 19th Street N.W., Suite 700, Washington, D.C. 20036 · 202-833-0060 · Fax 202-496-0588 · www.hermana.org

Founded by Mexican American Women in 1974

The Honorable Sonia Sotomayor's perseverance, work ethic, integrity, and tested and proven ability to excel demonstrate her strength of character. Her commitment to nonpartisan, fair decision making, and upholding the law without bias makes Judge Sotomayor a clear choice for Supreme Court Justice. We are confident that Judge Sotomayor will dutifully represent the law as it is written, always serving in the best interests of the nation. A true example of living the American dream, she is an inspiration.

Moving forward, we urge that the Senate follow the timeline suggested by the White House, with an expeditious hearing by mid-July. As is our established procedure, we will also be submitting this legislative vote to the National Hispanic Leadership Agenda for consideration on the Annual Congressional Report Card, which tracks and publishes the voting records of Members of Congress on issues relevant to the Hispanic community. In the best interest of our nation, we ask you to confirm the Honorable Sonia Sotomayor based on her credentials, experience, and desire to honorably serve our great nation.

Sincerely,

Alma Morales Riojas
President & CEO

CC: Senate Judiciary Committee Members

1146 19th Street N.W., Suite 700, Washington, D.C. 20036 · 202-833-0060 · Fax 202-496-0588 · www.hermana.org

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IRIS Y. MARTINEZ
STATE SENATOR • 20TH DISTRICT

COMMITTEES:
CHAIRPERSON
LICENSED ACTIVITIES
VICE-CHAIRPERSON
PENSION & INVESTMENTS
MEMBER:
DEFICIT REDUCTION
COMMERCE
EDUCATION
ENERGY
REDISTRICTING

Dear Senator;

I am writing to present you with a copy of Senate Resolution 306 that passed the Illinois Senate May 30, 2009, voicing our chamber's support for Judge Sonia Sotomayor's nomination to the United States Supreme Court. The resolution urges the U.S. Senate to confirm her nomination, making her the first Hispanic to serve on the nation's highest court.

The experience of Judge Sotomayor illustrates her commitment to justice and to the laws of the United States of America. Her career as a lawyer demonstrates an understanding of multiple areas of law and her work in both the public and private sectors helps to inform her decisions today. As an Assistant District Attorney in New York, she fearlessly and effectively prosecuted dozens of criminal cases. In addition, her confirmation would be a symbol of progress for Hispanic Americans and a truer reflection of our country's diversity on the Supreme Court.

As a United States Senator, it falls within your constitutional duty to give Judge Sotomayor full and fair consideration as you review her nomination to the Court. Given her vast legal experience and the tremendous milestone her confirmation would represent for our nation, I urge you to vote to confirm her nomination to the United States Supreme Court.

Sincerely,

Iris Y. Martinez

Iris Y. Martinez
State Senator 20th District

RECYCLED PAPER • SOYBEAN INKS

STATE OF ILLINOIS
NINETY-SIXTH GENERAL ASSEMBLY
SENATE

Senate Resolution No. 306

Offered by Senators Martinez, Delgado, Sandoval, Munoz, Collins and Hendon

WHEREAS, On May 26, 2009, President Barack Obama nominated Judge Sonia Sotomayor of the U.S. Court of Appeals for the Second Circuit to serve as a Justice of the United States Supreme Court; and

WHEREAS, President Barack Obama has demonstrated excellent vision in nominating a Hispanic with such deep experience to the United States Supreme Court; and

WHEREAS, Judge Sotomayor's upbringing serves as an inspiration to all, with a life story that includes being raised by a single mother from Puerto Rico in public housing in Bronx, New York; and

WHEREAS, Judge Sotomayor attended Princeton University and graduated summa cum laude; and

WHEREAS, Judge Sotomayor graduated from Yale Law School, where she served as editor of the Yale Law Journal; and

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WHEREAS, In 1978, Judge Sotomayor served as Assistant District Attorney in New York, fearlessly and effectively prosecuting dozens of criminal cases; and

WHEREAS, In 1984, Judge Sotomayor served as a partner in a prestigious law firm in New York, primarily representing prominent corporations engaged in international business; and

WHEREAS, In 1992, Judge Sotomayor was appointed by President George H.W. Bush to serve on the United States District Court for the Southern District of New York; and

WHEREAS, In 1998, Judge Sotomayor was appointed by President Bill Clinton to serve on the U.S. Court of Appeals for the Second Circuit, the first Hispanic to serve on the Second Circuit, one of the most demanding circuits in the nation; and

WHEREAS, Judge Sotomayor has more federal judicial experience than any nominee in the last 100 years; and

WHEREAS, If confirmed, Judge Sotomayor's ascension to the United States Supreme Court would represent a monumental step for America and a better reflection of our national diversity, as she would be the first Hispanic and only the third woman in history to serve as a Justice of the Supreme Court; therefore, be it

RESOLVED, BY THE SENATE OF THE NINETY-SIXTH GENERAL ASSEMBLY OF THE STATE OF ILLINOIS, that we congratulate Judge Sotomayor for this incredible honor and thank her for serving as a role model to all Americans, but particularly women and Latinas; and be it further

RESOLVED, That we congratulate our President and former colleague Barack Obama for his wisdom in selecting Judge Sotomayor; and be it further

RESOLVED, That we call upon the United States Senate to confirm Judge Sotomayor after full and fair consideration of her long and distinguished career, consistent with the Senate's constitutional obligation to fully and properly review all judicial nominees submitted by the President of the United States; and be it further

RESOLVED, That suitable copies of this resolution be presented to Judge Sonia Sotomayor and all members of the United States Senate.

Adopted by the Senate, May 30, 2009.

John J. Cullerton

President of the Senate

Secretary of the Senate

Testimony of Arkansas Attorney General Dustin McDaniel

Before the Senate Judiciary Committee
United States Senate

Hearing on "The Nomination of Sonia Sotomayor to be Associate Justice to the United States Supreme Court"

Thank you Chairman Leahy, Ranking Member Sessions and members of the Committee for giving me the opportunity to be here today. My name is Dustin McDaniel, and I am the Attorney General for the State of Arkansas.

I am here today to speak in support of the nomination of Judge Sonia Sotomayor to the Supreme Court of the United States. We have heard all week about her compelling life story and impressive accomplishments. I have the highest respect and admiration for Judge Sotomayor, and I am proud to testify on behalf of this person who was first appointed to the United States District Court by President George H. W. Bush and then to the Second Circuit Court of Appeals by my most famous predecessor in the Arkansas Attorney General's Office, President Bill Clinton. More specifically, I am here to rebut any assertion that Judge Sotomayor's participation in the United States Court of Appeals for the Second Circuit's ruling in the matter of Ricci v. DeStefano in any way negatively reflects on her qualifications or ability to serve as a justice on the United States Supreme Court.

When the United States Supreme Court granted certiorari in the Ricci case, I, on behalf of the State of Arkansas, joined with five other attorneys general in support of the Second Circuit. Before I address the brief and the relevance, or lack thereof, of that case to this

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confirmation hearing, let me address the firefighters who were involved, and how I have both a personal and professional interest in the issues confronted by each court which has considered this matter.

I entered the world of public service long before I became an elected official. After college, I turned down admission into law school and became a police officer in my hometown of Jonesboro, Arkansas. As a police officer, I saw first hand the heroism and dedication of the men and women who protect and serve our communities every day. Firefighters like Frank Ricci run into homes and buildings when everyone else is running out. I have the highest respect and gratitude for all who serve our communities, states and nation.

My personal experience with civil service exams was favorable, but not all are so lucky. I understand the frustration of Mr. Ricci and his colleagues with the process. I also understand the city's fear of litigation and its desire to avoid unfair results. I am for a process that is fair. All of us are. But ensuring fairness in such a process can be extremely difficult, as reflected by the lengthy litigation that unfolded in the Ricci case.

As Attorney General, I represent hundreds of state agencies, boards and commissions. I provide general advice and litigation defense in matters of employment law, including issues surrounding Title VII of the Civil Rights Act of 1964. Like all attorneys, my job is to allow my clients to go about their appointed duties with confidence that they are in compliance with all applicable law and without fear that they will be subject to costly

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litigation. City attorneys are no different. I joined the amicus brief in Ricci because the Second Circuit's ruling was based on precedent relied upon by thousands of agencies for some level of certainty. The law had, until recently, allowed the flexibility necessary for public employers to develop and administer their personnel systems so as to avoid unfair outcomes and to avoid litigation. The Supreme Court's ruling in Ricci decreased certainty, continuity and flexibility. The decision will likely increase litigation. Litigation is expensive, and the taxpayers will ultimately pay the price.

Based on the Supreme Court's ruling, an employer is now subject to being sued no matter its course of action in a situation like that presented in Ricci. As a result, employment decisions in this context will be based upon an evaluation of which lawsuit an employer and its counsel believe they are most likely to win. That will not produce a fair result and it is not a consideration an employer should have to make in administering the work place.

In the end, I believe Judge Sotomayor and her colleagues on the Second Circuit reached a decision that was based on the law. All who have commented on the nomination process in recent years have been critical of those who have been labeled an "activist judge." It is quite important to note that Judge Sotomayor's ruling in Ricci was not judicial activism at work. To the contrary, she followed existing law.

In Ricci, Judge Sotomayor and the panel issued a *per curiam* order adopting the lengthy analysis of the district court, an opinion the panel described as "thorough, thoughtful and

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well reasoned."[1] The district court opinion adopted by the *per curiam* cited two prior cases issued by the Second Circuit that stand for the proposition that a public employer faced with a potential claim of racial discrimination does not then violate the law by taking neutral remedial action, although based on considerations of race, to avoid liability. (Hayden v. County of Nassau, 180 F.3d 42 (2nd Cir. 1999); Bushey v. N.Y. State Civil Serv. Comm'n, 733 F.2d 220 (2nd Cir. 1985). Based on the facts and the application of the controlling precedent, the panel affirmed the district court's ruling.

That ruling was consistent with the law and the doctrine of *stare decisis*. Had Judge Sotomayor acted otherwise, she would have been in the minority among the judges considering the case at that time and would have been disregarding 28 years of precedent. Granted, the Supreme Court, in a closely divided opinion, ruled differently, but in doing so it set *new* precedent.

It is also important to note that Judge Sotomayor's ruling in Ricci was supported by many prestigious groups, including the following:

- The Equal Employment Opportunity Commission
- The United States Department of Justice[2]
- The National League of Cities
- The National Association of Counties

[1] The practice of adopting district court opinions in a per curiam opinion dates back to 1841 and it is a practice used by the 2nd Circuit frequently. See Ricci v. DeStefano, 530 F.3d 88, 91 – 92 (2nd Cir. 2008). The Supreme Court reviews thousands of such orders every year.

[2] Contrary to some assertions, the Department of Justice did not take a position contrary to the Second Circuit opinion. It agreed with the fundamental legal holding but also suggested the case be remanded for the development of additional fact.

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- International Municipal Lawyers Association
- The Attorneys General of Alaska, Arkansas, Iowa, Maryland, Nevada and Utah.

There is a large body of research available on Judge Sotomayor's record. No allegation that this judge rules based on anything other than the law can stand when cast in the light of her actual record. She knows that Congress makes the law and, like all good judges, she does not try to legislate from the bench. The Congressional Research Service is non-partisan and recently conducted an exhaustive analysis of her judicial record. It concluded as follows:

> Perhaps the most consistent characteristic of Judge Sotomayor's approach as an appellate judge could be described as an adherence to the doctrine of *stare decisis*, i.e., the upholding of past judicial precedents. This characteristic would be in line with the judicial philosophy of Justice Souter, who often displayed special respect for upholding past precedent.[3]

Finally, I believe Judge Sotomayor's judicial philosophy at work is best demonstrated in a dissent she authored in 2006, long before she was slated to seek confirmation from this body. In Hayden v. Pataki, 449 F.3d 305 (2nd Cir. 2006), a Voting Rights Act case, Judge Sotomayor dissented from the majority based primarily on her belief that the majority failed to simply follow and apply the law as it was written. She bluntly stated that "it is the duty of a judge to follow the law, not question its plain terms."[4] She then concluded by stating: "Congress would prefer to make any needed changes itself, rather than have courts do so for it."[5]

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[3] Congressional Research Service, "Judge Sonia Sotomayor: Analysis of Selected Opinions", June 19, 2009.
[4] Hayden, 449 F.3d at 368.
[5] Hayden, 449 F.3d at 368.

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In my opinion, Judge Sotomayor is abundantly qualified and an excellent nominee. Her experience as a prosecutor, trial judge and appellate judge provide her with valuable and unique experience that will be well placed on the United States Supreme Court. Most importantly, her history reflects an overriding support for the rule of law and contains nothing to support a legitimate concern that she will be an "activist judge." I believe the people of the United States will be well served by her presence on the Supreme Court.

Thank you.

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Testimony of John O. McGinnis
Stanford Clinton, Sr. Professor of Law
Northwestern University

Before the Senate Judiciary Committee

Re: Nomination of Judge Sonia Sotomayor to be an Associate Justice of the Supreme Court

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Thank you, Chairman Leahy and Ranking Member Sessions, for the opportunity to address you at the hearing on the nomination of Sonia Sotomayor to be a justice of the Supreme Court. My subject is the use of foreign and international law in constitutional interpretation and Judge Sotomayor's approach to this issue. I believe the use of international and foreign and international law is a subject of contemporary importance, because the ease of access to foreign and international law may tempt justices to use such sources in constitutional interpretation. Such reliance distorts the meaning of our constitution, undermines domestic democracy, and alienates Americans from a document that is our common bond. Sadly, I see the decision by some, including certain Supreme Court justices, to give weight to foreign and international law as the latest in long line of attempts by those who do not like our constitutional principles or the results of the democratic process to substitute principles and results more to their liking.

At the outset, I want to make clear that I am taking no position on Judge Sotomayor's nomination. What is important in the constitutional conversation offered by this hearing is to identify correct constitutional principles and to measure a nominee's adherence to those principles. It is not to engage in any kind of partisan or personal attack on an Article III judge who has my respect and good wishes. Thus, I will first set out the constitutional principles that should govern in this area: contemporary international or foreign law should generally be given no weight in constitutional analysis. I will then briefly turn to a speech that Judge Sotomayor

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gave to the ACLU which may suggest she does believe that foreign and international law may have some weight in constitutional analysis.

To be sure, however, this speech is not pellucid and perhaps Judge Sotomayor will have articulated what I believe to be the correct principles in her testimony to you. In particular, I would be most interested to know whether Justice Sotomayor, as she indicated in her speech, continues to agree more with Justice Ruth Bader Ginsburg rather than Justice Antonin Scalia and Clarence Thomas on this subject, because, as I will note, Justice Ginsburg is perhaps the foremost proponent of using foreign and international law on the Supreme Court. I would also be interested in learning whether she still agrees with the Supreme Court's use of a decision by the European Court of Human Rights in *Lawrence v. Texas*, because, as I also discuss, that use is a prime example of giving weight to foreign law in constitutional interpretation. Most importantly, I would want to know if she thinks there is any distinction between being bound by international law and foreign law and giving it any weight in her decisionmaking, because that appears to me the false distinction that some use to justify importing foreign and international law into our jurisprudence.

I turn now to a general discussion of the proper constitutional principles relating to international and foreign law as a source of authority in constitutional interpretation. First, I will discuss what it means to use foreign or international law as authority in the interpretation of the U.S. Constitution. Second, I will assume the truth of originalism as a theory of constitutional interpretation and show why the use of contemporary foreign or international law is incompatible with that theory. I will then show that the use of foreign and international law is also

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objectionable under even theories of constitutional interpretation that purport to be more pragmatic than originalism.

1. *Giving Weight to Foreign and International Law*

First, what does it mean to use international law or foreign law as an authority in helping to construe the Constitution? This question has itself been a source of confusion. A court uses foreign or international law as authority whenever it gives any weight in American constitutional law to propositions because they are part of international or foreign law

It is sometimes said by the apologists for the use of international and foreign law that, of course, such propositions have no authority so long as a court is not treating them as binding. But that defense misunderstands the nature of legal decisionmaking. Even Supreme Court precedent does not bind the Supreme Court. Such precedent may be overruled and yet few would deny that precedent has authority in constitutional law. The real question is whether propositions of international or foreign law are going to be given any weight (i.e. whether their existence or absence could make any difference to the way the Court comes out). If propositions of international and foreign law are not going to be given any weight, I do not believe it is a deep error for a court to cite them.

I still think, however, the better practice is not to cite such materials. Multiplying citations to legal propositions that do not make a difference to the outcome makes it harder to figure out what are the authorities that are doing the work in reaching the result. Certainly if a judge is not

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giving foreign or international materials weight, the judge should make clear that foreign and international legal material is being included for some reason other than its weight. It is otherwise natural for the reader to believe that citation to legal material means that material might have made a difference to the outcome.

Second, my objections are limited to propositions that are given weight by virtue of their presence in foreign or international law. Depending on their theory of constitutional interpretation, Justices may have other reasons to use a proposition that happens to occur in foreign or international law as a source of authority in constitutional interpretation. For instance, Justices may consider moral principles relevant to constitutional interpretation and may believe the proposition that happens to be contained in international and foreign law is a morally good one. But in that case the methodological question is what weight morality should have in constitutional construction, not the relevance of foreign or international law.

Let me make some clarifying analogies. Justices generally give our own domestic precedent weight, regardless of whether precedent is itself soundly reasoned. Justices could simply look at precedent to determine whether it contains reasoning that they judge to be good by some metric provided by the correct theory of constitutional interpretation. That would just be using precedent for informational value.[1] But Justices generally do use a precedent as authority as well, i.e. for its disposition value. Whatever its informational value, a precedent will make subsequent court opinions more likely to come out in its direction simply because it is precedent.

Or take another example. A justice trying to discern the meaning of word that appears

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ambiguous at the time of the Framing might consult dictionaries at the time to ascertain the better interpretation. If most dictionaries pointed to one meaning rather than the other and the Justice therefore chose that meaning as the proper legal construction, he would be giving weight to those dictionaries in his reasoning. If most dictionaries had favored the other meaning, he would presumably have chosen that other one. It is giving such weight to foreign or international law that is objectionable.

I think the prime example where the Supreme Court has given dispositional value to foreign or international law came in *Lawrence v. Texas*.[2] There the Court cited a case from the European Court of Human Rights, which constitutionally protected homosexual conduct and stated: "The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent."[3] In that case the Court used the decision in the European Union to support the view that our Constitution should also protect homosexual conduct. Ironically, the Court's reliance on European precedent came in a case when it overruled its own precedent. It also ignored the precedent from many other nations whose Constitutions permitted the regulation of sexual conduct.

2. *Originalist Objections to Giving Weight to Foreign or International Law*

Having defined what it is to deploy foreign and international law, the next question is what is wrong with giving any weight to these materials? If one is an originalist, as I am, the

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objections to this use of contemporary international or foreign law are straightforward. Originalists believe that the meaning of the Constitution is established at the time a provision is ratified. From the perspective of originalism, the problem thus with contemporary international or foreign law is the fact that it is contemporary, not the fact that it is foreign or international. Originalists would be pleased to consider Blackstone, or other foreign and international sources from the time of framing that shed light on what a reasonable person at that time would have thought the Constitution meant.[4]

Now, there may be some exceptions to this general rule, but they are exceptions that prove the rule. It may be, for instance, that the intent of the Framers was to have a word in a constitutional provision, like "treaty," be defined by whatever international law of the current day meant it to be. In that case originalism would use international law to construe the meaning of treaty.[5] But in general originalists do not believe as a matter of fact that the Framers meant to define words according to some future meaning.[6] Thus, contemporary foreign or international law is simply not relevant to construing the vast majority of constitutional provisions.

3. *Pragmatic Objections to Giving Weight to Foreign or International Law*

But one should also object to the use of foreign or international law in constitutional interpretation, even if one is a self-styled pragmatist about constitutional theory. Pragmatists believe that the Constitution should invalidate our laws, only if our laws have bad consequences. But does a conflict between our law and international or foreign law give us substantial reason to

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believe the consequences of our law are bad consequences? That is the central question for a pragmatic view of the relevance of foreign or international law, because we begin with some presumption that our democratically made legislation is beneficent and thus has good consequences for Americans. I do not have time to go into why we have that presumption about democratic legislation, but it is a default rule of our system.[7]

A. The Case of Foreign Law A rule of foreign law is not appropriately used to create doubt about the beneficence of our own law, because it is not formulated to be good with respect to the United States. Even assuming that the foreign nation has a flourishing political system, foreign law is formulated to be good for that foreign nation. There may be many differences between that foreign land and the United States that make its law appropriate for that nation and our law appropriate for ours. Indeed, foreign law viewed in isolation may seem contrary to our own, but that difference may be itself delusive. A proposition of foreign law represents the tip of an iceberg of some complex set of social norms in that nation.[8] There may well be other norms within their system that make the legal proposition in question good for those nations. But since the United States does not share in those other norms, importing this single legal proposition may have bad consequences for the United States.

Moreover, the United States and many other nations are differently situated in a variety of ways. For instance, the United States is more entrepreneurial and far more religious than most European nations and it would be hardly surprising if a different set of rules is optimal for its people.[9] Finally, it is very hard to see how one could draw any conclusion from looking at the foreign law of selected nations, because selective attention would ignore many nations that have

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norms that accord with ours. Perhaps as a matter of theory we could look at the law of all foreign nations on a constitutional issue and try to come up with kind of a weighted average of all that law as a standard of comparison for our own, but the courts are not institutionally competent to do that. That would be the work for the entire lifetime of a scholar.

B. The Case of International Law International law is different from foreign law, because international law at least purports to claim some kind of universality, which foreign law does not. Here I address giving weight to any international law that has not been ratified by our political process to create actual domestic obligations. Such "raw" international law includes the use of treaties the United States has not signed, customary international law, and the decisions of the International Court of Justice. In my view, any discrepancy between international law and our law should not cast doubt on the beneficence of our own law. The basic reason is that international law does not purport to be democratic and thus its results do not impeach the product of our own democratic processes. International law reflects the consent of nation states, not the peoples of the world or global demos.

The democratic deficit of international law is not a mere theoretical problem. Take, for instance, the many human rights treaties that are basis of modern human rights law, but that have not been ratified by the United States. These treaties, including treaties on civil rights and human rights, were fabricated during the time when the Soviet Union and its allies were important actors on the international stage. The provisions of treaties that required the give and take of negotiations with totalitarian nations cannot be presumed beneficial by virtue of the process that generated them. These provisions may be beneficial for some other reason, but are

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not good simply because they are a part of international law.

Customary international law in fact faces democratic deficits beyond the fact that nondemocratic nations are involved at many points in influencing its fabrication. Customary international law is not written down, and thus its principles depend on inferences about the propositions to which nation states have consented.[10] Those responsible for inferring these principles from the confusing welter of state practices and declarations are not democratically chosen. These fabricators include publicists and international courts. International law professors are publicists. But we have strong evidence that international law professors are not very representative of their fellow citizens, at least in the United States, because they contribute to one of our political parties over the other by a ratio of more than five to one.[11] International courts are not representative either, both because some members are appointed by authoritarian nations and because even those appointed by democratic government are appointed through processes that are unlikely to elicit the consensus of their societies. If we have such ideologically skewed groups choosing norms, we will get ideologically skewed norms.

C. Other Pragmatic Objections These concerns about the democratic bona fides of foreign and international law that should give us pause before permitting these sources to be used as a factor in overturning our own domestic law. But additional pragmatic reasons militate against the systematic use of international or foreign law as a factor in constitutional construction. While I generally focus on the problematic consequences for Americans of using foreign or international law to construe our Constitution, another pragmatic concern focuses on the welfare of foreign nationals as well. The systematic use of foreign and international law to

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interpret our Constitution will move United States' law, at the margin, to converge to the law of the rest of the world. It is at all not clear that such convergence through constitutional fiat is good. Competition among different laws in different jurisdictions often has advantages. The differences generate information about the effects of laws, and as a result democratic branches are better positioned to choose better laws for themselves. Particularly, if one believes in American exceptionalism, one will think it a loss to entire world to have our distinctive norms prematurely extinguished through the operation of a constitutional law constructed along the lines of international and foreign law.[12]

Indeed, I cannot resist responding to those like, Justice Ruth Bader Ginsburg, who use the "decent respect for the opinions of mankind language" in the Declaration of Independence as an argument for construing our Constitution in light of foreign laws. [13] If Thomas Jefferson had looked to the law of Louis XVI France or any republic on the European continent at the time he would have found support for a regime antithetical to the principles of the Declaration, but none for the self-evident truths which he proclaimed and which eventually diffused throughout the world.

Another pragmatic objection is rooted in the protection of our own sovereign democratic processes. If one takes the use of foreign or international in constitutional interpretation seriously, international or foreign law will have, at the margin, authority to change our law. It suddenly gives people in other nations some ability to affect the shape of our polity. It seems problematic to allow people in other nations to be able to consciously think about how they are changing their law to change our own law. Perhaps, even worse, our own domestic

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interests groups will have another way of getting a second bite at the apple, because they will be more effective than ordinary citizens in working in foreign and international forums to make law that will have a blowback effect on the United States.[14] Once again I would cite the Declaration of Independence in support of this position. One of the Declaration's charges was as follows: "King George the III has conspired with others to subject us to a jurisdiction foreign to our Constitution." I do not want to suggest that a judge relying on foreign law is exactly like King George the III! But a practice of giving weight to foreign law does permit people who are foreign to our jurisdiction to have some conscious influence over the content of our law.

My final kind of pragmatic concern goes back to Alexis de Tocqueville. Tocqueville was very impressed by how much the Americans paid attention to their laws, and in particular, to their Constitution—how much reverence they felt to their system. He came, of course, from the country that had recently been under the *ancien regime*, under a much more top down structure of social ordering, where people were indifferent or contemptuous of the laws that oppressed them. Tocqueville thought that one of the reasons that Americans were so psychologically invested in their law was because it was their own.[15] Americans' creation of their own Constitution remains an important reason for people's enthusiasm for their founding documents.[16]

Thus, a systematic reliance on the authority of foreign or international may have the effect of alienating Americans from the fundamental law that is the source of our stability and prosperity. I certainly fear that politicians in the long run will exploit that alienation to discredit the Court. Reliance on foreign and international authorities may seem chic, but that high style

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comes with a high price.[17]

Thus, for a wide variety of powerful reasons, the use of foreign or international law is of doubtful benefit even under pragmatic theories of constitutional interpretation. Regardless of whether a judge is an originalist or a pragmatist, he or she should keep contemporary foreign and international law, as interesting as those laws may be and useful as they may be in other contexts, separate from the construction of the Constitution that we Americans have made.

4. *Judge Sotomayor's Thoughts on the Subject*

Judge Sotomayor's most comprehensive statement on the use of international and foreign law came in speech to the American Civil Liberties Union in Puerto Rico.[18] I confess that I found the speech not entirely clear and thus I would be interested in any clarification that Judge Sotomayor might have offered in her testimony to this committee or otherwise. I am also at a disadvantage in that I have not found an authorized transcript of that speech and thus I am basing my remarks on having listened to it. As I understand the speech, her position depends on propositions that seem to me in some tension. Jude Sotomayor stated that Justices should not use "foreign or international law" but they should "consider the ideas" they find in foreign and international law in their decisionmaking. [19]

What I find confusing about this general position is that foreign and international law may well contain good ideas, but so do many novels, books of philosophical speculation, and the speeches of members of this committee. Despite the good ideas contained in such disparate sources, judges in my view should not rely on such material as a guide to legal interpretation.

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To put the question in perspective, undoubtedly the Bible, the Koran, and other religious texts have many good ideas, but we would be rightly concerned if judges used them as guidance for interpreting the Constitution, even if they stated they did not find such guidance binding. [20]

I think many would even be uncomfortable if judges routinely cited religious texts for their good ideas. Such a practice would lessen our confidence that the judges were actually making decisions based on the legally relevant material. Depending on what text a judge cited and what she omitted, we might think she was biased in favor of one tradition at the expense of others. The first problem is present in the citation of international law and both problems are present in the citation of foreign law.

Of course, it may be that the good ideas contained in foreign or international law have an independent bearing on constitutional law, but, if so, one needs some formal justification for their relevance other than their presence in foreign and international law. Indeed, what disturbs me a little about Judge Sotomayor's speech is not only some of its reflections on the use of foreign and international law, but its premise that this material may became a source to aid judicial decisionmaking, even although she correctly concludes that our jurisprudence does not endow this material with formal authority. The rule of law itself in my view is founded on the proposition that only material that is formally relevant should have weight in a judge's decisions.

I recognize that some might think that Judge Sotomayor is not saying that foreign law and international law should have any weight, but simply suggesting that judges should be aware of it. There is some possible support for this unexceptionable view. Judge Sotomayor spends a good deal of the speech showing that international law and foreign law are generally not binding.

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In particular, she rightly praises the result in the *Medellin v. Texas*,[21] which clearly holds the only the political branches can make international decisions binding on our land. I think this part of the speech is well done, and in particular, I appreciate her praise for the Supreme Court's excellent decision in *Medellin*, a decision which has been criticized by those who would like to permit judges to converge our own law to international decisions.

But in my view, the better interpretation of this speech rests on a distinction between her rejection of the proposition that international or foreign law can dictate the result or bind a court and her acceptance of the proposition that consideration of such law may have some weight in judicial decisionmaking, including interpreting the constitution.

I have several reasons for this construction of Judge Sotomayor's remarks. At one point she appears to suggest that such materials can "help us decide our issues." She also cites Justices Ginsburg's views on this matter favorably, and Justice Ginsburg has suggested that we should view foreign decisions as "basic denominators of common fairness between the governors and the governed."[22] Finally and most importantly, she favorably mentions the Supreme Court's reliance on foreign law in *Lawrence v. Texas*—the case that in my view is the prime example of one in which the Court improperly gives weight to foreign law. Thus, I think the better interpretation of Judge Sotomayor's speech is that she would give weight to ideas of foreign and international law in at least some circumstances even while disclaiming that such material could formally bind the Court.

For reasons I have described I believe this approach misguided, because contemporary foreign and international legal material deserves no weight in American jurisprudence, unless the

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Constitution itself calls for such material to be given weight. If the material has no proper weight even citing it can lead to confusion, because such a citation make Supreme Court opinions less transparent. Indeed, citation to foreign or international law in this context is worse than citation to a novel, because law of any kind intrinsically seems to carry with it a patina of authority. Citizens then are left in doubt as what is actually doing the analytic work justifying the decision.

Some have suggested that citing foreign or international law is like citing to a law review article. But there are differences. No one thinks that a law review article could have any intrinsic weight because it purports on its face to be just an opinion of an author without authority. Second, at least in most circumstances, a law review article cited offers reasoning directly about the provision in the United States Constitution at issue. It is thus natural to understand the citation as an acknowledgement of the author's work on the issue. That is not the case with a foreign or international legal opinion, because it is not addressed to a provision of the American constitution.

At one point, Judge Sotomayor justifies looking to foreign law on the theory that such consideration will encourage other nations to look at our law in making their own decisions. This justification may be called the "you scratch my back and I will scratch yours" justification for considering foreign law. I believe that this justification is plainly invalid. First, I am unaware of any evidence that foreign nations are more likely to rely on our law if we rely on theirs. I am skeptical that such evidence will be forthcoming: other nations are likely to make their decisions about what materials to rely on in their national interest, not ours. Second, the President may

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want to signal his displeasure with another nation's regime and isolate it. Our highest Court's favorable invocation of the legal system of that regime may send the opposite signal, thus undermining the President's ability to speak with one voice on behalf of the nation. Finally, and most fundamentally, the Supreme Court simply has no authority to decide cases in a way that maximizes its influence overseas. The Supreme Court is many things, but not an organ of our foreign policy. The Court should confine itself to umpire our disputes and not act like a secretary state authorized to shade decisions or even formulate opinions to burnish the Court's reputation in foreign lands.

I want to close these written remarks by emphasizing that Judge Sotomayor may well have clarified her views in her testimony. I do not believe we should necessarily hold mistaken comments in speeches against a judicial nominee, particularly if he or she corrects them. Constitutional law is a complex enterprise in which men and women of good will are often mistaken. I know I have been on more than one occasion.

Once again many thanks for the opportunity to participate and I look forward to your questions.

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[1] *See* Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1544 (2000) (distinguishing the information and disposition functions of precedent).

[2] Lawrence v. Texas, 539 U.S. 558 (2003). It is important to note that European Human Rights decision was not just used merely as a factual data point to rebut the claim that homosexual conduct

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has never been tolerated in Western civilization. Contrary to suggestions in Lawrence, neither the majority opinion in Bowers nor Chief Justice Burger's concurrence made any such claim. And if even if they had, it would have been irrelevant dicta in a case that required the identification of a fundamental right in our Nation's history and tradition. *See* Lund & McGinnis, *supra* note 17, at 1581.

[3] *Id.*

[4] I do not have space in this Essay to consider which constitutional provisions call for such references, but there clearly are some. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 10 (giving Congress the power "[t]o define and punish . . . Offenses against the Law of Nations"). Nor do I consider whether there are specific provisions that expressly contemplate being updated by reference to contemporary social norms. For reasons discussed below, however, it is doubtful that the Framers would want to make the evolution of our Constitution depend on the legal norms of other regimes which they knew to be hardly republican in practice or in spirit.

[5] Some have argued that the Framers were so respectful of the law of nations that they would have wanted to interpret the Constitution in congruence with that law when possible. But the Framers viewed the law of nations as a limited set of principles that were a category of natural law. Blackstone, for example, described the law of nations as "a system of rules, deducible by natural reason," and said that it "results from those principles of natural justice, in which all the learned of every nation agree." WILLIAM BLACKSTONE, 4 COMMENTARIES 66–67; *see also* Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 509–11 (1998). But defenders of the use of contemporary international law want to use evolving standards of an international law that has grown in scope to become a kind of local municipal law and changed in nature from natural to positive law. In this respect, modern international law does not resemble the law of nations known to the Framers. I do not believe there is evidence that the Framers wished to use this distinct brand of international law to interpret the Constitution.

[6] Some have also suggested that the Charming Betsy canon of construction, which requires statutes to be construed where possible in accordance with international law, be applied to constitutional construction as well. *See* Daniel Bodansky, The *Use of International Sources in Constitutional Opinion*, 32 GA. J. INT'L & COMP. L. 421 (2004). But this canon rests on the separation of powers consideration that it should be the political branches, not the courts, which make the decision to violate international law. *See* Bradley, *supra*, at 525–29. Thus, the canon should not be applied to the Constitution because its application would interpret the Constitution to accord with international law and thus tend to deprive the political branches of the opportunity to decide whether they want to violate international law.

[7] Such process-based defenses of democracy are often associated with Condorcet. *See Dennis C. Mueller*, PUBLIC CHOICE III 128 (2003).

[8] *See* Jed Rubenfeld, *The Two World Orders*, WILSON Q., Autumn 2003, at 22, 24–25.

[9] On the dramatic difference between the United States and Europe in terms of religious observance and influence, see Brian C. Anderson, *Secular Europe, Religious America*, PUB. INT., Spring 2004, at 143.

[10] I discuss the democratic deficit of customary international law at length in John O. McGinnis, *The Appropriate Hierarchy of Global Multilateralism and Customary International Law: The Example of the WTO*, 44 VA. J. INT'L L. 229 (2003).

[11] *See* John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculties*, 93 GEO. L.J. 1167 (2005).

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[12] *See also* John O. McGinnis & Ilya Somin, *Should International Law be Part of Our Law?*, 59 STAN. L. REV. 1175, 1234 (2007) (noting that permitting the United States to maintain its own bundle of norms allows people throughout the world, to choose to migrate and live under them).

[13] Ruth Bader Ginsburg, Keynote Address at the Annual Meeting of the American International Law Annual Meeting: " A Decent Respect to the Opinions of [Human]kind:" The Value of the Comparative Perspective in Constitutional Adjudication (April 1, 2005).

[14] *See* John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 558 (2000) (observing that the average citizen has a harder time following activities in Geneva than in Washington).

[15] *See* ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 247, 248 (Phillips Bradley ed., Alfred A. Knopf, Inc. 1945) (1835).

[16] Years ago this enthusiasm was actually marked by celebrations and even parades for the Constitution in particular. WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937, at 233 (1994) (discussing "Constitution Day" celebrations).

[17] Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, at 1607 (2004).

[18] Judge Sotomayor has not cited to international law or foreign law in any opinion about constitutional interpretation. But this aspect of her performance as a lower court judge is not necessarily a good predictor of her likely approach on the Supreme Court. Lower courts are necessarily focused on Supreme Court precedent. The Supreme Court is not bound by its precedent and thus judges have the discretion and have as a matter of fact chosen to rely on a wide variety of materials in their decisionmaking beyond precedent of their own Court.

[19] I should emphasize that my focus here is limited to discussing the use of foreign and international law in the context of interpreting the Constitution. Judge Sotomayor, for instance, has used foreign law in interpreting a treaty. *See* Croll v. Croll, 229 F.3d. (2d Cir. 2000). While I have no opinion on the outcome of that case, I think Judge Sotomayor was right to cite and perhaps give weight to foreign law in that very different context. Treaties are contracts and the views of other parties as to the meaning of the contract can be quite relevant. Indeed, the parties would expect that the decisions of other parties would be relevant to affixing the meaning of the treaty, because this relevance would advance a uniform meaning of a treaty which the parties signed as common enterprise.

[20] *See* John O. McGinnis, *Foreign to Our Constitution*, 100 N. W. L. REV. 303, 311 (2006).

[21] Medellin v. Texas, 128 S.Ct. 1346 (2008). I discuss the importance of this case further in John O. McGinnis, *Medellin and the Future of International Delegation*, 118 YALE L. J. 1712 (2008).

[22] *See* Ginsburg, *supra* note 12.

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María "Mayita" Meléndez Altieri
Alcaldesa

June 5, 2009

Hon. Patrick Leahy, Chair
Senate Judiciary Committee
433 Russell
Senate Office Building
US Senate
Washington, DC 20510

Honorable Senator:

Judge Sonia Sotomayor has been an excellent ambassador for the Hispanic and Puerto Rican people. Her life is a dignified example of struggle and survival. Ever since she was a student in High School who lived in a public housing project in the South Bronx, she has been a constant defender of human rights and has always struggled for the benefit of others.

Although growing up wasn't entirely smooth for Sonia Sotomayor, she was able to fulfill her goals and became a Lawyer, a distinguished Law Professor, an excellent writer and an Honorable Judge, respected by her peers. Over her ten years on the 2nd Circuit Court of Appeals in New York City, she has attended more than 3,000 appeals and has written more than 3,800 opinions.

Sonia Sotomayor is a leader, a great leader of herself. She gained a reputation for preparedness and fairness, a fearless and effective prosecutor. As a trial judge she garnered a reputation for being well-prepared in advance of a case and moving cases along a tight schedule. Due to the fact that Sonia Sotomayor was the first Puerto Rican woman to serve in United States Federal Court, we the people of Ponce, Puerto Rico feel very proud of her accomplishments and we know she would bring to the Nation's Highest Court her knowledge, wisdom, experience and sensibility.

I, María E. Meléndez Altieri, Mayor of the City of Ponce, in the name of my fellow citizens hope that Judge Sotomayor will be confirmed as Associated Judge of the Supreme Court of the United States of America. The numerous awards and honors received by this singular and humble Puerto Rican and Hispanic woman, her impressive academic and professional record and her "curriculum vitae" are the best presentation of her achievement.

God bless America, the Land of Opportunities and Dreams.

Respectfully yours,

María E. Meléndez Altieri, D.M.D.
María E. Meléndez-Altieri, DMD
Mayor of the City of Ponce

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TESTIMONY OF DISTRICT ATTORNEY ROBERT M. MORGENTHAU BEFORE THE COMMITTEE ON THE JUDICIARY OF THE UNITED STATES SENATE

I am pleased to join those who today endorse the nomination of Judge Sotomayor to the United States Supreme Court.

I first came to know Judge Sotomayor while I was on a recruiting trip to the Yale Law School. At that time Jose Cabranes was Yale's general counsel, and he also taught at the law school. I asked him if he knew anyone special I should speak with, and he said yes. He said that a remarkable student named Sonia Sotomayor was deciding where to work, and that while he did not know whether she had given any thought to being a prosecutor, it would be well worth my while to meet her.

He was decidedly correct. I am happy to be able to say that the Judge joined my office and remained with us for five years. In my conversations with her I learned a bit about the compelling story of her life, with which I know you are by now familiar. In a nutshell, she was raised by her mother in a working class home in the South Bronx, and as a teenager worked the evening shift in a garment factory to help make ends meet. She went on, through hard work and force of will, to overcome her initial difficulties with English composition; to win Princeton University's highest undergraduate

honor, the Pyne Prize; and to graduate with honors from the Yale Law School.

In the District Attorney's Office, the judge was immediately recognized by Trial Division supervisors as someone a step ahead of her colleagues, one of the brightest and most mature, a hard-working stand-out who was marked for rapid advancement. Ultimately she took on every kind of criminal case that comes into an urban courthouse, from turnstile jumping to homicide. One of those cases, the "Tarzan" murder case, involved an addicted burglar named Richard Maddicks who had terrorized a neighborhood during a crime spree that left three dead and involved his swinging into apartment windows from rooftops, shooting anyone in his way. He is now serving a 137 year to life sentence. Another case, prosecuted in 1983 by Assistant DA Sotomayor, involved a Times Square child pornography operation. That case was the first child pornography prosecution in New York after a landmark 1982 Supreme Court decision upholding New York's new child pornography laws. Assistant DA Sotomayor left the jurors in tears over what the defendants had done to child victims. These cases happened to grab the public's attention. But Assistant DA Sotomayor understood that every case is important to the victim, and

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appropriately gave undivided attention to the proper disposition of all of them.

Assistant District Attorney Sotomayor soon developed a reputation: unlike many beginning prosecutors, she simply would not be pushed around, by judges or by attorneys. Some judges were eager to dispose of cases cheaply, to clear their calendars. ADA Sotomayor instead fought for the right conclusion to each case.

After leaving my office Judge Sotomayor joined a prominent law firm, and also accepted a part-time appointment as a member of the New York City Campaign Finance Board. There she continued to earn a reputation for being tough, fair, and non-political, in an arena where those characteristics were sorely needed. And she has taken those characteristics with her to the federal bench, where they are equally important.

Judge Sotomayor's career in the law has spanned three decades, and she has worked at almost every level of our judicial system -- as a prosecutor, a private litigator, a trial court judge, and an appellate court judge on what I think is the second most important appellate court in the world. She has been an able champion of the law, and her depth of experience will be invaluable on our highest court. Judge Sotomayor is

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highly qualified for any position in which a first-rate intellect, common sense, collegiality, and good character would be assets.

I might add that the judge will be the only member of the Supreme Court with experience trying criminal cases in the state courts. The overwhelming majority of American prosecutions occur in the state courts. Sonia Sotomayor will bring to the Court a full understanding of the problems faced by prosecutors in those courts, as well as a first hand knowledge of the trauma faced by victims and of the legitimate needs of police officials who work in the state law enforcement systems. She will understand the impact of federal judicial decisions on state prosecutions.

In short, this judge is uniquely qualified by intellect, experience and commitment to the rule of law to be an outstanding, I repeat outstanding, member of the Court. President Obama, and for that matter the United States, should be proud to see once more the realization of that central American credo, that in this country a hard-working person with talent can rise from humble beginnings to one of the highest positions in the land.

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NARAL
Pro-Choice America Foundation

Considering the Next Supreme Court Justice: A Summary of the State of Choice

Testimony Presented by

Nancy Keenan
President

On Behalf of
NARAL Pro-Choice Arizona
NARAL Pro-Choice California
NARAL Pro-Choice Colorado
NARAL Pro-Choice Connecticut
NARAL Pro-Choice Maryland
NARAL Pro-Choice Massachusetts
NARAL Pro-Choice Minnesota
NARAL Pro-Choice Missouri
NARAL Pro-Choice Montana
NARAL Pro-Choice New Hampshire
NARAL Pro-Choice New Mexico
NARAL Pro-Choice North Carolina
NARAL Pro-Choice Ohio
NARAL Pro-Choice Oregon
NARAL Pro-Choice South Dakota
NARAL Pro-Choice Texas
NARAL Pro-Choice Virginia
NARAL Pro-Choice Washington
NARAL Pro-Choice Wisconsin
NARAL Pro-Choice Wyoming

U.S. Senate
Committee on the Judiciary

July 10, 2009

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On behalf of NARAL Pro-Choice America's one million members and activists, and all Americans who hold dear the values of freedom and privacy, I am honored to submit this testimony to the committee. You have before you the nomination of Sonia Sotomayor to the position of associate justice of the U.S. Supreme Court. The nomination of a Supreme Court justice is a notable opportunity to examine the state of one of our most deeply valued rights: the right to privacy. Your constitutional role in evaluating the qualifications and merits of this nominee is profoundly significant, as the Supreme Court is the final arbiter of our Constitution. The decisions the Supreme Court issues have a lasting impact on the lives of all Americans; therefore, each of us has a stake in this confirmation process.

The Supreme Court and the Right to Privacy

The Supreme Court has been pivotal in articulating and guaranteeing Americans' right to privacy. In the 20th century, it played a crucial role in recognizing certain sanctified spheres of individual autonomy, liberty, and privacy that Americans cherish.

During the half century leading up to the critical *Roe v. Wade* opinion, the Supreme Court decided a series of significant cases in which it recognized a constitutional right to privacy that protects important and deeply personal decisions concerning bodily integrity, identity, and destiny from undue government interference.[1] Citing these concerns for autonomy and privacy, the court struck down laws which had severely curtailed the role of parents in education, mandated sterilization, and prohibited marriages between people of different races.[2]

Of particular interest, *Griswold v. Connecticut*,[3] decided in 1965, and *Eisenstadt v. Baird*,[4] decided in 1972, recognized important aspects of the right to privacy. In these cases, the Supreme Court held that state laws that criminalized or hindered the use of contraception violated this central right. These cases recognized the right of the individual "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[5] Following these cases, in 1973, the court held in *Roe v. Wade* that the right to privacy encompasses the right to choose whether to end a pregnancy.[6]

Bioethicist and legal scholar R. Alta Charo articulates *Roe*'s importance as follows:

> *Roe v. Wade* represents the culmination of decades of constitutional law on the need to restrain over-zealous governmental intrusions on personal decisions concerning our families, our bodies, and our lives. In turn, it has formed the basis for yet more decades of constitutional law on the importance of maintaining a zone of personal liberty and privacy, in which individuals may flourish. In a century that will bring ever greater temptations and technological capabilities for governmental surveillance and control of its citizens, maintaining the integrity of this zone of personal liberty and privacy is more important than ever.[7]

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The right to privacy recognized in this series of cases is an area of law concerning our most intimate experiences. The particular understanding articulated in *Roe* that privacy includes the right to choose may be the most elemental application of the law.

Three Decades of *Roe*: A Better Life for Women

This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent.[8]

U.S. Supreme Court Justice Blackmun
Roe v. Wade

When *Roe v. Wade* was decided in January 1973, abortion except to save a woman's life was banned in nearly two-thirds of states.[9] Laws in most of the remaining states contained only a few additional exceptions.[10] In its landmark 7-2 decision, the Supreme Court established the right to choose and recognized that because the decision whether to have a child is unique to every woman and her particular situation, it must be a personal decision.

It is impossible to capture, even in pages of testimony, how monumental a positive impact *Roe* has had on women's personal lives and the legal doctrine of the right to privacy. *Roe v. Wade* has saved the lives of thousands of women, and has improved the quality of life for countless others. In addition to its other positive effects, *Roe* empowered women to take responsibility for their reproductive health and overall well-being; in other words, it embodies the fundamental American values of freedom and personal responsibility.

Most women welcome pregnancy, childbirth, and the responsibilities of raising a child at some period in their lives. However, few events can more dramatically constrain a woman's opportunities than an unplanned pregnancy. Because childbirth and pregnancy substantially affect a woman's educational prospects, employment opportunities, and self-determination, restrictive abortion laws narrowly circumscribed women's role in society and hindered women from charting their paths through life in the most basic of ways.[11] In the 36 years since *Roe*, the variety and level of women's achievements have reached unprecedented heights. The Supreme Court observed that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[12]

The Reality of *Roe* Today

Toward the end of his term on the court, Justice Blackmun wrote of the freedom to choose: "For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows."[13]

Twenty years later that wind is blowing at gale force.

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Justice Blackmun warned of a threat that he would come to see realized even in his years on the bench. In 1992, the court rendered one of its most important decisions on abortion rights since *Roe*. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the court reaffirmed *Roe*, while at the same time sharply restricting its protections. The *Casey* court abandoned the strict scrutiny standard of review and adopted a less protective standard that allows states to impose restrictions as long as they do not "unduly burden" a woman's right to choose. Under this new standard, the court approved state restrictions that it had previously found to violate the right to privacy and effectively invited states to impose barriers on women's access to abortion.[14] Indeed, under *Casey*'s looser standard, courts have allowed a multitude of state restrictions to be imposed upon reproductive freedom and choice.[15] *Casey* opened the floodgates to a relentless, purposeful effort on the part of anti-choice forces to erode and burden the right to choose—rendering it unavailable for many and more difficult and dangerous for others.

Even though *Roe* was not overturned in *Casey*, unfortunately reproductive choice is not a reality for many women in the United States today. At the state level, anti-choice legislators are steadily passing laws that could lay the groundwork for a Supreme Court case to challenge and possibly reverse *Roe v. Wade*. Between 1995 and 2008, states enacted 528 anti-choice legislative measures—including 16 in 2008. Abortion bans, mandatory waiting periods, biased-counseling requirements, restrictions on young women's access, medically unnecessary regulations on doctors, and limited funding for low-income women have unfortunately achieved their intended result: it is more difficult for women to obtain safe, legal abortion care today than it was in 1973, just after the *Roe* decision was handed down. Aggravating the problem, the number of doctors providing abortion care is steadily decreasing,[16] and anti-choice forces have created an atmosphere of intense intimidation and violence that deters physicians from entering the field and has caused others to stop providing abortion services.[17]

Following is a brief summary of some of the ways in which, today, a woman's right to choose is in fact unrealized.

Low-Income Women

As *Roe* established a constitutional right to choose, it follows that all women should have access to reproductive-health care regardless of their economic status. However, restrictions on public funding make abortion services an unavailable choice for many women. Numerous state and federal laws restrict abortion care with only very narrow exceptions. Banning public funding for services limits reproductive-health options for those who rely on the government for their health care — recipients of Medicaid, Medicare, the State Children's Health Insurance Program, Indian Health Service clients, and clients of the District of Columbia's public health-care programs — putting women's health in danger and inserting politicians into the doctor-patient relationship.

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Low-income women often have difficulty raising the money to pay for abortion care and, according to one study, on average need twice as much time to raise the necessary funds than do middle- or upper-income women.[18] These burdens disproportionately affect women of color, who are more likely than white women to be poor, to lack health insurance, and to rely on government health-care programs or plans.[19] In today's challenging economic climate, this can mean having to decide between accessing much-needed health care or paying rent and utilities. The ever-increasing demand placed on charities that provide funds for abortion care demonstrates this unmet need. The inability to exercise the constitutional right to choose can severely jeopardize women's health. When a low-income woman faces a medical complication during her pregnancy that does not qualify for one of the narrow exceptions to restrictions on public funding, her struggle to secure adequate private funding can result in dangerous health complications.

Young Women

Mandatory parental consent and notice laws burden young women's freedom to choose. Parental-consent and notice laws endanger young women's health by forcing some women—even some from healthy, loving families—to turn to illegal or self-induced abortion, to delay the procedure and increase the medical risk, or to bear a child against their will. Ideally, a teen facing a crisis will seek the advice and counsel of those who care for her most and know her best. In fact, even in the absence of laws mandating parental involvement, many young women do turn to their parents when they are considering abortion.[20] Unfortunately, some young women cannot involve their parents because physical violence or emotional abuse is present in their homes, because their pregnancies are the result of incest, or because they fear parental anger and disappointment. Mandatory parental-involvement (consent and notice) laws do not solve the problem of inadequate family communication; in some cases, they exacerbate a potentially dangerous situation.

In challenges to two different parental-involvement laws, the Supreme Court has stated that such laws must have some sort of bypass procedure in order to be constitutional.[21] Most states that require parental consent or notice provide—at least as a matter of law—a judicial bypass through which a young woman can seek a court order allowing an abortion without parental involvement. Despite the existence of these laws, they are very challenging to navigate. Some young women cannot maneuver the legal procedures required; others do not go or delay going because they fear that they will be recognized by people at the courthouse. Ultimately, judicial-bypass mechanisms are often an inadequate alternative for young women, especially when courts are either not equipped or resistant to granting these bypasses.

Women in Rural Areas

Mandatory-delay laws and provider shortages have a particularly limiting affect on the ability of women in rural areas to choose safe, legal abortion. State-imposed mandatory-delay provisions prohibit women from receiving abortion care until they are subjected to a state-

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mandated lecture and/or materials followed by a delay of usually at least 24 hours before they can receive services. This creates additional burdens for these women who have to travel for many hours to reach a health-care provider and for women who do not have the resources to take extra time off work or pay for child care. These laws impede earlier, and therefore safer, abortion care, thereby endangering women's health.

The precipitous decline in the number of abortion providers combined with mandatory-delay laws has a practical effect of rendering meaningless the constitutional right to choose for women in rural areas. Today, 87 percent of all U.S. counties have no identified abortion provider.[22] The American Medical Association's Council on Scientific Affairs concluded that "mandatory waiting periods, parental or spousal consent and notification statutes, a reduction in the number and geographic availability of abortion providers, and a reduction in the number of [trained] physicians"[23] delay abortion care and endanger women's health.

Violence Against Providers

A campaign of violence, vandalism, and intimidation, endangering providers and patients, has curtailed the availability of abortion services and has made it increasingly difficult for women to exercise their right to choose. Picketers have chained themselves to clinic entrances and blocked patients from entering in an effort to intimidate and discourage those seeking abortion care. More violent measures have claimed the lives of those involved in providing care for women; since 1993, eight clinic workers – including four doctors, two clinic employees, a clinic escort, and a security guard – have been murdered in the United States.[24] Seventeen attempted murders have also occurred since 1991.[25] Opponents of choice have directed more than 5,800 reported acts of violence against abortion providers since 1977, including bombings, arsons, death threats, kidnappings, and assaults, as well as more than 143,000 reported acts of disruption, including bomb threats and harassing calls.[26] Just a few weeks ago, Dr. George Tiller, a dedicated physician who provided abortion care for women for two decades, was shot and killed by an anti-choice extremist while attending church in Wichita, Kansas.

Because of the mounting threats to providers, clinics in many areas are increasingly forced to rely on "circuit riders" – doctors willing to fly and drive hundreds of miles to serve women who live in areas where local doctors no longer feel safe providing these services. Clinic directors can have a difficult time hiring and retaining office staff because of the daily threats and harassment from anti-choice activists. Although federal and state clinic-protection laws have alleviated some forms of violence against reproductive-health centers, the threats, intimidation, and violence against clinic providers and staff continue. These actions hinder access to abortion services and threaten the lives of those dedicated to ensuring a woman's right to choose.

The Reversal of *Roe* Poses a Threat to Women

Not only do women currently face barriers to accessing their right to choose, but *Roe v. Wade*'s constitutional protections are themselves in jeopardy. For three-and-a-half decades, the anti-

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choice movement has been on a mission for the elusive fifth justice to overturn *Roe*. It has sustained a concerted, well-funded, and politically potent effort with the ultimate goal of ending legal abortion in all, or nearly all, circumstances. The threat to *Roe* itself is very real.

If *Roe v. Wade* is overturned, tens of millions of women would face the possibility of losing their right to choose altogether. Without this federal protection in place, many state bans on abortion would go into effect immediately, and anti-choice state legislatures and governors in other states could pass new laws eliminating access to abortion. In 2008 alone, legislators in 12 states considered 22 near-total bans on abortion care, and 15 states have not repealed their existing bans, some of which could become enforceable if *Roe* falls.[27] All told, according to our analysis, 23 states are poised to make abortion illegal if *Roe v. Wade* falls.[28]

According to one estimate made before 1973, "more than five thousand women may have died [per year] as a direct result [of criminal abortions]. Many deaths from illegal abortion may go unlabeled as such because of careless or casual autopsies and the lack of experience and ability of autopsy surgeons."[29] An estimated 1.2 million women each year resorted to illegal abortion,[30] despite the hazards of frightening trips to dangerous locations, unlicensed practitioners, unsanitary conditions, and risk of severe infection or death.[31] Since abortion was legalized in 1973, the safety of the procedure has increased dramatically. The number of deaths per 100,000 legal abortion procedures declined from 4.1 to 0.6 between 1973 and 1997.[32] *The New England Journal of Medicine* has reported that "[s]erious complications and death from abortion-related infection are almost entirely avoidable. Unfortunately, the prevention of death from abortion remains more a political than a medical problem."[33]

In addition to the impact the reversal of *Roe* would have on medical safety and health of women, it also would have considerable ramifications for the other private decisions protected by *Roe*'s recognition of the right to bodily autonomy.

As Professor Charo explains:

> *Roe v. Wade* is at the core of American jurisprudence, and its multiple strands of reasoning concerning marital privacy, medical privacy, bodily autonomy, psychological liberty and gender equality are all connected to myriad other cases concerning the rights of parents to rear their children, the right to marry, the right use contraception, the right to have children, and the right to refuse unwanted medical treatment. Overturning *Roe* would unravel far more than the right to terminate a pregnancy, and many Americans who have never felt they had a personal stake in the abortion debate would suddenly find their own interests threatened, whether it was the elderly seeking to control their medical treatment, the infertile seeking to use IVF to have a child, the woman seeking to make a decision about genetic testing, the couple heeding public health messages to use a condom to reduce the risk of contracting AIDS or other sexually

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transmitted diseases, or the unmarried man who, with his partner, is trying to avoid becoming a father before he is ready to support a family.[34]

The right to choose encompass the right to control the path of our lives, and weakening this protection would open the door for government intrusion into not only reproductive decisions but virtually all matters of personal life.

Choice Hangs in the Balance

We have seen that the retirement of a Supreme Court justice can have dramatic impact on the constitutional protection of a woman's right to choose. The most recent cases dealing with reproductive rights have been decided by the narrowest of margins, hinging on just one vote. While choice once enjoyed a comfortable majority on the court, it now hangs precariously in the balance.

In June 2000 in *Stenberg v. Carhart*, the Supreme Court issued a ruling that emphatically maintained the centrality of women's health and struck down Nebraska's ban on abortion care as early as the 12th week in pregnancy.[35] With the retirement of Justice O'Connor and the passing of Chief Justice Rehnquist in 2006 President Bush appointed Chief Justice Roberts and Justice Alito, shifting the court's balance further to the right. Both had anti-choice records, giving pro-choice Americans reason to worry that these new additions to the court would vote to limit *Roe* further, or even overturn it.

These fears were confirmed by the 2007 outcome of the Federal Abortion Ban cases of *Gonzales v. Planned Parenthood Federation of America* and *Gonzales v. Carhart*[36] that illustrated the anti-choice, anti-woman direction in which the Roberts court is moving. In a stunning retreat from more than three decades of precedent, the U.S. Supreme Court under Chief Justice Roberts upheld the first-ever federal ban on an abortion procedure. This decision represents a monumental departure from prior cases, and with it, the court effectively eliminated one of *Roe v. Wade*'s core protections: that a woman's health must always be paramount. Perhaps most ominously, President Bush's appointees to the court cast the critical votes to uphold the ban, likely signaling a seismic shift in the court's future rulings. The Roberts court thus not only upheld a dangerous and invasive federal law, it gave the green light to anti-choice politicians to enact new restrictions to test the shrinking contours of the right to privacy.

As *Roe* enters its fourth decade, though its protections remain a bulwark of freedom for American women, our rights have been eroded and are in grave peril; the full vision of reproductive freedom remains elusive for too many women.

The Senate's Responsibility

The American people deserve a Supreme Court composed of independent and fair-minded justices who will respect and preserve our fundamental rights, including the right to privacy

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and a woman's right to choose. The U.S. Supreme Court's ultimate responsibility is to fulfill the American promise of equal justice under law.[37] The Senate has the rare opportunity to reaffirm, through its "advice and consent" responsibility, the enduring values of freedom and individual autonomy upon which our country was founded.

The Senate's role in the Supreme Court confirmation process has a profound influence on everyday people's lives. *Roe*, a case decided by nine Supreme Court justices confirmed by the Senate, enshrined the right to choose in our nation's jurisprudence. With the confirmation of two anti-choice justices, Chief Justice John Roberts and Justice Samuel Alito, the 2007 *Carhart* decision took away a core tenet of *Roe*, that a state's interest in regulating abortion never trumps a woman's health.

The balance on the nation's highest court is shifting, and the recent changes in the court's composition underscore why it is critical for the U.S. Senate to examine nominees for their commitment to upholding American liberties. By every measure, the American people overwhelmingly support upholding *Roe*, which stands as a milestone to women's freedom and equality. On behalf of NARAL Pro-Choice America and millions of Americans who value freedom and privacy, I urge the Senate to consider this history as it begins to undertake one of its most serious responsibilities: confirming the next justice of the Supreme Court of the United States.

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[1] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), at 927 (Blackmun, J., concurring and dissenting).

[2] *See Meyer v. Nebraska*, 262 U.S. 390 (1923); *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Loving v. Virginia*, 388 U.S. 1 (1967).

[3] *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[4] *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

[5] *Eisenstadt*, 405 U.S. at 453.

[6] *Roe v. Wade*, 410 U.S. 113 (1973), at 153.

[7] *The Consequences of Roe v. Wade and Doe v. Bolton: Hearing Before the Senate Comm. on the Judiciary, Subcommittee on the Constitution, Civil Rights and Property Rights*, 109th Cong. (2005) (testimony of R. Alta Charo).

[8] *Roe v. Wade*, 410 U.S. 113 (1973), at 153.

[9] *Roe*, 410 U.S. at 118-119 n.2.

[10] *See, e.g.*, DEL. CODE ANN., tit. 24, §§ 1790-1793.

[11] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), at 928 (Blackmun, J., concurring and dissenting).

[12] *Casey*, 505 U.S. at 856.

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[13] *Webster v. Reproductive Health Services*, 492 U.S. 490, 560 (1989) (Blackmun, J. dissenting).

[14] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), at 881-87.

[15] Between 1995 and 2006, states enacted 512 anti-choice legislative measures—including 45 in 2006 alone. *See generally* NARAL PRO-CHOICE AMERICA & NARAL PRO-CHOICE AMERICA FOUNDATION, *Who Decides? The Status of Women's Reproductive Rights in the United States* (16th ed. 2007), *available at* http://www.prochoiceamerica.org/choice-action-center/in_your_state/who-decides/.

[16] Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence and Services in the United States in 2000*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 10 (2003).

[17] For example, in October 1999, abortion provider Stephen M. Dixon closed down his District of Columbia ob/gyn practice, indicating that threats and harassment by anti-abortion activists had taken their toll. These activists mailed threats to Dixon's home, placed his photograph on a "wanted poster," and listed him on a "Baby Butchers" web site, along with 32 other D.C. physicians and hundreds more across the country. (In February 1999, a federal jury ordered the creators of the poster and web site to pay more than $107 million to Planned Parenthood of Columbia/Willamette, the Portland Feminist Women's Health Center, and doctors because of the threats contained in these and other materials.) Dixon said he had already stopped providing abortion care due to the stress caused by anti-abortion terrorism. In a letter to his patients, Dixon wrote, "Sadly, the ongoing threat to my life and my concern for the safety of my loved ones has exacted a heavy toll on me, making it necessary that I discontinue practicing OB-GYN." Avram Goldstein, *Doctor Quits, Cites Antiabortion Threats*, WASH. POST, Nov. 4, 1999, at B1; *Planned Parenthood of the Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 41 F. Supp. 2d 1130 (D. Or. 1999), *aff'd. in part, vacated and remanded in part*, 290 F.3d 1058 (9th Cir. 2002), *petition for cert. denied*, 123 S. Ct. 2637 (June 27, 2003).

[18] Patricia Donovan, *The Politics of Blame: Family Planning, Abortion and the Poor*, THE GUTTMACHER INSTITUTE 36 (1995).

[19] NARAL PRO-CHOICE AMERICA & NARAL PRO-CHOICE AMERICA FOUNDATION, *The Reproductive Rights and Health of Women of Color* (2000), at 22.

[20] Stanley K. Henshaw and Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 FAM. PLAN. PERSP. 196, 199 (1992).

[21] *Hodgson v. Minnesota*, 497 U.S. 417, 420 (1990) (requiring a bypass procedure for a two-parent notification statute); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 510 (1990) (requiring bypass procedures for parental consent statutes).

[22] Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence and Services in the United States in 2000*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 10 (2003) (noting that 34 percent of women age 15-44 were living in a county with no abortion provider in 2000).

[23] American Medical Association, *Induced Termination of Pregnancy Before and After Roe v Wade: Trends in the Mortality and Morbidity of Women*, 268 JAMA 3238 (1992).

[24] NAF's statistics include incidents from both the United States and Canada. The National Abortion Federation (NAF) derives most of its statistics from its members, most of whom are in the United States. NAF, *NAF Violence and Disruption Statistics: Incidents of Violence & Disruption Against Abortion Providers in the U.S. & Canada* (Jun. 30, 2008); NAF, *Chronological History of Shootings and Murder*.

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[25] NAF, *NAF Violence and Disruption Statistics: Incidents of Violence & Disruption Against Abortion Providers in the U.S. & Canada* (Jun. 30, 2008).

[26] NAF, *NAF Violence and Disruption Statistics: Incidents of Violence & Disruption Against Abortion Providers in the U.S. & Canada* (Jun. 30, 2008).

[27] *See generally* NARAL PRO-CHOICE AMERICA & NARAL PRO-CHOICE AMERICA FOUNDATION, *Who Decides? The Status of Women's Reproductive Rights in the United States* (18th ed. 2009), *available at* http://www.prochoiceamerica.org/choice-action-center/in_your_state/who-decides/.

[28] Donna Crane, "Debate Primer: Be Ready to DeBunk Palin's Answers on Roe," *RH Reality Check*, *available at*, http://www.rhrealitycheck.org/blog/2008/10/02/debate-primer-be-ready-debunk-palins-answers-roe-0 (last visited Jul. 10, 2009).

[29] Zad Leavey & Jerome M. Krummer, *Criminal Abortion: Human Hardship Unyielding Laws*, 35 S. CAL. L. REV. 123, 124 (1962). "It has been estimated that as many as 5,000 American women die each year as a direct result of criminal abortion. The figure of 5,000 may be a minimum estimate." Richard Schwarz, SEPTIC ABORTION 7 (1968); "One recent study at the University of California's School of Public Health estimated 5,000 to 10,000 abortion deaths annually." Lawrence Lader, ABORTION 3 (1966); "[M]ore than five thousand women may have died as a direct result [of criminal abortion in the United States in 1962]." Zad Leavy & Jerome M. Kummer, *Criminal Abortion: Human Hardship and Unyielding Laws*, 35 S. Cal. L. Rev. 123, 124 (1962); "Taussig and others have concluded that the abortion death rate during the late 1920s was about 1.2% and amounted to over 8,000 deaths per year." Russell S. Fisher, *Criminal Abortion, in* Harold Rosen, THERAPEUTIC ABORTION, MEDICAL PSYCHIATRIC, LEGAL, ANTHROPOLOGICAL, AND RELIGIOUS CONSIDERATIONS 8 (1954).

[30] Willard Cates, Jr. et al, *Comment: The Public Health Impact of Legal Abortion: 30 Years Later*, 35 PERSP. ON SEXUAL & REPROD. HEALTH 25 (2003); Willard Cates Jr., *Legal Abortion: The Public Health Record*, 215 SCIENCE 1586 (1982); Richard Schwarz, SEPTIC ABORTION 7 (1968).

[31] Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. PA. L. REV. 83, 117 (Nov. 1989).

[32] Laurie D. Elam-Evans et al., Centers for Disease Control and Prevention, *Abortion Surveillance – United States, 1999*, 51 MORBIDITY & MORTALITY WEEKLY REP., at 28, tbl. 19 (2002).

[33] Phillip G. Stubblefield & David A. Grimes, *Septic Abortion*, 331 NEW ENG. J. MED. 313 (1994).

[34] *The Consequences of Roe v. Wade and Doe v. Bolton: Hearing Before the Senate Comm. on the Judiciary, Subcommittee on the Constitution, Civil Rights and Property Rights*, 109th Cong. (2005) (testimony of R. Alta Charo).

[35] *Stenberg v. Carhart*, 530 U.S. 914 (2000).

[36] Gonzales v. Carhart and Gonzales v. Planned Parenthood Federation of America, 127 S. Ct. 1610 (2007).

[37] U.S. Supreme Court, *The Court and Constitutional Interpretation*, *available at* http://supremecourtus.gov/about/constitutional.pdf (last visited Jul. 9, 2009).

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July 7, 2009

The Honorable Patrick Leahy
Chair
Judiciary Committee
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

The Honorable Jeff Sessions
Ranking Member
Judiciary Committee
United States Senate
335 Russell Senate Office Building
Washington, DC 20510

Dear Senators Leahy and Sessions:

On behalf of the undersigned national advocacy organizations representing the interests of millions of people with disabilities, we write to express our strong support for the confirmation of Judge Sonia Sotomayor as Associate Justice of the Supreme Court of the United States. We have reviewed hundreds of Judge Sotomayor's decisions, including her disability rights decisions, from her career as a trial judge and appeals court judge, along with her public statements in speeches and in interviews. Based on her sterling judicial record, and on her valuable life experience, we strongly believe that Judge Sotomayor will adequately and fairly protect the rights of all Americans, including people with disabilities. As such, we ask that you vote to confirm her nomination.

Judge Sotomayor's decisions under our seminal civil rights law, the Americans with Disabilities Act (ADA), have demonstrated a good understanding of – and healthy respect for – the rights of persons with disabilities. In important ADA cases concerning the definition of "disability" – an area of the law subject over the years to many inappropriately narrowing judicial interpretations, so much so that last year Congress amended the ADA to restore its broad reach – Judge Sotomayor has often combed through voluminous or technical testimony to determine whether the plaintiff was protected by the law.[1] Similarly, her understanding of the importance of accommodations to help workers with disabilities maintain employment is reflected in her

[1] *See, e.g., Bartlett v. New York State Bd. of Law Exam'rs* ("*Bartlett I*"), 970 F. Supp. 1094 (S.D.N.Y. 1997); *Bartlett v. New York State Bd. of Law Exam'rs* ("*Bartlett II*"), No. 93 CIV. 4986(SS), 2001 WL 930792 (S.D.N.Y. Aug. 15, 2001).

thoughtful decisions in workplace accommodation cases.[2] She has not been afraid to dissent from a decision finding that plaintiffs did not have disabilities.[3] Nor has she been afraid to overturn a jury verdict where incorrect instructions to the jury impeded a plaintiff's ability to obtain relief under the ADA.[4]

In her ADA decisions, and in other cases, Judge Sotomayor has demonstrated great sensitivity to the needs of, and challenges facing, people with disabilities in this country. For example, her analysis of special education issues arising under the Individuals with Disabilities Education Act (IDEA) reflects – and language from her decisions explicitly states – a keen awareness of the importance of timely special education services to students with disabilities and their families.[5] She has been vigilant in reviewing administrative decisions denying Social Security benefits, especially where applicants are not represented by attorneys.[6] In a notable dissent, Judge Sotomayor argued forcefully that the appointment of a guardian ad litem violated the constitutional rights of a plaintiff who had received psychiatric treatments, because she was not properly notified that she would have no control over her case once the guardian was appointed.[7]

Given her record of balanced and thoughtful decisionmaking, we believe that Judge Sotomayor understands and appreciates Congress's role in enacting important disability rights protections. In enacting the ADA and other disability rights laws, Congress carefully considered the history of people with disabilities in the United States, and acknowledged that many people with disabilities have been ostracized from their families and communities – that they have been prevented from going to school in their neighborhood schools, from working at jobs for which they were qualified, and from participating fully in all aspects of community life. The care that Judge Sotomayor has taken in her disability rights decisions indicates a respect for Congress's intent that these laws have a broad remedial effect on the relationships between individuals with disabilities and covered entities such as employers, schools, state agencies, and public accommodations. For this reason, we expect that she would accord Congress appropriate deference in this area.

It is our belief that Judge Sotomayor will bring her fair, thorough approach to disability rights cases to her work on the Supreme Court. Judge Sotomayor understands the language and purpose of the ADA and other disability rights laws. Further, she understands that the decisions of judges, including Supreme Court justices, that interpret these laws have consequences for people with disabilities. Admirably, she has been unafraid to take strong positions on issues where she believes her reading of the law and facts is correct. Based on her record and her

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[2] *See, e.g., Rodal v. Anesthesia Group of Onondaga, P.C.*, 369 F.3d 113 (2d Cir. 2004).

[3] *See EEOC v. J.B. Hunt Transp., Inc.*, 321 F.3d 69 (2d Cir. 2003).

[4] *See Norville v. Staten Is. Univ. Hosp.*, 196 F.3d 89 (2d Cir. 1999).

[5] *See, e.g., Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195 (2d Cir. 2002); *see also Frank G. v. Board of Educ. of Hyde Park*, 459 F.3d 356 (2d Cir. 2006) (reasoning affirmed by *Forest Grove Sch. Dist. v. T.A.*, No. 08-305, 557 U.S. ___, 2009 WL 1738644 (Jun. 22, 2009)).

[6] *See, e.g., Kohler v. Astrue*, 546 F.3d 260 (2d Cir. 2008); *Jasmin v. Callahan*, No. 97 CIV. 2429(SS), 1998 WL 74290 (S.D.N.Y. Feb. 20, 1998); *Batista v. Chater*, 972 F. Supp. 211 (S.D.N.Y. 1997).

[7] *See Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642 (2d Cir. 1999).

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experience – including the fact that she has publicly acknowledged her own insulin-treated diabetes – we strongly urge you to confirm Judge Sotomayor for the Supreme Court.

Thank you for your important work on Judge Sotomayor's nomination. Should you have questions about this letter, please feel free to contact Andrew Imparato of the American Association of People with Disabilities at (202) 521-4301, Jim Ward of ADA Watch/National Coalition for Disability Rights at (202) 448-9928, or Jennifer Mathis or Lewis Bossing of the Judge David L. Bazelon Center for Mental Health Law at (202) 467-5730.

Sincerely,

Alexander Graham Bell Association for the Deaf and Hard of Hearing
American Association for Affirmative Action
American Association on Health & Disability
American Association of People with Disabilities
American Diabetes Association
ADA Watch/National Coalition for Disability Rights
Association of Programs for Rural Independent Living
Autism Society of America
Burton Blatt Institute
Disability Rights Education and Defense Fund
Empowerment for the Arts International
Epilepsy Foundation
Higher Education Consortium for Special Education
Judge David L. Bazelon Center for Mental Health Law
MindFreedom International
National Association of the Physically Handicapped.
National Association of Social Workers
National Association of State Head Injury Administrators
National Center for Environmental Health Strategies, Inc.
National Center for Learning Disabilities
National Council on Independent Living
National Disability Institute
National Disability Rights Network
National Down Syndrome Society
National Spinal Cord Injury Association
Teacher Education Division of the Council for Exceptional Children
United Church of Christ Disabilities Ministries Board of Directors
United Spinal Association

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National Association of Latino Elected and Appointed Officials

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hair, Congressional Hispanic Caucus

lon. Luz Urbáez Weinberg
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ctavio Vargas

Advisory
Staff

July 10, 2009

The Honorable Patrick J. Leahy
Chairman
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Jeff Sessions
Ranking Member
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Leahy and Senator Sessions:

On behalf of the National Association of Latino Elected and Appointed Officials (NALEO), I am writing to express our strong support for the swift confirmation of Judge Sonia Sotomayor to serve as Associate Justice of the U.S. Supreme Court. NALEO is the leadership organization of the nation's more than 6,000 Latino elected and appointed officials.

Judge Sotomayor is an exceptionally accomplished jurist who has demonstrated a deep commitment to equal justice for all Americans. She has excelled as a prosecutor, a corporate litigator, a federal trial judge, and an appellate judge on the Second Circuit Court of Appeals. Judge Sotomayor has more experience in the federal judiciary than any other person nominated to the United States Supreme Court in a hundred years.

In addition, during her distinguished career, Judge Sotomayor has combined a profound respect for the rule of law with careful and thoughtful analysis of the law's impact on the day-to-day realities of our diverse nation. Through her extensive public service efforts, she has promoted equal opportunity in employment and housing, and expanded access to the electoral process.

NALEO's Board reached the decision to support Judge Sotomayor's nomination after a thorough review of her qualifications conducted in accordance with the Board's principles governing the assessment of federal judiciary nominees. This assessment involved a comprehensive evaluation of the Judge's professional accomplishments, and her opinions and rulings that affect equal access to civic and economic opportunities. The Board also reviewed the Judge's record of service to the legal profession, the judiciary, and the public.

1122 W. Washington Blvd., 3rd Floor • Los Angeles, California 90015 • Tel (213) 747-7606 Fax (213) 747-7664 • www.naleo.org

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We believe that the confirmation of Judge Sotomayor is particularly important, because it will help enhance the diversity of the nation's highest court, where no Latino has yet served. In order for our judicial system to carry out justice effectively and interpret our laws fairly, our judges must understand how laws affect the daily realities of the life of our nation's diverse residents. Latinos are the nation's second largest and fastest growing population group, and Judge Sotomayor will bring a deep understanding of the issues facing Latinos and all Americans to the Supreme Court. Thus, her service as an Associate Justice will greatly enrich the administration of justice in our nation.

NALEO believes Judge Sotomayor will be an invaluable asset to our nation's highest court because she possesses exceptional judicial expertise and a firm dedication to our laws and Constitution. The full Senate must confirm the Judge's nomination by the August Congressional recess in order for Judge Sotomayor to participate in September when the Court confers, and to be seated on the first Monday in October, when the court publicly convenes. We urge the Senate Judiciary Committee to help meet this schedule by advancing Judge Sotomayor's nomination to the full Senate as expeditiously as possible.

Thank you for attention to this matter. Should you have any questions, please contact me at 213-747-7606 or at avargas@naleo.org.

Sincerely,

Arturo Vargas
Executive Director

NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC.

Representing America's Finest
317 South Patrick Street. ~ Alexandria, Virginia ~ 22314-3501
(703) 549-0775 ~ (800) 322-NAPO ~ Fax: (703) 684-0515
www.napo.org ~ Email: info@napo.org

EXECUTIVE OFFICERS

THOMAS J. NEE
President
Boston Police Patrolmen's Association

MICHAEL J. PALLADINO
Executive Vice President
Detectives' Endowment Association of New York City

MICHAEL J. MADONNA
Recording Secretary
New Jersey State Policemen's Benevolent Association

SEAN M. SMOOT
Treasurer
Police Benevolent & Protective Association of Illinois

MICHAEL MCHALE
Sergeant-at-Arms
Florida Police Benevolent Association

CHRIS COLLINS
Executive Secretary
Las Vegas Police Protective Association

NATIONAL HEADQUARTERS

WILLIAM J. JOHNSON
Executive Director

June 5, 2009

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Re: *Endorsement of Judge Sonia Sotomayor for the United States Supreme Court*

Dear Chairman Leahy and Ranking Member Sessions:

On behalf of the National Association of Police Organizations (NAPO), representing more than 241,000 law enforcement officers throughout the United States, I am writing to advise you of our endorsement of the nomination of Judge Sonia Sotomayor for the United States Supreme Court.

Throughout her distinguished career spanning three decades, Judge Sotomayor has worked at almost every level of our judicial system, giving her a depth of experience and knowledge that will be valuable on our nation's highest court. After five years as the Assistant District Attorney in Manhattan, she went into private practice in 1984 to become a corporate litigator. In 1991, she began her career as a federal judge with her nomination to the United States District Court by President Bush. In 1992, she was promoted to the United States Appeals Court for the Second Circuit by President Clinton, where she has served for the past eleven years.

Through her years of trial experience as an Assistant District Attorney, Judge Sotomayor gained an understanding of what law enforcement officers go through day to day in their jobs. Her familiarity with criminal procedure and qualified immunity are evident in the rulings and findings she has issued during her seventeen year career as a federal judge. Judge Sotomayor has shown that as a jurist she has a keen awareness of the real-world implications of judicial rulings, an important aspect when it comes to evaluating the actions of law enforcement officers and to keeping officers and the communities they serve safe.

As a Supreme Court Justice, NAPO believes Judge Sotomayor's extensive experience in the judicial system and the knowledge she has gained as a prosecutor and judge will serve our nation well. Therefore, we urge you to confirm the nomination of Judge Sonia Sotomayor for the United States Supreme Court. If you have any questions, please feel free to contact me, or NAPO's Executive Director, Bill Johnson, at (703) 549-0775.

Sincerely,

Thomas J. Nee
President

NASW
National Association of Social Workers
...the power of social work

June 3, 2009

Hon. Patrick Leahy, Chair
Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

Dear Senator Leahy:

On behalf of the 150,000 members of the National Association of Social Workers (NASW), I am writing in support of the nomination of Sonia Sotomayor to the United States Supreme Court. Judge Sotomayor has a distinguished judicial record that is highlighted by her respect for human dignity and the needs of all Americans.

Judge Sotomayor has issued several rulings we support as social workers, and she boldly dissented on cases in which individual rights were not fully appreciated by the majority. For example, Judge Sotomayor has upheld the rights of citizens to sue corporations acting on behalf of the federal government when the corporation in question has violated the citizen's rights. She has also prevented insurance companies from suing to reclaim benefits after the victim of an injury won a related lawsuit. The latter decision was upheld by a diverse majority of U.S. Supreme Court Justices.

In terms of dissenting opinions, Judge Sotomayor courageously supported the rights of adolescent girls whom she believed were needlessly strip searched in juvenile detention centers. Although her colleagues disagreed, Judge Sotomayor's dissent reinforced her regard for the safety and well being of all people.

Additionally, Judge Sotomayor would bring increased diversity to the Court. Like all deliberative bodies, the Court functions best when it considers a broad range of perspectives. This leads to rulings that cover the rights and interests of many oppressed, underserved, and underrepresented groups. Judge Sotomayor's decisions have proven that she is not just an example of such diversity, but also a champion of it.

Judge Sotomayor's overall record has demonstrated the judicial sensitivity NASW has always endorsed and valued. As a result, I am pleased to extend our full support for her nomination.

Sincerely,

Elizabeth J. Clark

Elizabeth J. Clark, PhD, ACSW, MPH
Executive Director

750 First Street NE, Suite 700, Washington, DC 20002-4241
(202) 408-8600 • FAX (202) 336-8310 • www.socialworkers.org

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National Association of Women Lawyers®
The voice of women in the law ™

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Washington, DC

President-Elect
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Immediate Past President
Holly English
Roseland, NJ

Past President
Cathy Fleming
New York, NY

Vicky DiProva
Executive Director
Chicago, IL

July 7, 2009

VIA HAND DELIVERY

Senator Patrick Leahy
Chair, Judiciary Committee
United States Senate
Attention: Kristine Lucius
433 Russell Senate Office Building
United States Senate
Washington, DC 20510

Re: U.S. Supreme Court Nominee Sonia Sotomayor

Dear Senator Leahy:

As President of the National Association of Women Lawyers (NAWL), and on behalf of NAWL, I am pleased to announce to the Senate Judiciary Committee NAWL's conclusion that Judge Sonia Sotomayor is highly qualified to become an Associate Justice of the United States Supreme Court. The conclusion, based upon Judge Sotomayor's intellectual capacity, her appropriate judicial temperament and her respect for established law and process, has been reported today to the Senate Judiciary Committee.

The NAWL Committee, which includes a distinguished array of law professors, appellate practitioners and lawyers, founded its conclusion upon (i) a comprehensive review of Judge Sotomayor's publicly available writings and decisions and (ii) in-depth personal interviews by Committee members with key individuals having information regarding Judge Sotomayor, the various roles she has fulfilled during the course of her professional life, and her treatment of litigants, attorneys, employees and colleagues, particularly those who are women. A copy of the Committee's Mission and Procedures and its previous statements about nominees to the United States Supreme Court is enclosed.

During the course of the assessment, the NAWL Committee reviewed a substantial number of opinions drafted by Judge Sotomayor, including majority opinions, concurrences, dissents and opinions she wrote or joined in that were reviewed by the United States Supreme Court. Although the Committee emphasized review of cases that might be of particular importance to women, the members of the Committee did not limit their review, focusing on a wide range of criminal and civil issues.

• American Bar Center • 321 North Clark Street, M.S. 15.2 • Chicago, IL 60610 •
• Phone: (312) 988-6186 • Fax: (312) 988-5491 • nawl@nawl.org • www.nawl.org •

The Committee concluded that Judge Sotomayor consistently has displayed a superior intellectual capacity and a comprehensive understanding of the issues with which she was presented. Her ability to analyze statutory and case law was found to be excellent and her judicial reasoning sound.

In certain areas involving issues of importance to women and within the scope of the NAWL Committee's review, such as domestic violence and reproductive choice, the Committee had no decisions of Judge Sotomayor to review. There were, however, many cases where the issues involved government-sponsored violence against women (arising in the asylum context) in which Judge Sotomayor displayed a sensitive understanding of the impact of forced sterilization and forced abortion on mothers and their partners. Similarly, Judge Sotomayor displayed great knowledge and understanding of the impact of gender and race-based comments and behavior in the workplace, although her sensitivity to the plight of the plaintiffs in these cases did not necessarily translate into findings favoring those individuals unless a solid basis in law existed on which to base their claims.

Judge Sotomayor's decisions and the information developed by the NAWL Committee demonstrate that while Judge Sotomayor is not afraid to disagree with her colleagues if her legal analysis leads her there, she has a strong preference for following judicial precedent. The information developed by the Committee also establishes her lack of gender, racial, ethnic or religious bias and her willingness to maintain an open mind, deciding cases on the record before her.

Importantly, the Committee found Judge Sotomayor's judicial temperament to be appropriate. She is generous in her explanations to *pro se* litigants while at the same time enforcing legal procedure and principles. She was found to have treated all litigants, attorneys, court personnel, and, in particular for the Committee's review, women in the courts, with the utmost respect and professionalism in and out of the courtroom.

The Committee, therefore, concluded that Judge Sotomayor has the intellectual capacity, the appropriate judicial temperament and respect for established law and process needed to be an effective Supreme Court Justice and is highly qualified to serve as an Associate Justice of the United States Supreme Court.

The National Association of Women Lawyers is the leading national voluntary organization devoted to the interests of women lawyers and women's rights. Founded over 100 years ago, NAWL has members in all 50 states and engages in a variety of programs and activities to advance its mission. Members of the NAWL Committee for the Evaluation of Supreme Court Nominees are appointed by the President of NAWL and include a distinguished array of law professors, appellate practitioners and lawyers concentrating in litigation, with diverse backgrounds from around the country and who work in a variety of professional settings. The Committee independently reviews and evaluates the qualifications of each Presidential nominee to the United States Supreme Court with an emphasis on laws and decisions regarding women's rights or that have a special impact on women. More information may be found at www.nawl.org.

Very truly yours,

Lisa B. Horowitz

Lisa B. Horowitz

Enclosure

• American Bar Center • 321 North Clark Street, M.S. 15.2 • Chicago, IL 60610 •
• Phone: (312) 988-6186 • Fax: (312) 988-5491 • nawl@nawl.org • www.nawl.org •

NATIONAL ASSOCIATION OF WOMEN LAWYERS

COMMITTEE FOR THE EVALUATION OF SUPREME COURT NOMINEES

MISSION OF THE COMMITTEE

The mission of the Committee is to review and evaluate the qualifications of each Presidential nominee to the United States Supreme Court with an emphasis on laws and decisions regarding women's rights or that have a special impact on women.

GOVERNANCE

The Committee is chaired by the President of NAWL or her designee. Members of the Committee are appointed by the President of NAWL and consist of lawyers who are diverse with respect to the nature of their practice and jurisdiction. The size of the Committee ranges from a minimum of 12 and a maximum of 18 lawyers. Committee members are appointed for a one-year term and may be reappointed up to a total of

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three terms. All fact-finding and deliberations of the Committee are confidential to the Committee. A list of current Committee members as of June 2005 is provided in Appendix A.

PROCEDURES FOR INVESTIGATION AND EVALUATION

Each member of the Committee is expected to participate in the investigation and evaluation of a nominee. To advance the investigation process, the Committee Chair shall appoint a Coordination Subcommittee and a Readers Subcommittee and a chair of each Subcommittee. The Coordination Subcommittee shall consist only of Committee members. The Readers Subcommittee shall consist of Committee members and may also consist of non-members of the Committee.

Inquiry by both Subcommittees shall be focused on the issues set forth in Appendix B, below. Inquiry shall also be made into the nominee's history of treatment of women, including especially her/his female employees and colleagues.

The Readers Subcommittee shall review all available writings of the nominee and report to the Committee about its findings.

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The Coordination Subcommittee shall take primary responsibility for (a) coordinating fact-finding about the nominee, which shall consist of a range of information, including personal interviews and available documentation relating to the nominee's history and life experiences, and (b) reporting the results of fact-finding to the full Committee.

Upon announcement of the nominee, the Coordination Subcommittee shall request from the White House and from the appropriate Senate office copies of the questionnaires completed by the nominee. The Coordination Committee also shall obtain all other information that the White House and Senate will provide about the nominee. The Coordination Subcommittee shall request from the nominee a signed and notarized Waiver of Confidentiality authorizing the Committee to ascertain from the appropriate disciplinary bodies whether the nominee has ever been the subject of professional complaint or discipline. The Coordination Subcommittee shall distribute copies of the questionnaires and all other information to members of the Committee. Members of the full Committee shall review these materials and identify, if any, particular areas of inquiry that require more detailed review.

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The Coordination Subcommittee shall recommend individuals to be interviewed, either telephonically or in person, and assign members of the Committee to arrange for and conduct interviews. Interviewees may include references named on the nominee's questionnaires, members of the nominee's staff and her/his employees, attorneys who have worked with or opposed the nominee, clients of the nominee, and colleagues in bar and community groups who have worked with the nominee. Other potential interviewees may include lawyers, judges, or academics who have had dealings with the nominee; attorneys whose names appear in legal opinions either as adversaries to or co-counsel with the nominee; and counsel who have appeared before a nominee who is a sitting judge. In the case of a current or former judge, interviewees also may include attorneys who have appeared before the nominee in capacities other than as trial counsel, the judicial officer (if any) having supervisory responsibility over the nominee, and representatives from the relevant Public Defender's Office, Legal Aid Society and the U.S. Attorney's or District Attorney's office.

In each interview, every effort will be taken to obtain a fair and candid evaluation of the nominee and her/his qualifications for office. When conducting interviews, each Committee member shall assure the interviewee that her/his identity and specific responses will be kept confidential and not disclosed to the nominee or to anyone who is not a

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member of the Committee.

No Committee member shall reveal to the nominee, or to any other person who is not a member of the Committee, comments made during the investigation. While the identity and comments of persons interviewed are otherwise kept confidential, they will be disclosed to the full Committee.

It is Committee policy not to consider anonymous remarks about a nominee. Accordingly, no such remarks shall be considered by the Committee in making its evaluation. The Committee may take account of anonymous remarks if it is able to confirm the accuracy of those remarks from other sources, including witnesses who are willing to be identified to the Committee.

The Coordination Subcommittee shall request a personal interview with the nominee. If possible, the interview shall be held face-to-face with the nominee in the nominee's office or other convenient setting. If possible, the interview shall take place after the Committee has completed the bulk of its investigation, so that any questions arising in the course of the fact-finding can be discussed with the nominee within the limitations of confidentiality. The Subcommittee or Committee shall make reasonable efforts to notify the nominee in advance of the interview of the nature of any

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material negative information known to the Committee, and to obtain the nominee's comment about such information. If such negative information comes to light after the interview, the Committee shall endeavor to bring the matter to the attention of the nominee and invite her/his comment thereon.

CONCLUSIONS AND OVERALL EVALUATION

The Committee shall receive reports from the Coordination Subcommittee and the Readers Subcommittee. After review and deliberation, the Committee shall issue a summary evaluation ("Evaluation"), which will consist of a conclusion as to whether the nominee is well-qualified, qualified or not qualified, along with a brief statement of the bases for the Committee's Evaluation.

The Committee's Evaluation will be provided to the nominee, the President and the Senate Judiciary Committee; published on the NAWL website; and distributed to other appropriate persons.

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Appendix A:
Members of the Committee for Evaluation of Supreme Court Nominees
June 2009

Name, Title	Professional Affiliation
Anita L. Allen, Henry R. Silverman Professor of Law and Professor of Philosophy	University of Pennsylvania Law School
Terri Austin, Chief Diversity Officer	American International Group, Inc.
Kali N. Bracey, Partner	Jenner & Block LLP
Kathleen Burch, Associate Professor	John Marshall Law School
Jane Leslie Dalton, Partner	Duane Morris LLP
Margaret B. Drew, Professor of Clinical Law	University of Cincinnati College of Law
Joanne A. Epps, Dean, Professor of Law (Co-Chair)	Temple University
Sharla J. Frost, Partner	Powers Frost
Kay Hodge, Partner	Stoneman, Chandler & Miller LLP
Beth L. Kaufman, Partner	Schoeman, Updike & Kaufman, LLP
Joanne Lichtman, Partner	Howrey LLP
Lorraine K. Koc, General Counsel	Deb Shops, Inc.
Prof. Deborah Malamud	New York University Law School
Patricia Lee Refo, Partner (Co-Chair)	Snell & Wilmer LLP
Virginia A. Seitz, Partner	Sidley Austin Brown & Wood LLP
Charna E. Sherman, Partner	Squire Sanders
Sara Turnipseed, Partner	Nelson Mullins Riley & Scarborough LLP
Zachary Tripp, Associate	King & Spalding LLP

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Appendix B:
Issues for Review

1. Women and the Workplace (such as sexual harassment, sex or gender discrimination, equal pay, pregnancy leave/maternity leave, family leave/dependent care).

2. Women and the Criminal Justice System (such as sentencing guidelines, domestic violence, sexual assault).

3. Women and Health Care (such as reproductive rights, health insurance, Medicare).

4. Women and Education (such as Title IX/athletics, sexual harassment, sex or gender discrimination).

5. Women and Family (such as adoption, marriage and divorce, child support/child custody, child care, unmarried couples).

6. Women in the Military (such as sexual harassment, sex or gender discrimination, equal pay/equal promotion, pregnancy leave/maternity leave, family leave/dependent care).

7. Women and Finance (such as social security, credit/bankruptcy, welfare/poverty/government benefits, tax).

8. Women and Retirement (such as savings and investments, estate planning, probate/inheritance).

9. Policies and Laws Impacting Multicultural Women.

10. Enforcement of Statutes regarding Women's Rights; Federal versus State Law Relief.

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NEWS RELEASE

Contact: Vicky DiProva
Executive Director,
(312) 988-6186
diprovav@nawl.org

JoAnne A. Epps
Co-Chair, Committee for the Evaluation of Supreme Court Nominees,
(215) 204-8993
joanne.epps@temple.edu

Patricia Lee Refo,
Co-Chair, Committee for the Evaluation of Supreme Court Nominees,
(602) 382-6290
prefo@swlaw.com

FOR IMMEDIATE RELEASE BY THE NATIONAL ASSOCIATION OF WOMEN LAWYERS®

NATIONAL ASSOCIATION OF WOMEN LAWYERS ("NAWL") ISSUES EVALUATION OF JUDGE SONIA SOTOMAYOR FOR THE POSITION OF ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT

Washington, D.C., July 7, 2009 The National Association of Women Lawyers ("NAWL") announced today that its Committee for the Evaluation of Supreme Court Nominees has found Judge Sonia Sotomayor "highly qualified" for the position of Associate Justice of the United States Supreme Court. The conclusion, based upon Judge Sotomayor's intellectual capacity, her appropriate judicial temperament and her respect for established law and process, has been reported today to the Senate Judiciary Committee.

The NAWL Committee, which includes a distinguished array of law professors, appellate practitioners and lawyers, founded its conclusion upon (i) a comprehensive review of Judge Sotomayor's publicly available writings and decisions and (ii) in-depth personal interviews by Committee members with key individuals having information regarding Judge Sotomayor, the various roles she has fulfilled during the course of her professional life, and her treatment of litigants, attorneys, employees and colleagues, particularly those who are women. A copy of the Committee's Mission and Procedures and its previous statements about nominees to the United States Supreme Court may be found at www.nawl.org.

During the course of the assessment, the NAWL Committee reviewed a substantial number of opinions drafted by Judge Sotomayor, including majority opinions, concurrences, dissents and opinions she wrote or joined in that were reviewed by the United States Supreme Court. Although the Committee emphasized review of cases that might be of particular importance to women, the members of the Committee did not limit their review, focusing on a wide range of criminal and civil issues.

The Committee concluded that Judge Sotomayor consistently has displayed a superior intellectual capacity and a comprehensive understanding of the issues with which she was presented. Her ability to analyze statutory and case law was found to be excellent and her judicial reasoning sound.

In certain areas involving issues of importance to women and within the scope of the NAWL Committee's review, such as domestic violence and reproductive choice, the Committee had no decisions of Judge Sotomayor to review. There were, however, many cases where the issues involved government-sponsored violence against women (arising in the asylum context) in which Judge Sotomayor displayed a sensitive understanding of the impact of forced sterilization and forced abortion on mothers and their partners. Similarly, Judge Sotomayor displayed great knowledge and understanding of the impact of gender and race-based comments and behavior in the workplace, although her sensitivity to the plight of the plaintiffs in these cases did not necessarily translate into findings favoring those individuals unless a solid basis in law existed on which to base their claims.

Judge Sotomayor's decisions and the information developed by the NAWL Committee demonstrate that while Judge Sotomayor is not afraid to disagree with her colleagues if her legal analysis leads her there, she has a strong preference for following judicial precedent. The information developed by the Committee also establishes her lack of gender, racial, ethnic or religious bias and her willingness to maintain an open mind, deciding cases on the record before her.

Importantly, the Committee found Judge Sotomayor's judicial temperament to be appropriate. She is generous in her explanations to *pro se* litigants while at the same time enforcing legal procedure and principles. She was found to have treated all litigants, attorneys, court personnel, and, in particular for the Committee's review, women in the courts, with the utmost respect and professionalism in and out of the courtroom.

The Committee, therefore, concluded that Judge Sotomayor has the intellectual capacity, the appropriate judicial temperament and respect for established law and process needed to be an effective Supreme Court Justice and is highly qualified to serve as an Associate Justice of the United States Supreme Court.

NAWL's conclusion has been reported to Senator Patrick Leahy and the Senate Judiciary Committee today.

****

The National Association of Women Lawyers is the leading national voluntary organization devoted to the interests of women lawyers and women's rights. Founded over 100 years ago, NAWL has members in all 50 states and engages in a variety of programs and activities to advance its mission. Members of the NAWL Committee for the Evaluation of Supreme Court Nominees are appointed by the President of NAWL and include a distinguished array of law professors, appellate practitioners and lawyers concentrating in litigation, with diverse backgrounds from around the country and who work in a variety of professional settings. The Committee independently reviews and evaluates the qualifications of each Presidential nominee to the United States Supreme Court with an emphasis on laws and decisions regarding women's rights or that have a special impact on women. More information may be found at www.nawl.org.

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NCJW

National Council of Jewish Women

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475 Riverside Drive, Suite 520
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Jerusalem, Israel 91905
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Fax 972 2 5813 264
Email ncjwisrael@gmail.com

Web www.ncjw.org

July 13, 2009

The Honorable Patrick Leahy
Chairman, Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

The Honorable Jeff Sessions
Ranking Member, Senate Judiciary Committee
335 Russell Senate Office Building
Washington, DC 20510

Dear Senators:

I am writing on behalf of the 90,000 members and supporters of the National Council of Jewish Women, who are deeply committed to ensuring that Supreme Court Justices are fair and preserve and uphold our fundamental constitutional rights, including our right to reproductive freedom. In this spirit, we ask you to give full, fair, and timely consideration to the nomination of Judge Sonia Sotomayor to the court.

For the Senate, the process of exercising its constitutional duty to advise and consent to the nomination of members of the US Supreme Court is of foremost importance. Of all the acts the Senate may perform, the confirmation of a nominee to the Supreme Court will have the most long-lasting effect. We urge the Senate Judiciary Committee to examine the record of Judge Sotomayor with due diligence that focuses on her record and does not seek to obstruct her confirmation merely to make a political point.

Judge Sotomayor brings more judicial experience than any other nominee for the court in the last 100 years. She also brings the perspective of a local prosecutor and that of a litigator in private practice on intellectual property issues. She had a stellar academic record both during her years at Princeton and at Yale Law School. All of these were achieved with the support of a family of modest means and by dint of her own talent and hard work.

Judge Soptomayor's record on the bench is one of moderation and respect for the law. She has won bipartisan support from colleagues who know her from her various roles prior to and after joining the USA Court of Appeals for the Second Circuit. She deserves a thorough airing of her record, carried out by the Senate with due regard for the dignity of the office to which she is nominated.

Sincerely,

Nancy Ratzan

Nancy Ratzan
Cc: Members of the Senate Judiciary Committee

National District Attorneys Association
44 Canal Center Plaza, Suite 110, Alexandria, Virginia 22314
703.549.9222/703.863.3195Fax
www.ndaa.org

June 8, 2009

The Honorable Patrick Leahy
Chairman
The Honorable Jeff Sessions
Ranking Member
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Leahy and Ranking Member Sessions:

On behalf of the National District Attorneys Association, the oldest and largest organization representing America's state and local prosecutors, we offer our full support for the nomination of the Honorable Sonia Sotomayor to become the next Associate Justice of the United States Supreme Court.

Because state and local prosecutors handle 95% of the criminal prosecutions nationally, rulings by the Supreme Court have far-reaching, serious impacts upon criminal cases in state courthouses across the country. As former prosecutors yourselves, you have a unique appreciation of our concerns.

We practice where the law is truly tested: not in the deliberative atmosphere of an appellate courtroom, but on the streets where police must make split-second choices in dangerous situations and in trial court situations that sometimes give prosecutors and police only a moment to analyze and react. It is important to the National District Attorneys Association, and to the tens of thousands of prosecutors we represent, that the next Supreme Court justice be well steeped in the law and its practical applications.

I have had the opportunity to review the judicial record of Judge Sotomayor, particularly in areas important to prosecutors such as criminal and constitutional law. Through her rulings, Judge Sotomayor reveals a deep understanding of the law. As a prosecutor, I find her to employ a thoughtful analysis of legal precedent and the rule of law and apply that law to the specific facts of each case.

Just as important as her sophisticated knowledge of the law, as a former prosecutor and trial court judge Judge Sotomayor displays an understanding of the impact of those laws on law enforcement, victims and defendants. In interviews with prosecutors who served with Judge Sotomayor in the Manhattan District Attorney's office, Judge Sotomayor has often been described as a "tough and fearless" prosecutor. She vigorously and effectively prosecuted child pornographers, murderers, burglars and many other "street crimes" in the heart of New York City. She worked closely with law enforcement, deconstructed complex crimes, interviewed witnesses and investigated crime scenes. That kind of legal experience, combined with her 17 years on the federal bench, provide Judge Sotomayor with unique and unprecedented qualifications to be on the Supreme Court.

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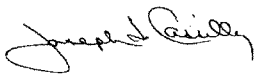
Judge Sotomayor's depth of experience with all aspects of the law – as a prosecutor, a private litigator, a District Court Judge and as a Federal Judge – has made her into an exemplary judge and an outstanding nominee to serve on our nation's highest court. She possesses wisdom, intelligence and a real world training that would bring important insight to Supreme Court decisions. The National District Attorneys Association believes that Judge Sotomayor would be a welcome addition to the Supreme Court.

We are happy to offer our full support for Judge Sotomayor's nomination to serve as a Supreme Court Associate Justice and encourage her swift nomination by the Senate.

Sincerely,



Joseph I. Cassilly
President

TOTAL P.003

NATIONAL
FRATERNAL ORDER OF POLICE®

309 MASSACHUSETTS AVE., N.E.
WASHINGTON, DC 20002
PHONE 202-547-8189 • FAX 202-547-8190

CHUCK CANTERBURY
NATIONAL PRESIDENT

JAMES O. PASCO, JR.
EXECUTIVE DIRECTOR

9 June 2009

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Jefferson B. Sessions III
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman and Senator Sessions,

I am writing on behalf of the members of the Fraternal Order of Police to advise you of our support for the nomination of Judge Sonia M. Sotomayor to join the Supreme Court of the United States.

Following her graduation from Yale Law School, Judge Sotomayor joined the District Attorney's office in Manhattan, where she tried dozens of cases during her tenure, including winning a conviction of the "Tarzan murderer". She worked closely with rank-and-file law enforcement officers during her time as a prosecutor, and was described by the legendary Manhattan District Attorney Robert Morgenthau as a "fearless and effective prosecutor."

After spending some time in private practice, Judge Sotomayor returned to public service and was nominated by President George H. W. Bush for a seat on the U.S. District Court for the Southern District of New York. The Committee on the Judiciary unanimously approved her nomination, and she was confirmed in the Senate by unanimous consent. Upon confirmation, Judge Sotomayor became the youngest sitting judge in the Southern District of New York.

Her first high profile case involved a labor issue--*Silverman v. Major League Baseball Player Relations Committee, Inc.* By issuing an injunction preventing the owners from imposing a new collective bargaining agreement, it can be argued that Judge Sotomayor helped save baseball, and certainly baseball fans, from a long, drawn out labor dispute.

In 1998, she was named to the U.S. Court of Appeals for the Second Circuit, one of the most demanding circuits in the country, by President William J. Clinton. As an appellate judge, she has participated in over 3000 panel decisions and authored roughly 400 opinions, handling difficult issues of constitutional law, complex procedural matters, and lawsuits involving complicated business organizations. Over the course of her career, she has demonstrated herself to be a sharp and fact-driven jurist, analyzing each case on its merits and weighing the facts before rendering any decision.

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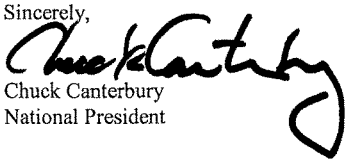
While her ruling in *Ricci v. Destefano* has been getting most of the media attention, we would like to bring another case to your attention, *Pappas v. The City of New York, et al.* New York City Police Officer Thomas Pappas was fired for distributing through the U.S. mail racially offensive material from his home. While the Second Circuit upheld the termination of Officer Pappas, Judge Sotomayor dissented noting that his First Amendment rights took precedence because he did not occupy a high-level supervisory, confidential or policymaking role within the department.

In other cases which came before her, both civil and criminal, Judge Sotomayor has often sided with law enforcement officers acting in good faith by upholding convictions on appeal. It is clear that she weighs the facts in evidence and makes her rulings based on the merits of the case. She is a model jurist–tough, fair-minded, and mindful of the constitutionally protections afforded to all U.S. citizens.

I believe that the President has made an excellent choice in naming Judge Sonia S. Sotomayor to the Supreme Court of the United States and, on behalf of the more than 327,000 members of the Fraternal Order of Police, I am proud to endorse her nomination. If I can be of any additional support on this matter, please do not hesitate to contact me or Executive Director Jim Pasco in my Washington, D.C. office.

Sincerely,



Chuck Canterbury
National President

56940.763

The Honorable Patrick J. Leahy, Chairman
Committee on the Judiciary
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Jeff Sessions
Committee on the Judiciary
United States Senate
335 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Sessions:

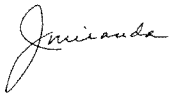
America's largest Hispanic Christian Organization, The National Hispanic Christian Leadership Conference (NHCLC), serving approximately 16 million Hispanic American Born Again Believers via 25,434 member churches, hereby endorses Judge Sonia Sotomayor's nomination to the Supreme Court.

We commend President Obama's selection of Sotomayor as a brilliant exercise in pragmatism and moderation. First, as Hispanic Americans, we celebrate her nomination. Her journey is our collective journey. Sotomayor stands as a model to all our Hispanic young people throughout America that faith, family and education can overcome the most difficult of environments and economic circumstances.

More importantly, as Americans concerned with judicial activism and defacto legislation from many sectors of our judiciary, Sotomayor reflects, via her career on the bench, the type of tempered restraint and moderation necessary for appropriate application of the rule of law. Without a doubt, Judge Sotomayor serves with a moderate voice without displays of bias towards any party based on affiliation, background, sex, color or religion. Judge Sotomayor's over 700 decisions stand as testimony of a commitment and respect for the rule of law, particularly the importance of *stare decisis*.

As an organization serving America's largest minority group and the fastest growing religious demographic, we seek to reconcile both the vertical and horizontal planes of the Christian message. As we serve both matters of the soul and community, religious liberties stand as an issue of utmost concern for our constituents. Judge Sotomayor's rulings affirm Constitutional safeguards for those liberties.

In conclusion, even moderate and conservative evangelicals within our ranks find no reason to conclude that the nomination and confirmation of Judge Sonia Sotomayor would diminish the collective application of Constitutional rights and freedoms to a religious community committed to Life, Liberty and the Pursuit of Happiness. For that matter, we encourage the support of this nominee from both sides of the political aisle.



Dr. Jesse Miranda

CEO NHCLC

President of Miranda Center for Hispanic Leadership

Member Organizations

American G.I. Forum of the United States

ASPIRA Association, Inc.

Cuban American National Council

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Hispanic Association of Colleges and Universities

Hispanic Federation

Hispanic National Bar Association

Labor Council for Latin American Advancement

League of United Latin American Citizens

Mexican American Legal Defense and Educational Fund

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National Hispanic Media Coalition

National IMAGE, Inc.

National Institute for Latino Policy

National Puerto Rican Coalition

Self-Reliance Foundation

SER Jobs for Progress-National

Southwest Voter Registration Education Project

United States Hispanic Chamber of Commerce

United States Hispanic Leadership Institute

United States-Mexico Chamber of Commerce

June 9, 2009

The Honorable Patrick Leahy
Chairman
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senator Leahy:

The National Hispanic Leadership Agenda (NHLA), comprised of thirty-one of the leading national and regional Hispanic civil rights and public policy organizations, representing a diverse Latino community and millions of members nationwide, would like to request a meeting regarding the nomination of Judge Sonia Sotomayor to become the next United States Supreme Court Justice. As community advocates with a vested interest in serving the public good, members of our coalition would like to meet with you and discuss Judge Sotomayor's nomination. NHLA represents a vast array of constituencies that include veterans, academics, legal experts, labor activists, federal employees, elected officials, medical professionals and members of the media, among many other community leaders who unequivocally support the nomination of Judge Sotomayor based on the merits of her judicial record and overall experience.

The NHLA mission and objectives call for providing a clearinghouse of information to the Hispanic community; providing a unified voice on relevant issues; and providing a much needed voice on legislative issues that have direct implications for our members nationwide. The composition of NHLA includes groups with Mexican, Puerto Rican, Dominican, and Cuban leadership, as well as the membership of countless other Hispanic and Latin-American interests. The common issues of education, civil rights, immigration, economic empowerment, health, and government accountability transcend ethnic origin and racial identity, as evidenced by the breadth of these different groups. The Hispanic community is larger and more diverse than ever, numbering close to 50 million persons and making up over 16% of the combined population of the United States, Puerto Rico, and the United States territories.

We look forward to your response as we would like to schedule meetings for the week of June 15th-19th. Should you have any questions, please contact Alma Morales Riojas, Secretary/Treasurer of the National Hispanic Leadership Agenda and President and CEO of MANA, A National Latina Organization at 202-833-0060 or via email at MANACEO@aol.com or James Albino, Director, Hispanic Federation at 202-510-0747 or via email at jalbino@hispanicfederation.org.

Sincerely,

Dr. Gabriela D. Lemus
Chair, NHLA Board of Directors

FRIDAY, JULY 10, 2009

STUART TAYLOR JR.: COMMENTARY

How Ricci Almost Disappeared

Updated at 6:30 p.m.

For all the publicity about the Supreme Court's 5-4 reversal of Judge **Sonia Sotomayor**'s decision (with two colleagues) to reject a discrimination suit by a group of firefighters against New Haven, Conn., one curious aspect of the case has been largely overlooked.

That is the likelihood that but for a chance discovery by a fourth member of the 2nd Circuit Court of Appeals, the now-triumphant 18 firefighters (17 white and one Hispanic) might well have seen their case, *Ricci v. DeStefano*, disappear into obscurity, with no triumph, no national publicity and no Supreme Court review.

The reason is that by electing on Feb. 15, 2008, to dispose of the case by a cursory, unsigned summary order, Judges Sotomayor, **Rosemary Pooler** and **Robert Sack** avoided circulating the decision in a way likely to bring it to the attention of other 2nd Circuit judges, including the six who later voted to rehear the case.

And if the *Ricci* case -- which ended up producing one of the Supreme Court's most important race decisions in many years -- had not come to the attention of those six judges, it would have been an unlikely candidate for Supreme Court review. The justices almost never review summary orders, which represent the unanimous judgment of three appellate judges that the case in question presents no important issues.

The 2nd Circuit and other appeals courts hear cases in three-judge panels, which almost always write full opinions in all significant cases. Those opinions, which are binding precedents, are routinely circulated to all other judges on the circuit, in part so that they can decide whether to request what is called a rehearing *en banc* by the entire appeals court.

Not so summary orders. They do not become binding precedents, and in the 2nd Circuit they are not routinely circulated to the judges except in regular e-mails containing only case names and docket numbers. Those e-mails routinely go unread, on the assumption that all significant cases are disposed of by full opinions, according to people familiar with 2nd Circuit practice.

In any event, any 2nd Circuit judge who had chanced to find and read the panel's summary order in *Ricci* would have found only the vaguest indication what the case was about.

But the case came to the attention of one judge, **Jose Cabranes**, anyway, through a report in the *New Haven Register*. It quoted a complaint by **Karen Lee Torre**, the firefighters' lawyer, that she had expected "'a reasoned legal opinion,' instead of an unpublished summary order, 'on what I saw as the most significant race case to come before the Circuit Court in 20 years.'"

According to 2nd Circuit sources, Cabranes, who lives in New Haven, saw the article and looked up the briefs and the earlier ruling against the firefighters by federal district judge **Janet Arterton**. He decided that this was a very important case indeed, and made a rare request for the full 2nd Circuit to hold an *en banc* rehearing.

(In response to an e-mail from me, Cabranes declined to comment.)

Cabranes, like Sotomayor a Clinton appointee of Puerto Rican heritage -- and once a mentor to her -- was outvoted by 7-6, with the more liberal judges (including Sotomayor) in the majority. But by publishing a blistering June 12, 2008, dissent Cabranes brought the case forcefully to the attention of the Supreme Court.

By that time, Torre had filed a petition for certiorari with the court, a fairly unusual move in a case involving impecunious clients because of the long odds against success. Those odds seemed especially long in this case. Not only had the panel branded it as insignificant, but the justices usually review cases to resolve conflicts among precedents set by different appeals courts -- and a summary order sets no precedent.

Enter Judge Cabranes. In his dissent, he accused the Sotomayor panel of having "failed to grapple with the questions of exceptional importance raised in this appeal," and he urged the Supreme Court to do so. He stressed that despite the unusually long and detailed briefs, arguments and factual record, the panel's "perfunctory disposition" oddly contained "no reference whatsoever to the constitutional claims at the core of this case." Cabranes also suggested that the case might involve "an unconstitutional racial quota or set-aside."

Some of the seven judges who voted to deny rehearing, including Sotomayor, responded that (among other things) the panel's decision had been dictated by past 2nd Circuit precedents. Cabranes disputed this.

There has been much speculation about what **Adam Liptak** of the *New York Times* described on May 26 as the Sotomayor panel's "remarkably cursory" and "baffling" treatment of the case, which Liptak said "bristles with interesting and important legal questions about how the government may take account of race in employment."

Liptak later reported that "according to court personnel familiar with some of the internal discussions of the case, the three judges had difficulty finding consensus, with Judge Sack the most reluctant to join a decision affirming the district court. Judge Pooler, as the presiding judge, took the leading role in fashioning the compromise. The use of a summary order, which ordinarily cannot be cited as precedent, was part of that compromise."

But if that's what happened, it might be difficult to square the panel's action with the 2nd Circuit's Local Rule 32.1(a). That rule provides that panels may rule "by summary order instead of by opinion" *only* "in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by an opinion (i.e., a ruling having precedential effect)."

In response to e-mails from me asking each of the three panel members why they had proceeded by summary order, Chief Judge **Dennis Jacobs** of the 2nd Circuit called and explained that the judges don't comment on case deliberations except in their published opinions.

Whether that will be Judge Sotomayor's answer when she is asked about the *Ricci* summary order in next week's Senate Judiciary Committee hearing remains to be seen.

CORRECTION: The initial version of this post erred in stating that the cost of printing the required number of copies of a petition for certiorari is typically "$20,000-plus." In fact, the cost is typically $1,000-$2,000, although it was much more in the firefighters' case because they included voluminous materials from the record in the appendix to their petition.

CATEGORIES:

- Stuart Taylor Jr.: Commentary

STUART TAYLOR JR.: COMMENTARY

Justices Reject Sotomayor Position 9-0 -- But Bigger Battles Loom

The Supreme Court's predictable 5-4 vote to reverse the decision by Judge **Sonia Sotomayor** and two federal appeals court colleagues against 17 white (and one Hispanic) plaintiffs in the now-famous New Haven, Conn., firefighters decision does not by itself prove that the Sotomayor position was unreasonable.

After all, it was hardly to be expected that the five more conservative justices -- who held that the city had violated the 1964 Civil Rights Act by refusing to promote the firefighters with the highest scores on a job-related promotional exam because none were black -- would endorse an Obama nominee's ruling to the contrary.

What's more striking is that the court was unanimous in rejecting the Sotomayor panel's specific holding. Her holding was that New Haven's decision to spurn the test results must be upheld based *solely* on the fact that highly disproportionate numbers of blacks had done badly on the exam and might *file* a "disparate-impact" lawsuit -- regardless of whether the exam was valid or the lawsuit could succeed.

This position is so hard to defend, in my view, that I hazarded a prediction in my June 13 column: "Whichever way the Supreme Court rules in the case later this month, I will be surprised if a single justice explicitly approves the specific, quota-friendly logic of the Sotomayor-endorsed... opinion" by U.S. District Judge **Janet Arterton**.

Unlike some of my predictions, this one proved out. In fact, even Justice **Ruth Bader Ginsburg**'s 39-page dissent for the four more liberal justices quietly but unmistakably *rejected* the Sotomayor-endorsed position that disparate racial results alone justified New Haven's decision to dump the promotional exam without even inquiring into whether it was fair and job-related.

Justice Ginsburg also suggested clearly -- as did the Obama Justice Department, in a friend-of-the-court brief -- that the Sotomayor panel erred in upholding summary judgment for the city. Ginsburg said that the lower courts should have ordered a jury trial to weigh the evidence that the city's claimed motive -- fear of losing a disparate impact suit by low-scoring black firefighters if it proceeded with the promotions -- was a pretext. The jury's job would have been to consider evidence that the city's main motive had been to placate black political leaders who were part of Mayor **John DeStefano**'s political base.

Disparate-impact law, as codified by Congress in 1991, specifies that an employer whose qualifying exam or other selection criterion produces racially disparate results can be held liable for unintentional discrimination *only* if (1) the test is not "job-related... and consistent with business necessity," or (2) the employer is presented with and refuses to adopt another, similarly job-related test with less disparate impact.

Contrary to the Sotomayor-endorsed opinion, the Ginsburg dissent states (on page 19) that an employer's decision to jettison a promotional test under circumstances like this case would be legal *only* if the employer had "good cause to believe the [test] would not withstand examination for business necessity."

Ginsburg added (on page 26 and page 33) that "ordinarily, a remand for fresh consideration" would be proper because the lower courts (including Judge Sotomayor) had not carefully considered the evidence of "pretext" and racial politics.

To be sure, Justice Ginsburg also found (against the clear weight of the evidence, in my view) that New Haven *did* have good cause to believe that the test was invalid. She also said that if ether party was to be granted summary judgment, it should have been the city, and that the Supreme Court majority had erred in awarding summary judgment to the high-scoring plaintiffs.

But as a matter of law, the difference between the Sotomayor position and the Supreme Court dissenters' position is nonetheless important and revealing.

Both, in my view, would risk converting disparate-impact law into an engine of overt discrimination against high-scoring groups across the country and allow racial politics and racial quotas to masquerade as voluntary compliance with the law.

But while Ginsburg at least required the city to produce some evidence that the test was invalid, the Sotomayor panel required no such evidence at all. Its logic would thus provide irresistible incentives for employers to abandon any and all tests on which disproportionate numbers of protected minorities have low scores.

And racially disparate scores on virtually all objective tests are unfortunately the norm, not the exception. It's not hard to understand why: Studies have long showed that because of unequal educational opportunities and cultural differences, the average black high-school senior has learned no more than the average white eighth-grader -- and considerably less than the average white senior.

Of course, this would be no justification for basing promotions on test scores that have little relationship to the requirements of the job. But the New Haven exam was clearly job-related and carefully developed to insure race-neutrality, as the majority opinion of Justice **Anthony Kennedy** detailed.

To be sure, as Ginsburg argued, alleged imperfections in the New Haven test were attacked by black firefighters, city officials, and others after the fact. But every written and oral objective test ever devised can be similarly attacked as imperfect. If the law were as Judge Sotomayor ruled, no employer could ever safely proceed with promotions based on any test on which minorities fared badly.

The broader questions lying behind the New Haven case are whether this nation will ever get beyond racial preferences and quotas such as those encouraged by both the Sotomayor and the Ginsburg positions, and whether it will ever realize Dr. **Martin Luther King**'s dream of a nation where people are judged not by the color of their skins, but by the content of their characters.

Justice Ginsburg's prediction that the New Haven decision "will not have staying power" seems to reflect a conviction that the nondiscrimination ideal articulated by Dr. King should be put on hold for the indefinite future, if not forever. Judge Sotomayor's position in the case, and some of her off-the-bench pronouncements, suggest the same even more strongly.

President Obama's campaign rhetoric about getting away from identity politics and racial spoils seemed to promise something rather different.

NATIONAL LATINO PEACE OFFICERS ASSOCIATION®™
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Santa Ana, CA 92711-3159
www.nlpoa.org

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1st President
Vicente Calderon
Founder, of the NLPOA
Eduardo Roy, Esq.
National Legal Counsel

May 26, 2009

President Barack Obama
The White House
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

RE: Honorable Sonia Sotomayor

Dear Mr. President:

I am writing on behalf of the men and women of the National Latino Peace Officers Association (NLPOA) to unanimously support the appointment of the Honorable Sonia Sotomayor, Judge with the United States Court of Appeals for the Second District, as the next Justice of the Supreme Court of the United States.

The NLPOA supports Judge Sonia Sotomayor because she has a long and distinguished career on the federal bench as well as having the depth and breadth of legal experience of all levels of the judicial system. She brings a lifelong commitment to equality, justice, and opportunity, and has earned the respect of all her colleagues being in one of the most demanding appeals circuits in America; the Second Circuit.

She brings excellent credentials to this position, with a Juris Doctorate from Yale Law and completing her undergraduate work at Princeton, graduating summa cum laude. With over 30 years experience in handling a wide range of substantial civil and criminal cases, Judge Sotomayor has a distinguished record of professional accomplishments as judge, prosecutor, and community leader.

The NLPOA enthusiastically supports Judge Sonia Sotomayor as the next Supreme Court Justice of the United States of America.

If you have a need for additional information please feel free to contact me.

Respectfully,
AAcevedo
Art Acevedo
NLPOA National President
[redacted]

NATIONAL ORGANIZATION OF BLACK LAW ENFORCEMENT EXECUTIVES
HUBERT T. BELL, JR. OFFICE COMPLEX
4609 PINECREST OFFICE PARK DR. • SUITE F
ALEXANDRIA, VA 22312-1442
(703) 658-1529 • FAX: (703) 658-9479
Website: http/www.noblenational.org

June 8, 2009

The Honorable Patrick J. Leahy
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

The Honorable Jeff Sessions
United States Senate
335 Russell Senate Office Building
Washington, DC 20510

Dear Senators Leahy and Sessions:

The National Organization of Black Law Enforcement Executives (NOBLE), an organization of approximately 3,000 primarily African American law enforcement CEOs and command level officials writes to express its support for President Barack Obama's nomination of US District Court Judge Sonya Sotomayor as Associate Justice of the US Supreme Court.

It is critically important to NOBLE, that a Supreme Court justice exercises the ability to interpret the Constitution in a manner that respects the fundamental rights of all people, and that is fair. Judge Sotomayor has credible service; her transition from local prosecutor, to US District Court judge, to US Appeals Court jurist has afforded her the opportunity to experience the breadth of criminal, civil and administrative law issues. The critical issues involving the dialectical contradictions of inequities and fairness across the spectrum of employment, education, housing, the status of juvenile offenders and the enforcement of law are of deep concern to us and are issues that we believe she will be sensitive to.

Furthermore, as the cases before the Court become more challenging, and with science and technology related issues advancing at such a rapid pace, we believe that Judge Sotomayor is imminently qualified to look at our 200 year-old Constitution in a manner that is relevant to today's world. It is interesting to note a recent White House Press Office statistic, "If confirmed, Sotomayor would bring more federal judicial experience to the Supreme Court than any justice in 100 years, and more overall judicial experience than anyone confirmed for the Court in the past 70 years".

Law enforcement is a profession that is constantly evolving and we believe that there is a seat among the top of that criminal justice system for this great American. We trust that the Senate will look at her character and act quickly on her confirmation.

Respectfully,

Joseph A. McMillan
National President

Cc: U.S. Senate Judiciary Committee Members

06/12/2009 4:34PM

National Puerto Rican Coalition, Inc. ®

July 13, 2009

Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
433 Russell Senate Office Building
Washington, DC 20510

Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
335 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Sessions:

On behalf of the National Puerto Rican Coalition Inc. (NPRC), representing the interests of over 8 million U.S. citizens in the states and Puerto Rico, I would like to express our full and enthusiastic support for the confirmation of the Honorable Judge Sonia Sotomayor to the United States Supreme Court. Her personal and professional experiences make her uniquely sensitive and qualified to address the concerns of all Americans in our nation's highest court.

Judge Sotomayor's personal story of growing up as a daughter of Puerto Rican parents in a Bronx housing project, and eventually going on to study in Princeton and Yale, is an authentic reflection of the power for motivated and talented people in our society to overcome hardship and achieve success. This experience allows her a profound sensitivity to the challenging conditions of life which are the reality for a significant portion of the U.S. population and will provide her with a unique perspective on how to justly and equally apply our nation's laws.

In her professional life Judge Sotomayor's legal career has included not only criminal prosecution and commercial litigation, but also academia and appointment to the federal bench. For the past ten years, her intellect, integrity, and consensus-building have made her a highly respected jurist on the Second Circuit. This followed a distinguished career as a federal trial judge, during which Judge Sotomayor's pragmatism and resolve brought the national baseball strike to an end that satisfied all parties. She then taught for over nine years at the New York University School of Law and at Columbia Law School and has been a mentor to hundreds of attorneys and students as well as a member of the Puerto Rican and the Hispanic National Bar Associations. This wealth of experience has impressed upon her both the law's potential, as well as its limits. Since her nomination was announced she has received endorsements and praise from across the country.

As the Senate holds confirmation hearings, NPRC will be watching carefully to ensure that the Senate treats Judge Sotomayor fairly. Our organization firmly believes that Judge Sotomayor is the best choice for our country's next Supreme Court Justice. Therefore, NPRC will include her confirmation vote as part of our NPRC Community Accountability Rating. I hope and trust that you and your colleagues will enthusiastically support her nomination.

Sincerely,

Rafael Fantauzzi
President & CEO

1100 G Street, N.W.
Suite 805
Washington, DC 20005
W: 202-223-3915
F: 202-429-2223
Email: nprc@nprcinc.org
Website: www.nprcinc.org

NATIONAL RIFLE ASSOCIATION OF AMERICA
INSTITUTE FOR LEGISLATIVE ACTION
11250 WAPLES MILL ROAD
FAIRFAX, VIRGINIA 22030

Office of the Executive Director
CHRIS W. COX

July 7, 2009

The Honorable Patrick J. Leahy
Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Jeff Sessions
Ranking Member
U.S. Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Sessions:

I am writing to express the National Rifle Association's very serious concerns about the nomination of Judge Sonia Sotomayor to the Supreme Court of the United States.

We are particularly dismayed about the U.S. Court of Appeals for the Second Circuit's recent decision in the case of *Maloney v. Cuomo*, which involved the application of the Second Amendment as a limit on state law, via incorporation of the Second Amendment through the Fourteenth Amendment's Due Process Clause. Judge Sotomayor was on the panel that decided this case in a brief—and in our opinion, clearly incorrect—*per curiam* opinion.

The *Maloney* panel claimed that "it is settled law...that the Second Amendment applies only to limitations the federal government seeks to impose on this right." It based this ruling on the 1886 case of *Presser v. Illinois*, decided long before the development of the Supreme Court's modern incorporation doctrine. But as the Court made clear last year in *District of Columbia v. Heller*, post-Civil War cases such as *Presser* "did not engage in the sort of Fourteenth Amendment inquiry *required* by our later cases."

Further, *Presser* (along with *United States v. Cruikshank*) only stands for the concept that the guarantees in the Bill of Rights do not apply *directly* to the States. As we have seen throughout the Supreme Court's Twentieth Century jurisprudence, most of the Bill of Rights has been incorporated against the States through the Fourteenth Amendment's Due Process Clause. Thus, the failure of the *Maloney* panel to engage in a proper due process analysis of the Second Amendment is extremely troubling, to say the least.

Tel: (703) 267-1140 • www.nraila.org • Fax: (703) 267-3973

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The Second Circuit's decision (as well as the Seventh Circuit's similarly flawed reasoning in *Nat'l Rifle Ass'n of Am., Inc. v. City of Chicago*) is at odds with the Ninth Circuit's decision in *Nordyke v. King*, which did engage in a full Fourteenth Amendment analysis (again, as *required* by the Supreme Court in *Heller*). The Ninth Circuit held that while the Second Amendment does not apply to the states directly or through the Privileges or Immunities Clause, modern Fourteenth Amendment cases do require its incorporation through the Due Process Clause. This stark circuit split makes it highly likely that the Supreme Court will take up one or more of these cases in the immediate future, perhaps as soon as next term.

In addition, Judge Sotomayor was a member of the panel in the case of *United States v. Sanchez-Villar*, where (in a summary opinion) the Second Circuit dismissed a Second Amendment challenge to New York State's pistol licensing law. That panel, in a terse footnote, cited a previous Second Circuit case to claim that "the right to possess a gun is clearly not a fundamental right." Since the precedent cited for that point is no longer valid in the wake of *Heller*, Judge Sotomayor should be asked whether she would take the same position today.

The cases in which Judge Sotomayor has participated have been dismissive of the Second Amendment and have troubling implications for future cases that are certain to come before the Court. Therefore, we believe that America's eighty million gun owners have good reason to worry about her views. We look forward to a full airing of her past decisions and judicial philosophy at the upcoming committee hearings, and urge you and all committee members to engage in the most serious questioning possible on these critical issues.

Out of respect for the confirmation process, the NRA has not announced an official position on Judge Sotomayor's confirmation. However, should her answers regarding the Second Amendment at the upcoming hearings be hostile or evasive, we will have no choice but to oppose her nomination to the Court.

Finally, we would caution you against lending any credence to the endorsement of Judge Sotomayor's nomination by organizations that falsely claim to represent gun owners, while promoting an anti-gun agenda. These front groups' actions give them no credibility to speak on this nomination.

Thank you for your attention to our concerns. Should you have any questions or wish to discuss further, please do not hesitate to call on me personally.

Sincerely,

Chris W. Cox

Executive Director

Cc: The Honorable Harry Reid, Senate Majority Leader

The Honorable Mitch McConnell, Senate Republican Leader

Members of the Senate Committee on the Judiciary

LETTER RELEASED TODAY:

July 7, 2009

Dear Senators:

As Americans who have dedicated themselves to protecting the Second Amendment right of U.S. citizens to keep and bear arms, we urge you not to confirm Judge Sonia Sotomayor as the next associate justice of the United States Supreme Court.

It is extremely important that a Supreme Court justice understand and appreciate the origin and meaning of the Second Amendment, a constitutional guarantee permanently enshrined in the Bill of Rights. Judge Sotomayor's record on the Second Amendment causes us grave concern over her treatment of this enumerated constitutional right.

Last year, the Supreme Court decided the landmark case *District of Columbia v. Heller*, holding that the Second Amendment guarantees to all law-abiding, responsible citizens the individual right to keep and bear arms, particularly for self-defense. Following *Heller*, the Supreme Court is almost certain to decide next year whether the Second Amendment applies to states and local governments, as it does to the federal government (see *NRA v. Chicago* and *McDonald v. Chicago*.)

While on the Second Circuit, Judge Sotomayor revealed her views on the right to keep and bear arms in *Maloney v. Cuomo*, a case decided after *Heller*, yet holding that the Second Amendment is not a fundamental right, that it does not apply to the states, and that if an object is "designed primarily as a weapon" that is a sufficient basis for total prohibition even within the home. Earlier in a 2004 case, *United States v. Sanchez-Villar*, Sotomayor and two colleagues perfunctorily dismissed a Second Amendment claim holding that "the right to possess a gun is clearly not a fundamental right." Imagine if such a view were expressed about other fundamental rights guaranteed by the Bill of Rights, such as the First, Fourth and Fifth Amendments.

Surprisingly, *Heller* was a 5-4 decision, with some justices arguing that the Second Amendment does not apply to private citizens or that if it does, even a total gun ban could be upheld if a "legitimate governmental interest" could be found. The dissenting justices also found D.C.'s absolute ban on handguns within the home to be a "reasonable" restriction. If this had been the majority view, then any gun ban could be upheld, and the Second Amendment would be meaningless.

The Second Amendment survives today by a single vote in the Supreme Court. Both its application to the states and whether there will be a meaningfully strict standard of review remain to be decided by the High Court. Judge Sotomayor has already revealed her views on these issues and we believe they are contrary to the intent and purposes of the Second Amendment and Bill of Rights. As Second Amendment leaders deeply concerned about preserving all fundamental rights for current and future generations of Americans, we strongly oppose this nominee, and urge the Senate not to confirm Judge Sotomayor.

Sincerely,

Sandra S. Froman, Esq.
Former President, National Rifle Association of America
NRA Board of Directors and Executive Council

Landis Aden
President, Arizona State Rifle & Pistol Association

Scott L. Bach, Esq.
President, Association of New Jersey Rifle and Pistol Clubs

The Honorable Bob Barr
Former Congressman, 7th District of Georgia

NRA Board of Directors

Ken Blackwell
Senior Fellow, Family Research Council
NRA Board of Directors

Rep. Jennifer R. Coffey, NREMT-I
Representative, New Hampshire State House of Representatives
Representative, New Hampshire General Court
Director and National Coordinator, Second Amendment Sisters, Inc.
Advisor, New Hampshire Pro-Gun Advisory Council

Robert K. Corbin, Esq.
Former Attorney General, State of Arizona
Former President of NRA and current member of NRA Executive Council

Jim Dark
Former Executive Director, Texas State Rifle Association
NRA Board of Directors

Alan M. Gottlieb
Chairman, Citizens Committee for the Right to Keep and Bear Arms

Tom Gresham
Host of "Gun Talk"
Nationally syndicated radio talk show

Gene Hoffman, Jr.
Chairman, The Calguns Foundation

Susan Howard
NRA Board of Directors

Tom King
President, New York State Rifle and Pistol Association
NRA Board of Directors

John T. Lee
President, The Pennsylvania Rifle and Pistol Association

Owen P. Buz Mills
President, Gunsite Academy, Inc.
NRA Board of Directors

Evan F. Nappen, Esq.
Corporate Counsel and Director, Pro-Gun New Hampshire, Inc.

Grover G. Norquist
President, Americans for Tax Reform
NRA Board of Directors

Sheriff Jay Printz
Retired Sheriff and Coroner, Ravalli County, Montana
Successful plaintiff in U.S. Supreme Court case *Printz vs. U.S.*
NRA Board of Directors

Todd J. Rathner

President, T. Jeffrey Safari Company
NRA Board of Directors

Wayne Anthony Ross, Esq.
President, Alaska Gun Collectors Association
Former Attorney General, State of Alaska
NRA Board of Directors

Don Saba, Ph.D.
Sierra Bioresearch
NRA Board of Directors

Robert E. Sanders, Esq.
Former Assistant Director (Law Enforcement), Bureau of Alcohol, Tobacco and Firearms
NRA Board of Directors

Jon A. Standridge
Brigadier General (USA Ret.)

Joseph P. Tartaro
President, Second Amendment Foundation

Jim Wallace
Executive Director, Gun Owners' Action League

Current and past affiliations are for identification purposes only.

NATIONAL SHERIFFS' ASSOCIATION

1450 Duke Street • Alexandria, VA 22314-3490 • 703-836-7827 • Fax 703-683-6541
WWW.SHERIFFS.ORG • NSAMAIL@SHERIFFS.ORG

June 8, 2009

The Honorable Patrick J. Leahy, Chair
The Honorable Jeff Sessions, Ranking Member
Senate Judiciary Committee
Washington, D.C. 20510

Dear Chairman Leahy and Ranking Member Sessions:

On behalf of the National Sheriffs' Association, we are writing to express our support for the nomination of Sonia Sotomayor to be the Associate Justice of the United States Supreme Court.

As you know, in most jurisdictions, sheriffs have several responsibilities in the criminal justice system including law enforcement and the administration of our jails. Because of the sheriff's role in enforcing the law and administering the jails, there are many occasions where the sheriff's duties are directly impacted by the actions of the United States Supreme Court. Sheriffs across the country can recite examples in our communities, where criminals have gone free because of technicalities. In many cases, an overriding problem for law enforcement throughout the United States has been the courts—on the federal, state and local level.

Because of the critical role that the court plays in our criminal justice system, the National Sheriffs' Association is urging the Senate to confirm Judge Sotomayor who we believe has the qualifications, judicial philosophy and commitment to interpreting the Constitution with an abiding sense of fairness and justice.

Judge Sonia Sotomayor's real world experience as a prosecutor who pursued justice for victims of violent crimes as well as a federal judge at both the district and circuit court levels with an unassailable integrity make her an ideal nominee to serve on the Supreme Court. We believe her judicial philosophy in criminal justice to be sound and support her common sense approach in reviewing criminal cases.

As one of the largest law enforcement organizations in the nation, the National Sheriffs' Association is calling on the United States Senate to approve Sonia Sotomayor to be the next Associate Justice of United States Supreme Court.

Respectfully,

Sheriff David A. Goad
President

Aaron D. Kennard
Executive Director

Serving Our Nation's Sheriffs Since 1940

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NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

What the *Ricci v. DeStefano* Case Means for Women's Rights

In *Ricci v. DeStefano* (07-1428), the Supreme Court held that where an employer seeks to set aside what it believes to be a discriminatory test or practice, the employer must have "a strong basis in evidence" – that is, that the employer will be subject to Title VII liability because the test adversely impacts individuals based on their sex, race, national origin or religion, and that the test is not job-related or consistent with business necessity," or that there was "an equally valid, less-discriminatory alternative that served the City's needs but that the City refused to adopt."

The Court's ruling creates a new hurdle for employers that wish to voluntarily avoid the use of discriminatory tests. But the ruling recognized that consistent with this heightened standard employers are still obligated by Title VII to take steps to remove both intentional discrimination and unjustified discriminatory practices. It therefore is critical that employers identify effective ways to craft fair entry and promotional exams to ensure that Title VII remains an effective tool to open doors previously closed to employment to women and people of color.

Women's entry into nontraditional occupations, such as firefighting, police work or construction, was made possible in large part by challenges to a variety of recruitment, hiring, and promotion practices that adversely affected women – challenges brought under the Title VII "disparate impact" theory of discrimination – that likely would have otherwise remained unchanged. Importantly, the Court's decision preserves such challenges and requires on employers to continue to ensure that their tests and other selection criteria do not artificially exclude women or minorities.

I. Background on *Ricci v. DeStefano*

In 2003, the City of New Haven administered written and oral promotional examinations for captain and lieutenant positions in its fire department. Based on the results, no Hispanic or African American applicants were eligible for the available lieutenant positions, and only two Hispanic and no African Americans were eligible for the captain positions. And no women of any race were eligible for promotion. Following hearings before the City's Civil Service Board, the Board determined that it should not certify the exam results for promotions, believing that the City could be in violation of Title VII of the Civil Rights Act of 1964, which bars discrimination in employment based on race, color, sex, national origin and religion, if it made promotions based on the results of a flawed exam..

The City would not have been able to justify its use of the exam if it could not show that the exam was both job-related and consistent with its business needs. The City also considered testimony about alternative approaches to the exam. Testing experts offered evidence that other methods of testing candidates for promotion were available and

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suggested that alternative tests might not have an adverse effect on minority candidates. Twenty white firefighters, including one Hispanic firefighter, filed suit, claiming that the decision by the City to not certify the results was reverse discrimination.

The district court rejected the firefighters' arguments that the City was required to certify the results of a test that it believed violated Title VII. A panel of the Court of Appeals for the Second Circuit affirmed the district court decision in a summary order, and the full Circuit denied rehearing of the panel's decision. The firefighters petitioned for certiorari, and the Supreme Court heard oral argument in the case in April, 2009.

The Supreme Court's decision that employers must have "a strong basis in evidence" before discarding a discriminatory test or practices represents a shift in the standard traditionally guiding employers confronting discriminatory practices and potentially undermines the decades of efforts to expand opportunities for women in nontraditional areas of employment.

II. Disparate Impact Cases Have Expanded Opportunities for Women

Employment practices that impose a disparate impact, like the promotional test used in *Ricci*, have closed opportunities for women in nontraditional fields. In some cases, a practice disadvantages women without any relationship to job performance. Indeed, in such a case, a seemingly neutral practice may actually conceal an employer's intent to bar women from a job. For example, employers have historically implemented height, weight or strength requirements in police departments, fire departments, and in correctional facilities that are not at all related to job performance; in many cases, these practices were designed to maintain predominantly male working environments.

In addition, other employment practices covered by the bar against disparate impact discrimination reflect stereotypes about the skills required for a position but, upon examination, there are alternative practices that may both satisfy job performance demands and allow for a diverse workforce. Both forms of discrimination covered by the disparate impact standard serve as roadblocks to the advancement of women in nontraditional fields.

The examples below illustrate just a few of the employment practices, including tests and other seemingly neutral requirements, that courts have struck down under the Title VII disparate impact standard.

Height and Weight Requirements:

Title VII's ban on disparate impact discrimination allowed individuals to challenge – and as a result largely eliminated – the use of height and weight requirements that disproportionately excluded women from firefighting, construction and police work. For example:

- The Supreme Court first applied the disparate impact standard to remedy sex-based disparate impact discrimination when it struck down the Alabama State Penitentiary System's minimum height and weight requirements for correctional

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counselors. The requirements had a significant disparate impact on women – 33 percent of women were ineligible for the positions because of the weight requirements and 22 percent of women were ineligible because of the height requirements. And only 1.28% and 2.35% of men were excluded by the respective height and weight requirements. The Supreme Court held that Alabama offered no evidence that either height or weight were necessary qualifications for correctional counselor positions. Although the state argued that height and weight were related to the strength needed for the position, there was no evidence correlating height and weight requirements to strength. (*Dothard v. Rawlinson*, 433 U.S. 321 (1977)).

- The Ninth Circuit struck down the height requirements utilized by the Los Angeles Police Department (LAPD) because they were not job related and had a disparate impact on women, who tend to be shorter than men. (*Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979)).

Strength & Physical Tests:

The disparate impact standard has led to changes to employer physical ability and strength tests. Although some positions are physically demanding, the tests have in some cases been designed in ways that are unrelated to the job and have served as part of a strategy to exclude women from nontraditional fields.

- The Eighth Circuit recently struck down a newly implemented strength test used for workers in a sausage factory. The test was not job related; in fact, it was more physically demanding than the actual job. And it had gross disparate impact on women – the percentage of women hired to work in the sausage factory fell from 47 percent to 15 percent after the employer implemented the strength test. Women who had worked in the factory along side men for years were unable to pass it. (*Equal Employment Opportunity Comm'n v. Dial*, 469 F.3d 735 (8th Cir. 2006)).

- A court struck down a physical agility test used by a fire department in Rhode Island. The test's designer admitted that the test favored men because it emphasized upper body strength, an area where men tend to outperform women. And the fire department was unable to show that the physical test was job-related. In fact, the plaintiff performed her job as a part-time firefighter without having passed the test and there was no evidence that part-time firefighters required different skills from fulltime firefighters. (*Legault v. aRusso*, 842 F.Supp. 1479 (D.N.H. 1994)).

Oral and Written Examinations That Disadvantage Women:

The disparate impact standard has also led courts to strike down discriminatory employer written and oral examinations. These tests have in some cases been designed in ways that are unrelated to job requirements and have served as part of a strategy to exclude women from nontraditional fields.

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- The Sixth Circuit struck down the examination process used by the Toledo, Ohio Police Department in hiring and promotions. The exams consisted of a combination of written tests, physical ability tests, and a structured oral interview. The court struck down both the physical test portion and the structured interview, finding that neither was valid nor appropriately job-related. The court found that the grading of the interviews "was subject to a host of errors resulting from a lack of standardized conditions, rater bias, and the lack of criteria on which to judge the degree of correctness of answers." The court concluded that "the structured interview was rife with the potential for discrimination." (*Harless v. Duck*, 619 F.2d 611 (6th Cir. 1980)).

- The Ninth Circuit upheld a district court verdict striking down a written examination used by the City of Los Angeles Sheriff's Department because it had a disparate impact on female applicants. Out of 79 women who applied for promotion for Sergeant, only 10 scored high enough for consideration, and only four were ultimately promoted. In comparison, of the 1312 men who took the exam, 127 were ultimately promoted. Similar results occurred in other years of testing. (*Bouman v. Block*, 940 F.2d 1211 (9th Cir. 1991)).

Other Standards That Disadvantage Women:

- A court struck down a construction site policy prohibiting bathroom breaks. The employer told its female crane operators to follow the model set by their male colleagues and urinate off the back of the crane while working. This policy was not job-related and had a disparate impact on the ability of women to be employed as crane operators. (*Johnson v. AK Steel Corp*, 2008 WL 2184230 (S.D. Ohio May 23, 2008)).

Because of the disparate impact standard, courts have been able to root out discriminatory exams and other requirements and in their place implement standards that are do not disproportionately exclude women and that more accurately screen for qualified employees.

The Supreme Court's Decision in Ricci Allows Employers to Continue to Prevent Discriminatory Standards

Despite the Court's departure from traditional interpretations of Title VII, employers must continue to take steps to eliminate practices that unfairly disadvantage women in the workplace. The Court rejected arguments made by the white firefighters that an employer must be found by a court to be in violation of the disparate impact provision of Title VII before it can discard the results of a discriminatory practice. This, the Court held, was "overly simplistic" and would undermine Congress's intent that 'voluntary compliance be 'the preferred means of achieving the objectives of Title VII.'" Slip Op. at 21. Instead, employers must continue to evaluate their practices and, where practices serve as discriminatory barriers for employment or promotion, must address those barriers. Indeed, there are steps that employers can take during the design phase of a test to ensure their tests are fair. And even after administering a test, if there is a strong basis in evidence that the test would violate Title VII's disparate impact standard, employers must take steps to remedy the discrimination.

NWLC filed an amicus brief in the case, which is available here: http://nwlc.org/pdf/NWLC-Partnership%20Ricci%20Brief%20Final.pdf.

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NEW YORK CITY HOUSING AUTHORITY

NEW YORK CITY HOUSING AUTHORITY
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RICARDO ELÍAS MORALES
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MEMBER
VILMA HUERTAS
SECRETARY
DOUGLAS APPLE
GENERAL MANAGER

May 28, 2009

Honorable Senator Patrick J. Leahy
Chairman, Senate Judiciary Committee
433 Russell Senate Office Building
United States Senate
Washington, DC. 20510

Dear Senator Leahy:

As Chairman of the New York City Housing Authority, I enthusiastically support the nomination of the Honorable Sonia Maria Sotomayor to the United States Supreme Court.

Judge Sotomayor is uniquely qualified to serve on our Nation's Highest Court. There are few candidates who can match her academic achievements, her distinguished career as first a federal district judge and now a member of the prestigious Second Circuit Court of Appeals, and her inspiring life experience.

It is with particular pride that the New York City Housing Authority stands behind the nomination of Judge Sotomayor, who for many of her formative years called the New York City Housing Authority's Bronxdale Houses home. Judge Sotomayor's illustrious public service is a testament to the important role that public housing plays in the life of our nation.

By confirming Judge Sotomayor, the Senate will not only ensure the United States Supreme Court of another intellectually superior justice, but will also make significant strides in ensuring that all branches of government reflects the diversity that make this nation great.

Respectfully,

Ricardo Elias Morales
Chairman

July 2, 2009

Honorable Patrick J. Leahy
Chairman, United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20515

Honorable Jeff Sessions
Ranking Member, United States Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20515

Dear Senators:

As former colleagues of the Honorable Sonia Sotomayor during her years as a prosecutor in the Office of the New York County District Attorney, we write to express our wholehearted support for her nomination to the United States Supreme Court.

We served together during some of the most difficult years in our City's history. Crime was soaring, a general sense of disorder prevailed in the streets, and the popular attitude was that increasing violence was inevitable. It was in this setting that Sonia decided to start her career, not in a judge's chambers or at a high-powered law firm, but rather in the halls of New York's Criminal Courts, as an assistant district attorney.

She began as a "rookie" in 1979, working long hours prosecuting an enormous caseload of misdemeanors before judges managing overwhelming dockets. Sonia so distinguished herself in this challenging assignment that she was among the very first in her starting class to be selected to handle felonies. She prosecuted a wide variety of felony cases, including serving as co-counsel at a notorious murder trial. She developed a specialty in the investigation and prosecution of child pornography cases. Throughout all of this, she impressed us as one who was singularly determined in fighting crime and violence. For Sonia, service as a prosecutor was a way to bring order to the streets of a City she dearly loves. At the same time, she had an abiding sense of justice that spoke of the traditions of an Office headed by Thomas Dewey, Frank Hogan and Robert Morgenthau.

Few of us can forget her careful and painstaking jury selection. As diligently as she prepared her cases, she also readied her juries to evaluate the evidence and apply the facts to the law as they were instructed by the judge. As any trial lawyer knows, this is no easy task. Sonia emphasized that it is both a privilege and a duty to sit on a case, and jurors must do so without bias or prejudice.

We are proud to have served with Sonia Sotomayor. She solemnly adheres to the rule of law and believes that it should be applied equally and fairly to all Americans. As a group, we have different world views and political affiliations, but our support for Sonia is entirely non-partisan. And the fact that so many of us have remained friends with Sonia over three decades speaks well, we think, of her warmth and collegiality.

We urge all Senators to approve Sonia's nomination, as our country will be better off with Judge Sotomayor sitting on our nation's highest court.

Thank you for your consideration.

Sincerely,

Steven M. Rabinowitz
Marc J. Citrin
John W. Fried
Thomas Demakis
Rubie A. Mages
John Lenoir
Ted Poretz
Mike Cherkasky
Joseph Ortego
Steven Fishner
Irving Hirsch
Jerry Neugarten
Fred Biesecker
Annette Sanderson
Jackie Hilly
Jessica DeGrazia
Maureen Barden
Deborah Veach
Vivian Berger
Maurice Mathis
Susan Gliner
Elizabeth Lederer
Frank Munoz
Isabelle Kirshner
Richard Girgenti
Peter Kougasian
Nancy Gray
Jason Dolin
William Tendy
Patrice M. Davis
Jose Diaz
Scott Sherman
Peter Zimroth
James Warwick
Stephen L. Dreyfuss
Consuelo Fernandez
Jeff Schlanger
Richard H. Girgenti
John Moscow
Eugene Porcarco
Kim H. Townsend

CC: Hon. Herb Kohl
Hon. Orrin G. Hatch
Hon. Dianne Feinstein
Hon. Charles E. Grassley
Hon. Russell D. Feingold
Hon. Jon Kyl
Hon. Charles E. Schumer
Hon. Lindsey Graham
Hon. Richard J. Durbin
Hon. John Cornyn
Hon. Benjamin L. Cardin
Hon. Tom Coburn
Hon. Sheldon Whitehouse
Hon. Ron Wyden
Hon. Amy Klobuchar
Hon. Edward E. Kaufman
Hon. Arlen Specter

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DAILY•NEWS | Opinion

Those labeling Sonia Sotomayor a radical don't know her at all

By Robert Morgenthau

Thursday, May 28th 2009

No sooner had President Obama announced his nomination of Court of Appeals Judge Sonia Sotomayor than conservative partisans began calling for her defeat. These so-called pundits have pronounced her a "radical," an "activist," part of the "far left," an "affirmative action case" and, most astoundingly, a "racist." We were not long left in suspense as to whether this administration's judicial nominees can expect to be vetted with objectivity and due civility.

I have known Judge Sotomayor for decades, and I know how absurd these charges are. I doubt that anyone will be fooled by them, but let me state for the record my views on her nomination.

I first heard the judge's name while on a recruiting trip to Yale Law School in 1979. I asked the general counsel of the university, who also taught at the law school, if there were any talented students I should see. He singled out Sotomayor, who was about to graduate, who had impressed her professors, and who had while in college won the extremely prestigious Pyne Prize, the highest undergraduate honor for students at Princeton. She and I talked, and I learned that she had been raised from an early age only by her mother, in a working class home in the South Bronx. I recognized that she was not only extremely bright, but had both feet planted firmly on the ground. I made her an offer, and I am pleased to say that she joined the district attorney's office for five years.

Assistant District Attorney Sotomayor was no "liberal." Rather, she was a tough and effective prosecutor. Young prosecutors are sometimes picked on by judges and defense attorneys, but no one successfully pushed this ADA around. Within a short time she had come to the attention of trial division executives as someone who was a step ahead of her colleagues, one of the brightest, an immediate standout who was marked for rapid advancement.

While in the district attorney's office she co-tried the notorious Tarzan burglar, Richard Maddicks, whose crime spree had left three dead and others injured; Maddicks is serving a sentence of 75 years to life. She led an investigation in the first child pornography case brought under a new New York statute, later the occasion for a landmark ruling in the U.S. Supreme Court, and she convicted the Times Square pornographers who were helping exploit children. The defendants in Judge Sotomayor's cases would find as amusing as I do the charge that Justice Sotomayor would be "soft on crime."

The judge's work since she left this office confirms that she is a strong champion of the law. In particular, she has served with distinction on what I consider to be the second most important appellate court in the world, the U.S. Court of Appeals for the Second Circuit. To be sure, she is in favor of civil rights, in the sense that she believes there should be fair treatment for all. But that is, of course, the law. And she understands poverty, and does seem willing to accept government action that provides a safety net to the poor. But that is not exactly "radical."

Most importantly, I am astonished that she has been disparaged as an "affirmative action" beneficiary. Whatever position one takes on affirmative action, it is simply unreasonable, if not racist, so to impugn this individual. She may be a woman, and she may be a Latina. But Sonia Sotomayor possesses an abundance of wisdom, intelligence, collegiality and good character. Sotomayor is where she is today because of her talent. Those who insinuate otherwise don't know her, or simply paint her as they do for political reasons having nothing to do with the truth.

President Obama, and for that matter the United States, should be proud to see once more the realization of that central American credo, that in this country a hardworking person with talent can rise from humble beginnings to one of the highest positions in the land.

Morgenthau is district attorney for New York County.

New York State Law Enforcement Council

ONE HOGAN PLACE NEW YORK, NY 10013 (212) 335-8927, FAX (212) 335-3808

The New York State Law Enforcement Council congratulates President Obama on his nomination of Judge Sonia Sotomayor to the United States Supreme Court. Judge Sotomayor is well known to us from her career as a prosecutor and as a federal judge. She is an extremely able jurist and an exceptional individual. The interests of the nation will be well served when she assumes her seat on the Supreme Court.

NYSLEC

NEW YORK STATE DISTRICT ATTORNEYS ASSOCIATION
Daniel M. Donovan, Jr., President

ATTORNEY GENERAL OF THE STATE OF NEW YORK
Andrew M. Cuomo

CRIMINAL JUSTICE COORDINATOR
OF THE CITY OF NEW YORK
John Feinblatt

NEW YORK STATE ASSOCIATION OF CHIEFS OF POLICE
Lloyd Perkins, President
John Grebert, Executive Director
John Poklemba, Counsel

NEW YORK STATE SHERIFFS' ASSOCIATION
Peter Kehoe, Executive Director
Christopher O'Brien, Deputy Executive Director

CITIZENS CRIME COMMISSION OF NEW YORK CITY

COUNSEL
Robert M. Morgenthau, District Attorney
New York County

COORDINATOR
Leroy Frazer, Jr.
Office of the District Attorney
New York County

May 27, 2009
NEWS ANALYSIS

Nominee's Rulings Are Exhaustive but Often Narrow

By ADAM LIPTAK
New York Times

WASHINGTON — Judge Sonia Sotomayor's judicial opinions are marked by diligence, depth and unflashy competence. If they are not always a pleasure to read, they are usually models of modern judicial craftsmanship, which prizes careful attention to the facts in the record and a methodical application of layers of legal principles.

Judge Sotomayor, whom President Obama announced Tuesday as his choice for the Supreme Court, has issued no major decisions concerning abortion, the death penalty, gay rights or national security. In cases involving criminal defendants, employment discrimination and free speech, her rulings are more liberal than not.

But they reveal no larger vision, seldom appeal to history and consistently avoid quotable language. Judge Sotomayor's decisions are, instead, almost always technical, incremental and exhaustive, considering all of the relevant precedents and supporting even completely uncontroversial propositions with elaborate footnotes.

All of which makes her remarkably cursory treatment last year of an employment discrimination case brought by firefighters in New Haven so baffling. The unsigned decision by Judge Sotomayor and two other judges, which affirmed the dismissal of the claims from 18 white firefighters, one of them Hispanic, contained a single paragraph of reasoning.

The brief decision in the case, which bristles with interesting and important legal questions about how the government may take account of race in employment, will probably attract more questions at her Supreme Court confirmation hearings than any of the many hundreds of much more deeply considered decisions she has written.

Judge Sotomayor's current court, the United States Court of Appeals for the Second Circuit, in New York, is a collegial one. But Judge Jose A. Cabranes, writing for himself and five other judges, used unusually tough language in dissenting from the full court's later refusal to rehear the firefighters' case.

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Judge Cabranes said the panel's opinion "contains no reference whatsoever to the constitutional claims at the core of this case" and added that "this perfunctory disposition rests uneasily with the weighty issues presented by this appeal."

That assessment, which was directed at the work of all three judges on the panel, may have carried extra weight with Judge Sotomayor. Judge Cabranes was a mentor to her, and he administered the judicial oath to her twice — in 1992, when she joined the Federal District Court in Manhattan, and again in 1998, when she was elevated to the Second Circuit.

The case, Ricci v. DeStefano, is now before the Supreme Court. In the next month or so, that court will render an unusually high-profile judgment on the work of a judge who hopes to join it. Based on the questioning at the argument in the case last month, the majority's assessment is likely to be unflattering.

In an interview shortly before she joined the district court in 1992, Ms. Sotomayor spoke about what awaited her, saying that "95 percent of the cases before most judges are fairly mundane."

"I'm not going to be able to spend much time on lofty ideals," she said. "The cases that shake the world don't come along every day. But the world of the litigants is shaken by the existence of their case, and I don't lose sight of that, either."

Judge Sotomayor's six years on the trial court and more than a decade on the Second Circuit probably confirmed those intuitions, in part because of the idiosyncratic dockets of the federal courts in New York. They hear many important cases involving business, securities, employment, white-collar crime and immigration. But they do not regularly confront the great issues of the day.

One exception is on the horizon. The full Second Circuit, including Judge Sotomayor, recently reheard the case of Maher Arar, a Canadian who contends that American officials sent him to Syria in 2002 to be tortured. A divided panel of the court had dismissed Mr. Arar's case. The decision from the full court should provide clues about Judge Sotomayor's views concerning how far the government may go in its efforts to combat terrorism.

Thomas C. Goldstein, a lawyer who argues frequently before the Supreme Court and founded Scotusblog, a Web site that covers the court, said there could be no doubt about Judge Sotomayor's intellectual capacity.

"She's got the horses, for sure," Mr. Goldstein said.

Nor, he added, was there any question of her fundamental orientation, based on a review of her decisions. "From the outcomes," Mr. Goldstein said, "she's certainly on the left."

Judge Sotomayor's rulings have sometimes anticipated decisions of the Supreme Court. In 1999, for instance, she refused to suppress crack cocaine found by police officers who were executing a warrant that had been vacated 17 months before but never deleted from a police database.

That kind of error, Judge Sotomayor said, did not require suppression. The Supreme Court came to the same conclusion in January, a decade after Judge Sotomayor's decision.

On other occasions, Judge Sotomayor has been content to wait for definitive guidance from the Supreme Court. In January, she joined an unsigned decision rejecting a Second Amendment challenge to a New York law prohibiting the possession of chukka sticks, a weapon used in martial arts made up of two sticks joined by a rope or chain.

The decision reasoned that the Supreme Court's ruling last year establishing an individual right to bear arms, District of Columbia v. Heller, had not yet been applied to the states. The Second Circuit's decision may well reach the Supreme Court.

In a 2004 dissent, Judge Sotomayor seemed to be in agreement with Justice Ruth Bader Ginsburg's observation in a recent interview with USA Today that female judges can be more sensitive to claims that strip searches of young girls are unduly intrusive.

The majority opinion in the 2004 case, by two male judges, upheld the legality of some strip searches of girls held at juvenile detention centers in Connecticut.

In her dissent, Judge Sotomayor wrote that the majority had not been attentive enough to "the privacy interests of emotionally troubled children" who "have been victims of abuse or neglect, and may be more vulnerable mentally and emotionally than other youths their age."

That was in line with Justice Ginsburg's questioning from the bench last month in Safford Unified School District v. Redding, which concerned what

she called a "humiliating" strip search of a 13-year-old middle school student by school officials in Arizona.

In her dissent, Judge Sotomayor also emphasized how "embarrassing and humiliating" the searches of the girls in Connecticut had been. "The officials inspected the girls' naked bodies front and back, and had them lift their breasts and spread out folds of fat," Judge Sotomayor wrote.

In a 2002 dissent, Judge Sotomayor said she would have ruled that the First Amendment has a role to play in protecting anonymous racist communications made by a police officer. Saying she found the communications "patently offensive, hateful and insulting," Judge Sotomayor nonetheless would have allowed the officer's case against the police department that fired him to proceed to trial.

She said the majority should not "gloss over three decades of jurisprudence and the centrality of First Amendment freedoms in our lives because it is confronted with speech it does not like."

The New York Times

May 27, 2009
Op-Ed Contributor

Scenes From Judge Sotomayor's Courtroom

By GERARD N. MAGLIOCCA

Indianapolis

IN nominating Sonia Sotomayor to fill Justice David Souter's seat on the Supreme Court, President Obama chose someone similar to himself in experience and intellect. What may surprise those who have read criticisms of Judge Sotomayor's personality on the bench — largely, descriptions of her by anonymous detractors as imperious and a "bully" — is that she also mirrors the president's measured temperament.

I have known the judge for 13 years, and found myself assisting her and sometimes at odds with her professionally. She hired me as a summer intern in her chambers when she served on the federal district court in New York in the 1990s. While that obviously makes me somewhat biased, I think two incidents from that time make the case for her temperament.

The first was a criminal trial she presided over in which the lawyers on both sides were inexperienced and made a number of strange decisions. One tried to hand the judge his exhibits and kept strolling up to the bench during his questioning, which is not typical courtroom behavior. As a former prosecutor, Judge Sotomayor was clearly perplexed, but she bent over backward to keep things running smoothly. After the verdict came in, she invited the lawyers to her chambers for a private conversation and spent at least an hour advising them on how to improve their trial and cross-examination skills.

On another occasion, I drafted some research for her that was not well written. When she discussed the memo with me, she started by saying, "You are too smart for me," and proceeded to ask me a series of questions that I had not addressed. I realized later that this was her polite way of saying: "This isn't good. Do it over." She could have said just that, but evidently decided that positive reinforcement was the way to go. This is exactly the kind of skill that a Supreme Court justice needs to persuade her colleagues, who tend to have powerful personalities and do not take criticism well.

A few years later, I was a law clerk to Judge Guido Calabresi on the United States Court of Appeals for the Second Circuit and observed Judge Sotomayor after her elevation to that court. There was one case in which I thought the state workers who took a child away from his father based on wrongful allegations should have been found negligent, and helped Judge Calabresi with his opinion to that effect. Judge Sotomayor took a different view of the facts given the extraordinary pressures that child welfare workers operate under. Yet while we disagreed, there was no question hers was a reasonable judgment informed by pragmatic considerations, which is exactly what we should expect to see from her on the high court.

As her nomination moves ahead, some who have appeared before her are offering criticisms. And, yes, it is fair to say that experienced lawyers who argued before her and were just not prepared got tough

questions. But a judge who does not probe a lawyer's case and expose its weaknesses is not doing her job. Besides, the Supreme Court is not made up of shrinking violets.

While many have discussed her underprivileged background as a strong point for her confirmation, I think that her experiences as a lawyer and a judge are more relevant. Plenty of judges can talk intelligently about trademarks, but few have actually strapped on a bulletproof vest and taken part in law-enforcement raids on gang warehouses filled with counterfeit merchandise, as she did when she was in private practice. Many judges are knowledgeable about labor law, but few have faced a labor decision as intense as her ruling in favor of the players that ended the 1995 Major League Baseball strike.

One result of her broad experience in many different fields is a distrust of abstraction. Indeed, her stint presiding over trials in district court will help the other justices, none of whom have done so, understand the implications of their rulings on everyday litigation and criminal sentencing.

I am a conservative, and I did not vote for President Obama. It is perfectly understandable for conservatives to say that they will not vote for anyone the president picks, but at that point the debate, if you can call it that, is over. For those of us who think that intellectual rigor and fairness are the crucial factors, no matter which party the president hails from, there is no question that Judge Sotomayor should be confirmed.

Chief Justice John Roberts said in his confirmation hearings that a judge should behave like an umpire. Now President Obama wants to give the court the judge who actually saved baseball.

Gerard N. Magliocca is a law professor at Indiana University at Indianapolis.

June 6, 2009

New Scrutiny of Judge's Most Controversial Case

By ADAM LIPTAK
New York Times

WASHINGTON — Near the end of a long and heated appeals court argument over whether New Haven was entitled to throw out a promotional exam because black firefighters had performed poorly on it, a lawyer for white firefighters challenging that decision made a point that bothered Judge Sonia Sotomayor.

"Firefighters die every week in this country," the lawyer, Karen Lee Torre said. Using the test, she said, could save lives.

"Counsel," Judge Sotomayor responded, "we're not suggesting that unqualified people be hired. The city's not suggesting that. All right?"

The exchange was unusually charged. Almost everything about the case of Ricci v. DeStefano — from the number and length of the briefs to the size of the appellate record to the exceptionally long oral argument — suggested that it would produce an important appeals court decision about how the government may use race in decisions concerning hiring and promotion.

But in the end the decision from Judge Sotomayor and two other judges was an unsigned summary order that contained a single paragraph of reasoning that simply affirmed a lower court's decision dismissing the race discrimination claim brought by Frank Ricci and 17 other white firefighters, one of them Hispanic, who had done well on the test.

The Ricci case, bristling with important issues, has emerged as the most controversial and puzzling of the thousands of rulings in which Judge Sotomayor participated, and it is likely to attract more questions at her Supreme Court confirmations hearings than any other.

The appeals court's cursory treatment suggested that the case was routine and unworthy of careful scrutiny. Yet the case turned out to be important enough

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to warrant review by the Supreme Court, which heard arguments in April and is likely to issue a decision this month.

The result Judge Sotomayor endorsed, many legal scholars say, is perfectly defensible. The procedure the panel used, they say, is another matter.

There is evidence that the three judges in the case agreed to use a summary order rather than a full decision in an effort to find common ground. Allies of Judge Sotomayor, who was the junior judge on the panel of the United States Court of Appeals for the Second Circuit, correctly point out that the Second Circuit often decides even significant cases with summary orders that adopt the reasoning of the lower court. They add that the panel's decision reflected a respect for precedent, though it cited none. Judge Sotomayor certainly made no suggestion at the argument that she was constrained by precedent to rule for one party or the other.

At the argument, Judge Sotomayor did not indicate that she was inclined to use the case to make a larger statement about affirmative action. She was focused, instead, on the array of factual and legal issues before her.

"Race on some level was a part of this discussion" when New Haven's civil service board decided to throw out the test, Judge Sotomayor told Ms. Torre, the lawyer for the plaintiffs.

"The entire discussion before the board was, 'Was there an adverse impact on the minority candidates by this testing procedure?' " Judge Sotomayor said.

That sort of race consciousness, she said, may be perfectly lawful. "You can't have a racially neutral policy that adversely affects minorities," Judge Sotomayor said, "unless there is a business necessity."

Her extensive and probing questions at the argument were typical of her methodical approach to cases, and they offer sometimes conflicting hints about her views on when the government may take account of race in decisions concerning hiring and promotion.

At times, her questions were small lectures on the governing legal standards.

"You have to look at the test and determine whether the test was in fact fair or not," Judge Sotomayor told a lawyer for the defendants, Richard A. Roberts. "If you're going to say it's unfair, point to specifics, of ways it wasn't, and make sure that there really are alternatives."

But the summary order Judge Sotomayor joined drew none of those distinctions.

Catherine O'Hagan Wolfe, the clerk of the court, said in an e-mail message that such an order "ordinarily issues when the determination of the case revolves around well-settled principles of law."

The Ricci case does not meet that standard, Judge Jose A. Cabranes wrote for himself and five other judges in a dissent from the full court's decision not to rehear the case. The questions posed in the Ricci case, Judge Cabranes wrote, were exceptionally important "constitutional and statutory claims of first impression" — meaning ones where no binding precedent exists.

The district court judge in New Haven, whose opinion the appeals court panel affirmed and adopted, did identify three earlier Second Circuit decisions concerning the use of race by the government in hiring and promotional exams. But they did not involve precisely the same issues.

The panel's brief decision in the Ricci case was conversational in tone, and it does not reflect Judge Sotomayor's somewhat bureaucratic writing style.

It did strike a note of empathy, though one couched in a double negative: "We are not unsympathetic to the plaintiffs' expression of frustration. Mr. Ricci, for example, who is dyslexic, made intensive efforts that appear to have resulted in his scoring highly on one of the exams, only to have it invalidated."

The decision ruled that New Haven's civil service board "had no good alternatives" and was protected because it "was simply trying to fulfill its obligations" under a federal civil rights law when it was "confronted with test results that had a disproportionate racial impact."

In the Second Circuit, Judge Sotomayor was the junior judge on the panel, which also included Judge Rosemary S. Pooler, who was the presiding judge at the argument, and Judge Robert D. Sack, who did not attend due to illness.

In the end, according to court personnel familiar with some of the internal discussions of the case, the three judges had difficulty finding consensus, with Judge Sack the most reluctant to join a decision affirming the district court. Judge Pooler, as the presiding judge, took the leading role in fashioning the compromise. The use of a summary order, which ordinarily cannot be cited as precedent, was part of that compromise.

Neil A. Lewis contributed reporting.

The New York Times

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Op-Ed Contributor

Her Justice Is Blind

By TOM GOLDSTEIN

Washington

LONG past the Civil War, and a generation after the formative civil rights struggle, many of us remain incapable of having a conversation about ethnicity that does not devolve into charges of racism.

One recent example of this is the public discussion about the nomination of Judge Sonia Sotomayor to the Supreme Court, and the widespread accusations that she has been unable to dispassionately decide cases involving questions of race. In the rush to find Judge Sotomayor's "biases," critics have latched onto her decision in Ricci v. DeStefano, where she ruled in favor of New Haven's decision to discard the results of a promotion exam for firefighters because too few minorities scored high enough. Some infer from this that Judge Sotomayor must be biased against whites.

Overlooked in the hysteria over this one decision is that Judge Sotomayor considered issues of race almost 100 times as an appellate judge. Having now reviewed every single race-related case on which she sat in more than a decade on the United States Court of Appeals for the Second Circuit, I've concluded that Judge Sotomayor does not allow bias to infect her decision-making.

In addition to Ricci v. DeStefano, Judge Sotomayor has participated in 97 race-related cases. Of these, the court of appeals rejected the claim of discrimination roughly 80 times and agreed with it 10 times. (The remaining cases involved other kinds of claims or dispositions.) In the 10 cases in which the court of appeals favored claims of discrimination, nine resulted in unanimous rulings and seven involved at least one Republican-appointed judge. In the single time a judge dissented from a ruling in which Judge Sotomayor participated, the dissent was over a technical question, not race discrimination.

In total, Judge Sotomayor has disagreed with her colleagues in race-related decisions — a fair measure of whether she is an outlier — only five times in 11 years. In that entire time, Judge Sotomayor has only twice dissented from a ruling on a substantive question of race discrimination.

In her opinions regarding civil rights laws, Judge Sotomayor has written about principles of restraint. She has stressed that "the duty of a judge is to follow the law," so that judges have no power "to disregard the plain language of any statute or to invent exceptions to the statutes" created by Congress.

That principle seems to run consistently through her rulings on race-related cases. Dissenting from a decision to permit the New York Police Department to fire an employee for sending hate mail, she wrote, "To be sure, I find the speech in this case patently offensive, hateful and insulting." But, she added, "while we are more comfortable when the speech we are protecting involves protestations against racial discrimination, it is not our role to approve or disapprove of the viewpoint advanced."

In rejecting the discrimination claims of black passengers against an airline based on an international treaty limiting suits against carriers, she rejected the plaintiffs' assertion that "we should nonetheless carve out an exception for civil rights actions as a matter of policy" in light of "the specter that our decision will open the doors to blatant discrimination aboard international flights."

That is not to say that Judge Sotomayor is inattentive to questions of racial discrimination. In Gant v. Wallingford Board of Education, for example, she dissented from the majority's ruling that a school's favorable treatment of white students could not prove that a young black student who was demoted to a lower grade was the victim of discrimination. In Hayden v. Pataki, she concluded that felon disenfranchisement laws are discriminatory and violate the Voting Rights Act.

Her decisions in these cases would hardly make her an extremist. The now notorious Ricci v. DeStefano was a genuinely tough call. Yes, the firefighter plaintiffs had a serious claim that they suffered discrimination when the city refused to apply a promotion test they passed. But the city argued that it feared a lawsuit by minority firefighters alleging that the city's promotion tests unintentionally discriminated against blacks and Hispanics. A ruling in the city's favor was not necessarily ideological.

The public debate ought to be about what the law should command in these kinds of difficult cases. Unsubstantiated charges of racism distract us from these questions and demeans our justice system.

Tom Goldstein, a founder of the Scotusblog Web site, is a lawyer and a lecturer at Stanford and Harvard Law Schools.

June 30, 2009
OP-ED CONTRIBUTOR

The Court Changes the Game
By LINDA GREENHOUSE

Washington

THE law of employment discrimination today is not what it was before 10 a.m. Monday, when the Supreme Court ruled against the City of New Haven for scrapping a fire department promotional exam that appeared to favor white test-takers.

Whatever else the court's 5-to-4 majority achieved, the result removed the breathlessly awaited case of Ricci v. DeStefano as a substantial issue in the imminent Supreme Court confirmation hearing for Judge Sonia Sotomayor.

Judge Sotomayor, famously, was one of three judges on an appellate panel who applied their federal circuit's settled precedent to rule in New Haven's favor. Like that decision or hate it, cheer Monday's ruling or deplore it, one thing that is clear from reading the Supreme Court's 89 pages of opinions in the case is that Judge Sotomayor and her colleagues played by the old rules, and the court changed them. Although "Sotomayor Reversed" was a frequent headline on the posts that spread quickly across the Web, it was actually the Supreme Court itself that shifted course.

To understand the nature of the shift requires a bit of history. Congress enacted Title VII of the Civil Rights Act of 1964, the statute at issue in the Ricci case, with a simple command to employers: thou shalt not discriminate on the basis of race or other protected characteristics, including sex and religion. But the simple proved to be complicated. An employer of blue-collar workers in North Carolina, Duke Power, required a high school diploma of all job applicants, a requirement that screened out 88 percent of black men in that region at that time.

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In a 1971 decision, the Supreme Court ruled unanimously that a test that was "fair in form, but discriminatory in operation" could violate Title VII even without proof that the discrimination was intentional. Congress eventually amended Title VII to codify that decision, Griggs v. Duke Power. The rule was clear: if a job requirement produced a "disparate impact," the employer had the burden of showing that the requirement was actually necessary.

Federal agencies, in turn, stepped forward to define the statistical disparity that prompted the further inquiry. Under the Equal Employment Opportunity Commission's "four-fifths rule," a test that one racial group passed at less than 80 percent the rate of another group would place an employer in presumptive violation of Title VII.

The early Supreme Court decision and later Congressional ratification represented a highly visible social settlement in the employment discrimination area. But beginning in the 1990s, changes in the Supreme Court's membership and outlook began to unravel not only the legal structure, but also the philosophic one that had kept the settlement intact.

Powerful voices on the court, including Justice Anthony M. Kennedy, who wrote the majority opinion on Monday, began to call for something close to a zero-tolerance policy when it came to government counting its citizens by race for any purpose. And the court became skeptical of Congress's making its own legislative judgments in ways that threatened to expand the boundaries of the court's own narrowing constitutional vision.

These were tensions that underlay the challenge to the Voting Rights Act that the justices deflected with a narrow statutory ruling last week. The same tensions made the disparate-impact prong of Title VII something of an accident waiting to happen, because curing or avoiding a disparate impact obviously requires an employer to take race into account. A municipal employer like New Haven is bound not only by Title VII but also by the 14th Amendment's equal protection clause, which the Supreme Court has interpreted to prohibit only intentional, and not simply statistical, discrimination.

The New Haven case, like the Voting Rights Act case, thus reached the court at a moment when the tectonic plates were in motion. White firefighters in New Haven had passed the promotional exams in 2003 at roughly double the rate of black and Hispanic test-takers, and no black firefighters had scored high enough to be eligible for promotion in a department with a long history of minority under-representation in a city that is now 60 percent black and Hispanic. Advised by its counsel that it faced Title VII disparate-impact liability, New Haven decided not to use the exam's results. It thought it had found an escape from liability, and two lower federal courts agreed.

But where the lower courts saw a safe harbor, the Supreme Court majority saw "express, race-based decision-making" that violated Title VII's other prong, the prohibition against disparate treatment. A "statistical disparity based on race," the standard that Judge Sotomayor and her colleagues used, is no longer a sufficient excuse, Justice Kennedy said. The court announced what it called a "strong-basis-in-evidence standard." Without a "strong basis" for concluding that a disparate impact made it vulnerable, and not just a lawyer's plausible caution, an employer is stuck.

As it did last week, the court stopped short of addressing the deeper constitutional question. But Justice Kennedy warned that the Ricci opinion did not mean "that meeting the strong-basis-in-evidence standard would satisfy the equal protection clause in a future case."

In dissent, Justice Ruth Bader Ginsburg had her own warning: "The court's order and opinion, I anticipate, will not have staying power."

Both predictions are provocative, and each depends on the same thing: not future cases so much as future justices. Even before the court ruled, there was little doubt that Judge Sotomayor would be confirmed. With the justices having changed the rules in employment discrimination cases, now it's not even clear what there will be to talk about.

Linda Greenhouse, a former Supreme Court correspondent for The Times, teaches at Yale Law School.

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The New York Times

OP-ED CONTRIBUTORS

Trial by Firefighters

By LANI GUINIER and SUSAN STURM
Published: July 10, 2009

STANDING on the steps of the federal courthouse in New Haven, the lawyer Karen Torre reveled in her clients' victory in a recent case before the Supreme Court. She anointed her clients — the white firefighters who scored well on a promotion test — "a symbol" for millions of Americans who are "tired of seeing individual achievement and merit take a back seat to race and ethnicity."

But the Supreme Court's 5-to-4 decision last month — that New Haven should not have scrapped the test — perpetuates profound misconceptions about the capacity of paper-and-pencil tests to gauge a person's potential on the job. Exams like the one the New Haven firefighters took are neither designed nor administered to identify the employees most qualified for promotion. And Ms. Torre's identity-politics sloganeering diverts attention from what we need most: a clear-eyed reassessment of our blind faith in entrenched testing regimes.

New Haven used a multiple-choice test to measure its firefighters' retention of information from national firefighting textbooks and study guides. Civil service tests like these do not identify people who are best suited for leadership positions. The most important skills of any fire department lieutenant or captain are steady command presence, sound judgment and the ability to make life-or-death decisions under pressure. In a city that is nearly 60 percent black and Latino, the ability to promote cross-racial harmony under stress is also crucial.

These skills are not well measured by tests that reward memorization and ask irrelevant questions like whether it is best to approach a particular emergency from uptown or downtown even when the city isn't oriented that way. The Civil Service Board in New Haven declined to certify the test not only because of concerns about difference in scores between black and

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white firefighters but also because it failed to assess qualities essential for firefighting.

As Justice Ruth Bader Ginsburg noted in her dissent, tests drawn from national textbooks often do not match a city's local firefighting needs. Most American fire departments have abandoned such tests or limited the multiple-choice format to 30 percent or less of an applicant's score. In New Haven, the test still accounted for 60 percent of the score. Compounding the problem, insignificant numerical score differences were used to rank the firefighter candidates.

What should a city do when its promotion test puts a majority of its population at a disadvantage and is also unlikely to predict essential job performance? People who excel on such a test may expect to be promoted. But testing should not be about allocating prizes to winners. No one has a proprietary right to a particular open job, even if that person worked hard preparing for a test.

When a city replaces a bad test, as New Haven wanted to do, the employees who did well on it do not lose their right to compete for promotions; they merely need to compete according to procedures that actually identify people who advance the mission of saving lives and property — and enhance the department's reputation in the community for treating all citizens with respect.

Yet many Americans believe so strongly that tests are fair that they never question the outcomes, especially when those outcomes conform to stereotypes about people of color. Such preconceptions lead to the conclusion that blacks or Latinos who don't do well must lack individual initiative or ability.

As the plaintiff in the New Haven case, Frank Ricci, declared, "If you work hard, you can succeed in America." His lawyer went further: White officials who voted for a better assessment system must have been lowering "the professional standard of competence," she said, "for the sake of identity politics." Yet, in New Haven, no one was promoted instead of the white firefighters.

In fact, many fire departments with a history of discrimination, like New Haven's, still stack the deck in favor of candidates who have relationships to people already in the fire department. Those without $500 for the study materials or a relative or friend from whom they might borrow the books were put at a disadvantage.

Moreover, it was the firefighters union — which sided with the white firefighters in the Supreme Court — that negotiated the contractual mandate giving disproportionate weight to the multiple-choice test. Those negotiations occurred two decades ago when the leadership of the department was virtually all white.

Taking this into account, after five days of public hearings, Malcolm Webber, one of the white members of the New Haven Civil Service Board, said: "I've heard enough testimony here to give me great doubts about the test itself and the testing — some of the procedures. And I believe we can do better."

Unfortunately, the Supreme Court blessed entrenched testing regimes that do not advance public goals and fell for the story about identity politics run amok. That doesn't mean, though, that cities need to hire and promote firefighters who are "book smart" but "street dumb."

Fortunately the court left room for municipalities to develop alternative assessments to promote people with the skills needed to advance public safety in a diverse citizenry. Indeed, most American fire departments have already rejected written tests in favor of "assessment centers" that simulate on-the-job challenges and focus on problem-solving in the relevant context. In so doing, city officials demonstrate that their decisions are wiser than the Supreme Court's.

Lani Guinier, a Harvard law professor, and Susan Sturm, a Columbia law professor, are the authors of "Who's Qualified?"

The New York Times

July 12, 2009

The Place of Women on the Court

By EMILY BAZELON

In late February, three weeks after she had an operation for a recurrence of cancer, Justice Ruth Bader Ginsburg went to Barack Obama's first address to Congress. Given the circumstances, it wasn't an event anyone expected her to attend. She went, she said, because she wanted the country to see that there was a woman on the Supreme Court.

Now another woman, Judge Sonia Sotomayor, is about to begin the confirmation hearings that stand between her and a seat near Ginsburg on the high bench. After 16 years on the court — the last three, since the retirement of Justice Sandra Day O'Connor, as the only woman working alongside eight men — Ginsburg has a unique perspective on what's at stake in Sotomayor's nomination. I sat down with the 76-year-old justice last week to talk about women on the bench and their effect on the dynamics and decisions of the court.

I first met Justice Ginsburg a year ago, when she invited me to her chambers and to a tea for international fellows from Georgetown law school, at which she was speaking. It struck me then, as we walked through the courthouse, that each marker she pointed out involved women's history — from a photograph and a political cartoon in the hallway outside her chambers of Belva Lockwood, the first woman admitted to the Supreme Court bar, to the renaming of a dining room at the court in honor of Natalie Cornell Rehnquist, wife of the late chief justice. (The tribute was O'Connor's idea. "My former chief was a traditionalist, but he could hardly object," Ginsburg said with a bit of glee.)

This time, we talked for 90 minutes in the personal office of Ginsburg's temporary chambers (she is soon moving to the chambers that Justice David Souter is vacating). Ginsburg, who was wearing an elegant cream-colored suit, matching pumps and turquoise earrings, spoke softly, and at times her manner was mild, but she was forceful about why she thinks Sotomayor should be confirmed and about a few of the court's recent cases. What follows is a condensed and edited version of our interview.

At the end of our time together, Ginsburg rose and said energetically that she would soon be off to her twice-weekly 7 p.m. personal-training session. She works out at the court on an elliptical machine, and she lifts weights. "To keep me in shape," she said.

Q: At your confirmation hearings in 1993, you talked about how you hoped to see three or four women on the court. How do you feel about how long it has taken to see simply one more woman nominated?

JUSTICE GINSBURG: My prediction was right for the Supreme Court of Canada. They have Beverley McLachlin as the chief justice, and they have at least three other women. The attrition rate is slow on this court.

Q: Now that Judge Sotomayor has been nominated, how do you feel about that?

JUSTICE GINSBURG: I feel great that I don't have to be the lone woman around this place.

Q: What has that been like?

JUSTICE GINSBURG: It's almost like being back in law school in 1956, when there were 9 of us in a class of over 500, so that meant most sections had just 2 women, and you felt that every eye was on you. Every time you went to answer a question, you were answering for your entire sex. It may not have been true, but certainly you felt that way. You were different and the object of curiosity.

Q: Did you feel that this time around from your male colleagues?

JUSTICE GINSBURG: My basic concern about being all alone was the public got the wrong perception of the court. It just doesn't look right in the year 2009.

Q: Why on a deeper level does it matter? It's not just the symbolism, right?

JUSTICE GINSBURG: It matters for women to be there at the conference table to be doing everything that the court does. I hope that these hearings for Sonia will be as civil as mine were and Steve Breyer's were. Ours were unusual in that respect.

Q: Did you think that all the attention to the criticism of Sotomayor as being "bullying" or not as smart is sex-inflected? Does that have to do with the rarity of a woman in her position, and the particular challenges?

JUSTICE GINSBURG: I can't say that it was just that she was a woman. There are some people in Congress who would criticize severely anyone President Obama nominated. They'll seize on any handle. One is that she's a woman, another is that she made the remark about Latina women. [In 2001 Sotomayor said: "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."] And I thought it was ridiculous for them to make a big deal out of that. Think of how many times you've said something that you didn't get out quite right, and you would edit your statement if you could. I'm sure she meant no more than what I mean when I say: Yes, women bring a different life experience to the table. All of our differences make the conference better. That I'm a woman, that's part of it, that I'm Jewish, that's part of it, that I grew up in Brooklyn, N.Y., and I went to summer camp in the Adirondacks, all these things are part of me.

Once Justice O'Connor was questioning counsel at oral argument. I thought she was done, so I asked a question, and Sandra said: Just a minute, I'm not finished. So I apologized to her and she said, It's O.K., Ruth. The guys do it to each other all the time, they step on each other's questions. And then there appeared an item in USA Today, and the headline was something like"Rude Ruth Interrupts Sandra."

Q: It seemed to me that male judges do much more abrasive things all the time, and it goes unremarked.

JUSTICE GINSBURG: Yes, the notion that Sonia is an aggressive questioner — what else is new? Has anybody watched Scalia or Breyer up on the bench?

Q: She'll fit right in?

JUSTICE GINSBURG: She'll hold her own.

Q: From your point of view, does having another woman on the court matter primarily in terms of the public's perception, or also for what it feels like to be in conference and on the bench?

JUSTICE GINSBURG: All of those things. What was particularly good was that Sandra and I were different — not cast in the same mold. Sandra gets out two words to my every one. I think that Sonia and I will also be quite different in our style. I think she may be the first justice who didn't have English as her native language. And

she has done just about everything that you can do in law as a prosecutor, in a private firm and on the District Court and the Court of Appeals.

Q: Do you know her well or a little bit?

JUSTICE GINSBURG: I know her because I'm the Second Circuit Justice. So I go once a year to the Judicial Conference.

Q: What do you think about Judge Sotomayor's frank remarks that she is a product of affirmative action?

JUSTICE GINSBURG: So am I. I was the first tenured woman at Columbia. That was 1972, every law school was looking for its woman. Why? Because Stan Pottinger, who was then head of the office for civil rights of the Department of Health, Education and Welfare, was enforcing the Nixon government contract program. Every university had a contract, and Stan Pottinger would go around and ask, How are you doing on your affirmative-action plan? William McGill, who was then the president of Columbia, was asked by a reporter: How is Columbia doing with its affirmative action? He said, It's no mistake that the two most recent appointments to the law school are a woman and an African-American man.

Q: And was that you?

JUSTICE GINSBURG: I was the woman. I never would have gotten that invitation from Columbia without the push from the Nixon administration. I understand that there is a thought that people will point to the affirmative-action baby and say she couldn't have made it if she were judged solely on the merits. But when I got to Columbia I was well regarded by my colleagues even though they certainly disagreed with many of the positions that I was taking. They backed me up: If that's what I thought, I should be able to speak my mind.

Q: Is that another example of how you've worked with men over the years?

JUSTICE GINSBURG: I always thought that there was nothing an antifeminist would want more than to have women only in women's organizations, in their own little corner empathizing with each other and not touching a man's world. If you're going to change things, you have to be with the people who hold the levers.

Q: You sent me an article by Michael Klarman, a Harvard law professor, that was about ways in which you and Thurgood Marshall were effective as litigators. Klarman

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pointed out that you were very good at influencing a male lawyer's brief without making him feel that you had taken over the case. Is that something you learned to do? Was it a conscious approach?

JUSTICE GINSBURG: I think it was a conscious approach. If you want to influence people, you want them to accept your suggestions, you don't say, You don't know how to use the English language, or how could you make that argument? It will be welcomed much more if you have a gentle touch than if you are aggressive.

Q: Do you think women have to learn how to do that in a different way from men sometimes in the workplace?

JUSTICE GINSBURG: I haven't noticed it. There are some very sympathetic men.

Q: Is it an approach that you still use with your colleagues to try and have a gentle touch?

JUSTICE GINSBURG: Yes, or to have a sense of humor.

Q: Do you think if there were more women on the court with you that other dynamics would change?

JUSTICE GINSBURG: I think back to the days when — I don't know who it was — when I think Truman suggested the possibility of a woman as a justice. Someone said we have these conferences and men are talking to men and sometimes we loosen our ties, sometimes even take off our shoes. The notion was that they would be inhibited from doing that if women were around. I don't know how many times I've kicked off my shoes. Including the time some reporter said something like, it took me a long time to get up from the bench. They worried, was I frail? To be truthful I had kicked off my shoes, and I couldn't find my right shoe; it traveled way underneath.

Q: You are said to have very warm relationships with your colleagues. And so I was surprised to read a comment you made in an interview in May with Joan Biskupic of USA Today. You said that when you were a young lawyer, your voice was often ignored, and then a male colleague would repeat a point you'd made, and other people would be alert to it. And then you said this still happens now at conference.

JUSTICE GINSBURG: Not often. It was a routine thing [in the past] that I would say something and it would just pass, and then somebody else would say almost the same thing and people noticed. I think the idea in the 1950s and '60s was that if it was a

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woman's voice, you could tune out, because she wasn't going to say anything significant. There's much less of that. But it still exists, and it's not a special experience that I've had. I've talked to other women in high places, and they've had the same experience.

Q: I wonder if that would change if there were more women who were part of the mix on the court?

JUSTICE GINSBURG: I think it undoubtedly would. You can imagine in Canada, where McLachlin is the chief, I think they must have a different way of hearing a woman's voice if she is the leader.

Q: I wanted to ask you about the academic research on the effect of sex on judging. Studies have found a difference in the way male and female judges of similar ideologies vote in some cases. And that the presence of a woman on a panel can influence the way her male colleagues vote. How do these findings match your experience?

JUSTICE GINSBURG: I'm very doubtful about those kinds of [results]. I certainly know that there are women in federal courts with whom I disagree just as strongly as I disagree with any man. I guess I have some resistance to that kind of survey because it's what I was arguing against in the '70s. Like in Mozart's opera "Così Fan Tutte": that's the way women are.

Q: We started by talking about the idea of three or four women on the Supreme Court. Could you imagine a Supreme Court that had five or six or seven women on it?

JUSTICE GINSBURG: Yes, we've had some state Supreme Courts that have had a majority of women.

Q: Do you have a sense of what that would be like to actually work on and how it would be different?

JUSTICE GINSBURG: The work would not be any easier. Some of the amenities might improve.

Q: Do you think that some of the discrimination cases might turn out differently?

JUSTICE GINSBURG: I think for the most part, yes. I would suspect that, because the women will relate to their own experiences.

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Q: That's one area in which outcomes might actually differ?

JUSTICE GINSBURG: Yes. I think the presence of women on the bench made it possible for the courts to appreciate earlier than they might otherwise that sexual harassment belongs under Title VII [as a violation of civil rights law].

Q: Can I bring up the Ricci case, brought by the New Haven firefighters?

JUSTICE GINSBURG: This case had some very hard elements. It was a bit like the Heller case, which involved the Second Amendment. [Last year, the Supreme Court found that Washington gun-control laws that barred handguns in private homes were unconstitutional.] For that, the plaintiff was a nice guy who was a security guard at the Federal Judicial Center, and he had to carry a gun on his job, but he couldn't carry it home. And in Ricci, you have a dyslexic firefighter. Which is just exactly what you should do as a lawyer. I mean, that's what I did.

Q: It's true, it's a very good strategy. He was a very sympathetic plaintiff. And it was important that the city had already given the test that the white firefighters scored high on and the black firefighters did not.

JUSTICE GINSBURG: Yes. And the city weights the written and oral parts of the test 60-40, and says: That's what the union wanted, it's been in the bargaining contracts for 20 years.

I don't know how many cases there were, Title VII civil rights cases, where unions were responsible. The very first week that I was at Columbia, Jan Goodman, a lawyer in New York, called me and said, Do you know that Columbia has given layoff notices to 25 maids and not a single janitor? Columbia's defense was the union contract, which was set up so that every maid would have to go before the newly hired janitor would get a layoff notice.

Q: What about the case this term involving the strip search, in school, of 13-year-old Savana Redding? Justice Souter's majority opinion, finding that the strip search was unconstitutional, is very different from what I expected after oral argument, when some of the men on the court didn't seem to see the seriousness here. Is that an example of a case when having a woman as part of the conversation was important?

JUSTICE GINSBURG: I think it makes people stop and think, Maybe a 13-year-old girl is different from a 13-year-old boy in terms of how humiliating it is to be seen undressed. I think many of [the male justices] first thought of their own reaction. It

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came out in various questions. You change your clothes in the gym, what's the big deal?

Q: Seeing that Souter wrote the opinion in Savana Redding's case reminded me of Justice Rehnquist writing the majority opinion in Nevada v. Hibbs, the 2003 case in which the court ruled 6-3 that the Family Medical Leave Act applies to state employers, for both female and male workers. Chief Justice Rehnquist wrote in his opinion about an idea you have been talking about for a long time, about stereotypes. He discussed how when women are stereotyped as responsible for the domestic sphere, and men are not, that makes women seem less valuable as employees. I wonder if one of the measures of your success on the court is that a male justice would write an opinion like this?

JUSTICE GINSBURG: That opinion was such a delightful surprise. When my husband read it, he asked, did I write that opinion? I was very fond of my old chief. I have a sense that it was in part his life experience. When his daughter Janet was divorced, I think the chief felt some kind of responsibility to be kind of a father figure to those girls. So he became more sensitive to things that he might not have noticed.

Q: Right. Chief Justice Rehnquist once said that sex-discrimination claims carry little weight. And he quipped at the end of a case you argued, when you were a lawyer, "You won't settle for putting Susan B. Anthony on the new dollar, then?" Do you think he was affected by working with you and Justice O'Connor?

JUSTICE GINSBURG: I wouldn't attribute it to one thing. I think I would attribute it to his court experience and his life experience. One of the most moving statements at a memorial service I ever heard was when Janet Rehnquist's daughter read a letter that she had written to her grandfather. The closeness of their relationship and the caring was just beautiful. Most people had no idea that there was that side to Rehnquist.

Q: You have written, "To turn in a new direction, the court first had to gain an understanding that legislation apparently designed to benefit or protect women could have the opposite effect." The pedestal versus the cage. Has the court made that turn completely, or is there still more work to be done?

JUSTICE GINSBURG: Not completely, as you can see in the case involving whether a child acquires citizenship from an unwed father. [Nguyen v. INS, in which the court in 2001 upheld, by 5 to 4, a law that set different requirements for a child to become a

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citizen, depending on whether his citizenship rights came from his unmarried mother or his unmarried father.] The majority thought there was something about the link between a mother and a child that doesn't exist between the father and a child. But in fact the child in the case had been brought up by his father.

They were held back by a way of looking at the world in which a man who wasn't married simply was not responsible. There must have been so many repetitions of Madame Butterfly in World War II. And for Justice Stevens [who voted with the majority], that was part of his experience. I think that's going to be over in the next generation, these kinds of rulings.

Q: Let me ask you about the fight you waged for the courts to understand that pregnancy discrimination is a form of sex discrimination.

JUSTICE GINSBURG: I wrote about it a number of times. I litigated Captain Struck's case about reproductive choice. [In 1972, Ginsburg represented Capt. Susan Struck, who became pregnant during her service in the Air Force. At the time, the Air Force automatically discharged any woman who became pregnant and told Captain Struck that she should have an abortion if she wanted to keep her job. The government changed the regulation before the Supreme Court could decide the case.] If the court could have seen Susan Struck's case — this was the U.S. government, a U.S. Air Force post, offering abortions, in 1971, two years before Roe.

Q: And suggesting an abortion as the solution to Struck's problem.

JUSTICE GINSBURG: Yes. Not only that, but it was available to her on the base.

Q: The case ties together themes of women's equality and reproductive freedom. The court split those themes apart in Roe v. Wade. Do you see, as part of a future feminist legal wish list, repositioning Roe so that the right to abortion is rooted in the constitutional promise of sex equality?

JUSTICE GINSBURG: Oh, yes. I think it will be.

Q: If you were a lawyer again, what would you want to accomplish as a future feminist legal agenda?

JUSTICE GINSBURG: Reproductive choice has to be straightened out. There will never be a woman of means without choice anymore. That just seems to me so obvious. The states that had changed their abortion laws before Roe [to make

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abortion legal] are not going to change back. So we have a policy that affects only poor women, and it can never be otherwise, and I don't know why this hasn't been said more often.

Q: Are you talking about the distances women have to travel because in parts of the country, abortion is essentially unavailable, because there are so few doctors and clinics that do the procedure? And also, the lack of Medicaid for abortions for poor women?

JUSTICE GINSBURG: Yes, the ruling about that surprised me. [Harris v. McRae — in 1980 the court upheld the Hyde Amendment, which forbids the use of Medicaid for abortions.] Frankly I had thought that at the time Roe was decided, there was concern about population growth and particularly growth in populations that we don't want to have too many of. So that Roe was going to be then set up for Medicaid funding for abortion. Which some people felt would risk coercing women into having abortions when they didn't really want them. But when the court decided McRae, the case came out the other way. And then I realized that my perception of it had been altogether wrong.

Q: When you say that reproductive rights need to be straightened out, what do you mean?

JUSTICE GINSBURG: The basic thing is that the government has no business making that choice for a woman.

Q: Does that mean getting rid of the test the court imposed, in which it allows states to impose restrictions on abortion — like a waiting period — that are not deemed an "undue burden" to a woman's reproductive freedom?

JUSTICE GINSBURG: I'm not a big fan of these tests. I think the court uses them as a label that accommodates the result it wants to reach. It will be, it should be, that this is a woman's decision. It's entirely appropriate to say it has to be an informed decision, but that doesn't mean you can keep a woman overnight who has traveled a great distance to get to the clinic, so that she has to go to some motel and think it over for 24 hours or 48 hours.

I still think, although I was much too optimistic in the early days, that the possibility of stopping a pregnancy very early is significant. The morning-after pill will become more accessible and easier to take. So I think the side that wants to take the choice

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away from women and give it to the state, they're fighting a losing battle. Time is on the side of change.

Q: Since we are talking about abortion, I want to ask you about Gonzales v. Carhart, the case in which the court upheld a law banning so-called partial-birth abortion. Justice Kennedy in his opinion for the majority characterized women as regretting the choice to have an abortion, and then talked about how they need to be shielded from knowing the specifics of what they'd done. You wrote, "This way of thinking reflects ancient notions about women's place in the family and under the Constitution." I wondered if this was an example of the court not quite making the turn to seeing women as fully autonomous.

JUSTICE GINSBURG: The poor little woman, to regret the choice that she made. Unfortunately there is something of that in Roe. It's not about the women alone. It's the women in consultation with her doctor. So the view you get is the tall doctor and the little woman who needs him.

Q: In the 1980s, you wrote about how while the sphere for women has widened to include more work, men haven't taken on as much domestic responsibility. Do you think that things are beginning to change?

JUSTICE GINSBURG: That's going to take time, changing that kind of culture. But looking at my own family, my daughter Jane teaches at Columbia, she travels all over the world, and she has the most outstanding supportive husband who certainly carries his fair share of the load. Although their division of labor is different than mine and my husband's, because my daughter is a super cook.

Q: Can courts play a role in changing that culture?

JUSTICE GINSBURG: The Legislature can make the change, can facilitate the change, as laws like the Family Medical Leave Act do. But it's not something a court can decree. A court can't tell the man, You've got to do more than carry out the garbage.

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FELIX W. ORTIZ
Assemblyman 51st District
Kings County

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

CHAIR
Veterans Affairs Committee
CHAIR
Subcommittee on Sweatshops
COMMITTEES
Banks
Correction
Economic Development, Job Creation, Commerce & Industry
Energy
Labor
Rules

Senator Patrick Leahy
433 Russell Senate Office Building
Washington, DC 20510

May 28, 2009

Dear Senator Leahy:

I would like to extend my full support of Ms. Sonia Sotomayor as nominee for the anticipated opening on the United States Supreme Court. When I first heard that Ms. Sotomayor was being considered, I immediately contacted the President and Vice-President Biden to relay my full support.

As a co-founder, former president and current member of the National Hispanic Caucus of State Legislators (NHCSL) and a fellow New Yorker, I have contacted my colleagues across the United States as well as in Puerto Rico to rally their support for Ms. Sotomayor's confirmation. Her strength of character, wealth of experience, and commitment to ensuring that each decision is well researched and wholly works to promote our fine Constitution make her a worthy candidate to fill Justice Souter's seat.

Rest assured that I will continue to work towards a full confirmation and ultimate seating for Ms. Sotomayor before the fall judicial session commences.

If there is any area regarding this or any other matter in which I may be of assistance, please feel free to contact my office at any time.

Thank you for your leadership and God bless.

Sincerely,

Felix W. Ortiz
Member of Assembly

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June 23, 2009

Senator Patrick J. Leahy
Chair of the Judiciary Committee
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Senator Jeff Sessions
Ranking Member of the Judiciary Committee
United States Senate
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators Leahy & Sessions:

We, the faculty members of Pace Law School, write to support our friend and colleague, Judge Sonia Sotomayor. We are African-American, Latino, and Caucasian; men and women; liberals and conservatives. What we have in common is the privilege to be among those who are teaching the next generation of lawyers. It is in that pursuit that we have come to know and appreciate Judge Sotomayor. Each year she takes time from a horrendous schedule to teach classes for students in our Federal Honors program and to mentor one of those students as an intern in her chambers.

Having a law student in chambers is not the addition of another hand that can help with the work. Done properly, it is the addition of an obligation that takes time and attention with little return other than the satisfaction of providing the student with an unmatchable opportunity. Judge Sotomayor has taken on that task in a way that provides a window into the kind of person she is and, to our minds, the kind of asset she will be to the Court and the country.

It would be easy for a judge to provide a desk for an intern and to assign a law clerk to shepherd an intern through a semester and to do nothing more. Such an experience would be valuable to the intern, but it is nothing like the experiences had by the Pace interns fortunate enough to be in Judge Sotomayor's chambers. She works with the interns personally, making assignments, critiquing their work, and spending the personal time to serve as a mentor throughout the entire semester. Each year the student who has been in Judge Sotomayor's chambers has returned with stories not only of the hard work they had the opportunity to do and the rigor with which Judge Sotomayor critiqued it, but of the incredible amount of personal time and attention she took with them. That kind of interest in and attention to the education of a second-year law student from a sitting federal appellate judge is both rare and remarkable.

There are many qualities that make for a fine Supreme Court Justice. You have already heard from many of Judge Sotomayor's unmatched experience in the federal legal system, the high quality of her legal work, and the tremendous strength of her intellect, all of which mark her potential to be an outstanding Justice. We believe that character is among the most important qualities for the high office of Supreme Court Justice. With apologies to the semantic technicality, we have known Judge Sotomayor as a mensch!

Judge Sotomayor's character and career are exemplary of what our country should see in a Supreme Court nominee. We are confident that a fair hearing will give the country a portrait of this wonderfully qualified judge and will lead to her expeditious confirmation.

Yours truly,

Michelle S. Simon, Dean	Horace E. Anderson, Jr.	Barbara L. Atwell	Adele Bernhard
Jay C. Carlisle, II	David N. Cassuto	Luis E. Chiesa	S. David Cohen
Karl S. Coplan	Bridget J. Crawford	Donald L. Doernberg	David N. Dorfman
Linda C. Fentiman	James J. Fishman	Margaret M. Flint	Leslie Yalof Garfield
Bennett L. Gershman	Steven H. Goldberg	Shelby D. Green	Alexander K.A. Greenawalt
Lissa Griffin	Jill I. Gross	Jo Ann Harris	John A. Humbach
Irene D. Johnson	Janet A. Johnson	Robert F. Kennedy, Jr.	Andrew C.W. Lund
Thomas M. McDonnell	Randolph M. McLaughlin	Vanessa H. Merton	Jeffrey G. Miller
Gary A. Munneke	Michael B. Mushlin*	Marie Stefanini Newman	John R. Nolon
Richard L. Ottinger	Ann Powers	Nicholas A. Robinson	Audrey Rogers
Darren Rosenblum	Merril Sobie	Ralph M. Stein	Emily Gold Waldman
Gayl S. Westerman			

* Professor Mushlin has recused himself from this letter because of his membership on the New York City Bar Executive Committee.

July 10, 2009

The Honorable Patrick Leahy, Chairman
The Honorable Jeff Sessions, Ranking Member
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Leahy and Ranking Member Sessions:

On behalf of People for the American Way's hundreds of thousands of members nationwide, we are writing in strong support of the nomination of Judge Sonia Sotomayor to the position of Associate Justice of the United States Supreme Court. In her seventeen years on the federal bench, Judge Sotomayor has demonstrated her outstanding intellect, her deep respect for the rule of law, and her commitment to core constitutional values of equality and justice for all. As important, Judge Sotomayor's impressive life story has instilled in her a keen understanding of the impact of the law on the daily realities of people's lives.

Sotomayor was raised in a New York City housing project by parents who migrated from Puerto Rico. Her father died when she was nine years old and she was raised by her mother – a nurse - who instilled in her a deep respect for learning. She excelled in high school, graduating as valedictorian of her class and went from there to Princeton University, where she graduated *Summa Cum Laude* and then to Yale Law School, where she was an editor of the *Yale Law Journal.*

After law school, Judge Sotomayor spent five years as a criminal prosecutor in Manhattan. She then spent eight years as a corporate litigator with the firm of Pavia and Harcourt, where she gained expertise in a wide range of civil law areas, including contracts and intellectual property. In 1992, President George H.W. Bush appointed Judge Sotomayor to the position of District Court Judge on the United States District Court for the Southern District of New York. In 1998, she was nominated by President Bill Clinton and confirmed by the Senate to serve on the Second Circuit Court of Appeals. Judge Sotomayor has participated in over 3000 panel decisions and authored roughly 400 opinions, handling a range of complex legal and constitutional issues, including civil rights and voting rights, criminal justice, free speech, religious liberty, antitrust, bankruptcy, securities and banking, property rights, labor law, intellectual property, among others. When confirmed, Judge Sotomayor will have more experience on the federal bench than any other Supreme Court Justice in the last hundred years, and will be the only sitting Justice with experience as a trial court judge.

During her distinguished career, Judge Sotomayor has forged a stellar reputation that extends throughout the legal community and across the political spectrum. She has been honored on numerous occasions for her deep commitment to service for her community, including the 2009 New York State Women of Excellence Award Presented by Gov. David A. Paterson. Judge Sotomayor has also helped shape the minds of the nation's future lawyers, as a lecturer at

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Columbia University Law School and an adjunct professor at New York University School of Law.

Beyond a mastery of the law and a demonstrated ability to handle complex legal questions, which Judge Sotomayor has clearly shown, three other criteria guide People For the American Way's evaluation of judicial nominees: (1) their commitment to the rule of law, (2) their respect for the Constitution and commitment to core Constitutional values, and (3) their appreciation for how the law and the Constitution affect the daily lives of all Americans. As discussed briefly below, Judge Sotomayor's record is strong in all three respects.

Commitment to the Rule of Law

Three cases for which Judge Sotomayor has been criticized from some quarters for "judicial activism" in fact demonstrate her abiding respect for the rule of law and a clear understanding of the limits of her power and authority as a judge.

In *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006), Judge Sotomayor dissented from an *en banc* decision of the Second Circuit which rejected a claim that New York's law denying convicted felons the right to vote was a violation of the federal Voting Rights Act. The majority reasoned that Congress did not intend the Voting Rights Act to be applicable to state laws that disenfranchised felons nor did the Voting Rights Act contain a clear statement that it was intended to "alter the constitutional balance" between states and the federal government to warrant its extension to state felon disenfranchisement laws. Judge Sotomayor's pointed dissent challenged the majority for treating the issue as far more complicated than necessary. The plain reading of the Voting Rights Act, she opined, is that it applies to all "voting qualifications" and the state felon disenfranchisement law, by disqualifying people from voting, brings it squarely within the Voting Rights Act's coverage. As Judge Sotomayor said, "[t]he duty of a judge is to follow the law, not to question its plain terms. I do not believe that Congress wishes us to disregard the plain language of any statute or to invent exceptions to the statutes it has created.....even if Congress had doubts about the wisdom of subjecting felony disenfranchisement laws to the [Voting Rights Act] I trust that Congress would prefer to make any needed changes itself, rather than have the courts do so for it." 449 F.3d at 368 (Sotomayor, J., dissenting).

In *Maloney v. Cuomo*, 554 F.3d 56 (2d Cir. 2009), Judge Sotomayor joined a unanimous decision rejecting a New York resident's claim that the state's ban on the possession of a nunchaku, a martial arts weapon, violated the Second Amendment because it infringed on his right to keep and bear arms. The panel on which Judge Sotomayor participated, noted that the Supreme Court had recently decided in *District of Columbia v. Heller*, 128 S.Ct. 2783 (2008), that the Second Amendment protects an individual citizen's right to keep and bear arms, but had explicitly left open the question of whether the Second Amendment has been "incorporated" by the Fourteenth Amendment to apply to the States. As such, the panel reasoned that they were bound by the existing precedent in *Presser v. Illinois*, 116 U.S. 252 (1886), stating that the Second Amendment is a limitation only on the power of Congress and the federal government, not the states. As the panel said, "where, as here, a Supreme Court precedent has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the

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Court of Appeals should follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions." 554 F.3d at 59 (internal quotation omitted). Indeed, even Maloney, who brought the suit, later admitted that the Second Circuit was simply following the law. According to a June 1, 2009, article by Mike Pesca in NPR Legal Affairs, *High Court May Review Personal Weapons Ruling*, Maloney said "it was clear to me that they had a very solid basis for saying that the Second Amendment is not incorporated and that essentially they are powerless to do anything about it, they had a defensible position there."

Similarly, in *Ricci v. DeStefano*, 530 F.3d 87 (2d Cir. 2008), the Title VII discrimination case recently decided by the Supreme Court, Judge Sotomayor's panel followed Second Circuit precedent in the case of *Hayden v. City of Nassau*, 180 F.3d 42 (2d Cir. 1999), in unanimously affirming the District Court's rejection of the firefighters' claim of unlawful discrimination. In *Ricci*, a number of white firefighters and one Hispanic firefighter brought a Title VII challenge against the city's decision not to promote anyone, including the plaintiffs, because the test being used would have rendered virtually all of the minority exam takers ineligible for promotion. The Second Circuit panel, while indicating their sympathy for the plaintiffs' frustration, felt bound by the law. As the panel stated, "because the Board, in refusing to validate the exams, was simply trying to fulfill its obligations under Title VII when confronted with test results that had a disproportionate racial impact, its actions were protected." 530 F.3d at 87. As the District Court in *Ricci* said, "The Court of Appeals [in *Hayden*] rejected the plaintiffs' contentions [that race-consciousness in configuring public employment tests violated Title VII] observing that '[e]very antidiscrimination statute aimed at racial discrimination, and every enforcement measure taken under such a statute, reflect a concern with race. That does not make such enactments or actions unlawful or automatically suspect." (Citations omitted) 554 F.Supp. 2d 142, 157 (D. Conn. 2006). While the Supreme Court recently rejected this interpretation of Title VII, the Court admitted that it was "clarifying how Title VII applies," hardly a development that Judge Sotomayor's panel would have been expected to anticipate. Moreover as the New York Times recently editorialized: "[T]he ruling underscored the emptiness of the 'judicial activist' label [used] in debates over nominees to the federal courts, including Judge Sotomayor. In the firefighters' case, she actually refused to second-guess the city's decision – an act of judicial restraint. It was the court's conservatives, including Chief Justice John Roberts, who voted to overturn the decision of an elected government." *Firefighters and Race*, *N.Y. Times*, July 1, 2009.

Respect for the Constitution and Commitment to Core Constitutional Values

Several cases similarly demonstrate Judge Sotomayor's commitment to core Constitutional values.

In *Ford v. McGinnis*, 352 F.3d 582 (2d Cir. 2003), a Muslim prison inmate brought a suit against prison officials who refused to allow him to participate in a religious feast, alleging denial of his free exercise rights. The district court rejected the free exercise claim and granted summary judgment for the Department of Correctional Services, relying on testimony by the religious authorities working in the Department that the prisoner's beliefs did not comport with "Islam's actual requirements." Judge Sotomayor, writing for a unanimous panel, reversed the district court, concluding that "the opinions of the [Department's] religious authorities cannot trump the

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plaintiff's sincere and religious belief." *Id.* at 590. Relying on Second Circuit and Supreme Court precedent, Judge Sotomayor reasoned that attempting to assess the objective reasonableness of a prisoner's beliefs would require courts to resolve questions beyond their competence, saying "District courts have no aptitude to pass upon questions of whether particular religious beliefs are wrong or right." *Id.* at 591 n.8.

Judge Sotomayor's dissent in the difficult case of *Pappas v. Giuliani*, 290 F.3d 143 (2d Cir. 2002), similarly demonstrates her commitment to core First Amendment values. The case involved an employee of the New York City Police Department who was terminated from his desk job for responding to mailings requesting contributions with racially inflammatory and anti-Semitic writings. The statements were made anonymously, on the employee's own time and while not at the office. The majority held that the police department had not violated the employee's right to free speech. Judge Sotomayor in dissent, while acknowledging that the speech was "patently offensive, hateful, and insulting," cautioned the majority against "gloss[ing] over three decades of jurisprudence and the centrality of First Amendment freedoms in our lives because it is confronted with speech it does not like." *Id.* at 154 (Sotomayor, J., dissenting).

Judge Sotomayor's concern for fundamental due process protections is also notable. As the Alliance for Justice has noted in its *Report on Judge Sotomayor's Civil Rights and Constitutional Protections Record*, Sotomayor "consistently protects individuals' rights to have a meaningful opportunity to be heard and participate in the legal process before their life, liberty, or property is taken away." Relevant cases include: *Southerland v. Giuliani*, 4 F. App'x 33 (2d Cir. 2001) (Sotomayor panel allowed plaintiff to proceed with case against New York's child welfare organization that took his children away without a hearing); *Neilson v. Colgate-Palmolive Co,* 199 F.3d 642 (2d Cir. 1999) (Sotomayor dissent argued for due process rights of mentally disabled woman in employment suit); *Anderson v. Recore,* 446 F.3d 324 (2d Cir. 2006) (Sotomayor wrote for unanimous panel that affirmed prisoner's right to notice and opportunity to be heard before being removed from temporary release program); *Mills v. Fenger,* 216 F. App'x 7 (2d Cir. 2006) (Sotomayor panel unanimously held detainee's due process rights were violated when denied medical care for ruptured tendon).

Also instructive is the case of *Brody v. Village of Port Chester*, 434 F.3d 121 (2d Cir. 2005), a takings case in which Judge Sotomayor's panel concluded that notice to property owners by publication (as opposed to individual notice by mail) that a public use determination for their property had been made as well as the village's failure to notify property owners of the thirty-day period for challenging the determination violated the property owner's rights to due process.

Impact of the Law and the Constitution on the Lives of All Americans

Judge Sotomayor brings to the bench, not just an outstanding intellect, but a deep understanding, forged from the richness and diversity of her own life experiences, of the impact of the law on the daily lives of individual Americans. Several cases stand out in this regard.

In *Gant v. Wallingford Board of Education,* 195 F.3d 134 (2d Cir. 1999), Judge Sotomayor dissented from the majority's conclusion that there was no racial discrimination when a six-year

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old student, who was the only African American in his first grade class, was subjected to racial name-calling by other children and parents, including being called a "nigger" and was forced to repeat kindergarten. In concluding that the transfer was discriminatory because the African American student received different treatment than other students having academic difficulty who received transitional assistance, Judge Sotomayor described the child's treatment "during his brief time in Cook Hill's first grade to have been not merely 'arguably unusual' or 'indisputably discretionary,' but unprecedented and contrary to the school's established policies." *Id.* at 151 (Sotomayor, J., dissenting).

In *N.G. V. Connecticut*, 382 F.3d 225 (2d Cir. 2004), Judge Sotomayor dissented from a majority decision upholding the strip search of two teenage girls (age thirteen and fourteen) who were brought to a juvenile detention facility for running away and for truancy. In an opinion that aligned with the Supreme Court's recent decision in *Safford Unified School District v. April Redding*, 2009 WL 1789472 (U.S.) (U.S. 2009), Sotomayor found that while the juvenile detention facilities may conduct a strip search if there is a reasonable basis to believe the juveniles were concealing contraband, initial entry into a juvenile detention facility for running away or for truancy did not constitute such a reasonable basis. In balancing the interests involved, Judge Sotomayor focused on the invasive and degrading nature of a strip search and the fact that many of the young people subjected to these searches had suffered from sexual abuse that may enhance the potential psychological harm of a strip search. As Sotomayor explained, "We should be especially wary of strip searches of children, since youth is a time and condition of life when a person may be most susceptible to influence and to psychological damage." 382 F.3d at 239 (Sotomayor, J., dissenting) (citation omitted).

In *Bartlett v. New York State Board of Law Examiners*, 970 F. Supp. 1094 (S.D.N.Y. 1997), while serving on the District Court, Judge Sotomayor, in an exhaustive decision following 21 days of testimony, held that a dyslexic Vermont Law School graduate was a disabled individual within the meaning of the Americans with Disabilities Act and, therefore, entitled to reasonable accommodations, including extra time, for taking the New York bar exam. As Judge Sotomayor explained, Bartlett was entitled not to assurances that she pass the bar examination, only that she receive an accommodation "so that she might be able to compete on a level playing field with other applicants taking the bar examination." 970 F. Supp. at 1121. Without such a fair chance to compete for admission to the bar "a law school graduate is effectively excluded from performing 'a class of jobs,' most specifically, lawyering, including providing legal advice or performing all of the functions that comprise the essence of being a lawyer." *Id.* On appeal the Second Circuit affirmed in part and vacated in part, agreeing, however with Judge Sotomayor's finding that the plaintiff was entitled to reasonable accommodation in taking the bar exam. The Supreme Court then vacated and remanded the Second Circuit's decision, in light of recent decisions in which the Supreme Court held that corrective devices and mitigating measures must be considered in determining whether an individual is disabled under the ADA. On remand, after a four-day trial, Judge Sotomayor again found that the law school graduate was disabled and entitled to accommodations.

In sum, Judge Sotomayor's impressive intellect, her deep respect for the rule of law, her commitment to core constitutional values of equality and justice for all and her appreciation for

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the impact of the law on the lives of average Americans commend her nomination as an Associate Justice of the Supreme Court. We urge her prompt confirmation.

Sincerely,

Michael B. Keegan
President

Marge Baker
Executive Vice President for Policy
and Program Planning

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presente.org

Chairman Patrick Leahy
Senate Judiciary Committee
226 Dirksen Senate Office Building
Washington, DC 20510

July 11, 2009

Dear Chairman Leahy and Members of the Committee,

On behalf of the members of Presente.org, we are writing to express our support for Judge Sonia Sotomayor and to urge the Senate Judiciary Committee to give her a speedy hearing and a positive confirmation. Presente.org is a national organization dedicated to empowering Latinos and our allies. We have been outraged by the racist and sexist smear campaign against Judge Sotomayor in recent months and demand that the Committee conduct a fair hearing based on her qualifications and experience.

More than 5,000 people signed the following petition, and you can see their names and comments below.

Dear Senate Judiciary Committee Members:

We are outraged by the smear campaign against Supreme Court nominee Judge Sonia Sotomayor. Instead of discussing her record, right-wing activists have sought to question Sotomayor's intelligence and temperament, and suggested that her racial identity will prevent her from ruling fairly. This thinly veiled racism and sexism is not only insulting to Sotomayor, it's an affront to anyone who believes that a nominee should be judged on her record, not her heritage or skin tone.

The reality is that Sotomayor is an accomplished judge who would start with more federal judicial experience than any Supreme Court justice in 100 years. In her more than 3,000 panel decisions and almost 400 opinions, she has consistently protected the rights of working Americans and become one of the nation's most respected legal minds. Sotomayor is not only a superbly qualified nominee; she is a powerful example of the American dream and knows how the law affects the daily lives of Americans.

I stand with Judge Sotomayor, and urge the Senate Judiciary Committee to give her nomination a speedy hearing and a positive confirmation.

Sincerely,

The Undersigned

2150 Alston Way Suite 360
Berkeley, CA 94705

Fax: 510.548.5151
Phone: 510.841.1555

Thank you for your time. If you have any questions, please contact me at 510-841-1555 or via email at favianna@presente.org.

Sincerely yours,

Favianna Rodriguez
Co-founder
Presente.org

Michigan Law
University of Michigan Law School

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John Simon Guggenheim Memorial
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June 16, 2009

The Honorable Patrick J. Leahy
Chairman, United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20515

The Honorable Jeff Sessions
Ranking Member, United States Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20515

Dear Senators:

I write to you concerning the pending Supreme Court case of *Ricci v. DeStefano*, which has attracted attention because Judge Sonia Sotomayor participated in the proceedings below. Six years ago, I identified the legal problem that *Ricci* presents and wrote the first (and to my knowledge only) scholarly article analyzing it.[1] Given my connection to the subject matter, I have followed the *Ricci* case closely. I now offer the analysis in this letter to assist the Judiciary Committee in its consideration of Judge Sotomayor.

The deep problem in *Ricci* is the relationship between two elements of antidiscrimination law: the aspiration toward color-blind decisionmaking and the concern with facially neutral practices that have disparately adverse impacts on people of different racial groups. Sometimes these two elements of antidiscrimination law are understood to work together, and sometimes they are understood as operating in separate spheres. What has not been generally recognized, however, is that the two might also come into conflict with each other. That conflict is what drives the *Ricci* case.

Given existing law, there is a clear answer to the question of what a lower-court judge should do when faced with the problem in *Ricci*. The answer is that the judge should deny the plaintiffs' claim. That is what both the district and circuit courts did in *Ricci*, and it is also what both the district and circuit courts did when the same problem arose recently in Tennessee. But the underlying problem raises sensitive issues, and

[1] See Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 Harvard Law Review, 493 (2003). The article is cited in Judge Calabresi's opinion explaining the Second Circuit's decision not to rehear *Ricci*. See *Ricci v. DeStefano*, 530 F.3d 88, 88-89 (2d Cir. 2008).

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those issues may become more open for reexamination if the Supreme Court's decision in the case changes the existing legal landscape.

This letter's analysis has four parts. Part I lays out the big-picture problem, which is the tension between the value of color-blindness and the periodic need to reform facially neutral practices that have disparately adverse effects on people of different racial groups. Part II describes the facts of the New Haven case. Part III assesses the Second Circuit's decision. Part IV explains how the Supreme Court's intervention in the case could change the state of the law.

I. The Big Picture: Color-Blindness and Disparate Impact

The core value animating much of antidiscrimination law is the individualist aspiration that no person be disadvantaged on the basis of his or her race. Accordingly, the law generally requires public officials and private employers to make decisions without respect to the race of the persons affected. That said, a completely color-blind system could not correct hidden or unintentional instances of discrimination, many of which are discovered only by looking at statistical patterns to see the impact they have on people of different groups, considered in the aggregate. (The logic is the same as in the field of public health: we would never discover that heart disease affects more blacks than whites if race were always ignored in medical studies.) Antidiscrimination law therefore tempers the color-blind ideal with color-conscious devices aimed at identifying and remedying certain forms of discrimination.

One such device is the disparate impact standard of Title VII. Under the Nixon Administration, the EEOC interpreted Title VII to prohibit some employment practices that, in the statistical aggregate, affect members of some racial groups more adversely than others.[2] The Supreme Court confirmed this interpretation of the statute in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Some experts at the time thought that the Constitution's Equal Protection Clause embodied a similar disparate impact standard, but the Supreme Court disagreed. In *Washington v. Davis*, 426 U.S. 229 (1976), the Court held that the Constitution of its own force is concerned with discriminatory purposes rather than discriminatory effects. The Court reiterated, however, that Congress was free to enact disparate impact standards as a statutory matter—and the Court was of course aware that Title VII was already functioning with a disparate impact standard. Ever since, this division between the statutory and constitutional realms has been legal orthodoxy: the Constitution of its own force prohibits only intentional discrimination, but Congress may enact impact-based standards as well.[3]

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[2] See EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.3 (1970).

[3] As presently codified, Title VII prohibits any employment practice with disparately adverse effects on members of different racial groups, unless the employer demonstrates that the practice is required by business necessity and the practice cannot be replaced by different practices having less, or no, disparate racial impact. See 42 U.S.C. § 2000e(2)(k).

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Over the decades since *Davis*, the Supreme Court's interpretation of Equal Protection has become more uncompromisingly color-blind. Among other things, the Court has sharply limited, though not quite eliminated, the permissible scope of race-based affirmative action, even when intended to cure prior discrimination. During the same period, the Court also narrowed the scope of Title VII's disparate impact doctrine, but Congress pushed back in the Civil Rights Act of 1991,[4] and since then the Court has been content to let Congress decide the scope of that statutory standard. Until now, the Court's increasing preference for color-blindness has not been deployed to question the validity of disparate impact law under Title VII.

In 2003, however, I pointed out that if the Court pursued the color-blind vision of Equal Protection to its logical ending point, it might eventually find an actual conflict between Equal Protection and Title VII's disparate impact doctrine. The full analysis is complex, but the basic intuition can be summarized in a few sentences. Administering a disparate impact doctrine involves classifying employees into racial groups and measuring how particular employment practices affect the groups differently. Any remedy that a court orders in a disparate impact case is likely to alter the racial composition of the workforce. These features are part of disparate impact doctrine by design: there is no way to get the benefits of a disparate impact doctrine without them. But if Equal Protection had zero tolerance for race-conscious decisionmaking, these features of Title VII would be unconstitutional, and disparate impact doctrine would be invalid.

When I published my analysis, experts in the field overwhelmingly took the view that the Supreme Court would never take the color-blind idea so far as to strike down Title VII's disparate impact doctrine. Liberals and conservatives alike largely agreed that I had shown a conceptual tension between Title VII and the new interpretations of Equal Protection, but they also believed that the tension would remain at the conceptual level only. The acceptability of statutory disparate impact doctrine had, after all, been orthodox legal thinking for decades. Rather than expecting the Supreme Court to push its color-blind approach to the point where disparate impact doctrine would have to go, the consensus view was that the Court's investment in the color-blind ideal was balanced by its acceptance of the disparate impact doctrine in statutes like Title VII.

Ricci v. DeStefano may be the occasion for a change in that equilibrium: the Supreme Court may be poised to curtail the scope of disparate impact doctrine in the name of increased colorblindness in the law. If that happens, it will be a significant departure from prior doctrine.

II. *Ricci v. DeStefano*: The Problem

The core conflict in the New Haven case is exactly the one described above. And the facts of the case present that conflict in a highly charged way.

[4] See Civil Rights Act of 1991, § 105.

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In 2003, the City of New Haven administered written tests to firefighters seeking promotion to the ranks of Lieutenant and Captain. Nine black firefighters did well enough to qualify for promotion. In the aggregate, however, white applicants passed the test at a much higher rate than black applicants—nearly double the rate for the Lieutenant's exam and even more than double for the Captain's exam. Under longstanding EEOC guidelines, if applicants from one racial group pass a written promotion test at less than four-fifths the rate of applicants from a different racial group, there is prima facie evidence that the test has an unlawful disparate impact under Title VII. New Haven's test fell far below the four-fifths ratio. City officials accordingly had two choices. They could withdraw the test, or they could prepare to defend it in court. Faced with this choice, and knowing that a Title VII plaintiff would be able to make a prima facie case on the basis of these statistics, city officials withdrew the test, saying that they would find a different way to decide whom to promote.[5]

Considered strictly, the City's decision to throw out its test did not deny anyone a promotion. The test results would have determined eligibility for promotions, but the actual awarding of promotions would have required a further step. Moreover, it is still possible that people who would have been promoted under a system including the test will still be promoted in the end under whatever new system the City implements. That said, the City's choice to throw out the test did disadvantage the firefighters who would have been eligible for promotion under the test. They are not as close to promotion today as they were before the test was thrown out—and, in all likelihood, at least some of them have a smaller chance of being promoted in the end.

A group of those firefighters brought suit in federal district court. (One plaintiff was Hispanic; none was black.) According to the plaintiffs, the City's decision to throw out the test violated both Title VII and Equal Protection, because it aimed to alter the racial allocation of the promotions.

The district court rejected the plaintiffs' claims, and a panel of the Second Circuit affirmed. The three judges on the panel were Judge Rosemary Pooler, Judge Robert Sack, and Judge Sonia Sotomayor. The panel's opinion was for the court rather than signed by a particular judge. Normal practice in the Second Circuit is for the presiding judge—here, Judge Pooler—to draft such opinions.

III. The Second Circuit's Decision

As a matter of existing legal doctrine, the Second Circuit's decision was clearly right. The plaintiffs' Title VII claim, if credited, would make Title VII a statute at war with itself. And the Equal Protection claim, if credited, would mark a radical departure from the relationship between Equal Protection and disparate impact as that relationship has been understood since *Davis*.

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[5] Whether the City's subjective motivation for withdrawing the test was wholly to comply with Title VII or partly to comply with Title VII and partly to advance other agendas is a source of controversy. As explained in Part IV, one way that the Supreme Court could dispose of *Ricci* is by remanding to the District Court for a resolution of that question.

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A) The Title VII issue

The plaintiffs contend—and with some justice—that the city made a racially motivated decision to throw out the test. But there are different things that that contention might mean. Clearly, the City made its decision in consequence of learning how many people from each of several racial groups might be promoted if it stuck with its test. Without more, however, that kind of race-conscious decisionmaking is not illegal under Title VII. After all, Title VII affirmatively encourages employers to keep track of the racial impacts of their promotional criteria and to change criteria that have disparate racial impacts. In other words, administering a disparate impact doctrine inherently requires this kind of race-conscious decisionmaking. It would be odd, therefore, for such decisionmaking to violate Title VII; indeed, it would make Title VII a self-contradictory statute, requiring and prohibiting the very same behavior.

In theory, the law could permit employers to use race-conscious remedies for disparate impact problems only after those problems had been officially identified by court decree. Such a regime would aim at giving employers the minimum possible scope for race-conscious remedial action, and there is a plausible rationale for that aim. Race-conscious remedies are sometimes appropriate, but to the degree that they are necessary evils, it might make sense to constrain employers in this way.

In fact, though, the law has made a different choice: Title VII doctrine encourages employers to cure disparate impact problems voluntarily, without incurring the expense of litigation and the humiliation of being found liable for discrimination. The rationale for this choice lies partly in the premise that much disparate impact discrimination is unintentional. Given that premise, one good use of Title VII is to bring disparate impacts to light and nudge employers to do better without having to run the gauntlet of litigation. And even in cases where disparate impact findings arise from hidden *intentional* discrimination, there are advantages in permitting employers to reform voluntarily without have to be identified as wrongdoers in court. If a business or a municipality is willing to fix the problem, the Supreme Court has reasoned, there is wisdom in welcoming its cooperation rather than putting it on the defensive.[6]

B) The Equal Protection issue

The central idea of the plaintiffs' claim, however—that they have been disadvantaged by a race-conscious decision—is not a trivial one. Given the ideal of color-blind decisionmaking, the intuitive distaste for such decisions is easy to understand, and that intuition has increasingly informed Equal Protection doctrine in recent years. That said, interpreting Equal Protection to vindicate the plaintiffs' claim would go

[6] In Justice O'Connor's view, this rationale was strong enough to justify letting employers practice straightforward affirmative action without falling foul of Title VII. See *Johnson v. Santa Clara*, 480 U.S. 616, 652-53 (O'Connor, J., concurring in the judgment). If the rationale is strong enough to justify a more overtly race-conscious practice like affirmative action, it is strong enough to justify compliance with the more subtly race-conscious demands of the disparate impact standard.

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beyond anything that the Court has yet done. At its core, such an interpretation would signal that actions inherent in the administration of a disparate impact doctrine amount to unconstitutional discrimination. In other words, it would imply that Congress lacks the authority to include a disparate impact doctrine in Title VII, and that would uproot nearly four decades of settled law.

The plaintiffs are correct that there is a tension between disparate impact doctrine and an uncompromising ideal of color-blindness. Disparate impact is a color-conscious doctrine that requires courts and employers to make certain decisions based on the racial effects of employment practices. The color-blind ideal, however, is only one part of Equal Protection, and Equal Protection has never taken that ideal all the way to its extreme. For example, the Supreme Court agreed with my own institution, the University of Michigan Law School, that limited race-conscious decisionmaking can be appropriate in the context of university admissions.[7] Not everyone agreed with that decision, of course, but it is clearly the law. And even people who would prefer a more strictly color-blind regime in that context agree that color-blindness must *sometimes* be balanced against other public values. Nobody thinks, for example, that a police dispatcher violates Equal Protection when she tells patrol officers seeking a suspect that they are looking for a white woman, or a black man, as the case may be. In sum, the color-blind ideal is an important part of Equal Protection, but some forms of race-conscious decisionmaking are permitted or even affirmatively recommended. Ever since *Griggs* and *Davis*, it has been settled that a racially conscious disparate impact standard is an appropriate part of statutory antidiscrimination law.[8]

It should not be surprising, therefore, that when *Ricci* was litigated below, the law of the Second Circuit included prior cases upholding municipal employers' race-conscious interventions to prevent written tests from causing Title VII disparate impact problems. One instructive decision is *Hayden v. County of Nassau*, 180 F.3d 42 (2d. Cir 1999). *Hayden* involved a police department test that had been designed to afford county officials a great deal of flexibility to avoid disparate racial impacts. The test had 25 sections. The sections could be scored independently, and it was not necessary to include all 25 sections to reach a statistically valid result. In other words, it could have been a valid measure of job qualification to give a test that contained only sections 1-10, or only sections 11-20, or only the odd-numbered sections, *etc.*, so long as a sufficient number of sections was used. County officials thus had many options for how to use the test as a basis of promotions, because counting the scores for one set of sections might yield a different set of highest-scoring applicants than counting the scores for a different set of sections.

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[7] See *Grutter v. Bollinger*, 593 U.S. 306 (2003).

[8] Because the propriety of Title VII's disparate impact standard has always been a matter of consensus, the Supreme Court has never had occasion to spell out the doctrinal mechanics of reconciling that standard with Equal Protection doctrine. There is more than one way that such a reconciliation might work, and the relative merits of different possible reconciliations are a legitimate subject for technical debate. See Primus, 117 Harvard Law Review at 498-501, 515-51, 563-66, 585-87 (2003).

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After the test was administered, graders examined the results section by section and assembled a combination of nine sections that yielded statistically valid results while minimizing the disparate racial impact of the test. Quite clearly, the choice of those nine sections was race-conscious in the same sense that New Haven's decision to throw out its test in *Ricci* was race-conscious: county officials chose the sections they did in large part because choosing those nine sections yielded an appropriate racial distribution of candidates with passing scores.

A group of police officers who had taken the test brought an Equal Protection challenge, which the Second Circuit rejected. As the decision explained, it was surely true that the officials in *Hayden* had considered race. But they had done so only as was necessary to prevent a disparate impact actionable under Title VII. Given *Hayden*, and given that no panel of the Second Circuit may overrule the decision of a prior panel, it is hard to see how the judges in *Ricci* could have reached any other result.

The Second Circuit is not unique. In my own home circuit—the Sixth—a case presenting the same problem was recently decided in exactly the same way. The police department of Memphis, Tennessee gave a written test as part of deciding on officer promotions. The test had a disparately adverse impact on black applicants. City officials threw the test out, saying they would find a different process for promoting police officers. A group of applicants sued, alleging discrimination against them, and a panel of the Sixth Circuit rejected their claims. Indeed, the Sixth Circuit considered the decision sufficiently unremarkable so as to deal with the matter in an unpublished summary order. See *Oakley v. Memphis* (6th Cir., unpublished disposition, Sept. 8, 2008).

IV. The Supreme Court's Intervention

The job of the lower courts is to apply existing doctrine. On that understanding, the Second Circuit's decision in *Ricci* and the Sixth Circuit's decision in *Oakley* were not only correct but clearly so. That said, it is foreseeable—even likely—that the Supreme Court will go the other way. The Supreme Court is less bound by precedent than any other federal court, and its interpretations of antidiscrimination law have for some time been showing increased skepticism toward any form of race-conscious decisionmaking, even in the pursuit of remedying discrimination. How the Court handles this case may largely depend on whether those Justices who favor a more aggressively color-blind approach to antidiscrimination law consider *Ricci* an appropriate vehicle for advancing that interpretation.

I briefly consider three possible dispositions: affirmance, reversal, and remand.

(1) Affirming the Second Circuit's decision is the disposition that would do the least to disturb the existing state of the law. If the Court affirms, the decision would probably signal a limit to the Court's trend toward insisting on increasing color-blindness in antidiscrimination law. (Reading that meaning into an affirmance would be contingent, however, on assessing the Court's decision in *Northwest Austin Municipal Utility District No. 1 v. Holder*, where the conflict between color-blindness and

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longstanding statutory antidiscrimination standards is presented in the context of the Voting Rights Act.) But there are reasons to think that affirmance is unlikely, including the mere fact that the Court granted certiorari. One should always be wary of reading too much into a decision on certiorari, of course. But in the present case, the Court granted review without a clearly developed circuit split. In the absence of a division of authority in the lower courts, discretionary Supreme Court review suggests that there are Justices who are eager to weigh in on the question. And there would be little need to weigh in simply to endorse the view that both circuits to address the issue so far have taken.

(2) If the Court reverses the Second Circuit, *Ricci* will mark an expansion of color-blindness and a contraction of Title VII's disparate impact doctrine. Such a decision would be a change from existing law, but it would be a change continuous with the direction in which the Court has taken Equal Protection doctrine in recent years. If the Court is inclined to continue that line of development, and there are reasons to think that it is, then whether it does so in this case might principally depend on whether the majority of Justices considers *Ricci* a good vehicle for pressing the point. Here it matters that several of the plaintiffs are sympathetic characters, such that vindicating their claims has the ring of rough justice. The Court understands, of course, that the law sometimes requires results that seem to frustrate rough justice, and often for good reason. And one ought not to think that the Court's job is to do justice in each individual case rather than doing what the law requires. That said, the Justices also know that when doctrine is going to change, it is helpful to present the change as being in the service of rough justice in the particular case. It should therefore not be surprising if the Court takes an aggressive posture, alters the doctrine, and reverses the Second Circuit. If it does, there could be far-reaching consequences for disparate impact law (and, depending again on the interaction between *Ricci* and *Northwest Austin Municipal Utility District No. 1*, on antidiscrimination law more broadly). Exactly what those consequences might be would depend on how ambitiously the Court writes its opinion, and it may take some time for lower courts to work out the implications.

(3) Alternatively, the Court might take a more statesmanlike approach and decline the opportunity to remake a settled portion of the law. One good way to do that would be to accept the suggestion of the Solicitor General and remand the case for further fact-finding in the District Court. As the Solicitor General's brief explains, the District Court did not conduct a mixed-motive analysis, inquiring into the possibility that the City's decision to throw out its test was prompted partly by the need to comply with Title VII and partly by less admirable motives, including the racial dynamics of New Haven politics. The failure to conduct such an analysis is not a failing of the District Court: the plaintiffs did not clearly advance a mixed-motive argument, and a court is not bound to identify and resolve issues that the parties do not raise. But the Supreme Court is free to raise the issue and ask that it be resolved, and doing so might offer a way of disposing of this case without upsetting existing bodies of legal doctrine.[9] And it is a principle of

[9] If the District Court on remand were to find that the City was motivated partly by racial considerations outside of what Title VII's disparate impact doctrine requires, it could impose liability without truncating Title VII. If the District Court were to find that the City's motive had been solely to comply with Title VII, however, the fundamental legal conflict might have to be addressed after all.

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good judicial craft that courts should think hard before deciding what does not need to be decided, or what does not need to be decided today. That said, one should not count on the Court's taking this way out. Having granted certiorari, the Court might want to resolve the issue that attracted its attention.

Even if the Court does take an aggressive stance, however, a decision reversing the Second Circuit would be no ill reflection on the eight judges who decided *Ricci* and *Oakley* in the courts below. Those judges—two at the district court level, and six at the circuit level—were unanimous in the view that an employer may voluntarily abandon a test once it becomes apparent that that test has a disparate racial impact actionable under Title VII. They were unanimous in that view because that was the correct understanding of settled law prior to the Supreme Court's intervention in *Ricci*. If the Supreme Court announces new doctrine, it will then be the duty of the lower courts to apply the law in its newly changed form. But lower courts do not have the duty to anticipate the Supreme Court's new legal interpretations. Their responsibility is to apply the law as it stands when cases are before them.

* * *

I hope that Members of the Committee will not hesitate to call on me if I can be of further assistance.

Sincerely,

Richard A. Primus

Richard Primus
Professor of Law
John Simon Guggenheim Memorial
Foundation Fellow in Constitutional
Studies

cc: Hon. Herb Kohl
Hon. Orrin Hatch
Hon. Dianne Feinstein
Hon. Charles Grassley
Hon. Russell Feingold
Hon. Jon Kyl
Hon. Charles Schumer
Hon. Lindsey Graham
Hon. Richard Durbin

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June 30, 2009

The Honorable Patrick Leahy
Chairman
United States Senate Judiciary Committee
433 Russell Senate Office Building
Washington, DC 20510

The Honorable Jeff Sessions
Ranking Member
United States Senate Judiciary Committee
335 Russell Senate Office Building
Washington, DC 20510

Dear Senators Leahy and Sessions:

As professors of Disability Law, Disability Rights Law, and Special Education Law from across the country, we write to express our support for the confirmation of Judge Sonia Sotomayor for appointment to the United States Supreme Court.

A review of Judge Sotomayor's record on disability law issues indicates that she has an excellent understanding of the various laws' application to people with disabilities in various contexts, including disability civil rights, employment, special education, Social Security, Medicaid, and guardianship.

Judge Sotomayor's record shows that she takes a balanced, thoughtful approach to disability issues. Her analysis is consistently thorough, practical and respectful of individual rights. In close cases, she does not appear to follow any particular ideology or activist agenda.

Definition of Disability

With the passage of the Americans with Disabilities Amendments Act of 2008, Congress repudiated much of the way that the Supreme Court has interpreted the Americans with Disabilities Act's definition of disability. Notwithstanding this flux in the law, Judge Sotomayor's opinions in this area stand out as being careful and reasoned, as she has engaged in searching inquiries into the nature of plaintiffs' impairments to determine whether they meet the functional and legal definition of disability. (See Bartlett v. New York State Board of Law Examiners, 2001 WL 930792 (S.D.N.Y. 2001).

Judge Sotomayor has not been reluctant to dissent in cases where the law was being applied overly narrowly, particularly on the issue of coverage based on an employer's perceptions of disability ("regarded as"). (See EEOC v. J.B. Hunt Transp., Inc., 321 F.3d 69, 78 (2d Cir. 2003) (Sotomayor dissenting)). After the passage of the ADA Amendments Act, Judge Sotomayor's interpretation of the "regarded as" prong of disability now has been adopted as consistent with congressional intent.

Discrimination

Judge Sotomayor has authored decisions holding, as a matter of first impression in the Second Circuit, that "mixed motive" analysis (allowing discrimination claims where there are both discriminatory and non-discriminatory motives for a challenged action) applies in ADA employment discrimination claims

(See Parker v. Columbia Pictures Industries, 204 F.3d 326 (2d Cir. 2000)). Her opinion fully analyzed, and was consistent with, precedents in other jurisdictions and the demonstrated intent of Congress.

Reasonable Accommodation

Judge Sotomayor has participated in several cases reversing grants of summary judgment for ADA defendants where there were questions of fact regarding whether plaintiff's requested accommodations were reasonable. Judge Sotomayor wrote a decision reversing a jury verdict against the plaintiff for failure to give a jury instruction indicating that, in determining whether reassignment to a vacant position is a reasonable accommodation, an offer of an inferior position is not reasonable when a comparable, or lateral, position is available. (See Norville v. Staten Is. Univ. Hosp., 196 F.3d 89 (2d Cir. 1999)).

Education

Judge Sotomayor's education opinions reflect an appropriate concern for parents' procedural rights, recognizing that, only by ensuring parents' rights to hearings and records can their children's substantive educational rights be ensured, while also balancing states' rights under the "cooperative federalism" envisioned by the Individuals with Disabilities Education Act (IDEA). (See Taylor v. Vermont Dep't of Educ., 313 F.3d 768 (2d Cir. 2002). She has also written opinions recognizing that the IDEA exhaustion requirement is not so inflexible as to require parents to engage in futile efforts. (See Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195 (2d Cir. 2002)).

Constitutionality of Federal Civil Rights Legislation

Judge Sotomayor has resisted judicial attempts to artificially limit federal legislative authority to articulate and enforce individual rights. While demonstrating respect for precedent, she has not interpreted the Constitution to prevent Congress from recognizing individual and civil rights. (See Hayden v. Pataki, 449 F.3d 305 (2d Cir. 2006) (Sotomayor joining dissent from en banc decision); Connecticut v. Cahill, 217 F.3d 93 (2d Cir. 2000) (Sotomayor dissenting)). Her opinions reflect a deference to Congress and to the plain language of the Constitution.

The Supreme Court is the guardian of our rights and freedoms. As such, we recognize the importance of each nomination to the Court. Based on her record as a district court judge and as a judge on the Second Circuit Court of Appeals, we believe Judge Sotomayor has demonstrated appropriate respect for the rule of law and the importance of individual rights. Therefore, we urge you to confirm the nomination of Judge Sonia Sotomayor to the U.S. Supreme Court.

Michael Waterstone
Professor of Law
Associate Dean of Academic Programs
Loyola Law School, Los Angeles

Peter Blanck
University Professor
Chairman, Burton Blatt Institute
Syracuse University

Michael Stein
Executive Director
Harvard Law School Project on Disability
Professor of Law
William and Mary Law School

Mark C. Weber
Vincent de Paul Professor of Law
DePaul University College of Law

Deirdre M. Smith
Assoc. Professor of Law and
Director of the Cumberland Legal Aid Clinic
University of Maine School of Law

Robert Dinerstein
Professor of Law
American University
Washington College of Law

Carrie Griffin Basas
Assistant Professor of Law
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Arlene S. Kanter, Professor of Law
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Laura Rothstein
Professor and
Distinguished University Scholar
Louis D. Brandeis School of Law
University of Louisville

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El Paso, Texas
The International City

RACHEL QUINTANA
CITY REPRESENTATIVE
EASTSIDE DISTRICT V

June 29, 2009

The Honorable Patrick J. Leahy, Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Leahy:

I am writing to express my support for the confirmation of Judge Sonia Sotomayor as Associate Justice of the Supreme Court of the United States. In her seventeen years of service to date as a federal trial and appellate judge, and throughout the course of her entire career, Judge Sotomayor has strongly distinguished herself through her outstanding intellectual credentials and her deep respect for the rule of law, establishing herself beyond question as fully qualified and ready to serve on the Supreme Court.

Judge Sotomayor will be an impartial, thoughtful, and highly-respected addition to the Supreme Court. Her unique personal background is compelling, and will be both a tremendous asset to her on the Court and a historic inspiration to others. Her legal career further demonstrates her qualifications to serve on our nation's highest court. After graduating from Yale Law School, where she served as an editor for the Yale Law Journal, Judge Sotomayor spent five years as a criminal prosecutor in Manhattan. She then spent eight years as a corporate litigator with the firm of Pavia and Harcourt, where she gained expertise in a wide range of civil law areas such as contracts and intellectual property. In 1992, on the bipartisan recommendation of her home-state Senators, President George H.W. Bush appointed her District Judge for the Southern District of New York. In recognition of her outstanding record as a trial judge, President Bill Clinton elevated her to the U.S. Court of Appeals in 1998.

During her long tenure on the federal judiciary, Judge Sotomayor has participated in thousands of cases, and has authored approximately 400 opinions at the appellate level. She has demonstrated a thorough understanding of a wide range of highly complicated legal issues, and has a strong reputation for deciding cases based upon the careful application of the facts of cases to the law. Her record and her inspiring personal story indicate that she understands the judiciary's role in protecting the rights of all Americans, in ensuring equal justice, and respecting our Constitutional values – all within the confines of the law. Moreover, her well-reasoned and pragmatic approach to cases

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El Paso, Texas
The International City

RACHEL QUINTANA
CITY REPRESENTATIVE
EASTSIDE DISTRICT V

will allow litigants to feel, regardless of the outcome, that they were given a fair day in court.

Given her stellar record and her reputation for fairness, Judge Sotomayor has garnered broad support across partisan and ideological lines, earning glowing praise from colleagues in the judiciary, law enforcement community, academia, and legal profession who know her best. Her Second Circuit colleague (and also her former law professor) Judge Guido Calabresi describes her as "a marvelous, powerful, profoundly decent person. Very popular on the court because she listens, convinces and can be convinced -- always by good legal argument. She's changed my mind, not an insignificant number of times." Judge Calabresi also discredited concerns about Judge Sotomayor's bench manner, explaining that he compared "the substance and tone of her questions with those of his male colleagues and his own questions. And I must say I found no difference at all." Judge Sotomayor's colleague Judge Roger Miner, speaking of her ideology, argued that "I don't think I'd go as far as to classify her in one camp or another. I think she just deserves the classification of outstanding judge." And New York District Attorney Robert Morgenthau, her first employer out of law school, hailed her for possessing "the wisdom, intelligence, collegiality, and good character needed to fill the position for which she has been nominated."

I urge you not to be swayed by the efforts of a small number of ideological extremists to tarnish Judge Sotomayor's outstanding reputation as a jurist. These efforts have included blatant mischaracterizations of a handful of her rulings, as well as efforts to smear her as a racist based largely on one line in a speech that critics have taken out of context from the rest of her remarks. The simple fact is that after serving seventeen years on the federal judiciary to date, she has not exhibited any credible evidence whatsoever of having an ideological agenda, and certainly not a racist one. I hope that your committee will strongly reject the efforts at character assassination that have taken place since her nomination.

In short, Judge Sotomayor has an incredibly compelling personal story and a deep respect for the Constitution and the rule of law. Her long and rich experiences as a prosecutor, litigator and judge match or even exceed those of any of the Justices currently sitting on the Court. Furthermore, she is fair-minded and ethical, and delivers thoughtful rulings in cases based upon their merits. For these reasons, the undersigned organizations strongly urge you to vote to confirm Judge Sotomayor.

Respectfully,

RQuintana

Representative Rachel Quintana

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United States Senate Committee on the Judiciary Hearing:
The Nomination of Sonia Sotomayor
to be an Associate Justice of the United States Supreme Court

July 15, 2009

Prepared Statement of
Neomi Rao
Assistant Professor of Law
George Mason University School of Law
Arlington, Virginia

Thank you Mr. Chairman, Senator Sessions, and distinguished members of this Committee for inviting me today. It is an honor to testify at this hearing on the nomination of Judge Sonia Sotomayor to the United States Supreme Court.

My testimony seeks to further the public dialogue about the appropriate role of a judge in our constitutional democracy. Judge Sotomayor is accomplished and hard-working, and this process should give respectful and serious consideration to the jurisprudential principles she has articulated during her tenure as a federal judge. I take no position on the ultimate question of whether Judge Sotomayor should be confirmed. My testimony will explain how her speeches and writings express a view of the judicial role that is personal and consequentialist and at times suggests a position beyond even mainstream pragmatic judicial philosophies.

Each vacancy on the Supreme Court invariably leads to a public dialogue about how courts and judges fit into our democratic system of government. I have seen this process from a variety of perspectives, including as Counsel to this Committee and as Associate White House Counsel during the nominations of Chief Justice John Roberts and Justice Samuel Alito. The process has its familiar rhythms and arguments, but it also serves as a reminder of the important work of the Supreme Court and the high stakes of each appointment.

I want to consider for a moment some reasons why the stakes are so high. We can begin with the common observations that Supreme Court justices serve for life and decide many of the country's most difficult and controversial issues. Behind this observation is an important assumption, so widely accepted, that it is often taken for granted. This assumption is that each Supreme Court justice

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matters because Supreme Court judgments are treated as final and supreme in matters of constitutional interpretation.

In recent years, there are numerous examples of the Supreme Court reviewing and limiting congressional and executive branch powers. For example, in *Boumediene v. Bush*, the Supreme Court for the first time invalidated a wartime policy that had the joint support of Congress and the President. [1] In *Boumediene* and other cases, the President and Congress have accepted and followed the Court's decisions.

This supremacy, however, is not a constitutional necessity, but largely results from prudent political acquiescence.[2] The Framers said fairly little about what they expected from judges. Article III of the Constitution vests the "judicial power" in the federal judiciary, but does not articulate its scope.[3] Alexander Hamilton noted that the limits on the judiciary were primarily structural. He explained that the Supreme Court has "no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments."[4] This weakness of the Supreme Court, as well as other structural factors, casts doubt on the idea that judicial supremacy is *required* by the constitutional structure.[5]

The Constitution gives Congress and the President various tools by which they can restrain the Court. For example, Congress could reduce the budget of the courts, or cut back on its jurisdiction in certain types of cases. In extreme circumstances, it could seek impeachment and removal of overreaching judges. The President could decline to implement a decision he considered

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[1] Boumediene v. Bush, 128 S. Ct. 2229 (2008).

[2] *See* Neomi Rao, *The President's Sphere of Action*, 45 WILLAMETTE L. REV. 527, 531 (2009). *See also* John Harrison, *The Constitutional Origins and Implications of Judicial Review*, 84 VA. L. REV. 333 (1998) (explaining that "[t]he propriety of judicial review in light of the text is of considerable theoretical but, at the moment, little practical importance").

[3] U.S. CONST. art. III, § 1.

[4] THE FEDERALIST NO. 78, at 402 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

[5] THE FEDERALIST NO. 49, at 261 (James Madison) (George W. Carey & James McClellan eds., 2001) ("The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers."). *See also* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 228 (1994) (explaining the constitutional basis for coordinacy of the branches, or the idea that each branch of the federal government has an independent duty to interpret the Constitution).

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unconstitutional. I am not recommending any of these actions, only noting some possibilities. Indeed, the Congress and the President virtually never exercise these checks. Political reprisals against the Court are highly disfavored and viewed as interfering with judicial independence.

Because these checks on the Court's power are rarely exercised, the Supreme Court faces no effective challenge to its authority. The Court has assumed the right to define its constitutional limits and there are few issues that it considers to be outside of the judicial role.[6] This testimony is not the place to discuss the difficult and controversial questions about whether such independence is desirable or consistent with our constitutional structure. I merely wish to call attention to the prevailing view in the Supreme Court, Congress, and the Executive Branch about the essential finality and supremacy of Supreme Court decisions in constitutional matters.

In the practical absence of external constraints, each justice remains constrained primarily by his or her conception of the judicial role. Self-restraint is the primary restraint for Supreme Court justices – this is why a nominee's judicial philosophy is so important.

At the heart of debates about judicial philosophy is a longstanding disagreement between formalism, on the one hand, and a more flexible, pragmatic, or perhaps in the parlance of the day, empathetic decision-making. I will consider briefly the range of this spectrum in order to situate Judge Sotomayor's stated judicial philosophy in this traditional debate.[7]

First, some judges believe the judicial role and the privilege of political independence require a corresponding obligation to follow the law, not personal beliefs or public opinion. In order to pursue this ideal, they follow a more formalist approach to interpretation, which often means close textualism for statutes and historical or originalist readings of the Constitution. The basic idea is that by focusing closely on the written law, judges act as fair and impartial arbiters and avoid exercising personal discretion or imposing values and goals outside of the law.

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[6] This lack of oversight is a privilege given neither to the President nor to Congress, as the Supreme Court robustly enforces the constitutional limits on congressional and executive branch power. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997); Boumediene v. Bush, 128 S. Ct. 2229 (2008).

[7] I recognize that the brevity of this discussion necessarily omits some detail and nuance, but my discussion is intended to capture the essential jurisprudential dispute, not all of its variants.

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As a constitutional matter, this approach recognizes that judges should implement the "judicial power," not a legislative one. On a practical level, formalism recognizes that judges have limited capacity for assessing facts, gathering data, and judging consequences.[8] These tasks belong to the political branches. Justice Antonin Scalia and Judge Frank Easterbrook of the Seventh Circuit Court of Appeals exemplify this approach in their jurisprudence and scholarly writings.[9]

Formalists may be criticized and caricatured as wooden literalists. But judges who adopt formalist methods are not naive about their role.[10] They understand that judges are human and come to the bench with individual experiences.[11] Indeed, it is in part to limit human biases and prejudices that they seek to follow the law as closely as possible. As Justice Scalia has explained, "To be a textualist in good standing, one need not be too dull to perceive the broader social purposes that a statute is designed, or could be designed, to serve; or too hide-bound to realize that new times require new laws. One need only hold the belief that judges have no authority to pursue those broader purposes or write those new laws."[12]

In my view, proper respect for the judicial role requires an intelligent formalism in which judges interpret, without rewriting, our laws and the Constitution. This approach allows us to remain a society governed by laws and not men.

On the other side of this debate, pragmatic judges largely reject the restraints of formalism. They believe that the privilege of judicial independence also confers the privilege of interpreting the law to conform to substantive

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[8] *See, e.g.*, ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006).

[9] *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J. L. PUB. POL'Y 61 (1994).

[10] James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) ("I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they make it *as judges make it*, which is to say *as though* they were 'finding' it – discerning what the law *is*, rather than decreeing what it is today *changed to* or what it will *tomorrow* be.") (emphasis in original).

[11] To take a recent example, Chief Justice Roberts explained at his confirmation hearings that "we all bring our life experiences to the bench," but the ideal for each judge is to follow the rule of law, not their own preferences. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the U.S. Before the S. Comm. on the Judiciary*, S. Hrg. 109-158, at 205 (2005) (statement of John G. Roberts, Jr.).

[12] SCALIA, *supra* note 9, at 23.

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purposes and practical consequences – these judges seek to reach the best outcome all things considered. Justice Stephen Breyer and Judge Richard Posner are articulate proponents of legal pragmatism.[13]

In this view, judges can address the problems to be solved and interpret statutes and the Constitution to serve broader purposes and goals. For example, Justice Breyer has recently explained that our Constitution has a basic democratic objective and that the courts must help secure this objective.[14] They do this in part by focusing on the purposes of laws and the consequences of particular interpretations.[15]

These judges celebrate the individual wisdom of each jurist, who should try, in part, to resolve cases pragmatically, a concept that will be "relative to the prevailing norms of particular societies."[16] Often these judges go further and suggest that judges can interpret statutes and the Constitution to make them fairer or more just – to reach substantive results more in line with modern sensibilities as understood by the judge. In this view, through interpretation judges can promote what is right and good.

Pragmatic, flexible interpretation of the law allows significant room for individual assessments of what the law requires, as each individual will have his or her own conceptions of what is coherent, rational, or just. Judge Posner has argued that most American judges are pragmatists. Nonetheless, pragmatism as a method of judging places insufficient attention on the requirements of the law. Although pragmatists disclaim judicial willfulness,[17] flexible and evolving interpretations of statutes and the Constitution will turn, to some extent by necessity, on the individual perceptions of particular judges.

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[13] *See, e.g.*, STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2006); RICHARD POSNER, HOW JUDGES THINK (2008); RICHARD POSNER, PROBLEMS OF JURISPRUDENCE (1990).

[14] BREYER, *supra* note 13, at 37.

[15] *Id.* at 18.

[16] POSNER, HOW JUDGES THINK, *supra* note 13, at 241.

[17] Most pragmatists are quick to acknowledge that they should not impose their personal or political will through judicial decisions. For example, Justice Breyer acknowledges the imperative that judges should avoid being "willful, in the sense of enforcing individual views." BREYER, *supra* note 13, at 18 (internal quotation marks omitted). Judge Posner explains, "A pragmatic judge assesses the consequences of judicial decisions for their bearing on sound public policy as he conceives it. But it need not be policy chosen by him on political grounds as normally understood." POSNER, HOW JUDGES THINK, *supra* note 13, at 13.

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This testimony provides only a brief sketch of these different perspectives. No doubt in actual cases such views may be practiced on a continuum, with justices balancing concerns of formalism with other consequences or substantive values. Nonetheless, most judges have strongly felt views on these matters and such views crucially affect the outcomes of cases. Formalism and pragmatism reflect different attitudes about the role of the judge, appropriate sources for judicial decision-making, and methods for deciding cases.

In her writings and speeches, Judge Sotomayor has set out important aspects of her judicial philosophy, identifying where a judge should be on this spectrum. I focus here on her writings and speeches because these are the fullest articulation of her judicial philosophy over a long career in which she repeated many of the same remarks. Judge Sotomayor's judicial record may provide a somewhat different picture, but judges at the court of appeals, bound by Supreme Court precedent, are limited in the extent to which they can exercise personal discretion. Lower court judges infrequently discuss explicitly the judicial role in their opinions.

On the Supreme Court, however, justices enjoy more freedom and consequently can exercise their personal judicial philosophies to a greater degree. Thus, it may be revealing that outside of particular cases, when discussing the judicial role, Judge Sotomayor has quite candidly and consistently articulated a personal, consequentialist approach to judging. She has repeatedly disavowed formalism, and furthermore, in numerous remarks has suggested a position beyond where even many pragmatic jurists would go.

First, Judge Sotomayor has explicitly and repeatedly rejected the idea that there can be an objective stance in judging.[18] She has explained that every judgment requires an individual choice by the judge. She recognizes that there may be a "danger embedded in relative morality," but that this relativity is

[18] Sonia Sotomayor, *Raising the Bar: Latino and Latina Presence in the Judiciary and the Struggle for Representation: Judge Mario G. Olmos Memorial Lecture: A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 91 (2002) (accepting Martha Minnow's proposition that "there is no objective stance but only a series of perspectives—no neutrality, no escape from choice in judging"); Sonia Sotomayor, Address at the Woman's Bar Association of the State of New York: Women in the Judiciary 8 (Apr. 30, 1999) ("there is 'no objective stance but only a series of perspectives. ... [N]o neutrality, no escape from choice' in judging, I further accept that our experiences as women will in some way affect our decisions. In short, as aptly stated by Professor Minnow, 'Th[e] aspiration to impartiality ... is just that an aspiration rather than a description because it may suppress the inevitable existence of a perspective ... .'") (citing Judith Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877, 1905 (1988)) (internal citation omitted).

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inherent in the judicial role.[19] This goes much further than recognizing that interpretation *may be* affected by the position of the interpreter and instead strongly implies that judging is often a series of personal choices by the judge.

Second, with objectivity discarded as unrealistic, Judge Sotomayor has explained that a judge's personal background, her race, gender, and life experiences, *should* affect judicial decisions. She has questioned the ideal that judges should transcend their personal sympathies and prejudices because by doing so men and women of color may "do a disservice both to the law and society."[20] She has extolled the fact that judges of color, both men and women, will have a collective effect on the development of the law. The effect she considered is not simply the inclusion of qualified women and minorities on the federal bench. Rather she predicted some substantive effect, some difference in the outcome of cases from minority representation. Moreover, she explained that judges "must not deny the differences resulting from experience and heritage" but must attempt "continuously to judge when those opinions, sympathies and prejudices are appropriate."[21]

Finally, given that legal decisions are relative and should depend on a judge's background, Judge Sotomayor repeatedly reiterated what may be a natural conclusion from this, that her particular background leads her to make, not just different, but *better* decisions than those who have not walked in her shoes. Or as she explains, her "hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."[22]

As I explained at the outset, the Supreme Court enjoys effectively unchallenged supremacy and finality with regard to constitutional interpretation.

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[19] Sotomayor, *A Latina Judge's Voice*, *supra* note 18, at 93 ("There is always a danger embedded in relative morality, but since judging is a series of choices that we must make, that I am forced to make, I hope that I can make them by informing myself on the questions I must not avoid asking and continuously pondering.").

[20] *Id.* at 91.

[21] *Id.* at 93.

[22] *Id.* at 92. As has been widely reported, Judge Sotomayor made similar remarks in a number of speeches. *See, e.g.*, Judge Sonia Sotomayor, Panel Presentation at the 40th National Conference of Law Reviews: Women in the Judiciary 11 (Mar. 17, 1994) ("First, if Professor Martha Minnow is correct, there can never be a universal definition of 'wise.' Second, I would hope that a wise woman with the richness of her experience would, more often than not, reach a better conclusion. What is better? I, like Professor Resnik, hope that better will mean a more compassionate and caring conclusion."); *see also* John Dickerson, *More Better Judging*, SLATE, June 3, 2009, *available at* http://www.slate.com/id/2219699/ (discussing Judge Sotomayor's speech at the Conference of Law Reviews).

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Accordingly, each Supreme Court justice remains constrained, in practice, only by his or her approach to the law. Judge Sotomayor's stated approach over many years as a federal court of appeals judge invokes a personal conception of the judicial role. If personal experience not only unconsciously shapes decision-making, but is essential to it, then the judicial process has few objective constraints of law. If one believes that a judge's race, gender, and life experiences should affect how a judge decides cases, then justice may turn on personal beliefs, not law. This is not only a rejection of formalist theories of interpretation, but a significant step beyond even pragmatic jurisprudence.

Our constitutional structure does not give judges political power – it gives them the judicial power to decide particular cases through an even-handed application of the law. Judges are human and the demand for impartiality imposes a difficult standard on those entrusted with the honor of serving on the federal judiciary. The difficulty of such objectivity and impartiality, however, does not suggest jettisoning the ideal. In our constitutional democracy, the rule of law should prevail over the rule of what the judge thinks is best.

This testimony is being submitted before the questioning of Judge Sotomayor by the Committee was completed. Judge Sotomayor's early statements before this Committee suggest a change of heart and express agreement with some the principles I have articulated. I hope that her testimony reflects a properly reconsidered view of the judicial role and the understanding that true "fidelity to the law" best suits the constitutional role of a judge and enhances the predictability and stability of our social and political arrangements.

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Statement of Frank Ricci

Good Morning,

Thank you for the opportunity to appear before this distinguished committee. I accepted with honor the invitation to tell my story. Many others have a similar story and I feel I am speaking for them as well. The New Haven firefighters were not alone in their struggle. Firefighters across the country have had to resort to the federal courts to vindicate their civil rights.

Technology and modern threats have changed our profession. We have become more effective and efficient but not safer. The structures we respond to today are more dangerous, constructed with lightweight components that are prone to early collapse, and we face fires that can double in size every thirty to sixty seconds.

Too many think that firefighters just fight fires. Officers are also responsible for mitigating vehicle accidents, hazardous material incidents and handling complicated rescues. Rescue work can be very technical. All of these things require a great deal of knowledge and skill.

Lieutenants and Captains must understand the dynamic fire environment and the critical boundaries we operate in. They are forced to make stressful decisions based on imperfect information and coordinate tactics that support our operational objectives. Almost all of our tasks are time

sensitive. When your house is on fire or your life is in jeopardy, there are no do-overs.

The Lieutenant's test that I took was without a doubt a job-related exam that was based on the skills, knowledge and abilities needed to ensure public and firefighter safety. We all had equal opportunity to succeed as individuals and were provided a road map to prepare for the exam.

Achievement is neither limited nor determined by one's race but by one's skills, dedication, commitment, and character. Ours is not a job that can be handed out without regard to merit and qualifications. For this reason I and many others prepared for these positions throughout our careers. I studied harder than I ever had before. Reading, making flash cards, high lighting and reading again all while listening to prepared tapes. I went before numerous panels to prepare for the oral assessment. I was a virtual absentee father and husband for months because of it.

In 2004 the City of New Haven felt not enough minorities would be promoted and that the political price of complying with Title VII, the Cities' civil service rules and the charter would be too high. Therefore they chose not to fill the vacancies. Such action deprived all of us the process set forth by the rule of law. Firefighters who earned promotions were denied them.

Despite the important civil rights and constitutional claims we raised, the Court of Appeals panel disposed of our case in

an unsigned, unpublished summary order that consisted of a single paragraph that mentioned my dyslexia and thus led everybody to think that this case was about me and a disability claim. This case had nothing to do with that. It had everything to do with ensuring our command officers were competent to answer the call and our right to advance in our profession based on merit regardless of race.

Americans have the right to go into our federal courts and have their cases judged based on the Constitution and our laws, not on politics and personal feelings.

The lower courts' belief that citizens should be reduced to racial statistics is flawed and it only divides people who don't wish to be divided along racial lines. The very reason we have civil service rules is to root out politics, discrimination and nepotism, although our case demonstrates that these ills will exist if the rules of merit and law are not followed. Our courts are the last resort for Americans whose rights are violated. Making decisions on who should have command positions solely based on statistics and politics where the outcome of the decision could result in injury or death is contrary to sound public policy.

The more attention our case got, the more some people tried to distort it. It bothered us greatly to see so many reporting this case as involving a testing process that resulted in minorities being completely excluded from eligibility for promotion. That was entirely false as minority firefighters

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were victimized by the city's decision as well. As a result of our case, they should now enjoy the career advancement that they earned and deserve.

Enduring over five years of court proceedings took a toll on us and our families. But at some point we began to understand that this case was no longer about the twenty of us but about so many other Americans who had lost faith in the court system because of what happened to us. We understood that firefighters and others of all races and different ethnicities wanted what we sought, which was simple fairness, the right to be judged on merit, and the rules and the law to be enforced even handedly. Many were counting on us and when we finally won our case, the messages we received from every corner of the country made us know it was all worth it.

We never asked for sympathy from the courts. We simply asked for serious consideration of our claims and an acknowledgement of our basic right to be treated fairly. That is the just expectation of all Americans.

Again, thank you for the honor and privilege of speaking to you today.

Statement by

David B. Rivkin, Jr.

Partner, Baker & Hostetler LLP

Co-Chairman of the Center for Law and Counterterrorism at the Foundation for Defense of Democracies

Before the

Senate Committee on the Judiciary

Hearings On The Nomination Of The Honorable Sonia Sotomayor

To Be Associate Justice Of The United States Supreme Court

July 16, 2009

David B. Rivkin, Jr.
1050 Connecticut Ave., N.W.
Suite 1100
Washington, D.C. 20036

Chairman Leahy, Ranking Member Sessions, members of the Committee: I want to thank you for the opportunity to testify today and, I hope, to contribute to the Committee's consideration of President Obama's nomination of Judge Sonia Sotomayor to the United States Supreme Court. I am honored to be here. Please let me begin by noting, however, that I am appearing here on my own account and not to represent the views of my law firm, or any of its clients, or any other entity or organization with which I am affiliated.

I will focus on the question of judicial involvement in the national security area and the related issues I believe the Senate should consider in the context of Judge Sotomayor's nomination. Before addressing national security specifically, however, I would like to make a few observations about the scope of these hearings.

The Senate's duty to advise upon and consent to the President's federal judicial appointments is one of its most important responsibilities. The Senate's performance of this duty must be informed by a proper respect for the principle of separation of powers – including and especially judicial independence. In my view, it would be inappropriate for this Committee, or for the Senate as a whole, to try to obtain commitments from a judicial nominee as to how that person would rule on particular cases if confirmed. It is as important for the Senate to respect the Judiciary's independence as it is for the courts to refrain from legislating from the bench. For that reason, I would urge that members of the Committee – of whatever political persuasion – neither ask nor expect Judge Sotomayor to commit herself to ruling a particular way on any particular legal question.

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At the same time, both the Committee and the Senate as a whole must inquire into Judge Sotomayor's judicial philosophy. It is clear that Judge Sotomayor is both an accomplished lawyer and an experienced and respected jurist. It is nevertheless critical that the Senate weigh her understanding of the Judiciary's proper role in our constitutional system, how she would approach the important task of interpreting both the Constitution and congressional enactments, as well as the temperament and habits of mind she would bring to the High Court.

Of course, it is particularly important that the Senate probe Judge Sotomayor's views on the proper judicial role in the handling of national security issues. This is the case for two distinct reasons.

First, the United States remains engaged in a protracted global war against al Qaeda, the Taliban and other enemies. Winning this war is pivotal to our country, and its conduct has presented legal challenges of a kind rarely seen in conventional conflicts.

Second, despite Judge Sotomayor's long and distinguished service on the federal bench, she has not had the occasion to consider many cases in the national security area. Indeed, in the most significant of the cases involving the war on terror heard by Judge Sotomayor, *Arar v. Ashcroft*, the Second Circuit has yet to issue a decision. As a result, there is very little data from which the Senate may discern the approach which Judge Sotomayor would take to the vital and unresolved questions of national security law that will inevitably reach the High Court.

Therefore, a central topic of the Committee's inquiry should be Judge Sotomayor's understanding of the proper role of Article III courts vis-à-vis the Executive

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and Legislative Branches in the area of national defense. To the extent that these hearings have not produced sufficient information regarding Judge Sotomayor's views in this area, I would urge the Committee to pose written questions to her. Such questions permit far more detailed and thoughtful responses than those asked in the glare of a full committee hearing.

As you know, Congress and the President have traditionally been accorded near plenary authority in the national defense and foreign policy areas. This is especially true with regard to questions involving the conduct of armed conflict. Indeed, over the course of our history, the courts have been loath to intrude into such issues, at least until after hostilities have concluded. In recent years, however, the Supreme Court has dramatically expanded its role in these areas. In my view, this has significant implications for the Government's ability to prevent another devastating attack on the United States, and to vanquish al Qaeda and its allies. Indeed, there can be little doubt that the principles the Supreme Court has developed since *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), make it far more difficult for the United States to defeat any enemy that resorts to unconventional warfare.

For example, the Supreme Court has imposed what has proven to be an unworkable habeas corpus framework with regard to the detainees now held at Guantanamo Bay, Cuba. That the government has lost 26 of the 31 habeas cases that have been fully litigated so far at the District Court level underscores the practical difficulties caused by the application of this regime to Guantanamo detainees. The question of what to do with these detainees is prompting yet another round of litigation, also likely to reach the Supreme Court. The key question there will be whether Article

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III judges can order the President to bring to the United States aliens presently held at Guantanamo. The fact that Congress has enacted an appropriations rider which bans the expenditure of funds for such purposes presents a further constitutional issue.

Meanwhile, lower courts are already beginning the process of extending this habeas regime to individuals captured and held by the United States in other parts of the world, including at the Bagram Air Force base in Afghanistan. This development threatens our ability to wage war in the Afghan theater in general and operations of our special forces in particular. This legal architecture is fundamentally inconsistent with the Constitution and established precedent.

When Mohammed Atta and his compatriots boarded their scheduled flights on September 11, 2001, the rights of wartime detainees were governed by several major precedents. These cases were marked by judicial restraint, especially with regard to foreign nationals held by the United States overseas. In crafting its original detainee policies over the fall and winter of 2001-2002, the Bush Administration relied on two critical Supreme Court decisions: *Ex parte Quirin*, 317 U.S. 1 (1942) and *Johnson v. Eisentrager*, 339 U.S. 763 (1950). Together, these cases – along with the customary laws of war upon which the Court relied – recognized the President's authority to detain captured enemies without a civilian trial for so long as hostilities continue and to charge them before military courts as appropriate. Foreign nationals held outside of the territorial United States were not entitled to challenge their detention in the federal courts.

This well-settled case law relied upon the vital and traditional distinction between the rights and privileges of "lawful combatants" (generally the regular soldiers of

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sovereign states) and "unlawful combatants," who fail to meet four critical criteria: (1) a regular command structure; (2) the wearing of uniforms; (3) the carrying of arms openly, and (4) obedience to the laws of war, including not attacking civilians. These requirements force combatants to distinguish themselves clearly from the surrounding civilian populations, and to otherwise comply with international law of armed conflict.

Although individuals held as enemy combatants within the United States or in overseas areas subject to its sovereignty were able to obtain judicial review in a handful of cases, that foreign combatants held overseas should have been able to seek judicial intervention was virtually unthinkable. In *Eisentrager*, Justice Robert Jackson – fresh from his role as the chief Nuremberg prosecutor – explained why:

> It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.

339 U.S. at 779. This was the law in 2001. Of course, the individuals detained by the United States at Guantanamo and elsewhere were not without legal protection. Abuses against detainees can and have been prosecuted under the Uniform Code of Military Justice (UCMJ). Customary international norms entitle detainees to humane treatment – including a trial before criminal punishment may be imposed.

This legal architecture gave way to judicial activism in the *Hamdi* case. There, a divided Court ruled that detainees were entitled to challenge their classification as enemy combatants through administrative proceedings. In response, the Bush Administration developed an elaborate process to determine whether individual

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detainees were properly classified as enemy combatants. This process included periodic review of whether a detainee's continued detention was appropriate. In the 2005 Detainee Treatment Act ("DTA"), Congress revised this system to provide for a carefully tailored form of unprecedented judicial review.

In its next major decision, *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Supreme Court struck down the system of military commissions established by President Bush to try captured al Qaeda operatives. Although the Court accepted that military commissions were a legitimate part of the American military justice system (a point hard to deny since such bodies have been used by the United States throughout its history), it nevertheless concluded that the President had failed to justify various departures from the procedural rules governing ordinary courts martial under the UCMJ. Congress acted within weeks to amend the UCMJ, and to establish military commissions to try captured terrorists by passing the Military Commissions Act ("MCA"). In this law, as in the DTA, Congress sought to place strict limits on the judiciary's role in reviewing these cases.

The Supreme Court – doubtless emboldened by forty years of growing primacy in domestic affairs – swept aside these MCA-based limitations in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008). In that case, the Court ruled that detainees at Guantanamo Bay, and potentially at any other site wholly controlled by the United States, were constitutionally entitled to challenge their detention by seeking a writ of habeas corpus in the federal courts.

A very real question now is whether *Eisentrager* has been abandoned and whether the paralysis which Justice Jackson warned against has come to pass. We

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may reasonably wonder whether the Supreme Court has presented America's enemies with a new "litigation weapon" and whether there is now any particular reason why all captured combatants, lawful or unlawful, cannot litigate the basis of their detention and force the government to "prove" that they are enemy combatants.

By opening the courthouse doors to our enemies, *Boumediene* created both uncertainty for our warfighters and opportunities for al Qaeda. It is unclear what other constitutional rights detainees may now enjoy. In a breathtaking assertion of judicial power, the *Boumediene* Court left all of this for the future. As Justice Kennedy wrote:

> Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury. The result is not inevitable, however. The political braches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism.

128 S. Ct. at 2277. Needless to say, Congress and the Executive Branch have been engaged in exactly that debate – about how to protect the Nation's values and the lives of its citizens – since the September 11 attacks. Unfortunately, the results of this debate have not been accorded much respect by the Court.

I want to emphasize that this judicial activism was not prompted by, nor even exclusively directed at, the previous Administration's allegedly exaggerated view of executive power. To begin with, the Bush Administration's use of Presidential powers was far more modest than that of any previous American war-time Presidency's – including those of Franklin Roosevelt, Woodrow Wilson, and Abraham Lincoln.

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Second, in striking down the MCA, the Supreme Court invaded the constitutional prerogatives of *both* political branches. The Court's majority did not seem troubled by the fact that Congress and the President worked in concert at the very apex of their respective Articles I and II constitutional prerogatives as identified in Justice Jackson's landmark *Youngstown Sheet & Tube* analysis. Nor did it pause at the fact that the very same Court majority a year earlier in *Hamdan* specifically urged the political branches to undertake exactly this type of collaborative effort, strongly implying that their joint handiwork would be granted the utmost deference.

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

As we address these issues today, I note that these concerns are now shared by both sides of the aisle. Despite criticizing President Bush's wartime policies during last year's campaign, President Obama has continued – in substance if not necessarily in name – virtually all of them. His Administration's litigation strategy on all of the pending key national security issues is identical to that of his predecessor's. This is especially

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true with regard to the detention of captured enemy combatants without trial outside of the United States. Despite the President's stated desire to the contrary, it now appears likely that the detention facilities at Guantanamo Bay will remain open indefinitely because our allies have refused to take all but a handful of the detainees, and Congress has withdrawn funding for any effort to bring them into the United States.

As a result, Congress and the new Administration can expect that their policies will continue to be challenged in the courts, and that the Supreme Court will continue to play a central part in determining what those policies should be. If Judge Sotomayor is confirmed, her rulings will have immense consequences for our country's safety and security. The Senate owes it to the American people to engage her on these issues fully and openly.

For example, the Committee may want to ask Judge Sotomayor which aspects of the foreign affairs powers exercised by the President, the Congress, or both of the political branches jointly, are plenary, and not subject to review by Article III courts on either constitutional or prudential grounds. Another topic worth exploring is whether Judge Sotomayor shares the view that it is appropriate for the political branches of our government and the courts to balance civil liberties and public safety differently in war time than in peace time. It would also be appropriate to inquire into Judge Sotomayor's views of the "political question" and state secrets doctrines, and particularly the extent to which they are grounded in the Constitution. To emphasize, I believe that these types of questions can be raised and resolved in ways which are consistent with the principle of proper respect for judicial independence and would not require the Judge to indicate how she would rule in any particular case.

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Finally, the Senate should also focus on Judge Sotomayor's views regarding the increasing tendency of the Supreme Court to invoke the law and precedent of foreign jurisdictions in interpreting the Constitution and laws of the United States. Although the Court has cited a great many sources, among them Hammurabi and Shakespeare, the use of foreign administrative or judicial rulings or practices in reaching its decisions is highly problematic. The United States Constitution is a unique document. The system of government it established was unprecedented and very much inconsistent with the prevailing legal and political norms at the time it was adopted. Even today, the American system of government remains different in critical respects from that of even our closest democratic allies.

As a result, the views of non-U.S. jurisdictions are of limited utility in the legitimate interpretation of the Constitution and federal statutes, and must be used with great circumspection even in the construction of international law and treaties. This is because the United States – as an independent sovereign – is not bound by the interpretations or legal rules adopted by other countries, even if these may in some instances prove to be persuasive. Indeed, the right to interpret international law obligations is a fundamental attribute of sovereignty and many of the disagreements between the United States and its allies over the past 8 years can be attributed to the simple fact that it has adopted different views on a number of important questions involving the use of force and the conduct of hostilities. In addition, when United States courts look to foreign law for guidance, let alone a rule of decision, they may inappropriately disregard doctrines such as *Stare Decisis*, a critical limitation on the exercise of judicial power.

Thank you for this opportunity to share my thoughts with the Committee.

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05/29/2009 1:52PM (GMT-04:0

Dear Hon. Patrick Leahy:

The resignation of Justice Souter from our nation's highest court affords an historic opportunity to appoint a nominee who combines a range of unrivaled traits. Judge Sonia Sotomayor is such a nominee.

Judge Sotomayor's personal and professional experiences make her uniquely sensitive to the concerns of a wide range of Americans. She was raised by a widowed mother in a Bronx housing project and worked hard to graduate summa cum laude from Princeton and to become an editor of the Yale Law Journal. For the first four years of her career, Judge Sotomayor prosecuted criminal defendants under Manhattan's legendary District Attorney Robert Morgenthau. She later spent eight years representing businesses at the international firm of Pavia & Harcourt.

Judge Sotomayor's legal career has included not only criminal prosecution and commercial litigation, but also academia and appointment to the federal bench at the age of thirty eight. For the past ten years, her intellect, integrity, and consensus-building have made her a highly respected jurist on the Second Circuit. This followed a distinguished career as a federal trial judge, during which Judge Sotomayor's pragmatism and resolve brought the national baseball strike to an end that satisfied all parties. She taught for over nine years at the New York University School of Law and at Columbia Law School, and has been a mentor to hundreds of attorneys and students as a member of the Puerto Rican and Hispanic Bar Associations. This wealth of experience has impressed upon her both the law's potential, as well as its limits.

There is no other candidate who possesses such consummate legal skills combined with a wide-ranging personal and professional background. For these reasons, Judge Sotomayor is the best choice for our country's next Supreme Court Justice.

Sincerely,

Enclda Roman, Esq.

cc: Members of the Senate Judiciary Committee
Hon. Patrick J. Leahy, Chairman
Hon. Jeff Sessions, Ranking Member
Hon. Herb Kohl
Hon. Arlen Spector
Hon. Dianne Feinstein
Hon. Orrin G. Hatch
Hon. Russell D. Feingold
Hon. Charles E. Grassley
Hon. Charles E. Schumer

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HISPANIC NATIONAL BAR ASSOCIATION

The National Voice of the Hispanic Legal Community

WRITTEN STATEMENT OF THE HISPANIC NATIONAL BAR ASSOCIATION IN SUPPORT OF THE CONFIRMATION OF THE HONORABLE SONIA SOTOMAYOR AS ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

SUBMITTED ON JULY 15, 2009 BY
RAMONA E. ROMERO, NATIONAL PRESIDENT

HISPANIC NATIONAL BAR ASSOCIATION

The National Voice of the Hispanic Legal Community

WRITTEN STATEMENT OF THE HISPANIC NATIONAL BAR ASSOCIATION IN SUPPORT OF THE CONFIRMATION OF THE HONORABLE SONIA SOTOMAYOR AS ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

SUBMITTED ON JULY 15, 2009 BY
RAMONA E. ROMERO, NATIONAL PRESIDENT

I. BACKGROUND AND INTRODUCTION

My name is Ramona E. Romero and I am the National President of the Hispanic National Bar Association ("the HNBA"). We are grateful to Chairman Leahy, Ranking Member Sessions and the rest of the Senate Judiciary Committee (the "Committee") for affording the HNBA the honor of testifying in support of the confirmation of Judge Sonia Sotomayor as Associate Justice of the Supreme Court of the United States.

While the HNBA is proud that Judge Sotomayor is a Latina, we support her confirmation because she is unquestionably well-qualified under the objective and subjective standards that have traditionally been applied to Supreme Court nominees. We base our endorsement on our due diligence evaluation of her credentials, judicial record, and reputation. Judge Sotomayor offers an unquestionable integrity, temperament, commitment to equal justice and record of service to the American public and the Hispanic community. Moreover, Judge Sotomayor has extraordinary academic credentials, a varied professional background and more judicial experience than any of the current members of the Supreme Court at the time of confirmation. In addition, she brings a practical understanding of how people and businesses interact with the legal system derived from her years as a prosecutor and private practitioner.

The HNBA is a nonprofit, national voluntary bar association that represents the interests of all attorneys, judges, law professors, legal assistants, and law students of Hispanic descent in the United States and Puerto Rico. The HNBA has Regional Presidents in every region of the country and 37 affiliated bar associations in 22 states. While Latinos in the legal profession come from diverse personal backgrounds and political persuasions, the HNBA is strictly non-partisan and does not represent a particular ideology. It was founded in 1972 to promote equal justice for all Americans by advancing the participation of Hispanics in the legal profession. The HNBA also serves as the voice of the broader Hispanic community on issues that significantly impact the interactions of Latinos and the legal system.

The HNBA has been looking forward to this moment for decades. For a variety of reasons, including our interest in preserving public trust in the Supreme Court, the HNBA has long advocated for the appointment of a Justice of Hispanic decent. Today, I am accompanied by nine former HNBA National Presidents – Mari Carmen Aponte, Lillian Apodaca, Lorenzo Arredondo, Dolores Atencio, Jimmie Gurule, Mary Hernandez, Carlos

Ortiz, Jimmie Reyna and Robert Ruiz. They and all other living HNBA past presidents unanimously support Judge Sotomayor's confirmation.[1] All former HNBA National Presidents have dedicated much of their lives and volunteered countless hours to fostering a legal profession that affords equal opportunity to Hispanics and all Americans. All have worked to educate the public on the importance of a diverse judiciary and on the practical, intellectual, and symbolic significance of a Hispanic presence on the Supreme Court. Accordingly, I take this opportunity to publicly acknowledge their work and to thank them on behalf of the American people. Other HNBA representatives here today include Román Hernández, the HNBA's President-Elect, Professor Jenny Rivera, and María González Calvet, who is acting as the HNBA's counsel in connection with this hearing.[2]

II. HNBA'S PERSPECTIVE ON THE JUDICIARY AND APPROACH TO JUDGE SOTOMAYOR'S NOMINATION

As the national voice of the Hispanic legal community, the HNBA has sought to promote a fair, independent and ***diverse*** judiciary. The benefits of diversity in all settings are broadly recognized in our society. For example, as Justice O'Connor has noted "effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."[3] All Americans benefit from judicial deliberations that include diverse perspectives because they increase the likelihood of better decisions and a stronger jurisprudence more likely to deliver on respect for the rule of law and on the promise emblazoned on the façade of the Supreme Court building—"equal justice under law."

For decades, the HNBA has led the advocacy in support of Hispanic representation on the federal bench, including the Supreme Court. It often conducts peer reviews of judicial candidates and, when appropriate, issues endorsements. While its focus is on Hispanics in the judiciary, the HNBA has evaluated and/or endorsed candidates of all races and political persuasions. For example, the HNBA testified before this Committee in support of the nominations of Associate Justices Kennedy, Souter, Ginsburg and Breyer. Similarly, the HNBA publicly endorsed Miguel Estrada when he was nominated to the D.C. Circuit on the basis of his qualifications and prepared an extensive written evaluation of Chief Justice Roberts that praised his integrity and character, professional experience, scholarship, communication skills, and judicial temperament.

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[1] The supporting statement signed by all 27 living former HNBA National Presidents, along with the cover letter forwarding it addressed to the Senate Judiciary Committee, are attached as Exhibit A.

[2] We thank Ms. Calvet and her law firm, Morgan Lewis & Bockius LLP, for their long-term support of the HNBA's efforts related to the Supreme Court of the United States.

[3] *Gutter vs. Bollinger*, 539 U.S. 306, 332 (2003).

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WRITTEN STATEMENT OF THE HISPANIC NATIONAL BAR ASSOCIATION IN SUPPORT OF THE CONFIRMATION OF THE HONORABLE SONIA SOTOMAYOR AS ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES SUBMITTED ON JULY 15, 2009 BY RAMONA E. ROMERO, NATIONAL PRESIDENT

In November 2008, shortly after the Presidential election, the HNBA wrote to President Obama to encourage the nomination of Latinos to the federal judiciary and to consider the historic nomination of a Hispanic to the Supreme Court. The HNBA also constituted its Special Committee on the Supreme Court of the United States ("Supreme Court Committee") to focus once again on identifying and evaluating potential Hispanic candidates for the Court. The Committee and the HNBA's current national leadership worked to educate the public and the Administration on the need for and importance of Hispanic representation on the Supreme Court.

On May 13, 2009, the HNBA released a bi-partisan "Long List" of 82 Latinos on the federal bench and on state courts of last resort compiled by the Supreme Court Committee. The HNBA did so in order to highlight for the Administration and for all Americans that there exists an impressive pool of Hispanic legal talent that President Obama could consider when selecting a replacement for Justice Souter. Judge Sotomayor was, of course, on that list.

The HNBA, like most Americans, reveled with pride and enthusiasm on May 26, 2009, as President Obama announced that he had selected Judge Sotomayor as his first Supreme Court nominee. The HNBA was already familiar with Judge Sotomayor's impressive background and jurisprudence. She was on a "Short List" of eight potential Supreme Court nominees that the HNBA submitted to President Bush in 2005 after conducting substantial due diligence on their backgrounds and careers. We also reviewed her credentials and endorsed her when she was nominated for the U.S. District Court for the Southern District of New York and for the Court of Appeals for the Second Circuit. Finally, she has been a distinguished member of the Hispanic legal community, and our organization honored her as its Judge of the Year in 2004 and also as its Latina of the Year (Judiciary) in 2005.

Notwithstanding our familiarity with her record and our prior evaluations and endorsements, the Supreme Court Committee once again reviewed Judge Sotomayor's candidacy after her historic nomination.[4] Our most recent analysis of her judicial record relied on appraisal criteria approved by the HNBA Board of Governors in 2001. Among the factors considered are exceptional professional competence, intellect, character, reputation for integrity, temperament, commitment to equal justice and record of service to the American public and the Hispanic community. In addition, the Committee

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[4] We thank the members of the HNBA's Supreme Court Committee for their extraordinary contribution to this effort. The HNBA Supreme Court Committee is co-chaired by Carlos Ortiz, General Counsel of Goya Foods, Inc. and HNBA National President 1992-1993 and Robert Raben, founder and President of The Raben Group. Its members are Michael A. Olivas, Houston, TX, HNBA Law Professor Sect Chair Emeritus, 1987-2009; Gilbert F. Casellas, Round Rock, TX, HNBA Past President, 1984-1985; Mark S. Gallegos, Miami, FL, HNBA Past President, 1988-1989; Dolores S. Atencio, Denver, CO, HNBA Past President, 1991-1992; Mary T. Hernandez, San Jose, CA, HNBA Past President, 1994-1995; Gregory A. Vega, San Diego, CA, HNBA Past President, 1997-1998; Lillian R. Apodaca, Albuquerque, NM, HNBA Past President, 1998-1999.

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commissioned a group of law professors to review and analyze approximately one hundred of Judge Sotomayor's key cases with particular emphasis on areas of law and issues of concern to Latinos in the United States. Finally, the Committee reviewed many of Judge Sotomayor's speeches and writings.

Based on the Supreme Court Committee's review of her record, the HNBA is confident that Judge Sotomayor is extraordinarily well-qualified to serve as a Justice of the Supreme Court. We respectfully urge the Judiciary Committee to promptly recommend her confirmation to the full Senate. We also respectfully urge the Senate to recognize and honor Judge Sotomayor's extraordinary credentials, service to the American people, and remarkable personal history and vote in favor of confirmation.

III. SUPPORT FOR THE CONFIRMATION OF JUDGE SOTOMAYOR

A. Personal and Educational Background

The Honorable Sonia Sotomayor embodies the attributes the HNBA looks for in a nominee to the Supreme Court: extraordinary intellect, commendable credentials, principled jurisprudence, integrity, an unrivaled work ethic, a clear commitment to the fair and impartial administration of justice, and a demonstrated dedication to serving the American people and the Hispanic community. Given her personal history, her achievements are both a tribute to her and to the best our great country has to offer.

Judge Sotomayor is a 55 year old American of Puerto Rican descent and raised in the humble environment of a low income public housing project in the Bronx, New York. Judge Sotomayor's father was a factory worker with a third grade education. He died when she was only nine years old. Her mother worked six days a week as a telephone operator and as a licensed practical nurse in order to provide for Judge Sotomayor and her brother, now a doctor. Despite these obstacles, Judge Sotomayor excelled at an early age, beginning her lifelong journey from the South Bronx to the halls of justice in New York and Washington D.C. This compelling story is an extraordinary example of what is possible in our great country—The Land of Opportunity—with hard work, perseverance and a belief in the promise of America. Hers is a story that instills a sense of pride and patriotism in each of us.

Judge Sotomayor continued to demonstrate excellence at every stage of her life and career. She graduated as the valedictorian of Cardinal Spellman High School in the Bronx. After earning a scholarship from Princeton University—one of the most prestigious schools in the country--she went on to graduate with the highest possible academic honors, receiving her Bachelor of Arts *summa cum laude* and Phi Beta Kappa. She was a co-winner of Princeton's top academic prize for scholastic excellence and service to the University. She attended Yale Law School—another premiere institution—and again excelled, serving as an editor of the Yale Law Journal and as a Managing Editor of the Yale Law Studies in World Public Order.

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B. Professional Experience (Non-Judicial)

Over her thirty-year legal career, Judge Sotomayor has acquired professional experience that is broad, deep and well-rounded. After she graduated from Yale Law School in 1979, Judge Sotomayor became an Assistant District Attorney in the Manhattan District Attorney's Office under District Attorney Robert M. Morgenthau. During her five years there, A.D.A. Sotomayor prosecuted significant criminal cases including murders, robberies, child abuse, police misconduct and fraud cases. According to Mr. Morgenthau,

> ...she was a tough and effective prosecutor....Within a short time she had come to the attention of trial division executives as someone who was a step ahead of her colleagues, one of the brightest, an immediate standout who was marked for rapid advancement. [5]

In 1984, Judge Sotomayor left the District Attorney's office and joined the law firm of Pavia & Harcourt as an associate. She was admitted into partnership four years later. Her practice focused primarily on general civil litigation, with emphasis on protecting her client's intellectual property rights. Former colleagues at the firm have described her as "very skilled," a quick learner, exceptionally hard-working, and immediately impressive.[6]

After becoming an appellate jurist, Judge Sotomayor co-taught a trial and appellate advocacy course at New York University Law School from 1998 through 2007. She also taught an appellate advocacy course at Colombia Law School from 1999 through the recent past.

C. Judicial Experience

Judge Sotomayor has spent seventeen years on the federal bench, six as trial judge and eleven as an appellate judge. She will bring to the Supreme Court more federal judicial experience than any other Justice in the last 100 years. Moreover, her experience as a trial judge will fill a void left by the retirement of Justice Souter who was the only member of the current Court with that prior experience.

In 1991, President George H.W. Bush nominated Judge Sotomayor to serve as a federal judge on the U.S. District Court for the Southern District of New York on the

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[5] Morgenthau, R., *Those Labeling Sonia Sotomayor a Radical Don't Know Her at All*, New York Daily News, May 28, 2009.

[6] See, e.g., Sloan, Karen, *Sotomayor's Civil Practice was with a Small, but Specialized, Firm*, The National Law Journal, May 28, 2009; Richburg, Keith, *N.Y. Federal Judge Likely on the Short List*, The Washington Post, May 7, 2009.

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recommendation of New York Senior Senator Daniel Patrick Moynihan (D-NY) and with the support of Senator Alfonse D'Amato (R-NY). After having evaluated and endorsed her for that federal district court judgeship, the HNBA worked with the White House and then Senate Judiciary Committee Chairman, Joseph Biden (D-DE), to secure her confirmation. When President Bush appointed Judge Sotomayor, she was the first Hispanic federal judge in New York and the first Hispanic female federal judge in the country.

In 1997, President William J. Clinton nominated Judge Sotomayor to serve on the United States Court of Appeals for the Second Circuit. The HNBA evaluated Judge Sotomayor's candidacy and jurisprudence during her six years of service as a federal district court judge at that time and endorsed her. Subsequently, the HNBA again worked with the White House and then Senate Judiciary Committee Chairman Orrin Hatch (R-UT) to secure the confirmation of Judge Sotomayor and her appointment by President Clinton in 1998.

D. Judicial Restraint and Temperament

Based on our analysis, Judge Sotomayor's jurisprudence demonstrates close attention to the facts of each case and a healthy respect for legal precedent. Her work is characterized by a thoughtful and measured approach to complicated legal questions, a diligent application of the law, reasoned judgment, and an unwavering commitment to upholding the Constitution and Supreme Court precedent. Rather than paint with a broad brush, her decisions reflect the importance of fidelity to the law, exercise of judicial restraint, and a narrowly restricted opinion that speaks only to the question presented.

It is with this measured approach that Judge Sotomayor has consistently rendered sound decisions during her impressive tenure. Her opinions cannot be readily associated with a particular political persuasion or judicial philosophy. Instead, her judicial record displays impartiality, a keen awareness of the limits of judicial review, a clear sense of the impact that her decisions have on the litigants before her and on the lower courts that must apply her precedential rulings, and a dedication to reaching the fair, just, prudent and law driven result. In short, she is the antithesis of an activist judge and she does not substitute her own perspective for what the law dictates.

Outside the courtroom, Judge Sotomayor has been a contributing member of the legal and scholarly communities, speaking to students and professionals, writing articles, and serving as a role model to young people. Critics of Judge Sotomayor have focused on a few out-of-court statements to suggest that her decisions are based on factors other than the interpretation of the legal questions posed to her. We respectfully suggest that the proper measure of Judge Sotomayor's fitness is the portfolio of her seventeen years as a jurist, which should be the focus of this Committee's analysis. Based on its review of Judge Sotomayor's jurisprudence, we believe that this Committee will conclude, as the HNBA has concluded, that her extensive judicial record reflects judicial restraint. Diversity of background, and consequently of experience, does not detract from a jurist's

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ability to adhere to the rule of law and should not be used as a litmus test to determine whether a jurist is able to remain objective and impartial. Judge Sotomayor embodies the truism that diversity coexists with fairness and sound judgment.

E. Service to the American People

For most of her career, Judge Sotomayor has foregone the private sector positions available to individuals with her extraordinary credentials in order to serve the American people. She has spent 22 years of her 30 year career in the public sector as a judge or prosecutor.

Her engagement with the community also spans her career and is evident from her responses to this Committee's questionnaire, where she details her volunteer service to a broad range of organizations that serve the public interest. For example, before becoming a judge she volunteered for the State of New York Mortgage Agency, the Puerto Rican Legal Defense and Education Fund (now known as Latino Justice PRLDEF), the New York State Advisory Panel on Inter-Group Relations, and the New York City Campaign Finance Board. Since becoming a judge, she has routinely made herself available as a speaker to law schools, bar associations and law student groups, served on the selection committees for various scholarships, and joined the Board of Trustees of her *alma mater*, Princeton University.

Of great significance to the HNBA is the fact that Judge Sotomayor has consistently demonstrated meaningful involvement in the Hispanic community. Judge Sotomayor has been a member of the HNBA for many years, has judged our moot court competition, spoken at some of our conventions, and attended or addressed gatherings of our local affiliates. Because of both her reputation as a remarkable jurist and her engagement, Judge Sotomayor has an outstanding reputation within the Hispanic legal profession.

IV. IMPORTANCE OF A HISPANIC PRESENCE ON THE SUPREME COURT

The HNBA's advocacy for a more diverse judiciary starts from the premise that diversity makes for a stronger Nation. As Justice Sandra Day O'Connor once noted, "society as a whole benefits immeasurably from a climate in which all persons, regardless of race or gender, may have the opportunity to earn respect, responsibility, advancement and remuneration based on ability." The American people benefit from having a judiciary that reflects our country's diversity and that depicts the varied perspectives and backgrounds of its population.

Moreover, adherence to and respect for the rule of law depends on public understanding of our system of government and on the People's trust in our judges to rule independently and fairly. There are over 45 million Hispanics in the United States, and we are the largest, fastest growing, and youngest segment of our Nation's population. Because the HNBA appreciates the importance of cultivating greater understanding and trust in our legal system among Hispanics, it has invested its own resources on

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educational programs for our community, including *La Promesa en el Derecho * The Promise in the Law*. This booklet is written in 9th grade English and Spanish to explain ten basic aspects of the American system of government.

If we are to nurture a sense of pride and connection to the judicial system, there is no substitute for a legal profession and a judiciary that reflect the rich mosaic of the American people. However, Hispanics continue to be severely under-represented among lawyers and judges.[7] The appointment of the first Hispanic to the Supreme Court of the United States is an important symbolic advancement for our community, much like the appointment of Justice Thurgood Marshall was for African Americans, and the appointment of Sandra Day O'Connor was for women. The confirmation of Judge Sotomayor would foster a greater connection between Latinos and the judicial system and would help imbue Latinos with a sense of ownership in our courts.

V. CONCLUSION

The HNBA endorses Judge Sotomayor not only because she exceeds the required credentials to be a Supreme Court Justice, but also because she is a beacon of hope for all Americans. Her personal story resonates with all of us as proof positive that in our country even those from the most modest beginnings can achieve the highest pinnacles of our Nation's leadership.

We are grateful to President Obama for selecting a nominee in Judge Sotomayor who has demonstrated intellectual rigor and fidelity to the law. The HNBA also thanks the Senate Judiciary Committee for giving it the opportunity to speak on behalf of the Hispanic legal community in support of Judge Sonia Sotomayor on this historic occasion. Finally, our thanks to all Americans for their interest in this important process and to the Committee for according Judge Sotomayor the respect she has earned. The HNBA urges the Senate to confirm Judge Sotomayor so that all Americans can celebrate her confirmation as another milestone in our journey to becoming "one Nation, indivisible."

Ramona Romero

RAMONA E. ROMERO, NATIONAL PRESIDENT
HISPANIC NATIONAL BAR ASSOCIATION

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[7] According to the Bureau of Labor Statistics, as of 2007, Hispanics comprised only 4.3% of all lawyers and 6% of all judges and other judicial workers.

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HISPANIC NATIONAL BAR ASSOCIATION

The National Voice of the Hispanic Legal Community

JOINT STATEMENT BY THE PAST PRESIDENTS OF THE HISPANIC NATIONAL BAR ASSOCIATION

EXHIBIT A
TO
WRITTEN STATEMENT OF THE HISPANIC NATIONAL BAR ASSOCIATION IN SUPPORT OF THE CONFIRMATION OF THE HONORABLE SONIA SOTOMAYOR AS ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

HISPANIC NATIONAL BAR ASSOCIATION

The National Voice of the Hispanic Legal Community

RAMONA E. ROMERO
NATIONAL PRESIDENT

July 10, 2009

VIA FACSIMILE AND FIRST CLASS MAIL

Senator Patrick Leahy
Chairman
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510-6275

Senator Jeff Sessions
Ranking Member
U.S. Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Chairman Leahy and Ranking Member Sessions:

On behalf of the Hispanic National Bar Association ("HNBA"), I am writing to inform you of a development relating to the nomination of Judge Sonia Sotomayor to serve as an Associate Justice of the Supreme Court of the United States. All 27 living past presidents of the HNBA, including Mario Obledo, its founding President, have signed a statement ("Statement") in support of Judge Sotomayor's fair and expeditious confirmation. We are attaching a copy of their Statement for the Committee's information and for the congressional record.

These HNBA leaders, all of whom have worked to further an independent, impartial and diverse judiciary though our non-partisan, not-for-profit Association, are diverse themselves. They include Democrats, Republicans and Independents, and come from around the country and from all Hispanic backgrounds.

We appreciate the Committee's consideration of this statement. Should you have any questions, please contact us at (202) 223-4777.

Very truly yours,

Ramona Romero

Ramona E. Romero

HNBA National President

1001 Connecticut Avenue, NW • Suite 507 • Washington, D.C. 20036 • 202-223-4777 phone • 202-223-2324 fax • www.hnba.com

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July 2009

HNBA PRESIDENTS' STATEMENT

We the undersigned past presidents of the Hispanic National Bar Association wholeheartedly support the nomination of Judge Sonia Sotomayor to serve as an Associate Justice on the United States Supreme Court. Judge Sotomayor has exceptional academic and professional credentials. She is a summa cum laude graduate of Princeton University and graduated from Yale Law School, where she served as an editor of the Yale Law Journal. Before her appointment to the federal bench, Judge Sotomayor was a prosecutor for five years in the Manhattan District Attorney's Office and then a commercial litigator in a private law firm. Judge Sotomayor has been a federal judge for 17 years, serving with distinction on both the U.S. District Court for the Southern District of New York and the Second Circuit Court of Appeals.

We have all long been troubled by the fact that no person of Hispanic heritage has ever served on our nation's highest court. During our terms as HNBA President, each and every one of us engaged in bipartisan efforts to diversify the federal bench and to build a pipeline of qualified Latino lawyers, jurists and legal scholars who would be prepared to serve on the U.S. Supreme Court with distinction. We have always been convinced that greater diversity on the Supreme Court would broaden and strengthen the perspective of its jurisprudence and enhance the administration of justice for all Americans. Words cannot adequately express the delight in our hearts that our time has finally arrived. We urge the U.S. Senate to confirm an exceptional jurist with extraordinary federal judicial and legal experience, Judge Sonia Sotomayor.

Printed Name: Hon. Mario G. Obledo, Founder
HNBA President Term: 1972-1977

Printed Name: John R. Castillo
HNBA President Term: 1980-1981

Printed Name: Hon. Lorenzo Arredondo
HNBA President Term: 1982-1983

Printed Name: Gilbert F. Casellas
HNBA President Term: 1984-1985

DECEASED
Printed Name: William Mendez, Jr.
HNBA President Term: 1986-1987

Printed Name: Mario T. Gallegos
HNBA President Term: 1988-1989

Printed Name: Robert J. Ruiz
HNBA President Term: 1990-1991

Printed Name: Carlos G. Ortiz
HNBA President Term: 1992-1993

DECEASED
Printed Name: Hon. Benjamin Aranda III
HNBA President Term: 1977-1980

Printed Name: Robert M. Maes
HNBA President Term: 1981-1982

Printed Name: Mari Carmen Aponte
HNBA President Term: 1983-1984

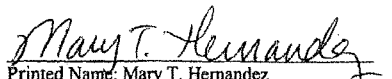
Printed Name: Robert G. Mendez, Sr.
HNBA President Term: 1985-1986

Printed Name: Michael N. Martinez
HNBA President Term: 1987-1988

Printed Name: Jimmy Gurule
HNBA President Term: 1989-1990

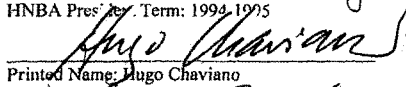
Printed Name: Dolores Atencio
HNBA President Term: 1991-1992

Printed Name: Wilfredo Caraballo
HNBA President Term: 1993-1994

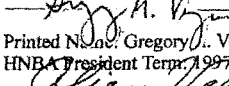


Printed Name: Mary T. Hernandez
HNBA President Term: 1994-1995

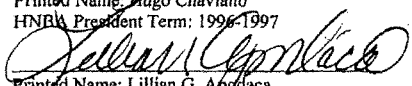
Printed Name: Jose Gaitan
HNBA President Term: 1995-1996



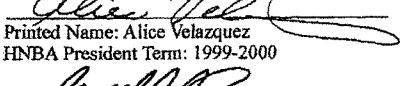
Printed Name: Hugo Chaviano
HNBA President Term: 1996-1997



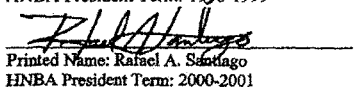
Printed Name: Gregory J. Vega
HNBA President Term: 1997-1998



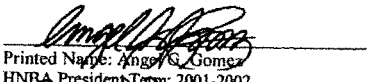
Printed Name: Lillian G. Apodaca
HNBA President Term: 1998-1999



Printed Name: Alice Velazquez
HNBA President Term: 1999-2000

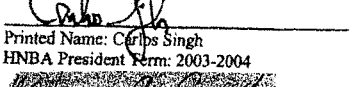


Printed Name: Rafael A. Santiago
HNBA President Term: 2000-2001

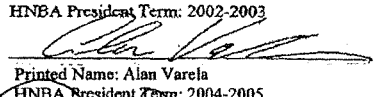


Printed Name: Angel G. Gomez
HNBA President Term: 2001-2002

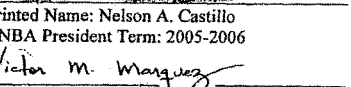
DECEASED
Printed Name: Duard M. Bradshaw
HNBA President Term: 2002-2003



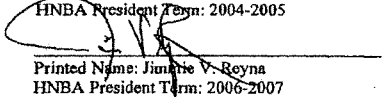
Printed Name: Carlos Singh
HNBA President Term: 2003-2004



Printed Name: Alan Varela
HNBA President Term: 2004-2005



Printed Name: Nelson A. Castillo
HNBA President Term: 2005-2006



Printed Name: Jimmie V. Reyna
HNBA President Term: 2006-2007

Printed Name: Victor Marquez
HNBA President Term: 2007-2008

United States Senate Judiciary Committee Hearing:

The Nomination of Sonia Sotomayor
to be an Associate Justice of the Supreme Court of the United States

July 15, 2009

Hart Senate Office Building
Room #216

Prepared Statement
of

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Mr. Chairman, Ranking Member Sessions, Members of the Committee: I thank you for the opportunity to testify at this momentous Hearing. I have been asked to comment on the use of contemporary foreign and international legal materials in the interpretation of the United States Constitution. In a recent speech, Judge Sotomayor seemed to embrace and defend this approach.[1] I believe that, in this, she may be misguided. I have written about this issue in the *Stanford Law Review*[2] and the *Harvard Journal of Law & Public Policy*,[3] and I will be drawing substantially on those articles in my remarks today. I also had the honor of testifying on this issue before the House Judiciary Subcommittee on the Constitution, and I commend the record of that Hearing to the Committee as well.[4]

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[1] *See* Sonia Sotomayor, Judge, United States Court of Appeals for the Second Circuit, How Federal Judges Look to International and Foreign Law Under Article VI of the U.S. Constitution, Speech Before the American Civil Liberties Union of Puerto Rico (Apr. 28, 2009), *available at* New York Times, Speech to the A.C.L.U. of Puerto Rico, http://video.nytimes.com/video/2009/06/10/us/politics/1194840839480/speech-to-the-a-c-l-u-of-puerto-rico.html (last visited Jul. 8, 2009) [hereinafter *Sotomayor Speech*]. Oddly, Judge Sotomayor seemed to say exactly the opposite in testimony on Tuesday. *See* M. Edward Whelan III, *Sotomayor's Confusion on Use of Foreign Law*, BENCH MEMOS ON NATIONAL REVIEW ONLINE, Jul. 14, 2009, http://bench.nationalreview.com/post/?q=NmU3NzQ3N2UzMjM2NGFjNDkzYWU5MGY1YzYxODBhNWY=WHELAN. I shall address my testimony to the position set forth in her April 28 speech and leave it to the Committee to reconcile her more recent statements.

[2] *See* Nicholas Quinn Rosenkranz, *Condorcet and the Constitution: A Response to* The Law of Other States, 59 STAN. L. REV. 1281 (2007).

[3] *See* Nicholas Quinn Rosenkranz, *An American Amendment*, 32 HARV. J. L. & PUB. POL'Y 475, 475-79 (2009).

[4] *See House Resolution on the Appropriate Role of Foreign Judgments in the Interpretation of the Constitution of the United States: Hearing on H.R. 97 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 30 (2005) (statement of Nicholas Quinn Rosenkranz, Associate Professor, Georgetown University Law Center).

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This issue has come to recent prominence because in two of the most high-profile and hot-button cases of the past decade, the Supreme Court relied on contemporary foreign law to help determine the meaning of the United States Constitution.[5] These sorts of foreign citations are quite controversial, and four current Supreme Court Justices have expressly objected to them. Justice Scalia[6] and Justice Thomas[7] have repeatedly explained why it is inappropriate to rely on foreign law when interpreting the U.S. Constitution. And, in hearings before this Committee, the two most recently confirmed Justices, Justice Alito[8] and Chief Justice Roberts,[9] also expressly repudiated such

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[5] *See* Roper v. Simmons, 543 U.S 551, 575-78 (2005); Lawrence v. Texas, 539 U.S. 558, 568-74 (2003).

[6] *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361, 370 n.1 (1989); Stephen Breyer & Antonin Scalia, Assoc. Justices, U.S. Supreme Court, Debate at American University: Constitutional Relevance of Foreign Court Decisions (Jan. 13, 2005) (Jan. 13, 2005) (transcript available at http://www.freerepublic.com/focus/f-news/1352357/posts).

[7] *See, e.g.*, Foster v. Florida, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring in denial of certiorari) ("While Congress, *as a legislature*, may wish to consider the actions of other nations on any issue it likes, this Court's Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans.").

[8] *See Confirmation Hearing on the Nomination of Samuel A. Alito to be an Associate Justice of the Supreme Court of the United States before the S. Comm. on the Judiciary*, 109th Cong. 471 (2006).

> I don't think that we should look to foreign law to interpret our own Constitution .... I think the framers would be stunned by the idea that the Bill of Rights is to be interpreted by taking a poll of the countries of the world .... The purpose of the Bill of Rights was to give Americans rights that were recognized practically nowhere else in the world at the time. The framers did not want Americans to have the rights of people in France or the rights of people in Russia or any of the other countries on the continent of Europe at the time .... They wanted them to have the rights of Americans. And I think we should interpret our Constitution—we should interpret our Constitution. And I don't think it's appropriate to look to foreign law. I think that it presents a host of practical problems that have been pointed out. You have to decide which countries you are going to survey. And then it's often difficult to understand exactly what you are to make of foreign court decisions. All countries don't set up their court systems the same way. Foreign courts may have greater authority than the courts of the United States. They may be given a policy-making role. And, therefore, it would be more appropriate for them to weigh in on policy issues. When our Constitution was being debated, there was a serious proposal to have members of the judiciary sit on a council of revision, where they would have a policy-making role before legislation was passed. And other countries can set up their judiciary in that way. So you'd have to understand the jurisdiction and the authority of the foreign courts. And then sometimes it's misleading to look to just one narrow provision of foreign law without considering the larger body of law in which it's located. If you focus too narrowly on that, you may distort the big picture. So for all those reasons, I just don't think that's a useful thing to do.

Id.

[9] *See Confirmation Hearing on the Nomination of John G. Roberts to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 201 (2005).

> If we're relying on a decision from a German judge about what our Constitution means, no president accountable to the people appointed that judge and no Senate accountable to the people confirmed that judge. And yet he's playing a role in shaping the law that binds the people in this country .... The other part of it that would concern me is that, relying on foreign precedent doesn't confine judges .... Foreign law, you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever. As somebody said in another context, looking at foreign law for support is like looking out over a crowd and picking out your friends. You can find them. They're there. And that actually expands the discretion of the judge. It allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent—because they're finding precedent in foreign law—

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citations. Indeed, Congress itself reacted quite strongly to these citations, holding several hearings on this topic[10]—and even going so far as to consider legislation disapproving such reliance on foreign law.[11] Dozens of Representatives and several Senators have endorsed such legislation.

Judge Sotomayor, however, has said that the position of these Justices is based on a "misunderstanding."[12] And likewise, according to Judge Sotomayor, those like the many Senators and Congressmen who would forbid this sort of reliance also labor under a "fundamental misunderstanding."[13] Most tellingly, in the same speech, Judge Sotomayor cited with approval the two most controversial instances in which the Supreme Court used foreign law to interpret the U.S. Constitution.[14]

I believe that contemporary foreign law generally has no place in the interpretation of the United States Constitution. Rather than reiterate the trenchant, pragmatic arguments of Professor McGinnis, I will explain why reliance on foreign law

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> and use that to determine the meaning of the Constitution. And I think that's a misuse of precedent, not a correct use of precedent.

Id.

[10] *See, e.g., House Resolution on the Appropriate Role of Foreign Judgments in the Interpretation of the Constitution of the United States: Hearing on H.R. Res 97 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. (2005); *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H.R. Res. 568 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. (2004).

[11] *See* H.R. Res. 97, 109th Cong. (2005); Constitution Restoration Act of 2004, S. 2323, 108th Cong.; H.R. Res. 568, 108th Cong. (2004); Constitution Restoration Act of 2004, S. 2082, 108th Cong.; Constitution Restoration Act of 2004, H.R. 3799, 108th Cong.

[12] *See Sotomayor Speech*, *supra* note 1 ("But this use [of foreign law] does have a great deal of criticism. The nature of the criticism comes from, as I explained, the misunderstanding of the American use of that concept of using foreign law. And that misunderstanding is unfortunately endorsed by some of our Supreme Court justices. Both Justice Scalia and Justice Thomas have written extensively criticizing the use of foreign and international law to [sic] in Supreme Court decisions.").

[13] *See id.* ("To suggest to anyone that you can outlaw the use of foreign or international law is a sentiment that's based on a fundamental misunderstanding.").

[14] *See id.*

> We have looked, in some Supreme Court decisions, to foreign law to help us decide our issues. So, for example, in Roper v. Simmons, Justice Kennedy noted that for almost a half century the Supreme Court has referenced the law of other countries into international authorities as instructive for its interpretation of the Eighth Amendment prohibition of cruel and unusual punishment. And in that case, the Supreme Court outlawed the death penalty of juveniles in the United States. Similarly, in a recent case, Lawrence v. Tribe, [sic] the Supreme Court overturned a Texas state law making it a crime for two people of the same sex to engage in certain intimate sexual acts. And the Justice referred to the repeal of such laws ... in many countries of the world. In both those cases, the courts were very, very careful to note that they weren't using that law to decide the American question. They were just using that law to help us understand what the concepts meant to other countries, and to help us understand whether our understanding of our own constitutional rights fell into the mainstream of human thinking. There may well be times where we disagree with the mainstream of international law. But there is much ambiguity in law, and I for one believe that if you look at the ideas of everyone and consider them and test them, test the force of their persuasiveness, look at them carefully, examine where they're coming from and why, that your own decision will be better informed.

Id.

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to interpret the U.S. Constitution is in tension with our constitutional text and structure, and with fundamental notions of democratic self-governance. I should emphasize that I take no position on the ultimate question of whether Judge Sotomayor should be confirmed, and I offer my comments with the greatest respect. But I am concerned that her recent speech on this issue may betray a misconception of the judicial role. For the balance of my testimony, I shall explain why.

In this room, and at the Supreme Court, and in law schools, and throughout the nation, we speak of our Constitution in almost metaphysical terms. In the United States, we revere our Constitution. And well we should; it is the single greatest charter of government in history. But it is worth remembering exactly what the Constitution is. *The Constitution is a text.* It is comprised of words on parchment. A copy fits comfortably in an inside pocket, but copies don't quite do it justice. The original is just down the street at the National Archives, and it is something to see. It is sealed in a titanium case filled with argon gas, and at night it is kept in an underground vault.[15] But during the day, anyone can go see it, and read it. The parchment is in shockingly good condition. And the words are still clearly visible.

The most important job of a Supreme Court justice is to discern what the words on that parchment mean. The Constitution includes words that some people wish it did not, like "the right of the people to keep and bear arms."[16] And it omits words that some people wish it included, like "privacy." But this is not the proper concern of a Justice. The job of the Court is not to *instill* the text with meaning. It is not to declare what the text *should* mean. It is not to excise some words. It is not to add others. It is to *discern*, using standard tools of legal interpretation, the meaning of the words on that piece of parchment.

Now language evolves, of course, but that evolution does not alter the interpretive project. A word in the Constitution may have taken on a new meaning in the centuries since the Constitution was ratified, but evolution in language does not effect amendment of law. This is why when the Court looks to dictionaries to interpret the Constitution, it looks not to contemporary dictionaries but to dictionaries from the Founding era.[17] And this is why, for example, no one contends that the constitutional phrase "domestic Violence"[18] should be understood in its modern sense, when that sense was entirely

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[15] *See* NICHOLAS A. BASBANES, A SPLENDOR OF LETTERS: THE PERMANENCE OF BOOKS IN AN IMPERMANENT WORLD 6 (2003).

[16] U.S. CONST. amend. II.

[17] *See* District of Columbia v. Heller, 128 S.Ct. 2783, 2828 (2008) (citing S. Johnson, Dictionary of the English Language (4th ed. 1773)); United States v. Lopez, 514 U.S. 549, 585-87 (1995) (Thomas, J., concurring) (citing S. Johnson, Dictionary of the English Language (4th ed. 1773); N. Bailey, An Universal Etymological English Dictionary (26th ed. 1789); T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796)); Morrison v. Olson, 487 U.S. 654, 719 (1988) (Scalia, J., dissenting) (citing S. Johnson, Dictionary of the English Language (6th ed. 1785)). *See also* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 113-14 (2001).

[18] U.S. CONST. art. IV § 4.

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unknown at the Framing.[19] The project of constitutional law is to discern what the text of the U.S. Constitution—those words on that parchment down the street—meant to the American people at the time of ratification.[20]

In many cases, the text is clear. For many questions, you don't need a lawyer, let alone a constitutional scholar. All you need to do is walk down the street and read the words. But sometimes the meaning of those words is not perfectly clear. Merely reading the parchment may not suffice. One might need to turn to other sources to help understand the meaning of the words. One might, for example, turn to a dictionary from the founding era. One might turn to the Federalist Papers, or to early Supreme Court cases, to see what early and authoritative interpreters thought that those words meant. One might even turn to British legal sources, like the Magna Carta, or Blackstone, or Coke, because those sources were perhaps in the minds of the ratifiers at the time.

But what the Supreme Court has done in two controversial cases is to rely on *contemporary* foreign law in determining the meaning of the United States Constitution. This is the practice that Judge Sotomayor seemed to endorse in her recent speech.[21] And it is this practice that is of great concern, because the relevance of these sources is questionable at best. When one is trying to figure out the meaning of the document down the street at the Archives, it is mysterious why one would need to study other legal documents, written in other languages, for other purposes, in other political circumstances, hundreds of years later and thousands of miles away. To put the point most simply, as a general matter, *it is simply unfathomable how the law of, say, France in 2009 could help one discern the public meaning of the United States Constitution in 1789.*

So far, all this must seem like common sense. But it may come as a surprise to the American people to learn that not everyone accepts these premises. Some judges, and many law professors, do not believe that the Court should try to discern the original public meaning of the words on the parchment down the street. They seem to believe,

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[19] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1-14, at 52-53 (3d ed. 2000); Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for its Own Interpretation?* 877 (U of St. Thomas Legal Studies Research Paper No. 08-36, 2009), *available at* http://ssrn.com/abstract=1301706.

[20] *See* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 621 (1999) ("In constitutional interpretation, the shift is from the original intentions or will of the lawmakers, to the objective original meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment."); Frank H. Easterbook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 359 (1992) ("Thus the question becomes the level of generality the ratifiers and other sophisticated political actors at the time would have imputed to the text."); Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1136 (1998) ("Originalism is the idea that the words of the Constitution must be understood as they were understood by the ratifying public at the time of enactment.") *See generally* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY ch. 4 (2004); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (Amy Gutmann ed., 1997); Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. Law and Legal Theory Research Papers, Series No. 07-24, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244.

[21] *See Sotomayor Speech*, *supra* note 1.

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instead, that the Court should *infuse* those words with meaning.[22] They reject the quest for original meaning and embrace the notion of an "evolving" Constitution. And the current predilection for using *contemporary* foreign law to interpret the United States Constitution necessarily implies an embrace of this "evolving Constitution" theory. These citations must entail a rejection of the quest for the *original* meaning of the Constitution, because, as a matter of logic, they cannot possibly shed light on that original meaning.

And so, to put the point most starkly, this sort of reliance on contemporary foreign law must be, in essence, *a mechanism of constitutional change*. Foreign law changes all the time, and it has changed continuously since the Founding. If modern foreign law is relevant to constitutional interpretation, it follows that a change in foreign law can alter the meaning of the United States Constitution.

And that is why this issue is so important. The notion of the Court "updating" the Constitution to reflect its own evolving view of good government is troubling enough. But the notion that this evolution may be brought about by changes in foreign law violates basic premises of democratic self-governance.[23] When American judges conceive of their job as ensuring, on an ongoing basis, that "our understanding of our own constitutional rights f[alls] into the mainstream of human thinking,"[24] then changes in that supposed "mainstream" can expand or contract those constitutional rights. When the Supreme Court declares that the Constitution evolves—and that foreign law may effect its evolution[25]—it is declaring nothing less than *the power of foreign governments to change the meaning of the United States Constitution.*

And even if the Court purports to seek a foreign "consensus,"[26] *a single foreign country* might make the difference at the margin.[27] Indeed, foreign countries might even

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[22] *See* STEVEN BREYER, ACTIVE LIBERTY 115-32 (2005); RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 12-15 (1996); RICHARD A. POSNER, HOW JUDGES THINK (2008); Address by William J. Brennan, Jr., at Hyde Park, New York, 8 Recorder, Nov. 8, 1989 ("I frankly concede that I approach my responsibility as a Justice, as a 20th century American not confined to [the] framers' vision in 1787. The ultimate question must be, I think, what do the words of the Constitution and Bill of Rights mean to us in our time.").

[23] *See* Frank H. Easterbrook, *Foreign Sources and the American Constitution*, 30 HARV. J.L. & PUB. POL'Y 223, 228 (2006) ("Foreign law post-dating the Constitution's adoption is relevant only to those who suppose that judges can change the Constitution or make new political decisions in its name, which I think just knocks out the basis of judicial review.").

[24] *See Sotomayor Speech*, *supra* note 1.

[25] If the Court cites foreign sources, presumably it is relying upon them at least in part. The Court has no business spending government money to print its thoughts in the United States Reports unless those thoughts are in service of an exercise of the judicial power. *See* Roper v. Simmons, 543 U.S 551, 628 (2005) (Scalia, J., dissenting) ("'Acknowledgment' of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court's judgment*—which is surely what it parades as today.").

[26] *See id.* at 577 (majority opinion) ("In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty."); *id.* at 604 (O'Connor, J., dissenting) (criticizing the Court's search for an "international consensus").

[27] *See, e.g., id.* at 577 ("The United Kingdom's experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment's own origins."). *But see id.* at

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attempt this deliberately.[28] The Court has already held that the Constitution—as interpreted by reference to foreign law—forbids the execution of murderers, no matter how heinous their crimes, if they committed their murders before turning eighteen.[29] But some foreign countries would have us go even further; France, for example, has declared that one of its priorities is the *abolition of capital punishment in the United States*.[30] Yet surely the American people would rebel at the thought of the French Parliament deciding whether to abolish the death penalty—not just in France, but also, thereby, in America.[31]

After all, foreign control over American law was a primary grievance of the Declaration of Independence. The Declaration, too, may be found at the National Archives, and its most resonant protest was that King George III had "subject[ed] us to a jurisdiction foreign to our constitution."[32] This is exactly what is at stake here: foreign government control over the meaning of our Constitution. Any such control, even at the margin, is inconsistent with our basic founding principles of democracy and self-governance.[33]

Indeed, the Constitution itself has something to say about constitutional change. "We the People *of the United States* . . . ordain[ed] and establish[ed] th[e] Constitution"[34] and included mechanisms by which *we* could change it if necessary. Article V sets forth a complex, carefully wrought mechanism—really four such mechanisms—for

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626-27 (Scalia, J., dissenting) ("The Court has . . . long rejected a purely originalist approach to our Eighth Amendment, and that is certainly not the approach the Court takes today. Instead, the Court undertakes the majestic task of determining (and thereby prescribing) *our* Nation's *current* standards of decency. It is beyond comprehension why we should look, for that purpose, to a country that has developed, in the centuries since the Revolutionary War . . . a legal, political, and social culture quite different from our own.").

[28] *See* Nicholas Quinn Rosenkranz, *Condorcet and the Constitution: A Response to* The Law of Other States, 59 STAN. L. REV. 1281, 1305 (2007) (explaining how the United States Supreme Court's reliance on foreign law could skew the policy incentives of foreign governments in a suboptimal way).

[29] *See Roper*, 543 U.S. at 568.

[30] *See* Ken I. Kersch, *Multilateralism Comes to the Courts*, PUB. INT., Winter 2004, at 3, 4-5.

[31] *See* Easterbrook, *supra* note 23, at 228 ("When other nations abolish the death penalty . . . they can do this by voting and can reverse the result by voting. How, then, can these deliberations and results possibly eliminate the role of the people of the United States in making decisions?").

[32] THE DECLARATION OF INDEPENDENCE para. 15 (U.S. 1776). The Declaration also protests:

> The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.
>
> He has refused his Assent to Laws, the most wholesome and necessary to the public good.
>
> He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation until his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

Id. para 2-4.

[33] *See* Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1911 (2005) ("Surely the Founders would have been surprised to learn that a United States statute—duly enacted by Congress and signed by the President—may, under some circumstances, be rendered unconstitutional at the discretion of, for example, the King of England.").

[34] U.S. CONST. pmbl. (emphasis added).

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constitutional change.[35] These mechanisms require the concurrence of many different collective bodies, each with a different—and exclusively American—geographic perspective.[36] There is simply no reason to believe that, in addition to the four express mechanisms of constitutional change in Article V, there is also a fifth mechanism, unmentioned in the text, by which foreign governments may change the meaning of the United States Constitution.

As I mentioned at the outset, in a recent speech, Judge Sotomayor seemed to endorse reliance on foreign law when interpreting the United States Constitution[37] (though her testimony seems to be to the contrary[38]). Again, I take no position on the ultimate question of whether Judge Sotomayor should be confirmed. But I do hope that the Committee will continue to explore her views on this important issue. Judge Sotomayor has affirmed that the U.S. Constitution has not been changed and cannot be changed other than by Article V amendment.[39] But, as I have explained, if contemporary foreign law were relevant to the interpretation of the United States Constitution, it would seem to follow that a change in foreign law could effect a change in the meaning of the United States Constitution. I hope the Committee will ask Judge Sotomayor whether foreign governments can, indeed, amend the United States Constitution in this way.

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[35] The amendment process has two phases, proposal and ratification, and each phase has two options. At the proposal phase, Congress may propose amendments "whenever two thirds of both Houses shall deem it necessary." U.S. CONST. art. V. Or alternately, "on the Application of the Legislatures of two thirds of the several States, [Congress] shall call a Convention for proposing Amendments." *Id.* Likewise, at the ratification stage, there are two options: an amendment may be "ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress." *Id.*

[36] *See id.*

[37] *See Sotomayor Speech*, *supra* note 1.

[38] *See* Whelan, *supra* note 1.

[39] *See Sen. Lindsey Graham Holds a Hearing on the Nomination of Judge Sonia Sotomayor to Be an Associate Justice of the U.S. Supreme Court*, WASHINGTON POST, July 14, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/07/14/AR2009071412782.html.

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'A Wise Latina Woman'
The context shows that Judge Sotomayor meant what she said.
by Jennifer Rubin
06/15/2009, Volume 014, Issue 37

Not since Rose Mary Woods made "18□ " famous has a number so absorbed the attention of the media and political establishment. But with President Barack Obama's nomination of Second Circuit judge Sonia Sotomayor to the Supreme Court to replace retiring Justice David Souter, Washington has become transfixed by "32"--the number of words in a startling passage from the Judge Mario G. Olmos Memorial Lecture that Sotomayor delivered at the University of California, Berkeley, School of Law in 2001 and published the following spring in the *Berkeley La Raza Law Journal.*

The sentence that set off a furious round of spin by supporters and of criticism by opponents of Sotomayor's nomination reads as follows: "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."

This sort of ethnic condescension is routinely bandied about among academics and those who style themselves "civil rights" advocates. But in general public parlance it is problematic in the extreme. As a political analyst confided privately, the sentence in question "is utterly absurd, and I say that as someone who believes that diversity is a good thing in Court appointments and just about everything else. .□□.□□. No one's gender or ethnicity bestows an edge in wisdom. What a fatuous concept."

The hapless White House press secretary Robert Gibbs at first refused to address Sotomayor's words. By the end of the week though he declared, "I think she'd say that her word choice in 2001 was poor." Sotomayor herself, according to Senator Dianne Feinstein, said that "if you read on and read the rest of my speech you wouldn't be concerned with it but it was a poor choice of words."

The following week the excuse of inadvertence unraveled. Sotomayor had used similar or identical words in speeches between 1994 and 2003, the most recent at Seton Hall, in which the same "wise Latina" formulation was used. And Sotomayor is a meticulous draftsman, as she explained in a separate 1994 speech on the importance of clear writing, in which she boasted that she repeatedly edits her work.

However, the president had already weighed in, pronouncing, "I'm sure she would have restated it. But if you look in the entire sweep of the [speech] that she wrote, what's clear is that she was simply saying that her life experiences will give her information about the struggles and hardships that people are going through that will make her a good judge."

But that is precisely not what the entire sweep of the speech conveys. Indeed, Sotomayor took nearly 4,000 words to say the opposite. The president's characterization of the speech is as false as Sotomayor's reassurances to Feinstein are misleading. The White House is no doubt banking

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on the media and public's unwillingness to seek out the *Berkeley La Raza Law Journal* and read Sotomayor's musings in their entirety. In contrast to Judge Richard Paez of the Ninth Circuit, a liberal Hispanic appellate judge who addressed the same Berkeley audience, Sotomayor propounded not warm and fuzzy feelings of ethnic pride but radical views of multiculturalism and of judging itself.

Sotomayor's speech is in many ways a distillation of the most extreme views of the liberal civil rights establishment. They have dispensed with Martin Luther King Jr.'s vision of a "colorblind" society, in which people "will not be judged by the color of their skin but by the content of their character." The notion of a shared American tradition is considered a dodge for maintaining white, male domination of society. Instead, they aim to secure the levers of power, to empower disadvantaged groups to pursue their distinct ideology, culture, and language. It is not enough to eliminate barriers to entry in business, universities, government, or the bench; numerical quotas are essential to securing each group's "fair share." And most critically, group identity and goals supplant individual identity and professional obligations. Each of these elements, the core of the most extreme variety of contemporary multiculturalism, is prominently featured in Sotomayor's speech and law review article.

Sotomayor begins with a homage to her ethnic background and personal experiences--and indeed pronounces the topic of her speech to be "my Latina identity, where it came from, and the influence I perceive it has on my presence on the bench." She goes on to describe in some depth her favorite ethnic foods and her memories of extended family celebrations. She never explains what "Latina" identity means much beyond "I became a Latina by the way I love and the way I live my life." How that might translate into a set of values, intellectual precepts, or methodologies for judging remains unexplained. The description of her ethnic identity is notable in its lack of intellectual content.

But she then gets to the heart of the matter: Whatever it means to be a Latina, the critical issue is that there aren't enough Latinas (or Latinos) on the bench. The bean-counting then begins, a long parade of statistics meant to illustrate her central point: "Those numbers [of Latino judges] are grossly below our proportion of the population." No consideration is given to whether Latinos have obtained the requisite educational or professional achievements or qualifications to qualify for federal judgeships; the key point is the percentage of the pie that they have secured. And the implication is clear: There is something very wrong, nefarious in fact, when a minority group's percentage in the population and its share of seats on the bench don't match up.

The reason for that fixation on numbers becomes apparent in the next section of her speech, which is devoted to debunking the views of a former colleague Judge Miriam Cedarbaum:

Now Judge Cedarbaum expresses concern with any -analysis of women and presumably again people of color on the bench, which begins and presumably ends with the conclusion that women or minorities are different from men generally. She sees danger in presuming that judging should be gender or anything else based. She rightly points out that the perception of the differences between men and women is what led to many paternalistic laws and to the denial to women of the right to vote because we were described then "as not capable of reasoning or thinking logically" but instead of "acting intuitively." I am quoting adjectives that were bandied around

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famously during the suffragettes' movement.

Cedarbaum's view--an affirmation of the innate intellectual equality of her fellow citizens--is what Sotomayor proceeds to dispute at great length. Sotomayor derides the idea that we should be wary of stereotyping individuals' intellectual abilities by their ethnic or racial background or gender. She argues the precise opposite, that intellectual equality is a myth and impartiality a canard:

While recognizing the potential effect of individual experiences on perception, Judge Cedarbaum nevertheless believes that judges must transcend their personal sympathies and prejudices and aspire to achieve a greater degree of fairness and integrity based on the reason of law. Although I agree with and attempt to work toward Judge Cedarbaum's aspiration, I wonder whether achieving that goal is possible in all or even in most cases. And I wonder whether by ignoring our differences as women or men of color we do a disservice both to the law and society. Whatever the reasons why we may have different perspectives, either as some theorists suggest because of our cultural experiences or as others postulate because we have basic differences in logic and reasoning, are in many respects a small part of a larger practical question we as women and minority judges in society in general must address. I accept the thesis of a law school classmate, Professor Stephen Carter of Yale Law School, in his affirmative action book that in any group of human beings there is a diversity of opinion because there is both a diversity of experiences and of thought. .□□.□□. Professor Judith Resnik says that there is not a single voice of feminism, not a feminist approach but many who are exploring the possible ways of being that are distinct from those structured in a world dominated by the power and words of men. Thus, feminist theories of judging are in the midst of creation and are not and perhaps will never aspire to be as solidified as the established legal doctrines of judging can sometimes appear to be.

That same point can be made with respect to people of color. No one person, judge or nominee will speak in a female or people of color voice. I need not remind you that Justice Clarence Thomas represents a part but not the whole of African-American thought on many subjects. Yet, because I accept the proposition that, as Judge Resnik describes it, "to judge is an exercise of power" and because as, another former law school classmate, Professor Martha Minnow of Harvard Law School, states "there is no objective stance but only a series of perspectives--no neutrality, no escape from choice in judging," I further accept that our experiences as women and people of color affect our decisions. The aspiration to impartiality is just that--it's an aspiration because it denies the fact that we are by our experiences making different choices than others. Not all women or people of color, in all or some circumstances or indeed in any particular case or circumstance but enough people of color in enough cases, will make a difference in the process of judging. The Minnesota Supreme Court has given an example of this. As reported by Judge Patricia Wald formerly of the D.C. Circuit Court, three women on the Minnesota Court with two men dissenting agreed to grant a protective order against a father's visitation rights when the father abused his child. The Judicature Journal has at least two excellent studies on how women on the courts of appeal and state supreme courts have tended to vote more often than their male counterpart to uphold women's claims in sex discrimination cases and criminal defendants' claims in search and seizure cases. As recognized by legal scholars, whatever the reason, not one woman or person of color in any one position but as a group we will have an

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effect on the development of the law and on judging.

Sotomayor plainly rejects the premise that judges from different backgrounds could or even should put their biases aside. The notion that there is a "Latino" brand of jurisprudence or way of judging seems inherent in her analysis. Minority judges *are* different, she contends, and will judge differently *because* they are Latino or African American or female. Such judges, she is arguing, are products of their ethnic and racial backgrounds and destined to express this on the bench.

In her view minority judges are practicing their own brand of law, which explains why she wants lots of those judges. It is, as she argues in invoking Resnik, about power and about asserting judges' distinct Latina (or female or African-American or whatever) visions.

She also denigrates the notion of a neutral, objective judiciary which treats all citizens alike and removes personal bias from the judicial branch. The goal here is not to remove racial or ethnic bias from judging, but to make sure the right bias is given voice--secured by increased numbers of minority judges. And her qualms about intellectual rigor and impartiality extend to virtually all that judges do ("I wonder whether achieving that goal is possible in *all or even in most cases*"). This is legal relativism, if not nihilism. No objective truth, no objective judging, only power politics.

And then she goes on to dispute the obvious rejoinder to her argument: "Judge Cedarbaum has pointed out to me that seminal decisions in race and sex discrimination cases have come from Supreme Courts composed exclusively of white males." Well, if *that* is the case then the assertion that we must have judges of a certain ethnic or racial background to achieve "good" results is undermined. Really, could it be that any white, liberal male judge might reach the same results as Sotomayor?

It is in this context that her 32 words (and several dozen more) are deployed--to defend the view that ethnicity and gender matter in judging:

Whether born from experience or inherent physiological or cultural differences, a possibility I abhor less or discount less than my colleague Judge Cedarbaum, our gender and national origins may and will make a difference in our judging. Justice [Sandra Day] O'Connor has often been cited as saying that a wise old man and wise old woman will reach the same conclusion in deciding cases. I am not so sure Justice O'Connor is the author of that line since Professor Resnik attributes that line to Supreme Court Justice Coyle. I am also not so sure that I agree with the statement. First, as Professor Martha Minnow has noted, there can never be a universal definition of wise. Second, I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life.

Her "wise Latina" declaration is therefore central to her argument that more Latinas are needed, that their brand of judging is distinct, and that they should wield their Latina wisdom to derive results which are superior to those of white males. It is hardly a throwaway line; it is the essence of her address.

She grudgingly acknowledges that yes, well, there were some noteworthy white jurists whose rulings dismantled legal discrimination. But that required "great moments of enlightenment" on their part, and hence does not diminish the need for the distinctive jurisprudence of nonwhite males:

However, to understand takes time and effort, something that not all people are willing to give. For others, their experiences limit their ability to understand the experiences of others. Others simply do not care. Hence, one must accept the proposition that a difference there will be by the presence of women and people of color on the bench. Personal experiences affect the facts that judges choose to see. My hope is that I will take the good from my experiences and extrapolate them further into areas with which I am unfamiliar. I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage.

I also hope that by raising the question today of what difference having more Latinos and Latinas on the bench will make will start your own evaluation. For people of color and women lawyers, what does and should being an ethnic minority mean in your lawyering? For men lawyers, what areas in your experiences and attitudes do you need to work on to make you capable of reaching those great moments of enlightenment which other men in different circumstances have been able to reach. For all of us, how do [we] change the facts that in every task force study of gender and race bias in the courts, women and people of color, lawyers and judges alike, report in significantly higher percentages than white men that their gender and race has shaped their careers, from hiring, retention to promotion and that a statistically significant number of women and minority lawyers and judges, both alike, have experienced bias in the courtroom?

She concedes that there is a "danger in relative morality" (perhaps she means subjective or bias-laden judging), but quickly returns to her theme: We need to boost minority numbers to change the law from white, male-dominated law into something better:

All of us in this room must continue individually and in voices united in organizations that have supported this conference, to think about these questions and to figure out how we go about creating the opportunity for there to be more women and people of color on the bench so we can finally have statistically significant numbers to measure the differences we will and are making.

Sotomayor's speech/law review article is a repudiation of the notion that the rule of law provides a single standard of justice, impartially applied by judges (of whatever background) who put aside bias and favoritism. She isn't advocating some new intellectual approach to interpreting the Constitution. She is, much in the way bilingual advocates defend distinct language traditions, defending a separatist school of judging. The law will be altered not by argument or persuasion, but by sheer force of numbers, by more judges who bring ethnic and gender and racial baggage to the bench.

The president's innocuous spin on Sotomayor's speech is in fact a description of what another Latino jurist offered in *contrast* to Sotomayor. While not styling his comments as a rebuttal to Sotomayor, Judge Richard Paez of the Ninth Circuit spoke in the same venue the following day and did in effect rebut Sotomayor's views. (His remarks, like hers, were published the following

year in the *Berkeley La Raza Law Journal*.)

Paez also declared that he would like more Latinos on the bench. Plainly this is a man who is proud of his heritage and would like more Latinos to rise to prominent positions. But his is the commonplace sort of ethnic pride that has permeated much American history. His purpose, as he explains, is *not* to insure some Latino brand of justice:

[T]here is something about our own personal life experience that makes each of us different. I used to tell jurors when they entered the courtroom and took their oaths as jurors, "You walk into the courtroom with a lifetime of experiences, and we don't ask you to suddenly forget all that experience, to ignore that experience." I asked them if they could judge fairly the case that they were about to hear. I explained, "As jurors, recognize that you might have some bias, or prejudice. Recognize that it exists, and determine whether you can control it so that you can judge the case fairly. Because if you cannot--if you cannot set aside those prejudices, biases and passions--then you should not sit on the case."

The same principle applies to judges. We take an oath of office. At the federal level, it is a very interesting oath. It says, in part, that you promise or swear to do justice to both the poor and the rich. The first time I heard this oath, I was startled by its significance. I have my oath hanging on the wall in my office to remind me of my obligations. And so, although I am a Latino judge and there is no question about that--I am viewed as a Latino judge--as I judge cases, I try to judge them fairly. I try to remain faithful to my oath.

He then goes on to speak of his professional experiences. Paez explains that the experience of providing legal services to poor clients gave him firsthand experience in dealing with the indigent. But then he hastens to add:

You don't shed that experience--you don't leave it behind. But, when called upon to decide a case, judges have a distinct and clear obligation to apply the law fairly and justly to the parties in the case. Judges have an obligation to read cases honestly and find facts fairly. I strive to do that at all times.

So it is Paez, not Sotomayor, who is the judge Obama describes: one whose "life experiences will give [him] information about the struggles and hardships that people are going through that will make [him] a good judge." Paez offers, in contrast to Sotomayor's celebration of ethnicity, an affirmation of the principle of equal justice. Though his experiences are distinct, his role on the bench is to judge fairly and impartially for all his fellow citizens. This is *not* Sotomayor's vision.

Sotomayor's 32 words were not an off-the-cuff indiscretion, but an accurate summary of 4,000 words of disdain for judicial impartiality. It is also remarkable in its apparent rejection of an assimilative society in which Americans of all backgrounds can receive an unbiased brand of justice that does not vary from court to court because of the race or ethnicity of the judge. It is a vision that subsumes individual identity and professional obligations to the ties that bind one to race and ethnicity.

In Sotomayor's 2001 speech, we have a candid and comprehensive description of her views on multiculturalism and on judging. We must as a matter of intellectual fairness assume that she was sincere. And we can therefore expect to see her put these views into practice should she be confirmed as a Supreme Court justice.

Unlike an appellate court judge who is bound by Supreme Court precedent and who frankly may be drafting opinions with an eye toward ascending to the High Court, a Supreme Court justice is relatively free from constraint. Her lifetime appointment gives her the mandate to write what she pleases, to endeavor to steer the Court and the body of constitutional law in whatever direction she thinks best, and to set a tone and standard of jurisprudence for the lower courts. One can expect that just as Justice Antonin Scalia has demonstrated the majesty of originalist interpretation (in *District of Columbia* v. *Heller*, for example) and extolled the correctness of text-based judging, so too can Sotomayor be expected to use her position if confirmed to implement and popularize her views.

We have never had a Supreme Court justice who subscribed to views like those described in Sotomayor's Berkeley speech and law review article. It will be up to the Senate to decide whether they are compatible with our constitutional tradition and the judicial role.

Jennifer Rubin, a lawyer and writer in Virginia, is a regular contributor to Commentary *magazine's blog, Contentions, and is the Pajamas Media D.C. editor.*

CARDINAL SPELLMAN HIGH SCHOOL 50 YEARS OF EXCELLENCE 1959-2009

June 26, 2009

The Hon. Patrick Leahy
433 Russell Senate Office Building
United States Senate
Washington, D.C. 20510

Dear Sir,

I am writing to you today with regards to the nomination of Judge Sonia Sotomayor's nomination to the Supreme Court of the United States. In reviewing her outstanding record and her long experience as a judge in the lower courts, I believe that she is thoroughly qualified to fill this position.

Despite some very difficult situations that she was challenged with at an early age, Judge Sotomayor did not use them as excuses to simply get by in life or to fail. I believe it is what gave her the strength and determination to succeed in achieving each goal that she set for herself.

As a Cardinal Spellman H.S. graduate myself, and having the honor of being one of her classmates, I can attest to the fact that her leadership qualities were demonstrated as a young adult. Her love and dedication to Spellman and its' student government was just a glimpse into the strong, intelligent, and very capable individual that stands before you awaiting confirmation to the Supreme Court.

It is not only with Spellman pride, but with pride as an American that I ask you to confirm Judge Sonia Sotomayor's nomination to the Supreme Court of the United States of America.

Respectfully,

Carmela Russo-Killeen

Carmela Russo-Killeen

One Cardinal Spellman Place, Bronx, New York 10466-5897 TEL 718.881.8000 FAX 718.515.6615 www.cardinalspellman.org

Legislature of the Virgin Islands

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NEREIDA "NELLIE" RIVERA-O'REILLY
Senator

COMMITTEES:
Financial Services, Infrastructure and Consumer Affairs
Education, Youth and Culture
Labor and Agriculture
Economic Development, Energy and Technology

June 12, 2009

The Honorable Harry Reid, Majority Leader
United States Senate
522 Hart Senate Office Building
Washington, DC 20510

The Honorable Patrick J. Leahy, Chairman
Committee on the Judiciary
United States Senate
433 Russell Senate Office Bldg
Washington, DC 20510

Dear Majority Leader Reid and Chairman Leahy:

As the only Latina Senator serving in the 28th Legislature of the US Virgin Islands, I write this letter in support of President Obama's nomination of Sonia Sotomayor to serve as an Associate Justice of the United States Supreme Court. Judge Sotomayor possesses an unparalleled depth and breadth of judicial knowledge and practice.

Judge Sotomayor's judicial experience and reputation make her an undeniable asset to the Supreme Court. She serves as a beacon of hope and is a testament to all children that hard work and perseverance can lead to success, despite perceived roadblocks. The combination of her awe-inspiring background and highly regarded professionalism has ignited a rallying cry to confirm Sotomayor's nomination, a cry which transcends race, gender, socioeconomic status, and nationality.

I am certain the decision to confirm the next Associate Justice of the United States Supreme Court will not come lightly, and will be based on the highly selective criteria by which all nominees are subjected. It is important to note, however, the historical significance of her ethnicity and gender. Judge Sotomayor will be the first Latina to serve as an Associate Justice of the United States Supreme Court, and the third woman ever, if her nomination is confirmed by the Senate. My hope for her confirmation rests in the hands of the Senate.

Respectfully,

Nereida Rivera-O'Reilly

cc: All Members of Judiciary Committee
Honorable Donna M. Christensen, USVI Delegate to Congress

Legislatura Municipal de San Juan
Ciudad Capital · San Juan Bautista
San Juan, Puerto Rico
Estado Libre Asociado de Puerto Rico

June 2, 2009

Hon. Patrick J. Leahy
Chairman
Judiciary Committee
United States Senate
433 Russell Senate Office Building
Washington DC 20510

Dear Mr. Leahy:

The San Juan Municipal Legislature, in its Ordinary Session held on May 29, 2009, approved by unanimous vote, a Resolution introduced by its President, the Hon. Elba A. Vallés Pérez, which title reads as follows:

Resolution No. 141 **Series: 2008-2009**

"OF THE MUNICIPAL LEGISLATURE OF SAN JUAN, IN REPRESENTATION OF ITS CITIZENS, TO RECOGNIZE AND TO CONGRATULATE THE HONORABLE SONIA SOTOMAYOR, APPEALS COURT JUDGE, WHO WAS CHOSEN BY PRESIDENT BARACK OBAMA TO FILL THE U.S. SUPREME COURT SEAT BEING VACATED BY LIBERAL JUSTICE DAVID SOUTER; AND FOR OTHER AIMS."

Enclosed you will find a copy.

Cordially,

Carmen M. Quiñones
Secretary of the San Juan Municipal Legislature

CMQ/mpb
Enclosure: 1

P O Box 9020272, San Juan, Puerto Rico 00902-0272 · Tels. 724-7171 Exts. 2400

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MUNICIPALITY OF THE CAPITAL CITY
SAN JUAN BAPTIST[1]

RESOLUTION NO. 141
SERIES 2008-2009
(Bill of Resolution No. 156, Series 2008-2009)

APPROVED:

MAY 29, 2009

RESOLUTION

OF THE MUNICIPAL LEGISLATURE OF SAN JUAN, IN REPRESENTATION OF ITS CITIZENS, TO RECOGNIZE AND TO CONGRATULATE THE HONORABLE SONIA SOTOMAYOR, APPEALS COURT JUDGE, WHO WAS CHOSEN BY PRESIDENT BARACK OBAMA TO FILL THE U.S. SUPREME COURT SEAT BEING VACATED BY LIBERAL JUSTICE DAVID SOUTER; AND FOR OTHER AIMS.

WHEREAS: Sonia Sotomayor, born June 25, 1954, is a federal judge on the U.S. Court of Appeals for the Second Circuit. On May 26, 2009, President Barack Obama nominated Judge Sotomayor for appointment to the U.S. Supreme Court to replace retiring Justice David Souter;

WHEREAS: Sotomayor is of Puerto Rican descent, and was born in The Bronx. Her father died when she was nine (9) years old, and she was raised by her mother;

WHEREAS: Sotomayor graduated with an A.B., *summa cum laude*, from Princeton in 1976, and received her J.D. from Yale Law School in 1979, where she was an editor at the Yale Law Journal. She worked as an Assistant District Attorney in New York for a time before entering private practice in 1984. Sotomayor was nominated to the U.S. District Court for the Southern District of New York by President George H. W. Bush in 1991 and confirmed in 1992;

[1] Commonwealth of Puerto Rico.

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WHEREAS: Sotomayor has ruled on several high profile cases. In 1995, she issued the preliminary injunction against Major League Baseball which ended the 1994 Baseball Strike. Sotomayor made a ruling allowing the *Wall Street Journal* to publish Vince Foster's suicide note. In 1997, she was nominated by Bill Clinton to the U.S. Court of Appeals for the Second Circuit. After more than a year, she was confirmed and joined the court in 1998. Sotomayor was an Adjunct Professor at New York University School of Law from 1998 to 2007 and has been a lecturer-in-law at Columbia Law School since 1999;

WHEREAS: Prior to her selection by Obama, Sotomayor was considered a strong potential Supreme Court candidate. In 2005, Senate Democrats suggested Sotomayor as a nominee to George W. Bush, who eventually selected Samuel A. Alito, Jr. If confirmed, she would be the court's first Hispanic Justice. She would be the third woman to serve on the court; the first two were now-retired Justice Sandra Day O'Connor and current Justice Ruth Bader Ginsburg;

WHEREAS: Each of us carries through life a unique set of experiences. Sotomayor's happen to be the experiences of a brilliant, high-powered Latina -- a *Nuyorican* who was raised in the projects of the Bronx, graduated *summa cum laude* from Princeton, edited the Yale Law Journal, worked as a Manhattan prosecutor and a corporate lawyer, and served for 17 years as a federal trial and appellate judge;

WHEREAS: Given that kind of sterling *resume* and given that she has, according to presidential adviser David Axelrod, more experience on the federal bench than any Supreme Court nominee in at least 100 years;

WHEREAS: Judge Sonia Sotomayor, is a proud and accomplished Latina;

WHEREAS: The members of the San Juan Municipal Legislature feel compelled to acknowledge and congratulate the Honorable Sonia Sotomayor, who was chosen by President Barack Obama to fill the U.S. Supreme Court seat being vacated by liberal Justice David Souter.

WHEREFORE: BE IT RESOLVED BY THE MUNICIPAL LEGISLATURE OF SAN JUAN, PUERTO RICO:

Section 1st.: The members of the San Juan Municipal Legislature feel compelled to acknowledge and congratulate the Honorable Sonia Sotomayor, who was chosen by President Barack Obama to fill the U.S. Supreme Court seat being vacated by liberal Justice David Souter.

Section 2nd.: The members of the San Juan Municipal Legislature respectfully recommends to the Senate Judiciary Committee the confirmation of the Honorable Sonia Sotomayor for a seat on the Supreme Court of the United States of America.

Section 3rd.: Copy of this Resolution will be prepared, in parchment form, and hastened its delivery to the Honorable Sonia Sotomayor, Supreme Court nominee; and a single copy its delivery to the Senate Majority Leader, the Honorable Harry Reid (Nev.); to the Minority Leader, the Honorable Mitch McConnell (Ky.); to the Judiciary Committee Chairman, the Honorable Patrick Leahy (Vt.); to the Ranking Member, The Honorable Jeff Sessions (Ala.); and to the rest of the members of the Judiciary Committee.

Section 4th.: This Resolution will take effect immediately upon its approval.

Elba A. Vallés Pérez
President

I, CARMEN M. QUIÑONES, SECRETARY OF THE MUNICIPAL LEGISLATURE OF SAN JUAN, PUERTO RICO:

CERTIFIFY: that the previous text is an original of the bill of Resolution Number 156, Series 2008-2009, approved by the Municipal Legislature of San Juan, in its Ordinary Session, dated the 29th day of May, 2009; with the affirmative votes of members of the Municipal Legislature; Mrs. Sara de la Vega Ramos, Linda A. Gregory Santiago, Isis Sánchez Longo, Migdalia Viera Torres; and Messrs. Roberto Acevedo Borrero, José A. Berlingeri Bonilla, Diego G. García Cruz, Angel L. González Esperón, Rafael R. Luzardo Mejías, Roberto D. Martínez Suárez, Manuel E. Mena Berdecía, Ramón Miranda Marzán, Víctor Parés Otero, Marco A. Rigau Jiménez, Angel Noel Rivera Rodríguez, Hiram J. Torres Montalvo; and the President, Mrs. Elba A. Vallés Pérez.

I ALSO CERTIFY, that all the members of the Municipal Legislature were adequately requested to attend this Session, in accordance with legal requirements.

IN WITNESS WHEREOF, and for the proper proceedings, I hereby issue this Certificate, and the Seal of the Municipality of San Juan, Puerto Rico is hereto affixed in the three pages of this Resolution the 1st day of June, 2009.

Carmen M. Quiñones
Secretary
Municipal Legislature of San Juan

AMERICAN
HUNTERS & SHOOTERS
ASSOCIATION

Senator Patrick Leahy
Chairman, Senate Judiciary Committee
United States Senate
Washington, DC

June 29, 2009

Dear Chairman Leahy:

In 1991, President George H.W. Bush appointed Judge Sotomayor to the US District Court for the Southern District of New York. Senator Al D'Amato (R-NY) led the fight for her initial Senate confirmation, which was approved by unanimous consent. Her later nomination to the US Appeals Court (Second Circuit) was made by President Bill Clinton and also moved along by then Senator Al D'Amato. She received strong bi-partisan support with a vote of 67 -29.

Some in the firearm community have leveled a number of charges against Judge Sotomayor that do not pass the truth test. In the recent case of *Maloney v. Cuomo*, a unanimous Second Circuit panel, which included Judge Sotomayor acknowledged that the landmark ruling in *District of Columbia v. Heller* confers an individual right of citizens to keep and bear arms.

The *Maloney* court also explained, as the *Heller* majority had, that earlier Supreme Court precedents had held that the Second Amendment "is a limitation only upon the power of congress and the national government and not upon that of the state." The panel noted that while *Heller* raises questions about those earlier Supreme Court decisions, the Second Circuit was obligated to follow direct precedent "leaving to the Supreme Court the prerogative of overruling its own decisions." While we are disappointed that the Supreme Court has not yet extended this right to the states, we note that Conservative Judge Frank Easterbrook of the 7th Circuit agreed with Sotomayor's ruling as being consistent with precedent. Judge Sotomayor has established herself as a model jurist in terms of respecting precedent. We suspect that her critics from the leadership of several well-known gun organizations are just as interested in supporting precedent as she is, now that the precedent to be protected is clearly enshrined within the *Heller* decision.

As the President of the American Hunters and Shooters Association, I am eager to see the Supreme Court take up the incorporation issue of the Second Amendment to the states. As a gun owner in Maryland, it is my fervent hope that the Supreme Court will extend the protections guaranteed by the Second Amendment, as defined in the *Heller* decision, to the

citizens of the United States of America who reside outside the District of Columbia, as it has with the First and Fourth Amendments.

Our own views on gun ownership notwithstanding, it is the role of the President, who was elected by a rather impressive majority, to nominate and the Senate's duty to advise and consent. The Senate would be wise to consent to this nomination.

Conservatives should applaud Judge Sotomayor as a model of judicial restraint on the Circuit Court, even if that restraint has frustrated gun rights outcomes in the immediate cases. As moderate progressives, we hope that the nominee views the settled law in *Heller* as ripe for an activist expansion by incorporation to the states in harmonizing the different Circuit Court decisions.

On behalf of the American Hunters and Shooters Association, we extend our strong support for the confirmation of Judge Sotomayor to the US Supreme Court. We fervently hope you and your fellow Judiciary Committee members will see fit to support this nomination.

Most respectfully submitted,

Ray Schoenke,

President

Statement of

The Honorable Charles E. Schumer

United States Senator
New York
July 13, 2009

Thank you, Mr. Chairman and Ranking Member Sessions.

And welcome to the many members of Judge Sotomayor's family, who I know are exceptionally proud to be here today in support of her historic nomination.

Our presence here today is about a nominee who is supremely well-qualified, with experience on the district court and appellate court benches that is unmatched in recent history. It is about a nominee who, in 17 years of judging, has authored opinion after opinion that is smart, thoughtful, and judicially modest.

In short, Judge Sotomayor has stellar credentials. There's no question about that. Judge Sotomayor has twice before been nominated to the bench and gone through confirmation hearings with bipartisan support. The first time, she was nominated by a Republican President.

But most important, Judge Sotomayor's record bespeaks judicial modesty—something that our friends on the right have been clamoring for—in a way that no recent nominee's has. It is the judicial record, more than speeches and statements, more than personal background, that most accurately measures how "modest" a judicial nominee will be.

There are several ways of measuring modesty in the judicial record. I think that Judge Sotomayor more than measures up to each of them.

First, as we will hear in the next few days, Judge Sotomayor puts rule of law above everything else. Given her extensive and even-handed record, I am not sure how any member of this panel can sit here today and seriously suggest that she comes to the bench with a personal agenda. Unlike Justice Alito, she does not come to the bench with a record number of dissents.

Instead, her record shows that she is in the mainstream:

- She has agreed with your Republican colleagues 95 percent of the time;

- She has ruled for the government in 83 percent of immigration cases;

- She has ruled for the government in 92 percent of criminal cases;

- She has denied race claims in 83 percent of cases;

- She has split evenly in a variety of employment cases.

Second – and this is an important point because of her unique experience in the district court – Judge Sotomayor delves thoroughly into the facts of each case. She trusts that an understanding of the facts will lead, ultimately, to justice.

I would ask my colleagues to do this: examine a sampling of her cases in a variety of areas. In case after case after case, Judge Sotomayor rolls up her sleeves, learns the facts, applies the law to the facts, and comes to a decision irrespective of her inclinations or her personal experience.

- In a case involving a New York police officer who made white supremicist remarks, she upheld his right to make them;
- In a case brought by plaintiffs who claimed they had been bumped from a plane because of race, she dismissed their case because the law required it;
- And she upheld the First Amendment right of a prisoner to wear religious beads under his uniform.

And, in hot-button cases such as ones involving professional sports, she carefully adheres to the facts before her. She upheld the NFL's ability to maintain certain player restrictions, and she also ruled in favor of baseball players to end the Major League Baseball strike.

I'd rather have a Supreme Court justice whose clear and obvious agenda is to examine each case than one whose covert goal is to change the way that courts decide cases.

Third, Judge Sotomayor has hewed carefully to the text of statutes, even when doing so results in rulings that go against so-called "sympathetic" litigants.

In dissenting from an award of damages to injured plaintiffs in a maritime accident, she wrote "we start with the assumption that it is for Congress, not the federal courts, to articulate the appropriate standards to be applied as a matter of federal law."

Just short of four years ago, then-Judge Roberts sat where Judge Sotomayor is sitting. He told us that his jurisprudence would be characterized by "modesty and humility." He illustrated this with a now well-known quote: "Judges are like umpires. Umpires don't make the rules. They apply them."

Chief Justice Roberts was, and is, a supremely intelligent man with impeccable credentials. But many can debate whether during his four years on the Supreme Court he actually has called pitches as they come -- or has tried to change the rules.

But any objective review of Judge Sotomayor's record on the Second Circuit leaves no doubt that she has simply called balls and strikes for 17 years, far more closely than Chief Justice Roberts has during his four years on the Supreme Court.

More important, if Judge Sotomayor continues to approach cases on the Supreme Court as she

has for the last 17 years, she will actually be modest. This is because she does not adhere to a philosophy that dictates results over the facts that are presented.

So, if the number one standard that conservatives use and apply is judicial "modesty and humility" – no activism on the Supreme Court – they should vote for Judge Sotomayor unanimously.

I look forward to the next few days of hearings, and to Judge Sotomayor's confirmation.

- SCOTUSblog - http://www.scotusblog.com/wp -

Judge Sotomayor and Race — Results from the Full Data Set

Posted By Tom Goldstein On May 29, 2009 @ 10:27 pm In Uncategorized | Comments Disabled

I've now completed the study of every one of Judge Sotomayor's race-related cases that I mention in the post below. I'll write more in the morning about particular cases, but here is what the data shows in sum:

Other than *Ricci*, Judge Sotomayor has decided 96 race-related cases while on the court of appeals.

Of the 96 cases, Judge Sotomayor and the panel rejected the claim of discrimination roughly 78 times and agreed with the claim of discrimination 10 times; the remaining 8 involved other kinds of claims or dispositions. Of the 10 cases favoring claims of discrimination, 9 were unanimous. (Many, by the way, were procedural victories rather than judgments that discrimination had occurred.) Of those 9, in 7, the unanimous panel included at least one Republican-appointed judge. In the one divided panel opinion, the dissent's point dealt only with the technical question of whether the criminal defendant in that case had forfeited his challenge to the jury selection in his case. So Judge Sotomayor rejected discrimination-related claims by a margin of roughly 8 to 1.

Of the roughly 75 panel opinions rejecting claims of discrimination, Judge Sotomayor dissented 2 times. In *Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642 (1999), she dissented from the affirmance of the district court's order appointing a guardian for the plaintiff, an issue unrelated to race. In *Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134 (1999), she would have allowed a black kindergartner to proceed with the claim that he was discriminated against in a school transfer. A third dissent did not relate to race discrimination: In *Pappas v. Giuliani*, 290 F.3d 143 (2002), she dissented from the majority's holding that the NYPD could fire a *white* employee for distributing racist materials.

As noted in the post below, Judge Sotomayor was twice on panels reversing district court decisions agreeing with race-related claims - *i.e.*, reversing a finding of impermissible race-based decisions. Both were criminal cases involving jury selection.

The numbers relating to unpublished opinions continued to hold as well. In the roughly 55 cases in which the panel affirmed district court decisions rejecting a claim of employment discrimination or retaliation, the panel published its opinion or order only 5 times.

In sum, in an eleven-year career on the Second Circuit, Judge Sotomayor has participated in roughly 100 panel decisions involving questions of race and has disagreed with her colleagues in those cases (a fair measure of whether she is an outlier) a total of 4 times. Only one case (*Gant*) in that entire eleven years actually involved the question whether race discrimination may have occurred. (In another case (*Pappas*) she dissented to favor a white bigot.) She participated in two other panels rejecting district court rulings agreeing with race-based jury-selection claims. Given that record, it seems absurd to say that Judge Sotomayor allows race to infect her decisionmaking.

Though the study dealt with panel opinions, Jonathan Adler helpfully reminds me of Judge Sotomayor's dissent in *Hayden v. Pataki* — which I discuss [1] here — in which she urged that felon disenfranchisement laws violate the Voting Rights Act.

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STATEMENT OF CONGRESSMAN JOSÉ E. SERRANO

Before the Senate Judiciary Committee

As Prepared for Delivery

Chairman Leahy, Ranking Member Sessions, Members of the Committee, thank you for the honor you have given me by inviting me to testify on behalf of Judge Sonia Sotomayor.

I am Congressman José E. Serrano, and today I represent the proudest neighborhood in the nation, the Bronx.

I cannot begin to describe the pride and excitement that my community feels to know that one of our own stands on the verge of a historic confirmation to the United States Supreme Court. Like all elected officials, I am often greeted by constituents on streets, at diners, after church services, where I cut my hair, or at the local bodega. In the past these conversations were about a personal issue, a congressional issue or simply a friendly greeting. Since Judge Sotomayor's nomination the conversations are about Sonia. They speak about her as if she was a member of their personal family. They speak about their pride in her accomplishments. Their comments, to me, show a profound understanding of just how significant this nomination is and how it proves that in our country everything is possible.

One of the best examples of the significance of this nomination is the number of people that have come together, this week, to watch these hearings. Schools in the Bronx and in many communities around our nation are using it as a teaching tool to encourage students not to give up regardless of where they live or the economic hardships that their families may be facing. Watching parties have been organized in many communities. People are coming together, as a community, to watch these hearings. That is a clear sign of the pride and joy that they feel. Back home it is a celebration.

Like the distinguished nominee, my family left Puerto Rico because of economic conditions. Like her, we grew up in a public housing project in the Bronx. Like her family, we also struggled in our new surroundings. We were still poor in the Bronx, but we had dignity and our eye on a better future. One of the proudest moments of my life came when I was first elected to the New York State Assembly with my State Assembly classmate Senator Chuck Schumer. As they were swearing us in a friend said to my father, "Don Pepe, you are a lucky man. You have two children. One son is a school teacher and the other is an Assemblyman. My Pop, with that wonderful,

charming accented English replied: "I busted my back to get lucky." I am sure that Judge Sotomayor and her mother have had many similar moments. We are living our parents' dreams—enabled by their sacrifices and years of hard work.

Our story is not unique to the community we come from. All around our great nation, there are people working day and night, two jobs, saving, doing without, all in order that their children could live the life that they want for them.

Sonia Sotomayor represents the best of American culture. She comes directly from the strand of our national character that says "you can be anything you want." It says, "Through hard work you can reach the top in this country." She is living proof that our dreams for our children are never impossible.

In accepting the honor of your invitation I wondered if my role here today was to tell you about her legal qualifications. Coming before you are many people who will speak to her work in the legal profession. We know that she is highly regarded and that she has a deep understanding of the law and a profound respect for the Constitution. I am also aware of the fact that she comes before you with more Federal Court experience than any other nominee in the last hundred years. I quickly came to the conclusion that my role is to tell you about where she comes from, how she got to this point, and what that means.

We come from rough neighborhoods. We were surrounded by people making do on too little. Sometimes, there was desperation and despair. Around us were many distractions and false choices that could have taken us down a totally different road. But there was also ambition and people determined to make something of themselves.

We came from a place where family comes first, where the core values were hard work and looking out for one another. As I moved out into the wider world, first through the Army, and then in my political career, I came to learn that these were not liberal or New York or Latino values. They were American values. Bronx neighborhoods may not be seen as similar to "middle America" but I can assure you that the values that we hold dear—family, freedom, looking out for family and neighbors—are the same. Everyone watching this nomination should know that based upon her background and ideals, they are in good hands with Judge Sotomayor.

I can't help but adding here that you can also be sure you are in the presence of a true blue American when you know that Judge Sotomayor is a proud Yankees fan.

When I walk into the Capitol to work on behalf of the American people, I often stop and think 'how fortunate I am as a kid from the Bronx projects to make it here.' It is an incredible story that I have lived. But since Judge Sotomayor was nominated by President Obama, I have had to remember that my story pales in comparison to hers.

This proud woman from the Bronx is perhaps the best and the brightest we have and she has risen to the top on the basis of her incredible intellect and hard, hard work. I know that her values are your values and those of people around our great nation. Her story is my story. Her story is your story or that of your parents or your grandparents.

She will be a brilliant Justice on the Supreme Court and I urge you to vote in favor of Judge Sotomayor's nomination.

Thank you for allowing me the honor of testifying before this committee on such a historic occasion.

FOR IMMEDIATE RELEASE
OCTOBER 2, 1998

CONTACT: INGRID ORTEGA BORGES
(202) 225-4363

SERRANO ANNOUNCES CONFIRMATION OF PUERTO RICAN JUDGE

WASHINGTON, D.C., Oct. 2 -- Congressman José E. Serrano (D-NY) today announced that Congress has confirmed Puerto Rican judge Sonia Sotomayor to the 2nd U.S. Circuit Court of Appeals.

Judge Sonia Sotomayor, who sits in Southern District of New York since 1992, is the first Hispanic woman appointed to the U.S. Court of Appeals. Clinton nominated Sotomayor in June 1997 and after an arduous process, the Senate ratified her nomination by voting 68-28. The 2nd Circuit Court includes New York, Connecticut and Vermont

"It's great! It was a painful process but the result is extremely important for the Hispanic community,"Serrano said, adding, "Judge Sotomayor was born and raised in the South Bronx."

"This is the kind of issue that should be discussed in the classrooms. She is a role model for Hispanics on the Mainland. Judge Sotomayor has set an example of how success is available for all of those who persevere to achieve their goals. She is an inspiration for many Puerto Ricans and for the people in the Bronx who are trying to break the cycle of poverty.

"I thank and congratulate the President and the Senate for this confirmation," Serrano said, who played a key role in her confirmation. Sotomayor also received support from Senator Alfonse D'Amato (R-NY).

Sotomayor, 44 and who grew up in the South Bronx housing project, graduated from Princeton University and Yale Law School. She was a former prosecutor at the office of District Attorney in Manhattan, and an associate and then partner in the New York law firm Pavia & Harcourt. She was also a member of the Puerto Rican Legal Defense and Education Fund.

Judge Sotomayor's nomination has received strong support from the National Puerto Rican Bar Association, the Hispanic National Bar Association, the National Coalition of Women's Bar the Government of Puerto Rico and other groups that pressured to secured her confirmation. In March, the Senate Judiciary Committee approved overwhelmingly her nomination.

Hispanics represent 10 percent of the population in the United States, but less than five percent of all judges are Hispanic. Currently there are 13 vacancies in the U.S. Courts of Appeals and 22 in the U.S. District Court.

-more-

More than 30 percent of the judicial seats in the 9th U.S. Circuit and 40 percent of all seats in the 2nd U.S. Circuit are vacant. These vacancies are causing inefficiencies in the system at the expense of taxpayers and those who have cases pending for years in court.

President Clinton has nominated four Hispanic candidates with outstanding records on the judicial bench to fill some of the vacancies in the federal court system.

"Judge Sotomayor is extremely qualified for this post and I expect the confirmation of other qualified Hispanic nominees"

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The Honorable Jose E. Serrano

Tribute to Judge Sonia Sotomayor
October 2, 1998

Mr. Speaker, I rise today to congratulate and to pay tribute to Judge Sonia Sotomayor, an outstanding individual who has dedicated her life to public service. She was confirmed today by the Senate for the United States Court of Appeals for the Second Circuit. Clinton nominated Sotomayor in June 1997 and after an arduous process, the Senate ratified her nomination by voting 68-28. The 2nd Circuit Court includes New York, Connecticut and Vermont

Judge Sotomayor was born and raised in the South Bronx. After graduating summa cum laude from Princeton University, she earned her Juris Doctor from Yale Law School. I have known her personally for many years, and I am very familiar with her background, experience, character, and personality. She is a person of the highest personal and professional integrity.

Mr. Speaker, since her appointment to the United States District Court for the Southern District of New York by President George Bush in 1992, Judge Sotomayor has distinguished herself and has received continuous recognition for her outstanding performance. During her tenure, she has been reversed only six times in what is considered perhaps the most litigious and scrutinized district court in the United States.

Being the first Hispanic woman to serve on the United States District Court for the Southern District of New York, Judge Sotomayor is well known and highly respected by her peers and the different communities for her sensitivity, professionalism, integrity and sound judgement. Her confirmation brings to the Court an outstanding judge at the same time that it expands its ethnic composition.

This is the kind of issue that should be discussed in the classrooms. She is a role model for all Hispanics. Judge Sotomayor has set an example of how success is available for all of those who persevere to achieve their goals. She is an inspiration for many Puerto Ricans and for the people in the Bronx who are trying to break the cycle of poverty.

Mr. Speaker, I ask my colleagues to join me in commending Judge Sonia Sotomayor for her outstanding achievements and in wishing her continued success as Judge on the United States Court of Appeals for the Second Circuit.

State of Connecticut
Latino and Puerto Rican Affairs Commission

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Senior Legislative Secretary
Clarisa Cardone

June 17, 2009

The Honorable Patrick J. Leahy, Chairman
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Leahy:

It gives us great pleasure to write this letter in support of the nomination of Judge Sonia Sotomayor to be the next United States Supreme Court Justice as nominated by the President of the United States of America, the Honorable Barack Obama, on Tuesday, May 26, 2009. Judge Sotomayor has been hailed by many people as a role model for her ascent to the federal bench from a difficult upbringing in a housing project in New York. She grew up in the South Bronx, New York in a public housing project with the help of her single mother Celina Sotomayor.

Judge Sotomayor, despite all the odds, graduated as the valedictorian of her class at Blessed Sacrament and at Cardinal Spellman High School in New York and graduated *summa cum laude* from Princeton University where she was a co-recipient of the M. Taylor Pyne Prize, the highest honor Princeton awards to an undergraduate student. Furthermore, Judge Sotomayor also received her law degree at Yale Law School in New Haven, Connecticut.

Judge Sotomayor is the first Hispanic to serve on the United States Court of Appeals for the Second Circuit as recommended by President Clinton in 1998. As a matter of fact, during her stay on the Second Circuit, Judge Sotomayor participated in over 3000 panel decisions, authorizing more than 400 published opinions on difficult issues that ranged from constitutional law and other complex procedural matters that allowed her to earn a positive reputation as a knowledgeable judge of legal doctrine. Prior to this appointment, Judge Sotomayor was appointed by President George H. W. Bush to the United States District Court for the Southern District of New York where in 1995 she issued an injunction against Major League Baseball owners which ended a baseball strike in the longest dispute in professional sports history.

It is within this context that it gives us great pleasure to support this nomination and we urge your committee to do the same. We make ourselves available to you and your committee should our additional input be helpful during the selection process.

Sincerely,

Ivette Servera
Chairperson
Connecticut General Assembly's
Latino and Puerto Rican Affairs Commission

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Statement of

The Honorable Jeff Sessions

United States Senator
Alabama
July 13, 2009

Opening Statement of US Senator Jeff Sessions at Judge Sotomayor's Supreme Court Confirmation Hearing

Before I begin, I want to thank Chairman Leahy for his openness and willingness to work together on the procedures for this hearing.

I hope it will be viewed as the best hearing this Committee has ever held.

Judge Sotomayor, I join Chairman Leahy in welcoming you here today.

This hearing marks an important milestone in your distinguished legal career. I know your family is proud, and rightfully so. It is a pleasure to have them with us today.

I expect this hearing and resulting debate to be characterized by a respectful tone, a discussion of serious issues, and a thoughtful dialogue, and I have worked hard to achieve that from day one.

I have been an active litigator in federal courts for the majority of my professional life. I have tried cases in private practice, as a federal prosecutor with the Department of Justice, and as Attorney General of the State of Alabama.

The Constitution and our great heritage of law are things I care deeply about—they are the foundation of our liberty and prosperity.

This nomination hearing is critically important for two reasons.

First, Justices on the Supreme Court have great responsibility, hold enormous power, and have a lifetime appointment.

Just five members can declare the meaning of our Constitution, bending or changing its meaning from what the people intended.

Second, this hearing is important because I believe our legal system is at a dangerous crossroads.

Down one path is the traditional American legal system, so admired around the world, where judges impartially apply the law to the facts without regard to their own personal views.

This is the compassionate system because this is the fair system.

In the American legal system, courts do not make the law or set policy, because allowing unelected officials to make laws would strike at the heart of our democracy.

Here, judges take an oath to administer justice impartially, which reads:

"I . . . do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me . . . under the Constitution and laws of the United States. So help me God."[1]

These principles give the traditional system its moral authority, which is why Americans respect and accept the rulings of courts—even when they lose.

Indeed, our legal system is based on a firm belief in an ordered universe and objective truth. The trial is the process by which the impartial and wise judge guides us to the truth.

Down the other path lies a Brave New World where words have no true meaning and judges are free to decide what facts they choose to see. In this world, a judge is free to push his or her own political and social agenda. I reject this view.

We have seen federal judges force their own political and social agenda on the nation, dictating that the words "under God" be removed from the Pledge of Allegiance[2] and barring students from even silent prayer in schools.[3]

Judges have dismissed the people's right to their property, saying the government can take a person's home for the purpose of developing a private shopping center.[4]

Judges have—contrary to the longstanding rules of war—created a right for terrorists, captured on a foreign battlefield, to sue the United States government in our own courts.[5]

Judges have cited foreign laws, world opinion, and a United Nations resolution to determine that a state death penalty law was unconstitutional.[6]

I'm afraid our system will only be further corrupted as a result of President Obama's views that, in tough cases, the critical ingredient for a judge is the "depth and breadth of one's empathy,"[7] as well as "their broader vision of what America should be."[8]

Like the American people, I have watched this for a number of years, and I fear this "empathy standard" is another step down the road to a liberal activist, results-oriented, and relativistic world where:
• Laws lose their fixed meaning,
• Unelected judges set policy,
• Americans are seen as members of separate groups rather than simply Americans, and

• Where the constitutional limits on government power are ignored when politicians want to buy out private companies.

So, we have reached a fork in the road. And there are stark differences between the two paths.

I want to be clear:

I will not vote for—no senator should vote for—an individual nominated by any President who is not fully committed to fairness and impartiality towards every person who appears before them.

I will not vote for—no senator should vote for—an individual nominated by any President who believes it is acceptable for a judge to allow their own personal background, gender, prejudices, or sympathies to sway their decision in favor of, or against, parties before the court.

In my view, such a philosophy is disqualifying.

Such an approach to judging means that the umpire calling the game is not neutral, but instead feels empowered to favor one team over the other.

Call it empathy, call it prejudice, or call it sympathy, but whatever it is, it is not law. In truth it is more akin to politics. And politics has no place in the courtroom.

Some will respond, "Judge Sotomayor would never say that it's acceptable for a judge to display prejudice in a case."

But, I regret to say, Judge Sotomayor has outlined such a view in many, many statements over the years.

Let's look at just a few examples:

We've all seen the video of the Duke University panel where Judge Sotomayor says "?it is [the] Court of Appeals where policy is made. And I know, and I know, that this is on tape, and I should never say that."[9]

And during a speech 15 years ago, Judge Sotomayor said, "I willingly accept that we who judge must not deny the differences resulting from experience and heritage but attempt . . . continuously to judge when those opinions, sympathies, and prejudices are appropriate."[10]

And in the same speech, she said, "my experiences will affect the facts I choose to see as a judge."[11]

Having tried cases for many years, these statements are shocking and offensive to me.

I think it is noteworthy that, when asked about Judge Sotomayor's now-famous statement that a "wise Latina" would come to a better conclusion than others, President Obama, White House

Press Secretary Robert Gibbs, and Supreme Court Justice Ginsburg declined to defend the substance of the nominee's remarks.

They each assumed that the nominee misspoke. But the nominee did not misspeak. She is on record making this statement at least five times over the course of a decade.

These are her own words, spoken well before her nomination. They are not taken out of context.

I am providing a copy of the full text of these speeches to the hearing room today.

Others will say that, despite these statements, we should look to the nominee's record, which they characterize as moderate. People said the same of Justice Ginsburg, who is now considered to be one of the most activist judges in history.

Some senators ignored Justice Ginsburg's philosophy and focused on the nominee's judicial opinions. But that is not a good test because those cases were necessarily restrained by preceden and the threat of reversal from higher courts.

On the Supreme Court, those checks on judicial power will be removed, and the judge's philosophy will be allowed to reach full bloom.

But even as a lower court judge, the nominee has made some very troubling rulings.

I am concerned by the nominee's decision in Ricci, the New Haven Firefighters case—recently reversed by the Supreme Court—where she agreed with the City of New Haven's decision to change its promotion rules in the middle of the game.

Incredibly, her opinion consisted of just one substantive paragraph of analysis concerning the major legal question involved in the case.

Judge Sotomayor has said that she accepts that her opinions, sympathies, and prejudices will affect her rulings. Could it be that her time as a leader of the Puerto Rican Legal Defense and Education Fund provides a clue as to her decision against the firefighters?

While the nominee was Chair of the Fund's Litigation Committee,[12] the organization aggressively pursued racial quotas in city hiring and, in numerous cases, fought to overturn the results of promotion exams.[13]

It seems to me that in Ricci, Judge Sotomayor's empathy for one group of firefighters turned out to be prejudice against the others.

That is, of course, the logical flaw in the "empathy standard." Empathy for one party is always prejudice against another.

Judge Sotomayor, we will inquire into how your philosophy, which allows subjectivity into the courtroom, affects your rulings on issues like:

• Abortion, where an organization in which you were an active leader argued that the Constitution requires that taxpayer money be used for abortions;

• Gun control, where you recently ruled that it is "settled law" that the Second Amendment does not prevent a city or state from barring gun ownership;

• Private property, where you have already ruled that the government could take property from one pharmacy developer and give it to another; and

• Capital punishment, where you personally signed a statement opposing the reinstatement of the death penalty because of the "inhuman[e] psychological burden" it places on the offender and his or her family.

I hope the American people will follow these hearings closely.

They should learn about the issues, and listen to both sides of the argument. And, at the end of the hearing, ask: 'If I must one day go to court, what kind of judge do I want to hear my case?

'Do I want a judge that allows his or her social, political, or religious views to change the outcome?

'Or, do I want a judge that impartially applies the law to the facts, and fairly rules on the merits, without bias or prejudice?'

It is our job to determine on which side of that fundamental divide the nominee stands.

STATEMENT OF THEODORE M. SHAW IN SUPPORT OF JUDGE SONIA SOTOMAYOR IN SUPPORT OF HER NOMINATION AS ASSOCIATE JUSTICE TO THE SUPREME COURT OF THE UNITED STATES

I have known Sonia Sotomayor for over forty years. We first met in 1968, as freshmen at Cardinal Spellman High School in the Bronx. There we were among a modest number of black and Latino students, perhaps ten per cent of the school's population, in what was one of the most academically challenging high schools in New York City. It was a time of great change and upheaval – 1968 was the year that Martin Luther King, Jr. and Robert F. Kennedy were assassinated, and our cities, including New York, were sites of urban unrest. Many of the minority students at Spellman, including Sonia and I, came from the public housing projects of Harlem or the Bronx; or from the tenement houses that surrounded them. We were shaped by those extraordinary times and by the communities from which we came, for better or worse. During that time, the light of opportunity began to shine into corners of society that were long neglected for reasons of race and poverty. Many of us were beneficiaries of what has come to be known as "affirmative action", *i.e*, conscious efforts to open opportunities to individuals from groups that had been discriminated against and excluded from mainstream American life. Some people will immediately seize upon that description to talk about "unqualified" individuals. Affirmative action, properly structured and implemented, lifts qualified individuals from obscurity rooted in unearned inequality. In spite of her brilliance, there was a time when someone like Judge Sotomayor would routinely be left out of the mainstream of opportunities we have come to associate with someone with her capabilities and credentials.

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Sonia was at the top of our class at Cardinal Spellman High School. Everyone - white, black, Latino, Asian - ranked behind her. She was studious, independent-minded, mature beyond her years, thoughtful, and was not easily influenced by what was going on around her. Sonia walked her own path. To be sure, Sonia was comfortable in her own skin and proud of her community and her heritage. She did not run from who or what she was and is. Still, Sonia was not one to be easily swayed by peer pressure, fad, or the politics of others around her. She approached any issue from the standpoint of a fierce intellectual curiosity and integrity. In fact, she was an intellectual powerhouse. Sonia was a leader at Cardinal Spellman. She was active in school governance and on the debate team. But more than anything, Sonia led by her excellence. Sonia Sotomayor set the pace at which others wanted to run.

Sonia did not live a life of privilege. She lost her father at a very young age. She also had been diagnosed as diabetic before she was in high school. It was not something I remember her talking about. Sonia simply carried herself with an air of dignity, seriousness of purpose and a sense that she was going somewhere. In my four years at Spellman, I never saw Sonia interact with anyone in a disrespectful or antagonistic manner. Her temperament was – even then – judicious. In short, although I never told her, and although she did not know it – I envied her intellectual capacity, her discipline, and her unquestionable integrity. I admired her.

After graduating from high school at the top of our class and as valedictorian, Sonia was off to Princeton, and I, somewhat further down in the rankings, was fortunate enough to be off to Wesleyan. We did not stay in touch over many of the ensuing years, but I followed Sonia in the way one follows a star from one's high school orbit. I may have seen her once in a while, but perhaps not. Eventually, while I was at Columbia Law School, I heard she was at Yale Law School. Those who knew her there always confirmed that Sonia was on the path on which she

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started years ago – intellectual excellence and academic achievement, thoughtful, balanced and careful (in the most literal sense) in all she did. Sonia excelled academically at Princeton and at Yale, performing at the top of her class at every level. One could not have stronger credentials. And she comes to this nomination with more judicial experience than any other Supreme Court nominee in at least the last one hundred years. But for the politics of judicial nominations, Sonia Sotomayor's qualifications for the Supreme Court would be a "no brainer". I have faith that this Committee and the Senate will not let politics get in the way.

My career has been as a civil rights lawyer. I have been in the midst of ideological warfare on contentious issues. I have been unabashed about my point of view. I am conscious of the fact that as I testify about Sonia, there will be some who may project my thoughts and beliefs onto Sonia. Some have already attempted to label her as an activist, outside of the political mainstream. (To be sure, I consider those who work for racial justice and other civil rights to be a vital part of mainstream America). But Sonia's life has not been lived on the battlefield of ideology or partisanship where many of us who are labeled or who label ourselves as "liberal" or "conservative" have locked horns. Indeed, Judge Sotomayor's record defies simplistic labels. She began her legal career as a prosecutor, in a job not ordinarily thought of as a bastion of liberal activism. At the same time, Sonia Sotomayor served as a board member of the Puerto Rican Legal Defense Fund (PRLDEF). Her service on the PRLDEF Board both speaks to the strength of that organization and the range of her interests, from prosecution to civil rights. In any event, her service on that Board is commendable. In fact, this range of experience and commitment places Judge Sotomayor in the middle of mainstream America, for surely Americans are concerned about the prosecution and punishment of those who engage in criminal activities as well as the protection of civil rights and the elimination of invidious discrimination.

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In her judicial career, Judge Sotomayor has been moderate. In race discrimination cases, as in all of her cases, whether she has ruled for plaintiffs or for defendants has been the function of the application of law to the facts of each case. Her approach to criminal law issues is similarly dependent on the application of governing law to the facts. I cannot say with certainty that Judge Sotomayor, if confirmed to the U.S. Supreme Court, would always rule in a way with which I would agree. What I can say is that I know she would be fair and open-minded, and that she would apply the law with intellectual integrity. That is all that any of us has a right to expect. Judge Sotomayor's career on the bench is the best guide to what kind of Justice she will be if confirmed by the Senate. Her record, intellect and achievements are her best arguments in favor of confirmation.

Let me turn back to the significance of this nomination and in doing so make a few observations concerning some of the issues that have been raised during these hearings. Our Nation is 233 years old, and has seated 110 Justices on the Supreme Court. All except two African Americans and two women have been white males. Lest I be misunderstood, many white men, including some of whom I count as heroes, have served our Nation well. But it is nonetheless striking that in 2009, at a time when we have moved so far and accomplished so much, we are still accomplishing "firsts"- the extraordinary election of our first African American President, the appointment of our first African American Attorney General, and if this Committee and the full Senate sees fit, the appointment of the first Latino or Latina to the Supreme Court. Moreover, as far as I am aware, no American who has grown up in public housing has ever served on the U.S. Supreme Court. Does an individual who is Latina and who grew up in public housing bring something different and of value to the Court that other Justices, however extraordinary, may not bring? I think about a case the Supreme Court grappled with a

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few years ago. In 2002, in *HUD v. Rucker*, 535 U.S. 125 (2002), the Court upheld a statutorily authorized HUD policy allowing eviction of innocent public housing tenants for the drug related actions of family or household members even if those drug activities were unknown or not under the innocent tenant's control. Like Judge Sotomayor, I grew up in a public housing project in which drugs destroyed or took many of the lives of my childhood and adolescent friends. I yield to no one in my abhorrence of the damage the scourge of drugs has done to our communities. But I wonder what the discussion of this case was like in the Supreme Court conference room. I wonder if any Justice knew what it was like to live in a public housing project in which innocent grandmothers and mothers struggling to raise families are evicted because of their children's or grandchildren's use of marijuana or other drugs. I wonder if any Justice pointed out that the governmental subsidy for those living in public housing that many people think distinguishes those tenants from those of us who own our own homes may not be as powerful a distinction as we believe, since our mortgage tax deductions are a form of governmental subsidy. Drugs, tragically, are ubiquitous, even among the middle and upper classes and across all races and ethnicities. Middle-class and wealthy families are not evicted from their homes or stripped of their mortgage interest deductions because a family member uses drugs.

Isn't it possible that the life experiences of an individual who grew up in public housing and who is from a racial or ethnic group that does not use drugs in higher proportions than the majority community, but that is nonetheless grossly over-incarcerated, might bring some additional wisdom to the table?

To be sure, a white male or female from a more privileged background or a conservative African American might have raised that issue in conference. And to be sure, it may be that the awareness or perspective of which I speak may ultimately be legally irrelevant

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because the Court is bound, in the absence of a constitutional violation (which may beg the question), to defer to Congress even if its policies are occasionally ill-considered or unfair. But it seems much more likely that the discussion would be better informed by the participation of one whose life experiences go beyond those who have been traditionally represented on the Court.

When the late Justice Thurgood Marshall announced his retirement from the Court among the many plaudits he received from his colleagues were a series of comments from across the spectrum of judicial philosophies. Justice O'Connor famously wrote and spoke about what Justice Marshall brought to the Court as a consequence of his background and experiences. Justice O'Connor said, "Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective.... At oral argument and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, constantly prodding us to respond not only to the persuasiveness of legal arguments but also to the power of moral truth." If Judge Sotomayor brought nothing more to the Supreme Court than the power of her intellect and the qualities of being a judge that she developed during her prior service on the federal bench, she would add significantly to the Court. But as it is, she would bring, as Justice O'Connor observed that every Justice does, her own personal history and experience, and may bring, as Justice Marshall did, "a special perspective".

Sonia Sotomayor has served our Nation for seventeen years as a federal district court and appellate judge with great distinction. Now she is being considered for appointment as Associate Justice on the United States Supreme Court. Candor compels me to admit that I swell with pride when I contemplate the possibility of my high school classmate ascending to the highest Court.

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But quite aside from petty and undeserved pride on the part of one who was merely a high school classmate, there are millions of Americans who see, for the first time, the possibility that someone who looks like them, or who comes from a background like theirs, may serve on the United States Supreme Court - someone who is supremely qualified by any measure. It is a great honor for Judge Sotomayor that President Obama has nominated her to the United States Supreme Court. It would be an even greater honor for our Nation if she were to be confirmed and were to serve.

Respectfully submitted,

Theodore M. Shaw
Professor of Professional Practice
Columbia University School of Law
and
Of Counsel to Fulbright & Jaworski

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National Latino Coalition
on Climate Change

June 15, 2009

The United States Senate
Washington, D.C. 20510

Dear Senator:

We write to you today to express our strongest support for the nomination of Judge Sonia Sotomayor to the Supreme Court of the United States. Her strong record and inspiring story make her an ideal justice, and we ask for your help in ensuring a prompt confirmation.

As the Supreme Court nominee with the most experience on the federal bench, Judge Sotomayor has proven herself to be thoughtful, intelligent and fair-minded. She would bring more federal judicial experience to the Court than any justice in the past century. Her career as a prosecutor, litigator and judge leave no doubt about her qualifications for the highest court in the land.

As the first Latina nominee to the Supreme Court, Judge Sotomayor would break an important barrier for Hispanics in the United States. This historic nomination makes Judge Sotomayor an important role model for millions of Americans from all backgrounds.

In her life experience, Judge Sotomayor embodies the American dream. Growing up in a South Bronx housing project with Puerto Rican parents, Judge Sotomayor was raised from age nine by a single mother, excelling in school and working her way through the best universities in the country. Her commitment to hard work and the rule of law will no doubt continue as she joins the Supreme Court.

The Supreme Court plays an extremely vital role in directing the law surrounding issues like clean air, clean water, public lands and global warming. Judge Sotomayor would become the justice with arguably the best environmental credentials of anyone nominated to the Supreme Court in the modern environmental era. As a judge on the Court of Appeals for the Second Circuit, she wrote a decision later overturned by the Supreme Court -- that the Environmental Protection Agency was not permitted to use "cost-benefit" calculations to grant public utilities the right to continue to postpone installing equipment that would protect fisheries from power plant cooling-system intakes.

President Obama's historic nomination of Judge Sotomayor reaffirms the importance of selecting nominees in all branches of government that reflect America's diversity. Our different backgrounds strengthen us in our efforts to protect the natural and human environment, and we look forward to decades of exemplary public service from Judge Sotomayor.

The National Latino Coalition on Climate Change and the Sierra Club strongly urge you to quickly approve the nomination of Judge Sonia Sotomayor to the United States Supreme Court so she can continue to uphold the constitution and serve this country with distinction.

Sincerely,

Carl Pope
Sierra Club Executive Director

Dr. Gabriela Lemus
Chair, National Latino Coalition on Climate Change

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June 25, 2009

Senator Patrick Leahy, Chair
United States Senate
Committee on the Judiciary
433 Russell Senate Office Bldg.
Washington, DC 20510-0104

Senator Jeff Sessions, Ranking Member
United States Senate
Committee on the Judiciary
335 Russell Senate Office Bldg.
Washington, DC 20510 -0104

Dear Senators Leahy and Sessions,

The Society of American Law Teachers (SALT) supports the nomination and confirmation of Judge Sonia Sotomayor to the United States Supreme Court.

Representing hundreds of law professors from more than 170 law schools across our nation, SALT has reached this conclusion after careful, scholarly and independent research pertinent to this nominee. We believe that Judge Sotomayor's judicial record reflects sound legal analysis, appropriate caution, and the highest integrity. The Judiciary Committee and its very capable staff have reviewed in detail Judge Sotomayor's judicial record. SALT is commenting on her approach to judging and the background and attitudes she would bring to her work on the Court, but we are not commenting on specific decisions, knowing that the Committee staff is closely reviewing individual decisions.

* * *

Judge Sotomayor will bring a breadth of trial court experience that will well serve today's Court. As an assistant district attorney in New York City, she spent her days in the courtroom and tried dozens of criminal cases involving the very difficult and dangerous matters affecting life in our urban centers, an environment all-too-familiar to one who had been raised by a single mother in a South Bronx public housing project. Later in her career, she was appointed to the federal district court bench by President George H. W. Bush, and she served in that capacity for six years until President Clinton elevated her to the Court of Appeals for the Second Circuit. If confirmed, Judge Sotomayor would be the only member of the Supreme Court with any significant trial court experience, either as a litigator or as a judge. Based on her experience as both, she knows and appreciates the real-world implications of appellate court rulings.

Judge Sotomayor will also bring a life perspective not adequately represented on the current Court. To be sure, the perspectives reflected in the deliberations of each and every judge are informed by a whole host of factors, including issues of class, race and gender. When retired Justice O'Connor speaks of being "profoundly influenced" and awakened to the African-American condition by her colleague Thurgood Marshall and when Justice Ginsburg observes that her male colleagues do not seem to fully comprehend the experience of women in our society, we are reminded that justice can best be served when the Court, as a deliberative body, reflects a diversity of experience. Judge Sotomayor's life story, now well known to the Committee and to the public, not only serves as a symbol of hope and possibility for many communities across our nation, but as an invaluable asset to the Court's own decision-making.

In recent weeks, much has been debated in the press as to whether "empathy" is an appropriate judicial qualification. Empathy is, to paraphrase President Obama, "something more demanding" than sympathy or charity; it is the capacity to "stand in somebody else's shoes and see through their eyes," to care, to understand what others are facing, and what their lives are like. As Harper Lee put it in her famous novel, To Kill a Mockingbird: "You never really understand a person until you consider things from his point of view -- until you climb into his skin and walk around in it." Empathy is an essential part of exercising rational judgment. Empathy cannot be dismissed as simply a matter of personal feelings and emotions, but, rather, is a key component of "doing justice". Inevitably constricted by the narrowness of our own backgrounds, we must seek to expand our awareness of other people's varied experiences if we are to realize "equality under the law" and "justice for all." As law professors, we try to teach empathy in our classrooms, to appreciate what all parties in a particular dispute are experiencing ("where they're coming from," in the vernacular of our students). Surely, this capacity helps in negotiating a case and in oral arguments, but empathy has far greater value than simply providing tactical benefits. It is crucial to sound and informed judgment.

* * *

While we, as private citizens, have differing views among us on many of the hot-button issues that come before the courts and on which Judge Sotomayor occasionally has ruled, we uniformly agree, as law professors, that she is a careful, hard-working, and thoughtful jurist, viewed by scholars and colleagues on the bench as a moderate well within the legal mainstream. Far from being an "activist judge," Judge Sotomayor decides cases on the basis of her understanding of the law and the applicable legal principles. In addition, we believe that the broad range of her legal and life experiences will add a new and much-needed perspective to the work of our highest court.

We will pay close attention to the confirmation hearings, and we will make ourselves available for future consultation should you so desire. We look forward to a timely confirmation of Judge Sotomayor so that she can take her place on the court as the new term begins this October.

Sincerely,

Margaret Martin Barry
Co-Presidents

Deborah Waire Post
Co-Presidents

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Ilya Somin
Assistant Professor of Law

JUDGE SONIA SOTOMAYOR'S RECORD ON CONSTITUTIONAL PROPERTY RIGHTS

TESTIMONY BEFORE THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

JULY 16, 2009

INTRODUCTION.

I am grateful for the opportunity to address the important issue of constitutional property rights before this Committee. I would like to thank Chairman Leahy, Ranking Member Sessions, and the other members.

As President Barack Obama has written, "[o]ur Constitution places the ownership of private property at the very heart of our system of liberty."[1] The protection of property rights was one of the main objectives motivating the establishment of the Constitution.[2] Unfortunately, the Supreme Court has often relegated property rights to second class status, giving them far less protection than that extended to other constitutional rights.[3] I hope that the Committee's interest in this issue will ultimately help change that.

The purpose of my testimony is to analyze Judge Sonia Sotomayor's two most important constitutional property rights decisions: *Didden v. Village of Port Chester*[4] and *Krimstock v.*

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[1] BARACK OBAMA, THE AUDACITY OF HOPE 149 (2006).

[2] *See, e.g.*, JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY (1990) (emphasizing centrality of property rights for the Founders); Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135, 1136 (noting that Perhaps the most important value of the Founding Fathers of the American constitutional period, 'was their belief in the necessity of securing property rights."

[3] I have summarized the second class status of property rights in current Supreme Court jurisprudence in Ilya Somin, *Taking Property Rights Seriously? The Supreme Court and the "Poor Relation" of Constitutional Law, in* THE UNITED STATES SUPREME COURT: CONTESTED CONSTITUTIONAL DOCTRINES (Steven Kautz, Arthur Melzer, and Jerry Weinberger, eds., forthcoming) , available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1247854.

[4] 173 Fed. Appx. 931 (2d Cir. 2006).

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Kelly.[5] Part I briefly sets the stage for the discussion of Didden by summarizing the Supreme Court's controversial decision in *Kelo v. City of New London*,[6] and the political reaction it generated. In Part II, I consider the *Didden* case itself, which goes even further than *Kelo* in giving government a virtual blank check to undertake even the most abusive of condemnations.[7] *Didden* raises serious questions about Judge Sotomayor's willingness to protect property owners' constitutional rights under the Takings Clause.[8]

Finally, Part III briefly considers *Krimstock*, a case where Judge Sotomayor authored an opinion providing important protection for the property rights of suspects in criminal investigations. Although *Krimstock* was not a close case in my view, it is of some importance because the issue it addressed will be considered by the Supreme Court this fall in *Alvarez v. Smith*.[9]

In this testimony, I take no position on Judge Sotomayor's overall qualifications for a seat on the Supreme Court. Although I find some aspects of her judicial philosophy troubling, she is a capable jurist with an inspiring life story. My purpose here is to help ensure that proper consideration is given to property rights issues, including some disturbing aspects of Judge Sotomayor's record on these questions.

I. THE *KELO* DECISION AND ECONOMIC DEVELOPMENT TAKINGS.

The Supreme Court's 2005 decision in *Kelo v. City of New London* and the controversy it generated are the essential background to Judge Sotomayor's ruling in *Didden*. The Takings Clause of the Fifth Amendment to the Constitution requires that property can only be condemned for a "public use." Traditional public uses include those where the condemned land is actually "used" by the public either by building a government-owned structure on it (such as a road or a bridge), or by constructing a privately owned facility that the owner is required to allow the general public to utilize, as a matter of law – such as a public utility.

In *Kelo*, the Supreme Court ruled that the condemnation of private property for transfer to another private party in order to promote "economic development" was a permissible "public use" under the amendment; indeed, it ruled that virtually any potential benefit to the public counts as a "public use."[10] The Court upheld the condemnation despite the fact that the condemned property would not be owned by the government, the general public would have no right of access to it, and there was no legal requirement that the new private owners

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[5] 306 F.3d 40 (2d Cir. 2002).
[6] 545 U.S. 469 (2005).
[7] Part of my analysis of Didden is based on an amicus brief I coauthored on behalf of seven prominent property law professors urging the Supreme Court to hear the case and reverse the Second Circuit's decision. *See Didden v. The Village of Port Chester*, 2006 WL (U.S. Dec. 8, 2006), Amicus Br. of Law Professors D. Benjamin Barros, Eric R. Claeys, Viet D. Dinh, Steven J. Eagle, James W. Ely, Jr., Richard A. Epstein, Adam Mossoff, and Ilya Somin in Support of Petitioners.
[8] Although *Didden* is an unsigned, unpublished summary order, my understanding is that, in the Second Circuit Court of Appeals, such orders are usually drafted by the senior active judge on the panel, which Judge Sotomayor was in this case. In any event, she clearly assented to the panel opinion.
[9] *Smith v. City of Chicago*, 524 F.3d 834 (7th Cir. 2008), pet. cert. granted, *Alvarez v. Smith*, 129 S.Ct. 1401 (2009).
[10] *Kelo v. City of New London*, 545 U.S. 469, 473-78 (2005).

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actually produce the promised "economic development" that supposedly justified the takings in the first place. *Kelo* was arguably consistent with two previous Supreme Court decisions that defined "public use" very broadly.[11] But it was at odds with the text and original meaning of the Fifth Amendment, which do not conflate "public use" with potential "public benefit."[12] It also placed undue faith in the willingness of government officials to protect the constitutional property rights of poor and politically weak. As historian and law professor James W. Ely, Jr. has written, "among all the guarantees of the Bill of Rights, only the public use limitation is singled out for heavy [judicial] deference" to the very government officials whose abuses of power it is meant to constrain.[13]

Takings that transfer property to private owners pose greater risk of abuse than condemnations for traditional public uses, such as government-owned facilities. Private-to-private takings enable governments to condemn property for the benefit of politically influential interest groups. They are also far less likely to be needed to overcome "holdout" problems. Private developers who seek to assemble land for projects that provide genuine economic benefits can generally do so without using the power of government to force current owners to sell.[14]

A. Dangers of Unconstrained Eminent Domain Power.

Judge Sotomayor has said that she "strive[s] never to forget the real-world consequences of [her] decisions."[15] The real world consequences of judicial failure to enforce public use limitations on takings are bleak. Perhaps the most important shortcoming of economic development condemnations is that they are often used to transfer property from the politically weak to the politically powerful.[16] It is not accidental that the *Kelo* condemnations were in large part instigated by the influential Pfizer Corporation, which stood to benefit from them.[17] Similarly, the famous 1981 *Poletown* condemnations – in which some 4000 people were forcibly expelled from their homes in a Detroit neighborhood in order to transfer property to General Motors to build a new factory – also benefited locally powerful interests such as the United Auto Workers labor union and of course General Motors itself. In both cases, the people displaced were mostly poor or lower middle class residents and small

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[11] *See* Hawaii Housing Auth. v. Midkiff 467 U.S. 229, 241 (1984) (ruling that takings are for a public use if they are "rationally related to a conceivable public purpose"); Berman v. Parker, 348 U.S. 26, 32 (1954) (holding that the legislature has well-nigh conclusive" power to define public use as it sees fit).

[12] *See* James W. Ely, Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners,* 2005 CATO SUP. CT. REV. 39, 40-43 (describing early American jurists' rejection of the idea that eminent domain can be used to transfer property from one private party to another without giving the general public any right to use it).

[13] *Id.* at 62.

[14] For a compelling explanation of the reasons why eminent domain is not needed to overcome holdout problems that might impeded private development, see Daniel B. Kelly, *The "Public Use" Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1 (2006); see also Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After* Kelo, 15 SUP. CT. ECON. REV. 183, 203-209 (2007).

[15] Quoted in Peter Baker & Jeff Zeleny, *Obama Hails Judge as "Inspiring,"* N.Y. TIMES, May 26, 2009, at A1.

[16] For a more in-depth discussion of this issue, see Somin, *Controlling the Grasping Hand*, at 190-203.

[17] *See* Ted Mann, *Pfizer's Fingerprints on Fort Trumbull Plan,* THE DAY, Oct. 16, 2005. For a detailed recent account of Pfizer's role, see JEFF BENEDICT, LITTLE PINK HOUSE: A TRUE STORY OF DEFIANCE AND COURAGE (2008).

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businesses with little political influence.[18] It is difficult to imagine an economic development condemnation that transfers property from a powerful interest such as Pfizer or GM to people with little political power, and there are few if any such cases on record. Since World War II, hundreds of thousands of Americans – most of them poor and lacking in political influence - have been forcibly displaced by economic development, urban renewal, and "blight" condemnations of the sort licensed by *Kelo* and previous Supreme Court decisions that allow government to condemn virtually any property.[19] As the National Association for the Advancement of Colored People and other civil rights groups pointed out in an amicus brief they filed in support of the property owners in *Kelo*, economic development takings continue to disproportionately victimize poor and ethnic minority property owners.[20]

Since economic development takings are often driven by political rather than economic considerations, it is not surprising that they generally fail to produce the economic development that supposedly justified them in the first place.[21] By destroying existing businesses, homes, churches, and schools, they often inflict economic damage on communities that outweighs whatever benefits they create. The problem is exacerbated by the fact that, in most cases, neither the condemning authority nor the new private owner of the condemned property is under any legal obligation to actually produce whatever economic benefits were promised as justification for the taking. Predictably, this state of affairs gives public officials and corporations an incentive to inflate claims of projected economic benefits, which are then used as justifications for condemnation.[22]

In theory, voters could potentially monitor economic development takings and punish public officials who approve abusive condemnations at the polls. In practice, such case-by-case public monitoring is often difficult or impossible.[23] Many condemnations are complex affairs that take place out of the public eye. Moreover, it rarely becomes clear whether an economic development has really produced any benefits until years after the fact. By that time, public attention is likely to have moved on to other issues, and the offending political leaders are unlikely to be punished at the polls as a result. For example, the 1981 *Poletown* condemnations mentioned above never produced more than a fraction of the 6000 jobs that were promised. But this fact did not become clear until the late 1980s, and the political leaders who approved the condemnations never suffered any significant political punishment.[24]

B. The Public Reaction to *Kelo*.

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[18] For details on the *Poletown* case, see Ilya Somin, *Overcoming Poletown:* County of Wayne v. Hathcock, *Economic Development Takings, and the Future of Public Use,* 2004 MICH. ST. L. REV.

[19] *See* Ilya Somin, *Blight Sweet Blight,* LEGAL TIMES, Aug. 14, 2006, at 42.

[20] *See Kelo v. City of New London*, Amicus Br. of NAACP, American Association of Retired Persons, & Southern Christian Leadership Conference, 2004 WL 2811057.

[21] This paragraph summarizes points made in greater detail in Somin, *Controlling the Grasping Hand*, at 192-204.

[22] *Id.*, at 197.

[23] *Id.* at 201-203.

[24] Somin, *Overcoming* Poletown, at 1022-23.

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Kelo led to a massive political backlash against eminent domain abuse, with over 80% of the public disapproving of the decision. The ruling was also denounced by many political leaders and activists from across the political spectrum, including Ralph Nader, Democratic Representative Maxine Waters, and former President Bill Clinton.[25] Since *Kelo*, forty-three states have enacted reforms that purport to constrain the use of eminent domain for "economic development."[26] Unfortunately, the majority of the new laws are likely to have little or no effect because they allow economic development condemnations to continue under other names, usually by means of blight condemnation statutes that define "blight" so broadly that virtually any area qualifies.[27] In these states, post-*Kelo* reform is likely to have little impact because the new laws don't actually impose any meaningful restraints on eminent domain. "Business as usual" will probably continue under another name. For that reason, judicial protection for property rights remains critical, especially with respect to the rights of poor and politically weak populations.

II. THE *DIDDEN* CASE.

A. Factual Background.

In 1999 the village of Port Chester, N.Y., established a "redevelopment area," giving designated developer Gregg Wasser a virtual blank check to condemn property within it. When local property owners Bart Didden and Dominick Bologna sought a permit to build a CVS pharmacy in the area, Wasser demanded that they pay him $800,000 or give him a 50 percent partnership interest in the store, threatening to have their land condemned if they said no. They refused, and a day later the village condemned their property.

Didden and Bologna challenged the condemnation on the ground that it was not for a "public use," as the Constitution's Fifth Amendment requires. Their argument was simple and compelling: extortion for the benefit of a private party is not a public use. Nevertheless, in a short, cursory opinion, Judge Sotomayor's panel upheld the condemnation.

To be sure, Wasser disputed part of Didden and Bologna's account of the facts. He claimed that in addition to offering Didden and Bologna the options of paying him $800,000 or giving him a 50% stake in their business, he also offered to buy the land from them in exchange for an $800,000 payment from him. Wasser's proposal was extortionate even if he was telling the truth. If Wasser's version of events is correct, he in effect gave Didden and Bologna two options: pay him $800,000 or 50% of the proceeds of their project for the right to proceed with the construction of a CVS on their land, or transfer the land to him in exchange for an $800,000 payment from Wasser, in addition to the fair market value of the property (ultimately estimated to be $975,000).

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[25] Ilya Somin, *The Limits of Backlash: Assessing the Political Response to* Kelo, 93 MINN. L. REV. 2100, 2108-13 (2009).
[26] *Id.* at 2101.
[27] *Id.* at 2114-37. Similarly broad definitions of blight have been used to condemn perfectly normal areas for years. For example, courts have ruled that such unlikely locations as Times Square and downtown Las Vegas are blighted. *See* Somin, *Blight, Sweet Blight.*

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If Wasser did make that additional offer, it was actually even less generous to Didden and Bologna than the demand for a payment of $800,000. Wasser himself had estimated the potential profits from the drug store project at $2 million. If the owners had accepted this third proposal, they would have given up a total of $2.975 million ($2 million from the drug store project and $975,000 in fair market value) in exchange for $1.775 million – a total loss of $1.2 million. Under Wasser's supposedly more generous alternative offer, he would have gained 50% *more* in extortion money than he would have obtained had Didden and Bologna given in to his alternative demand for a simple payment of $800,000.

If a Mafia don approaches a business owner says that he will break his legs unless the victim either 1) pays him $800,000, 2) gives him a 50% stake in his business or 3) sells him the land at a price $1.2 million below its value, that would surely be extortion. Wasser's offer was exactly the same, except that his leverage was based on the threat of condemnation rather than breaking the owner's legs. If this is not extortion using the threat of eminent domain as leverage, then nothing is.

In any event, Judge Sotomayor's panel was required to assume the truth of Didden and Bologna's version of events. The Second Circuit was reviewing the district court's ruling on the Village's motion to have the plaintiffs' case dismissed before going to a jury on the ground that they had no possible legal basis for their suit under the Federal Rule of Civil Procedure 12(b)(6). When considering such "a motion to dismiss, the facts in the complaint are presumed to be true, and all reasonable inferences are drawn in the plaintiff's favor."[28] What is most frightening about the panel's ruling is that it apparently concluded that Didden and Bologna had no case even if their account of the facts was true.

B. Legal Implications for Property Rights.

1. *Didden* holds that even the most abusive "pretextual" takings are constitutional.

Didden is probably the most extreme anti-property rights ruling by any federal court since *Kelo*. It goes beyond *Kelo* in gutting protections for property owners against abusive takings. It is also striking that Judge Sotomayor and her colleagues not saw fit to dispose of this important case in a brief, unpublished summary order.

Although based partly on *Kelo's* very broad definition of "public use,"[29] *Didden* actually exceeded it. Indeed, it validated precisely the sort of egregiously abusive pretextual condemnation that even the *Kelo* majority considered to be unconstitutional. A pretextual condemnation occurs when the official purpose of the taking is actually just a pretext for an effort to benefit a private party. Justice John Paul Stevens' opinion for the Court noted that "the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit," was not enough to count as a "public use."[30] As an example of such an unconstitutional pretextual taking, he cited a case with far less extreme facts than *Didden*—a

[28] *EEOC v. Staten Island Sav. Bank*, 207 F.3d 144, 148 (2d Cir. 2000).
[29] *See Kelo*, 545 U.S. at 473-78 (holding that any potential "public benefit" counts as a "public use").
[30] *Id.* at 478.

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California district court ruling invalidating the condemnation and transfer of a 99 Cents store to Costco.[31] The taking had been rationalized on the ground that Costco might produce more tax revenue and economic growth.[32]

Like the *Didden* property, the 99 Cents store was located in a redevelopment area subject to a development plan.[33] The rationale for the 99 Cents condemnation and transfer was at least plausible, since the upscale Costco store might have generated more economic activity than the 99 Cents store, and hence a public benefit. Nonetheless, the Supreme Court described the *99 Cents* condemnation as unconstitutional because it was "a one-to-one transfer of property, executed outside the confines of an integrated development plan."[34] In *Didden*, by contrast, there was no plausible public benefit. Wasser's plan for the condemned land was to build a Walgreens pharmacy—virtually identical to Didden and Bologna's plan to build a CVS pharmacy.[35] In any event, Didden and Bologna's land would not have been condemned but for their refusal to pay Wasser the money he demanded. As in *99 Cents*, the mere fact that a taking occurred in a redevelopment area should not have led the court to conclude that anything goes. Under *Kelo*, a taking within a redevelopment area can still be invalidated as pretextual.

Nearly all economic development takings occur in redevelopment areas of one type or another. If the mere existence of a redevelopment area licenses otherwise pretextual takings, then property owners are left completely unprotected against even the most abusive condemnations.[36]

For these reasons, *Didden* was a grave error that undermined even the modest protection for property owners mandated by *Kelo*. Since *Kelo* was decided, there has been considerable disagreement over the question of what sorts of condemnations are to be invalidated as "pretextual."[37] But if this case was not an unconstitutional pretextual condemnation, it is hard to see what would be. A judge unwilling to invalidate the condemnation of property for purposes of blatant extortion is unlikely to protect property owners in less extreme takings cases.

A final disappointing aspect of *Didden* is the way in which the panel disposed of this important constitutional issue in a single sentence that offered virtually no analysis:

> [E]ven if Appellants' claims were not time-barred, to the extent that they assert that the Takings Clause prevents the State from condemning their property for a private use within a redevelopment district, regardless of whether they have been provided with just compensation, the recent Supreme Court decision in *Kelo v. City of New*

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[31] *Id.* at 487 n. 17 (citing *99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), *app. dismissed as moot*, 2003 WL 932421 (9th Cir. Mar. 7, 2003).
[32] *99 Cents*, 237 F. Supp.2d at 1128-30.
[33] *Id.* at 1130 (noting that the condemnation was part of the "Amargosa Redevelopment Plan" in the "Amargosa Project Area").
[34] *Kelo*, 545 U.S. at 487 n. 17.
[35] *Didden v. Village of Port Chester*, 304 F. Supp. 2d 548, 552 (S.D.N.Y. 2004).
[36] *Cf.* Somin, *Controlling the Grasping Hand*, at 228-29.
[37] For a survey of the relevant cases, see Daniel B. Kelly, *Pretextual Takings: Of Private Developers, Local Governments, and Impermissible Favoritism*, 17 SUP. CT. ECON. REV. 173 (2009).

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> *London* . . . obliges us to conclude that they have articulated no basis upon which relief can be granted.[38]

Judge Sotomayor and her colleagues offer no defense of their constitutional ruling other than a misleading claim that it was required by *Kelo* – an unsupported assertion that simply ignores the *Kelo* Court's admonition that pretextual takings remain illegal.

2. The statute of limitations issue.

In addition to rejecting Didden and Bologna's constitutional argument, Judge Sotomayor's panel also ruled that their claim was time-barred because it exceeded the relevant three year statute of limitations. This, however, in no way vitiates the extreme nature of the decision.

First, it is essential to recognize that the panel clearly did rule on the substantive issue as well.[39] Thus, even if they were correct on the statute of limitations issue, they still committed a grave error in their ruling on the vastly more important constitutional question.

Second, the Second Circuit's conclusion that the property owners' claim was time-barred is completely dependent on their substantive ruling that a condemnation enacted within a redevelopment area cannot be invalidated as pretextual. The panel ruled that Didden and Bologna were required to challenge the condemnation of their property within three years after its inclusion in a redevelopment area in July 1999. But their property was not condemned at that time and Wasser did not make his extortionate threats until November 2003. Until then, it was impossible to file a pretextual taking claim because no pretextual taking had yet occurred or even been threatened. Judge Sotomayor's panel ruled that Didden and Bologna's case was time-barred because it assumed that there is no legal difference between the mere declaration of a redevelopment area and the use of condemnation for purposes of extortion. The panel's seemingly technical procedural ruling was actually based on a serious substantive error.

III. *KRIMSTOCK V. KELLY.*

Judge Sotomayor's opinion in *Krimstock v. Kelly*,[40] her other significant property rights ruling, is much better than the summary order in *Didden.* In *Krimstock*, she wrote an opinion invalidating New York City's policy of seizing and holding vehicles owned by suspects accused of DUI and other offenses, and then retaining them for months or years at a time without allowing the defendants to challenge the seizures in any kind of legal proceeding.

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[38] *Didden*, 173 Fed Appx. at 933 (some citations omitted).
[39] *See id.* (stating that "even if Appellants' claims were not time-barred, to the extent that they assert that the Takings Clause prevents the State from condemning their property for a private use within a redevelopment district, regardless of whether they have been provided with just compensation, the recent Supreme Court decision in *Kelo v. City of New London* . . . obliges us to conclude that they have articulated no basis upon which relief can be granted").
[40] 306 F.3d 40 (2d Cir. 2002).

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Judge Sotomayor correctly ruled that this policy violates the Due Process Clause of the Fourteenth Amendment, which mandates that citizens cannot be deprived of life, liberty, or property without "due process of law." One can certainly argue about how much process is "due" in any given situation. But surely it is a violation of the Clause for the state to deprive citizens of valuable property for many months *without any judicial process whatsoever*. That is especially true if the deprivation imposes a substantial burden on the owner, as is often the case when the property seized is a car. Perhaps little or no process should be required for a very small deprivation of property; but surely more is "due" when the owner suffers serious harm as a result of the government's seizure of her possessions. For these reasons, it is hard to dispute Judge Sotomayor's conclusion:

> A car or truck is often central to a person's livelihood or daily activities. An individual must be permitted to challenge the City's continued possession of his or her vehicle during the pendency of legal proceedings where such possession may ultimately prove improper and where less drastic measures than deprivation pendente lite are available and appropriate.[41]

The *Krimstock* case is similar to the recent Seventh Circuit decision in *Alvarez v. Smith*,[42] which will heard by the Supreme Court this fall. *Krimstock* may actually have been a slightly less egregious case because three of the owners of the vehicles in *Alvarez* had not even been charged with a crime,[43] while the seven plaintiffs in *Krimstock* had pleaded guilty to the charge of driving while impaired (though forfeiture of property was not part of the legally mandated sentence for this offense).[44]

Judge Sotomayor also participated in another ruling that upholding minimal procedural Due Process Clause rights for property owners. In *Brody v. Village of Port Chester,* she was on a panel that held that property owners subjected to takings were entitled to individualized notice of the government's plan to condemn their property and the time limit for challenging it in court.[45]

In my view, *Krimstock* and *Brody* are relatively easy cases. Surely holding onto valuable property for years at a time with no legal process at all is not "due process" under any defensible definition. Similarly, even a minimalist interpretation of the Due Process Clause requires that property owners be given notice of a city's decision to condemn and the time period for challenging it; otherwise, they could easily be deprived of any opportunity to present their case whatsoever. However, the fact that the Supreme Court decided to hear *Alvarez* and may end up reversing it suggests that we cannot take anything for granted. Therefore, Judge Sotomayor does deserve some substantial credit for her opinion in *Krimstock*.

CONCLUSION.

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[41] *Krimstock*, 306 F.3d at 44.
[42] *Smith v. City of Chicago*, 524 F.3d 834 (7th Cir. 2008), pet. cert. granted, *Alvarez v. Smith*, 129 S.Ct. 1401 (2009).
[43] *Smith v. City of Chicago*, Plaintiffs' Br.,2007 WL 1706653 at 10-12.
[44] *Krimstock*, 306 F.3d at 45-46.
[45] 434 F.3d 121 (2d Cir. 2005).

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Krimstock is a praiseworthy decision. But it does not fully offset Judge Sotomayor's deeply flawed ruling in *Didden.* For reasons described above, judicial enforcement of Public Use Clause limitations on takings is vital for protecting the rights of property owners, particularly the poor and politically weak. The procedural Due Process Clause protections Judge Sotomayor enforced in *Krimstock* and *Brody* have great value. But ultimately, they are less significant than the constitutional rules that prevent government from taking homes, businesses and other property without any legitimate public use. For property owners, there is only limited consolation in the fact that the government must provide notice and a hearing before it takes their land for the benefit of well-connected private interests.

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OPENING STATEMENT OF JUDGE SONIA SOTOMAYOR
Before the Senate Judiciary Committee
July 13, 2009

Embargoed for Delivery

Thank you, Mr. Chairman. I also want to thank Senators Schumer and Gillibrand for that kind introduction.

In recent weeks, I have had the privilege and pleasure of meeting eighty-nine gracious Senators, including all the members of this Committee. I thank you for the time you have spent with me. Our meetings have given me an illuminating tour of the fifty states and invaluable insights into the American people.

There are countless family members, friends, mentors, colleagues, and clerks who have done so much over the years to make this day possible. I am deeply appreciative for their love and support. I want to make one special note of thanks to my mom. I am here today because of her aspirations and sacrifices for both my brother Juan and me. Mom, I love that we are sharing this together. I am very grateful to the President and humbled to be here today as a nominee to the United States Supreme Court.

The progression of my life has been uniquely American. My parents left Puerto Rico during World War II. I grew up in modest circumstances in a Bronx housing project. My father, a factory worker with a third grade education, passed away when I was nine years old.

On her own, my mother raised my brother and me. She taught us that the key to success in America is a good education. And she set the example, studying alongside my brother and me at our kitchen table so that she could become a registered nurse. We worked hard. I poured myself into my studies at Cardinal Spellman High School, earning scholarships to Princeton University and then Yale Law School, while my brother went to medical school. Our achievements are due to the values that we learned as children, and they have continued to guide my life's endeavors. I try to pass on this legacy by serving as a mentor and friend to my many godchildren and students of all backgrounds.

Over the past three decades, I have seen our judicial system from a number of different perspectives – as a big-city prosecutor, a corporate litigator, a trial judge and an appellate judge. My first job after law school was as an assistant District Attorney in New York. There, I saw children exploited and abused. I felt the suffering of victims' families torn apart by a loved one's needless death. And I learned the tough job law enforcement has protecting the public safety. In my next legal job, I focused on commercial, instead of criminal, matters. I litigated issues on behalf of national and international businesses and advised them on matters ranging from contracts to trademarks.

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My career as an advocate ended—and my career as a judge began—when I was appointed by President George H.W. Bush to the United States District Court for the Southern District of New York. As a trial judge, I decided over four hundred and fifty cases, and presided over dozens of trials, with perhaps my best known case involving the Major League Baseball strike in 1995.

After six extraordinary years on the district court, I was appointed by President William Jefferson Clinton to the United States Court of Appeals for the Second Circuit. On that Court, I have enjoyed the benefit of sharing ideas and perspectives with wonderful colleagues as we have worked together to resolve the issues before us. I have now served as an appellate judge for over a decade, deciding a wide range of Constitutional, statutory, and other legal questions.

Throughout my seventeen years on the bench, I have witnessed the human consequences of my decisions. Those decisions have been made not to serve the interests of any one litigant, but always to serve the larger interest of impartial justice.

In the past month, many Senators have asked me about my judicial philosophy. It is simple: fidelity to the law. The task of a judge is not to make the law – it is to apply the law. And it is clear, I believe, that my record in two courts reflects my rigorous commitment to interpreting the Constitution according to its terms; interpreting statutes according to their terms and Congress's intent; and hewing faithfully to precedents established by the Supreme Court and my Circuit Court. In each case I have heard, I have applied the law to the facts at hand.

The process of judging is enhanced when the arguments and concerns of the parties to the litigation are understood and acknowledged. That is why I generally structure my opinions by setting out what the law requires and then by explaining why a contrary position, sympathetic or not, is accepted or rejected. That is how I seek to strengthen both the rule of law and faith in the impartiality of our justice system. My personal and professional experiences help me listen and understand, with the law always commanding the result in every case.

Since President Obama announced my nomination in May, I have received letters from people all over this country. Many tell a unique story of hope in spite of struggles. Each letter has deeply touched me. Each reflects a belief in the dream that led my parents to come to New York all those years ago. It is our Constitution that makes that Dream possible, and I now seek the honor of upholding the Constitution as a Justice on the Supreme Court.

I look forward in the next few days to answering your questions, to having the American people learn more about me, and to being part of a process that reflects the greatness of our Constitution and of our nation. Thank you.

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The Honorable Harry Reid
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The Honorable Patrick J. Leahy
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The Honorable Jeff Sessions
Ranking Member
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Re: The Nomination of Judge Sonia Sotomayor to the Supreme Court of the United States

Dear Majority Leader Reid, Minority Leader McConnell, Chairman Leahy, and Ranking Member Sessions:

We are women litigators in private practice who appear before the United States District Court for the Southern District of New York, the United States Court of Appeals for the Second Circuit, and other district courts in our Circuit.[1] We write to voice our enthusiastic support for the nomination to the Supreme Court of Sonia Sotomayor, based on her proven intellect, her broad-based legal and judicial experience, and her character.

[1] We write in our individual capacities and on behalf of no person or entity other than ourselves. Firm names and addresses are provided for identification purposes only.

Judge Sotomayor excelled in school, graduating valedictorian of Cardinal Spellman High School in New York. At Princeton University, she was a co-recipient of the M. Taylor Pyne Prize, the highest honor Princeton awards to an undergraduate, graduating *summa cum laude* and Phi Beta Kappa. At Yale Law School, Judge Sotomayor served as an editor of the Yale Law Journal and as managing editor of the Yale Studies in World Public Order.

Judge Sotomayor became an Assistant District Attorney in Manhattan in 1979, where she tried dozens of criminal cases over five years. She entered private practice in 1984, becoming a partner at the firm of Pavia & Harcourt LLP as a litigator, handling cases involving issues from intellectual property to banking, real estate and contract law.

Her judicial service began in October 1992 with her appointment to the United States District Court for the Southern District of New York by President George H.W. Bush. From 1992 to 1998, she presided over approximately 450 cases. While in the district court, Judge Sotomayor developed a reputation as a no-nonsense judge who was both tough and even handed. There, with her experience as a New York City prosecutor and a lawyer, she was focused on the issues, without losing sight of the fact that litigants before her often faced the loss of liberty.

President Clinton appointed Judge Sotomayor to the Second Circuit in 1998. On that court, she has participated in over 3000 panel decisions and orders, authoring over 230 majority opinions. In the Circuit, Judge Sotomayor's years of experience were quickly evident in the performance of her new duties. Her approach is professional, and she treats all parties respectfully. Her opinions speak for themselves and attest to her unquestioned commitment to excellence and the rule of law.

Judge Sotomayor is also a Lecturer at Columbia University Law School and was an adjunct professor at New York University Law School until 2007. She has served as a member of the Second Circuit Task Force on Gender, Racial and Ethnic Fairness in the Courts and was formerly on the Boards of Directors of the New York Mortgage Agency, the New York City Campaign Finance Board, and the Puerto Rican Legal Defense and Education Fund. A project to which she has devoted her attention is the Development School for Youth program, which sponsors workshops for inner-city high school students. In addition to the workshop experience, each student is offered a summer job by one of the corporate sponsors of the program. We also applaud the fact that almost one-half of her law clerks have been women, giving them an experience that will serve them throughout their lives.

We believe that Judge Sotomayor's character and experiences – educational, legal, and judicial – make her uniquely qualified for the challenges she will meet in the Supreme Court. She is an extraordinary judge and will make an extraordinary justice.

Thank you for your consideration of our views.

Respectfully submitted,

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Senator Jon Kyl
Senator Lindsey Graham
Senator John Cornyn
Senator Tom Coburn

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Kate Stith
Lafayette S. Foster Professor of Law
Yale Law School

July 16, 2009

BEFORE: Senate Committee on the Judiciary, Hearings on the Nomination of Judge Sonia Sotomayor to be Associate Justice of the United States Supreme Court

Members of the Committee:

I thank you for the opportunity to comment on the nomination of Judge Sonia Sotomayor, whom I have known professionally since she became a judge in 1992.

I am a professor at Yale Law School, where I teach and write primarily in the area of criminal law. Before I joined the Yale faculty in 1985, I was an Assistant U.S. Attorney in the Southern District of New York and a special assistant at the Department of Justice in Washington.

In my judgment, this is an exceptionally strong nomination. My judgment has nothing to do with Judge Sotomayor's sex, ethnicity, or "personal story." I am judging her on the same criteria I used when I was asked by the Yale Daily News whether Samuel Alito was a strong nomination to the Court. I answered "yes" then, and I answer "yes" now. Specifically, I am confident that Judge Sotomayor would serve this nation with powerful intelligence, vigor, rectitude, and an abiding commitment to our Constitution. Moreover, her service as a state prosecutor and district judge would make her unique on the Court to which she will ascend.

My judgment about Judge Sotomayor is informed by many sources.

First, I have been unusually involved, at least for a professor, with members of the Bar and the bench, as well as the academy, within the Second Circuit. Among these lawyers who know her best, she is held in high repute across the board.

My judgment is also based on my many conversations with Judge Sotomayor. The most important of these have been our conversations about Yale students who have applied to clerk with her after graduation. From her questions over the course of more than fifteen years, I believe that I have gained insight into her understanding of the role of a judge.

And the bottom line is this: What she wants in her law clerks is what we all want in a judge.

She wants to make sure, first, that they are serious about the law – not about public affairs, or professional opportunities after the clerkship, or about pursuing a political or other agenda as a law clerk.

And they must be serious about *all* areas of the law. Thus, if a student has primarily taken courses in, say, criminal law, she asks me – But will he care equally about

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commercial law, and administrative law, and immigration law? For *Judge* Sotomayor there are no favorite areas of the law.

Which brings me to a third quality that she wants in her law clerks: The prospective clerk must be willing to work his or her fingers to the bone if necessary to make sure that Judge Sotomayor's opinions and the opinions she joins don't miss an arguably relevant precedent, and don't get a fact wrong.

And there is an overriding fourth quality that the Judge holds critical: Is the prospective clerk willing to take criticism, to think harder, and (where appropriate) to rethink his or her initial assessment of the issues?

Over the years, the Judge's former clerks have told me time and again that they greatly appreciate the Judge's demanding devotion to the law, as a result of which they were held to higher standards and learned more than at any other time of their lives.

Her conception of the role of a judge is borne out by her judicial opinions in the area of criminal law.

Other witnesses have or will comment on her criminal procedure decisions. Let me just note that the left-right scale is not very helpful in this area of law. My conclusion about these opinions is that they often reflect a greater pragmatism than, say, Justice Souter's opinions. Sometimes this cuts for the government, and sometimes against it.

I do want to mention in particular one *substantive* criminal law case, United States v. George, decided in 2004. [386 F.3d 383, 2d Cir., 2004.] Judge Sotomayor's sixteen-page, unanimous opinion concerns the meaning of the mens rea term "willfully" in the federal statute that makes it a crime to "willfully" falsify a passport application. [18 U.S.C. 1542.] Her opinion makes clear that the role of the courts is not to decide what level of mens rea *they* think should be imposed, but what level *Congress* intended when it used the word "willfully." The opinion then embarks on a heroic effort to figure out what Congress meant in this particular statute, or – to be more precise, since she was a lower court judge – she set out to determine, on the basis of Supreme Court precedent, what that Court would say Congress intended in this statute. The opinion is so clarifying and insightful that my co-authors and I decided to include a long excerpt from it in our forthcoming Federal Criminal Law casebook.

The significance of the case isn't only that it is an excellent opinion, but that Judge Sotomayor and her two colleagues changed their minds. In their initial decision, they said the trial judge instructed the jury incorrectly on the meaning of "willfully," and they therefore vacated the conviction. But then the government filed a petition for rehearing. And after the prodigious amount of effort that is reflected in the final opinion, Judge Sotomayor vacated her own first opinion. As the Judge summarized: "Having reviewed the arguments of both parties pursuant to the government's petition for rehearing, we now [affirm the conviction]."

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I submit that the *George* case reveals the judicial qualities that Judge Sotomayor clearly possesses. *First*, she cared deeply about the issue at hand, no matter how minor or word-parsing it may seem even to lawyers. *Second*, she was willing to reassess her initial judgment and to keep digging. *Third*, her legal analysis was exceptionally clear and exceptionally astute. And, *fourth*, she had no agenda other than trying to get the law right – and in a society committed to the rule of law, "getting the law right" is what it *means* to be "fair and impartial."

This is a great judge. I urge you to vote in favor of Judge Sotomayor's confirmation.

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TRAC

Supreme Court Nominee Judge Sonia Sotomayor: Tough on White-Collar Crime

A case-by-case examination of the sentences imposed by Judge Sonia Sotomayor during her six years as a trial judge in the Southern District of New York has determined that she was more likely than her colleagues to send a person to prison. As shown in Figure 1, this was particularly true for convicted white-collar criminals.

These new findings about President Obama's nominee to the Supreme Court have emerged from an analysis by the Transactional Records Access Clearinghouse (TRAC) of 7,750 prosecutions handled by the 52 judges who served in the federal district court covering Manhattan, Westchester and several other neighboring counties from FY 1993 to FY 1998. The record shows that Judge Sotomayor handled 261 of the district-wide total of prosecutions.

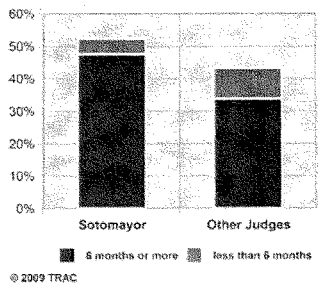

Figure 1. White Collar Criminals Sentenced to Prison. *(click for details)*

Since her nomination on May 26, the casual remarks, formal speeches and court of appeals decisions of Judge Sotomayor have been subjected to extensive review by scores of legal scholars, reporters, women's rights groups, gun advocates, civil rights organizations and many others. But her activities as a trial court judge have not previously been systematically examined.

In this first-of-its kind analysis, based on very detailed Justice Department information obtained under the Freedom of Information Act (FOIA), TRAC examined Judge Sotomayor's handling of all of her criminal cases and then compared this record with that of all judges who had served in her district during the same period.

The Senate Judiciary Committee hearings considering Judge Sotomayor's nomination by President Obama are scheduled to begin on July 13. If as expected she is confirmed, the judge would be the first Hispanic to serve on the Supreme Court.

What Do the Records Show?

The federal court in the Southern District of New York handles a wide array of criminal cases. For example, during the FY 1993 to FY 1998 period when Judge Sotomayor was a trial judge one in five cases (20%) were white-collar crime matters involving different types of financial frauds, a little over a quarter of the cases (27%) concerned illegal drugs, and the remaining half (52.5%) covered other federal offenses, such as immigration and regulatory violations, official corruption and organized crime.

Type of Offender	Sotomayor	Other Judges	Sotomayor	Other Judges
	FY93 - FY98		FY93 - FY98	
White Collar	47	1,570	18.0%	20.3%
Drugs	76	2,115	29.1%	27.3%
Other	138	4,065	52.9%	52.5%
Total	261	7,750	100.00%	100.00%

Table 1. Criminal Cases in U.S. District Court (Southern District of New York), FY 1993 - FY 1998

In accordance with the court's long-held policy that criminal cases are assigned to judges on a random basis, Justice Department data show that the makeup of Judge Sotomayor's caseload closely mirrored that of all of the judges in her district. Thus, during the same six-year period, 29% of the criminal matters assigned to her court involved drugs, 18% white-collar crime and 53% other offenses. See Table 1.

When district-wide sentences were compared with those imposed by Judge Sotomayor, however, real differences emerged. Most striking was the finding that across the board Judge Sotomayor was more likely to send the person to prison than her colleagues. This was true whether the offender was a drug dealer or had been convicted of a white collar crime. But the record also shows that she was notably tougher in her sentencing of white-collar criminals than was typical in this district.

About the Data

This analysis is based on an extensive database which tracks the case-by-case record of each federal district court judge. It was developed by TRAC and is available on a subscription basis at http://tracfed.syr.edu. Updated monthly, TRAC uses a variety of data sources including detailed case records obtained through a series of lawsuits under the Freedom of Information Act. See more...

White-Collar Crime

From 1993 to 1998, the judges in New York South were credited with handling the prosecution of 1,570 white-collar crime cases. Of these, 47 white-collar crime prosecutions were handled by Judge Sotomayor.

For this group of criminals, Judge Sotomayor's colleagues sent 43% to prison, with only one out of three of the total receiving a sentence of six months or longer. Judge Sotomayor, in contrast, handed out prison time more often. In her case, a bit more than half (52%) were given some prison time and nearly half (48%) -- rather than one-third (34%) -- were given a prison sentence of 6 months or more. (See earlier Figure 1 and accompanying table details.)

For the comparatively few white-collar criminals who were sentenced to significant time in prison, the TRAC analysis again shows that Judge Sotomayor was tougher. For all the judges in the district only slightly more than one out of ten white-collar offenders -- 12% of the total -- received a sentence of two years or more. By comparison Judge Sotomayor handed out such sentences twice as frequently, 24% of the time. (See Figure 2 and accompanying table details.)

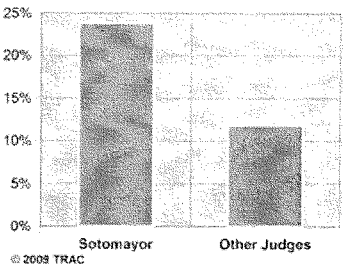

Figure 2. While Collar Criminals Sentenced to 2 Years or More in Prison.
(click for details)

Drugs

Under the EOUSA classification rules, 2,115 prosecutions were determined to involve narcotics or drugs in the Southern District of New York during the study period. The data further show that in this same category 76 of the total ended up in Judge Sotomayor's court.

With a median sentence of 48 months, the district-wide prison terms for drug offenses were a great deal harsher than they were for white collar crime. However, not all drug offenders received prison time. For the convicted drug offenders handled by Judge Sotomayor's colleagues about four out of five or 81% were sentenced to prison and 79% received at least 6 months of prison time.

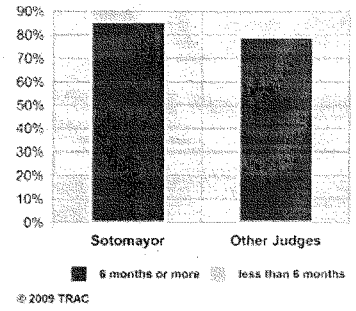

Figure 3. Drug Criminals Sentenced to Prison, *(click for details)*

By contrast, in the cases handled by Judge Sotomayor, six out of every seven (85.5%) were sentenced to at least six months of prison time. See Figure 3 and accompanying table details.

When it came to imposing lengthy drug sentences, however, her record was very similar to all of the judges in the district. In the case of Judge Sotomayor, one out of every five (20%) got a prison sentence of 10 years or more. For the district as a whole, 19% of the defendants were given such sentences. See table details.

During this period in the Southern District of New York, six cases out of the 2,115 were sentenced to an extremely long prison term of 999 years. None of those six occurred in Judge Sotomayor's court. These extremely long sentences received by the 6 individuals were enough to raise the average prison sentence for the whole district to 106 months. Without these six cases, the average prison sentence was 64 months. This average sentence is roughly comparable to Judge Sotomayor's of 66 months. Judge Sotomayor's and her colleagues' median sentences were both 48 months. That is, whether in Judge Sotomayor's or in her colleagues' courts, half of those convicted received longer times than 48 months and half shorter times.

Other Offenses

The remaining prosecutions cover a combination of small numbers of many different types of crimes. Together they added up to 4,065 cases. Judge Sotomayor handled 138 of them.

Despite their diversity, the overall pattern that emerged for white-collar and drug offenses repeats itself -- Judge Sotomayor was more likely to give prison time. For Judge Sotomayor, six out of ten (59.5%) received some prison time, and 56% received at least 6 months. Her colleagues, on the other hand, handed out prison sentences of at least 6 months less frequently, in only 46% of their cases. (See Figure 4 and accompanying table details.)

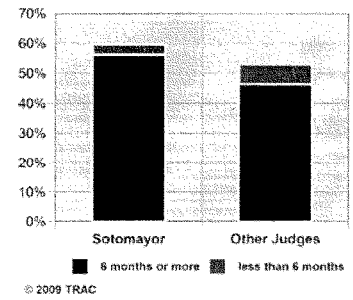

Figure 4. Other Criminals Sentenced to Prison, *(click for details)*

Slightly higher proportions received prison sentences of up to five years under Judge Sotomayor - 31 percent versus 29 percent for other judges. But the data further showed that a slightly smaller percentage - 9.5 percent versus 15 percent -- received sentences of 5 years or more. Considered together, Judge Sotomayor's median sentence for this wide range of different kinds of cases was 8 months - twice the length of the median sentence of 4 months handed out by her colleagues. (See table detail.)

The tendency for Judge Sotomayor to send individuals to prison is nowhere more evident than for immigration offenses. However, this finding can only be suggestive because there were just 385 immigration prosecutions completed for the entire district and only 14 of them in Judge Sotomayor's court. Nevertheless the findings here are striking. All but one immigration offender (91%) received prison time from Judge Sotomayor, while only 63% received prison time from her colleagues.

Summary

An examination of the 7,750 cases involving all of the Justice Department's many different categories of cases handled by all of the judges in New York during the 1993/1998 period show at least two consistent findings with respect to criminal sentencing.

First, by a range of different statistical measures, Judge Sotomayor was -- across the board -- a comparatively stiff sentencer, a judge who imposed prison time more often than was typical for her colleagues in the same district.

Second, for white-collar criminals who at that time typically did not receive any prison time at all from her colleagues, Judge Sotomayor's record was particularly tough. This conclusion is confirmed by two facts. First, the chance that a white-collar defendant would end up serving any prison time was higher in her court than it was for the district as a whole. Second, a higher proportion of the defendants in Judge Sotomayor's court were sentenced to longer prison terms than those who were sentenced by her colleagues.

Special Note: Federal Sentencing Guidelines

In 1987, after years of widespread public concern about the sentencing disparities that then existed in the federal courts, an overall sentencing reform package was formally adopted. These guidelines, largely the result of a bi-partisan effort by Senator Edward Kennedy, at that time the chairman of the Senate Judiciary Committee, and then Attorney General Edwin Meese, applied to offenses committed on or after November 1, 1987. The key objective of the guidelines was to assure that federal sentences would be primarily based on two factors: the offense committed and the defendant's past history. The broad goal was to better assure that similarly situated defendants would be treated similarly at sentencing.

A January 12, 2005 Supreme Court decision, United States V. Booker, held that the mandatory requirements of the original guidelines were not constitutional and in subsequent years a series of steps were adopted to make them advisory. But during the period Justice Sotomayor was a trial court judge, the sentencing guidelines would have applied to most of her cases. The only ones excluded would have been those where prosecution had been brought against an old offense -- that is, offenses committed prior to November 1, 1987 when the sentencing guidelines went into effect.

The sentencing guidelines, however, normally set a range of permissible sentence lengths for a given offense and offender criminal history. In addition, if there were extenuating circumstances a judge could hand down a higher or lower sentence than set by the guideline range. Thus, the guidelines did not impose lockstep uniformity on sentencing decisions.

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June 23, 2009

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Dear Senator Reid,

On behalf of the United States Hispanic Chamber of Commerce (USHCC)—the national representative for almost 3 million Hispanic-owned businesses—and the undersigned organizations, we write to express our support for the confirmation of Judge Sonia Sotomayor as Associate Justice of the Supreme Court of the United States. In her seventeen years of service to date as a federal trial and appellate judge, and throughout the course of her entire career, Judge Sotomayor has strongly distinguished herself through her outstanding intellectual credentials and her deep respect for the rule of law, establishing herself beyond question as fully qualified and ready to serve on the U.S. Supreme Court.

Judge Sotomayor will be an impartial, thoughtful, and highly-respected addition to the Court. Her unique personal background is compelling, and will be both a tremendous asset while serving on the Court and a historic inspiration to others. Her legal career further demonstrates her qualifications to serve in this position. After graduating from Yale Law School, where she served as an editor for the Yale Law Journal, Judge Sotomayor spent five years as a criminal prosecutor in Manhattan. She then spent eight years as a corporate litigator with the firm of Pavia and Harcourt, where she gained expertise in a wide range of civil law areas such as contracts and intellectual property. In 1992, on the bipartisan recommendation of her home-state Senators, President George H.W. Bush appointed her District Judge for the Southern District of New York. In recognition of her outstanding record as a trial judge, President Bill Clinton elevated her to the U.S. Court of Appeals in 1998.

During her long tenure on the federal judiciary, Judge Sotomayor has participated in thousands of cases, and has authored approximately 400 opinions at the appellate level. She has demonstrated a thorough understanding of a wide range of highly complicated legal issues, and has a strong reputation for deciding cases based upon the careful application of the facts to the law. Her record and her inspiring personal story indicate that she understands the judiciary's role in protecting the rights of all Americans, in ensuring equal justice, and respecting our Constitutional values – all within the confines of the law. Moreover, her well-reasoned and pragmatic approach to cases will allow litigants to feel, regardless of the outcome, that they were given a fair day in court.

Given her stellar record and her reputation for fairness, Judge Sotomayor has garnered broad support across partisan and ideological lines, earning glowing praise from

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http://www.ushcc.com

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colleagues who know her best in the judiciary, law enforcement community, academia, and the legal profession. Her Second Circuit colleague (and also her former law professor) Judge Guido Calabresi describes her as "a marvelous, powerful, profoundly decent person. Very popular on the court because she listens, convinces and can be convinced -- always by good legal argument. She's changed my mind, not an insignificant number of times." Judge Calabresi also discredited concerns about Judge Sotomayor's bench manner, explaining that he compared "the substance and tone of her questions with those of his male colleagues and his own questions. And I must say I found no difference at all." Judge Sotomayor's colleague Judge Roger Miner, speaking of her ideology, argued that "I don't think I'd go as far as to classify her in one camp or another. I think she just deserves the classification of outstanding judge." And New York District Attorney Robert Morgenthau, her first employer out of law school, hailed her for possessing "the wisdom, intelligence, collegiality, and good character needed to fill the position for which she has been nominated."

We urge you not to be swayed by the efforts of a small number of ideological extremists to tarnish Judge Sotomayor's outstanding reputation as a jurist. These efforts have included blatant mischaracterizations of a handful of her rulings, as well as efforts to smear her as a racist based largely on one line in a speech that critics have taken out of context from the rest of her remarks. The simple fact is that after serving seventeen years on the federal judiciary to date, she has not exhibited any credible evidence whatsoever of having an ideological agenda, and certainly not a racist one. We hope that your committee will strongly reject the efforts at character assassination that have taken place since her nomination.

In short, Judge Sotomayor has an incredibly compelling personal story and a deep respect for the Constitution and the rule of law. Her long and rich experiences as a prosecutor, litigator, and judge match or even exceed those of any of the Justices currently sitting on the Court. Furthermore, she is fair-minded and ethical, and delivers thoughtful rulings in cases based upon their merits. For these reasons, the undersigned organizations strongly urge you to swiftly confirm Judge Sotomayor to the Supreme Court.

Sincerely,

The United States Hispanic Chamber of Commerce
Albuquerque Hispano Chamber of Commerce
Asociación Interamericana de Hombres de Empresa (AIHE)
Association of Washington State Hispanic Chamber of Commerce
Atlantic City Hispanic Chamber of Commerce
Cámara de Comercio de Puerto Rico
Cámara de Comercio del Sur de Puerto Rico
Cámara de Comercio Hispana de Nebraska
Caribbean American Chamber of Commerce of Tampa Bay
Central California Hispanic Chamber of Commerce
Centro Unido de Detallistas de Puerto Rico
Colombian American Chamber of Commerce of New York
Ecuadorian-American Chamber of Commerce, Inc.
El Paso Hispanic Chamber of Commerce
Fresno Area Hispanic Chamber of Commerce
Greater Dallas Hispanic Chamber of Commerce
Greater Washington Hispanic Chamber of Commerce
Hampton Roads Hispanic Chamber of Commerce
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Hispanic Business Development Network
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The Greater Tulsa Hispanic Chamber of Commerce
Trinidad-Las Animas County Hispanic Chamber of Commerce
Utah County Hispanic Chamber of Commerce
100 Hispanic Women

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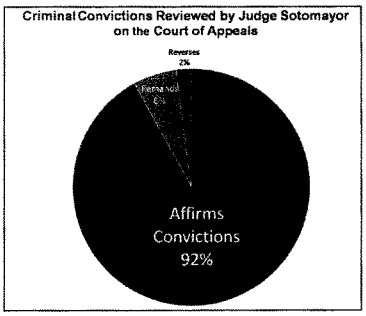
STUDY BY THE MAJORITY STAFF
OF THE SENATE JUDICIARY COMMITTEE

SONIA SOTOMAYOR: THE CRIMINAL JUSTICE RECORD

A comprehensive study of Judge Sotomayor's appellate decisions demonstrates a consistent record of following the rule of law in upholding convictions and sentences in criminal cases. Based on a review of her more than 800 appellate criminal cases, Judge Sotomayor is a traditional, consensus judge on criminal justice issues.

SUMMARY OF RESULTS

In more than ten years on the Second Circuit Court of Appeals, Judge Sotomayor affirmed criminal convictions 92 percent of the time and reversed convictions only 2 percent of the time.[1] Judge Sotomayor was particularly consistent in upholding convictions involving the most serious offenses. In violent crime cases, she affirmed convictions 98 percent of the time, including significant bombing and terrorism cases.[2] Similarly, her affirmance rates were consistently high in cases involving illegal firearms (98 percent), drug offenses (93 percent), criminal immigration violations (92 percent), and economic crime (93 percent).



Judge Sotomayor is a moderate judge whose decisions in criminal cases rarely diverge from those of her judicial colleagues. For example, Judge Sotomayor sat with Republican-appointed judges on more than 400 criminal cases as an appellate judge, considering the same arguments and evidence. She agreed with all Republican-appointed judges in the same case 97 percent of the time; she agreed with at least one Republican-appointed judge in the same case 99 percent of the time.

Judge Sotomayor has a strong record of fairness in considering challenges to police searches and considering the government's position in criminal cases. On appeal, she upheld police searches 90 percent of the time. When the government appealed adverse lower court rulings, she agreed with the government 92 percent of the time. In these cases, Judge Sotomayor was fair and consistent in applying the law, even at times disagreeing with her Republican-appointed colleagues who wanted to overturn a conviction that she would have affirmed.[3]

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[1] The remaining 6 percent of cases were remanded to the lower trial court for further factual or legal findings. Even in the small number of cases she reversed, she often only reversed partially, affirming numerous counts as well.
[2] *See U.S. v. Vallee*, 304 Fed. Appx. 916 (2d Cir. 2008) (affirmed convictions and life sentences imposed in car bombing which killed a federal witness); *U.S. v. Paracha*, 313 Fed. Appx. 347 (2d Cir. 2008) (affirmed terrorism conviction for material support of Al Qaeda).
[3] *See U.S. v. Yakobowicz*, 427 F.2d 144 (2d Cir. 2005) (Judge Sotomayor dissented, arguing conviction in tax case should be affirmed; two Republican-appointed judges wrote for the majority, overturning the conviction).

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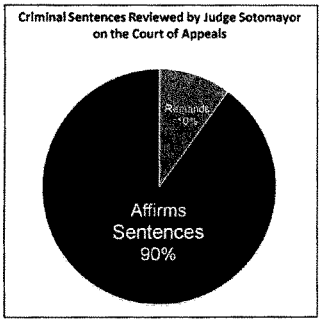
Judge Sotomayor's written opinions show restraint and careful adherence to the law in criminal cases. In *United States v. Tomasi*, Judge Sotomayor wrote separately in affirming a drug conviction in order to caution her fellow judges hearing the same case:

> [T]he majority abandons a well-established principle of sound, responsible jurisprudence--that courts have a duty to refrain from deciding issues whose resolution is not necessary to the disposition of a case. . . . While clarity in the law is always to be desired, judges should not indulge themselves by reaching out to decide issues not squarely before them in order to accomplish this result.[4]



Judge Sotomayor also affirmed challenges to criminal sentences 90 percent of the time, including significant upward departures in child pornography and organized crime cases.[5] This affirmance rate included 10 percent of cases where the court of appeals affirmed the sentence against all challenges, but nonetheless automatically remanded the case as required by new rulings from the Supreme Court or Second Circuit Court of Appeals.[6]

METHODOLOGY

The study conducted by staff included a review of all criminal cases heard by Judge Sotomayor on the Second Circuit Court of Appeals between 1998 and 2009. In total, staff reviewed more than 800 criminal cases, including every case in which Judge Sotomayor wrote an opinion or joined in a summary, *per curium*, or *en banc* opinion. The study did not include civil cases involving criminal issues, or civil habeas corpus petitions involving post-conviction review of criminal cases. If multiple opinions were issued in one case, it was only considered to be one case.

The study only considered a conviction or a sentence to be "affirmed" if all counts of the conviction or all portions of the sentence were affirmed. If any count of a conviction or any portion of a sentence was reversed or remanded, the case was not considered to be "affirmed," except for the sentences subject to automatic remand noted above. If the study had considered these partial affirmances, the overall affirmance rates would be even higher.

SPECIFIC FINDINGS

The study's principal findings were as follows:

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[4] 313 F.3d 653, 660-662 (2d Cir. 2002) (Sotomayor, J., dissenting).

[5] *See U.S. v. Adrignola*, 2009 WL 180303 (2d Cir. Jan 27, 2009) (affirmed 49-month upward departure in child pornography sentence); *U.S. v. Gravano*, 82 Fed. Appx. 736 (2d Cir. 2003) (affirmed upward departure for criminal history in conviction of former Gambino Family underboss).

[6] The Second Circuit Court of Appeals automatically remanded for resentencing cases affected by the Supreme Court's new rulings in *United States v. Booker*, 543 U.S. 220 (2005), *United States v. Blakely*, 542 U.S. 296 (2004), and *United States v. Kimbrough*. 552 U.S. 85 (2007), as well as Second Circuit Court of Appeals rulings in *United States v. Williams*, 558 F.3d 168 (2d Cir. 2009) and *United States v. Whitely*, 529 F.3d 150 (2d Cir. 2008). In these cases, the lower court had not had the opportunity to consider these new precedents in originally imposing sentence.

A STUDY OF JUDGE SONIA SOTOMAYOR'S CRIMINAL RULINGS ON THE SECOND CIRCUIT COURT OF APPEALS

Criminal Convictions:	92% Affirmed 6% Remanded 2% Reversed
Violent Crime Cases	98% Affirmed
Illegal Firearm Cases	98% Affirmed
Drug Cases	93% Affirmed
Immigration Crime Cases	92% Affirmed
Economic Crime Cases	93% Affirmed
Criminal Sentences:	90% Affirmed 10% Remanded
Rule of Law Judge:	
Agrees with All Republican-Appointed Judges Hearing Same Case	97% of the time
Agrees with One or More Republican-Appointed Judges Hearing Same Case	99% of the time
Police Searches:	90% Upheld
Government Appeals:	92% Upheld

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Statement of Lieutenant Ben Vargas

Senator Leahy, Senator Sessions, and members of this Committee. It was truly an honor to be invited here. Senators of both parties have noted the importance of this Committee's duty in this process precisely because decisions of the United States Supreme Court can greatly impact the everyday lives of ordinary Americans. I suppose that I and my fellow plaintiffs have shown how true that is.

I never envisioned being a plaintiff in a Supreme Court case, much less one that generated so much media and public interest. I am Hispanic, and proud of the Heritage and background that judge Sotomayor and I share, and I congratulate Judge Sotomayor on this nomination. But the focus should have been on what I did to earn a promotion to Captain and how my own government and some courts responded to that. In short, they didn't care. I think it important for you to know what I did, that I played by the rules, and then endured a long process of asking the courts to enforce those rules.

I am the proud father of three young sons. For them, I sought to better myself. And so I spent 3 months in daily study preparing for an exam that was unquestionably job-related. My wife, a special education teacher, took time off from work to see me and our children through this process.

I knew I would see little of my sons during these months when I studied every day at a desk in our basement. So I placed photographs of my boys in front of me. When I would get tired and want to stop, I would look at the pictures, realize that their own futures depended on mine, and I would keep going. At one point, I packed up and went to a hotel for days to avoid any distractions. I took my boys' pictures with me.

I was shocked when I was not rewarded for this hard work and sacrifice but actually penalized for it. I became not Ben Vargas, the fire lieutenant who proved himself qualified to be a Captain, but a racial statistic. I had to make a decision – whether to join those who wanted promotions to be based on race and ethnicity or join those who would insist on being judged solely on their qualifications and the content of their character. I'm proud of the decision I made and proud of the principle that our group vindicated together.

I do not want my sons to think their father became a Captain because he was Hispanic and used his ethnicity to get ahead. Worse still is to jump the line ahead of others who are more qualified. There is no honor in that.
In our profession, do not have the luxury of being wrong or having long debates. We must be correct the first time and make quick decisions under the pressure of time and rapidly unfolding events. Those who make these decisions must have the knowledge necessary to get it right the first time. Unlike the judicial system, there are no continuances, motions or appeals. Errors and delays can cost people their lives.

In our profession, the racial and ethnic make-up of my crew is the least important thing to us and to the public we serve. I believe the countless Americans who had something to say about our case understand that now.

Firefighters and their leaders stand between their fellow citizens and catastrophe. They want those who are the most knowledgeable and qualified to do this task. I am willing to risk and even lay down my life for my fellow citizens. But I was not willing to go along with those who place racial identity over these more critical considerations.

I am not a lawyer but I quickly learned about the law as it applied to this case, studying it as much as I studied for my exam. I thought it clear that we were denied our fundamental civil rights. I expected Lady Justice with the blindfolds on and a reasoned opinion from a federal court of appeals, telling me, my fellow plaintiffs and the public what that court's view on the law was and do it in an open and transparent way. Instead, we were devastated to see a one-paragraph unpublished order summarily dismissing our case and indeed even the notion that we had presented important legal issues to that court of appeals.

I expected the judges who heard my case along the way to make the right decision, the one required by the rule of law.

Of all that has been written about our case, it was Justice Alito who best captured our own feelings. We did not ask for sympathy or empathy. We asked only for even-handed enforcement of the law. And prior to the majority justices' opinion in our case, we were denied that.

CONGRESSWOMAN NYDIA M. VELAZQUEZ (NY-12)

CHAIR, CONGRESSIONAL HISPANIC CAUCUS

TESTIMONY BEFORE SENATE JUDICIARY COMMITTEE

Nomination of Sonia Sotomayor to the U.S. Supreme Court

July 16, 2009

Thank you, Chairman Leahy, Ranking Member Sessions, and Members of the Committee. I have known Sonia Sotomayor for over twenty years. In fact, when I was first elected to Congress in 1993, I asked her to administer my oath of office. I can tell you personally that she is a grounded and professional individual.

Hispanics everywhere are proud that such a distinguished legal talent hails from our community. We have all been energized by her nomination. But of course, that is not the reason why she should be confirmed. The case for Judge Sotomayor's confirmation is built on her vast experience, keen intellect and tremendous qualifications.

It is not that Judge Sotomayor does not have a compelling life history. She does. As so many have already pointed out, hers is a uniquely American story--one that begins in the Bronx projects and, ultimately, reaches the highest echelons of our legal system. This background instilled within her the belief that hard work is rewarded, and the knowledge that--with the right combination of talent and effort-- anything is possible.

These core values propelled Sonia Sotomayor to remarkable heights. As her career progressed, she managed to reach nearly every level of the legal system. With each new step, she excelled, not only as a prosecutor and a litigator, but also as an appellate judge. And yet, throughout that process of achievement, she never once lost touch with her roots, or her Bronx neighborhood. Instead, she augmented her vast legal experience with a commonsense understanding of working class America. That appreciation will add a valuable perspective to the Supreme Court.

Make no mistake -- the stakes are high for Hispanic Americans. The Supreme Court will rule on many matters that are critical to our community, from housing policy to voting rights. These are delicate issues. With many of these matters, passions run deep on both sides. Resolving them fairly will require objectivity, impartiality, and an unwavering commitment to the rule of law.

Judge Sotomayor's record demonstrates these qualities. She has a reputation as a non-ideological jurist--someone who chooses not to spar with those who think differently, but to instead find common ground. When working with Republican colleagues, Sotomayor's record will show that--95% of the time--she managed to forge consensus. She was able to do this because she commands a sophisticated grasp of legal arguments, and has a keen awareness of the law's effects on everyday Americans. When the Congressional Hispanic Caucus reviewed a broad range of qualified Supreme Court candidates, *these* were the traits we were looking for.

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We were looking for individuals who upheld constitutional values, exhibited a record of integrity, and had a profound respect for our constitution. It is our overwhelming belief that Judge Sotomayor meets these criteria. That is why we enthusiastically-- and *unanimously*-- endorsed her nomination.

Senators, the decision before the Committee today is one of your greatest responsibilities. I know this is something none of you, on either side of the aisle, take lightly. But, I believe Judge Sotomayor's record of judicial integrity, impartiality and, as she puts it, "fidelity to the law," is one we can all admire-- regardless of party or ideology. If confirmed, Judge Sotomayor's service on the Court will bring great pride to the Hispanic community. That goes without saying. But, more importantly, it will add another objective, disciplined legal talent to that august body.

Thank you again for the opportunity to testify. I look forward to answering any questions you may have.

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THE WALL STREET JOURNAL.
WSJ.com

- JULY 16, 2009

Defining Activism Down
A liberal vote cast in conservative judicial rhetoric.

After two days of Senate hearings on the nomination of Sonia Sotomayor, an onlooker could be forgiven for wondering where all the judicial liberals went. To hear the adjectives heaped on the judge by members of the President's party, you'd think Mr. Obama had nominated Chief Justice John Roberts's conservative cousin.

Judge Sotomayor is smart and accomplished, New York Democrat Chuck Schumer said Monday, "but most important . . . [her record] bespeaks judicial modesty" and shows she is a better "umpire" than Justice Roberts himself. Dick Durbin called her "restrained, moderate and neutral," while Pat Leahy said her record shows a "careful and restrained judge with a deep respect for judicial precedent."

The activists in Mr. Leahy's rhetorical show are, presto, the conservatives of the Roberts Court, which has very, very cautiously chipped away at some precedent in cases on issues like the Second Amendment and campaign finance reform.

Under this brave new meaning of judicial activism advanced several years ago by now-White House aide Cass Sunstein, a judicial activist is any judge invalidating a federal law, however shoddily made. Ergo, conservative judges are obliged to uphold liberal precedents no matter how narrow the vote and how recent the case, while liberals can overturn long-time principles in the name of the evolving Constitution.

The effect is a liberal ratchet, where precedents like Miranda v. Arizona and Roe v. Wade are cast in stone, but any rethinking by the Roberts Court of the six-year-old 5-4 campaign-finance ruling in McConnell v. FEC is a scandal. "So many of the rulings of the current conservative majority on the Supreme Court can be described as activist," Wisconsin Democrat Russ Feingold insisted. "The best definition of a judicial activist is when a judge decides a case in a way you don't like."

Actually, we have a better one. An activist judge is one who is willing to decide cases based on something other than what's in the Constitution. But that's a troublesome standard for Sonia Sotomayor, who in speeches and writings has shown she is open to a wide variety of sources, from human empathy to personal experience to foreign and international law to help her in judging cases, or to "set our creative juices flowing," as she said of the latter.

Under questioning yesterday on her controversial remark that a "wise Latina" would make better decisions than a white male, Judge Sotomayor backed away from the statement, calling it a "bad" play on the words of Sandra Day O'Connor that a wise old man and a wise old woman would reach the same conclusion. Still, she insisted, she

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was trying to inspire Hispanic law students "to believe that their life experiences would enrich the legal system, because different life experiences and backgrounds always do."

Democrats emphasize that Judge Sotomayor's record on the bench shows she is a moderate whose decisions were frequently in step with her colleagues on the Second Circuit Court of Appeals. According to a study by the left-leaning Brennan Center for Justice, Judge Sotomayor voted with the majority in 98.2% of her 217 constitutional cases, dissenting only four times.

Falling within the mainstream of liberal judges, however, is not the same as falling into the mainstream of the rest of the country. The judge's decision to deny a racial bias claim by white firefighters was overturned by the Supreme Court in Ricci v. DeStefano last month. Afterward, a Rasmussen poll found that 46% of voters considered her a political liberal compared to only 32% who thought she was a moderate. Justices shouldn't be confirmed based on polls, but the numbers do explain the concerted Democratic attempts to define her as a conservative.

In fact, what was once the Felix Frankfurter-Whizzer White school of liberal judicial restraint no longer exists in the polite echelons of the judicial left. The new school is now remarkably uniform in wanting to dictate racial outcomes, limit political speech, invoke foreign rulings as a legal guide, and do whatever else the activist cause of the moment demands.

Judge Sotomayor gives every sign of being of that school, and there's little reason to believe she wouldn't be a reliable liberal vote on every important issue. Elections have consequences, and Justice Sotomayor is almost certain to be confirmed. But for a President who was elected on the promise of moving beyond old racial divisions, Mr. Obama's first Supreme Court nominee looks jarringly passé.

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MORE IN OPINION

GERALD WALPIN
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212-288-5324

Honorable Patrick J. Leahy
United States Senator
Chairman, Senate Committee on the Judiciary

Honorable Jeff Sessions
United States Senator
Ranking Member, Senate Committee on the Judiciary

224 Dirksen Senate Office Building
Washington, DC 20510

By Courier and Fax

Dear Senators Leahy and Sessions:

Re: Confirmation Hearings On Judge Sotomayor

I am forwarding to each of you, with this letter, a submission to the members of the Senate Judiciary Committee, explaining my reasons in favor of the confirmation of Judge Sotomayor to be a Supreme Court Justice.

If there is anything else that I need to do in order for this to be considered by the members of the Senate Judiciary Committee, please ask one of your staff to inform me.

Thank you for your consideration.

Very truly yours,

Gerald Walpin

SUBMISSION TO THE SENATE JUDICIARY COMMITTEE
From Gerald Walpin

INTRODUCTION

I submit this memorandum to the Senate Judiciary Committee as it considers the nomination of Judge Sonia Sotomayor to be a Justice of the Supreme Court, so that the Committee has the views of one, whom the New York Times described as a "staunch conservative," in favor of her confirmation.

Some of the Senators on the Judiciary Committee may recognize my name as the Inspector General of the Corporation For National and Community Service whom the President, in June, ordered removed from that position. Not too long before that happened, I had been contacted by White House staff and, based on several communications, I stated that I would be pleased to make a submission in support of her confirmation. While I believe that the White House erred in the decision to remove me, I do not believe that decision should in any way detract from what I believe are the merits of the President's nomination of Judge Sotomayor.

The New York Times comment, referred to above, was made in connection with my submission in favor of her nomination to the Court of Appeals For the Second Circuit.

REASONS SHE SHOULD BE CONFIRMED

I would be less than honest if I did not, at the outset, state that I would prefer that the next Supreme Court nominee be someone more like Justices Scalia, Thomas, Roberts and Alito. But Senator McCain lost the election. The Constitution gives the winner, President Obama, the right to choose who will be the nominee to the Supreme Court.

I strongly believe that any President's nominee should be confirmed as long as the nominee meets five requirements: intelligence, integrity, experience, judicial temperament, and belief that the rule of law trumps any personal tendencies.

From personal knowledge and from my review of many of her decisions, both as a District Judge and then on the Court of Appeals, I have no doubt that Judge Sotomayor meets each of these qualifications. I have known her for about 15 years in my capacity as President of the Federal Bar Council – the bar association for the Federal Courts in the Second Circuit in which she sits – and as a New York litigator.

Her academic achievements at Princeton and Yale Law School, and now the plaudits of her judicial colleagues, both conservative and liberal, establish her intelligence. Few, if any, other appointees to the Supreme Court have equaled her seventeen years of prior experience in service on both the trial and appellate benches. I do not believe that, in all her years as a prosecutor, in private practice, and as a judge, any one has questioned her integrity.

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Since the nomination was announced, I have heard criticism of her judicial demeanor, based on the assertions that she interrupts lawyers too much and too quickly to ask them questions, and she too often has made up her mind before the oral argument. I find these assertions frivolous. I speak from my experience as a litigator who has argued many appeals before different judges. The objection to Judge Sotomayor's practice during oral argument simply describes a "hot" bench, composed of judges who have studied the briefs and ask questions quickly and frequently to test their views and the litigants' views – a bench that most good litigators prefer. As to her having often indicated during oral argument that she may have made up her mind before the argument, it must be assumed that a good judge, who has performed his/her responsibility to read the briefs in advance of oral argument, has reached a tentative conclusion; a judge with a totally "open" mind, not tending towards one side or the other, likely has not in fact studied the briefs.

Finally is the element on which Judge Sotomayor has been so far most criticized: does she really believe in the rule of law to submerge any personal predilections? The answer is yes.

I start with what she informed the Senate Judiciary Committee in connection with her Second Circuit nomination: "because judicial power is limited by Article III of the Constitution, judges should" base their decisions on "the law as written and interpreted in precedents." Further, she emphatically rejected reading new rights into the Constitution: "The Constitution is what it is. We cannot read rights into" it.

I will now cite and summarize some of her judicial opinions that, I believe, demonstrate that she has lived by that rule and does not base her judicial decisions on any liberal ideology.

The abortion issue has been a flash point of ideological differences. Yet – and without regard to her personal views on that subject – she sided with the anti-abortion position because she considered herself bound by *stare decisis* (precedents), which required that decision, in *Center For Reproduction Law and Policy v. George W. Bush*, 304 F.3d 183 (2d Cir. 2002). The plaintiff organization there challenged the Government policy which required foreign organizations, as a condition of receiving U.S. Government funding, to agree not to perform abortions and not even to promote abortions generally, even with other funds. Judge Sotomayor's opinion reflected her view that a judge must respect precedent: "The Supreme Court has made clear that the Government is free to favor the anti-abortion position over the pro-choice position, and can do so with public funds."

Much objection to so-called liberal judges has addressed decisions providing unreasonably large recoveries to the plaintiffs' bar. In *In re Air Crash Off Long Island*, 209 F.3d 200 (2d Cir. 2000), the issue was whether the air crash about eight miles off the coast of the United States was governed by the Death On The High Seas Act, which, if it controlled, would bar the plaintiffs from recovery of substantial non-pecuniary damages. The majority (two able judges known for their liberal tendencies) of the Court of Appeals panel on which Judge Sotomayor was the third judge, held in favor of the plaintiffs'

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ability to recover substantially greater damages. Judge Sotomayor dissented to reject a "more generous recovery" for the air crash victims in reasoning that demonstrates her recognition of the limits on judges' power:

> "In an understandable desire to provide the relatives and estate representatives of the 213 victims of the TWA Flight with a 'more generous recovery,' the majority fails to give proper effect to the [statute's language].
>
> "Congress and the President have the opportunity to amend [the statute] to incorporate a more generous remedial scheme .... I have no desire to pre-empt the legislative process .... The appropriate remedial scheme ... is clearly a legislative policy choice, which should not be made by the courts."

She again demonstrated her respect for the limitation on judicial power by her dissent in *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006), in which a 70-year old clergyman sued his Methodist Church, alleging that his forced retirement violated the Age Discrimination In Employment Act. The majority held that the age discrimination statute applied despite the religious context. In dissent, Judge Sotomayor stated that courts should not get involved "in matters as fundamental as a religious institution's selection of its spiritual leaders." For courts to interfere, she said, "risks an unconstitutional trespass on the most spiritually intimate grounds of a religious community's existence."

She again showed her respect for the limitation on judicial power is *Aguinda "B" "C" "D" v. Texaco Inc.*, 303 F.3d 470 (2d Cir 2002), in which she joined in the Court's opinion dismissing two class actions, on behalf of "indigenous citizens of the Ecuadorian Amazon" and of the adjoining area in Peru, which sought damages for environmental and personal injuries arising out of Texaco's oil exploration and extraction operations in that region over almost a 30 year period. Clearly, if Judge Sotomayor were to base her decisions on "liberal doctrine," this would have been a prime case for the court to jump in to protect the underdogs and the environment, against a large corporation. Instead, however, she rejected and dismissed those claims as inappropriate for a U.S. Court determination.

A final example of her willingness to limit the over-usage of our federal courts has been some of her decisions in securities stock fraud class actions – an area dear to the hearts of the plaintiffs' bar and the bane of existence of the business world. Her decisions have placed meaningful limits on the availability of the courts for such lawsuits. In *Rombach v. Chang*, 355 F.3d 164 (2d Cir. 2004), she joined an opinion dismissing such a class action, due to the failure of that complaint to meet heightened standards which the Court imposed, before a class action for fraud would be allowed. In an opinion that she wrote, in *Moore v. Painewebber*, 306 F.3d 1247 (2d Cir. 2002), she dismissed a class action based on alleged oral fraudulent representations, holding that, absent unique proof, a class action is not appropriate for oral misrepresentation claims.

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I am aware that Judge Sotomayor has been criticized for some speeches she has made, particularly those that declare her empathy for the downtrodden and minorities. I too disagree with some of her comments in some of her speeches, which go beyond recognition of past wrongs to suggestions that a person's race or ethnicity somehow might result in better judgment than someone of a different birth. As I do not believe such views are really held by the Judge Sotomayor whom I know and with whom I have had many conversations on many subjects, I attribute those remarks to the speech context, and not what she applies in ruling on cases. Thus, she had no problem in writing the opinion, in *Williams v. R.H. Donnelley, Corp.*, 368 F.3d 123 (2d Cir. 2004), in which she dismissed a race and gender discrimination law suit brought by an African-American woman because the evidence showed that she did not have the qualifications for the promotion that she sought – demonstrating that her rulings are based on the law and the evidence, not the color of the plaintiff.

The criminal law area is one on which conservatives have frequently criticized some judges for ignoring the reality of protecting innocent people from criminals in favor of a hyper-technical application of Constitutional protections. Judge Sotomayor hardly fits into that category. One media review of her criminal law decisions revealed that she sided with the Government in more than two-thirds of the cases that came before her. A good example of her realistic thinking in the criminal law area is *United States v. Howard*, Docket No. 06-0457 (2d Cir. June 5, 2007), in which the Government had appealed the lower court's suppression of evidence that established the defendants' sale and possession of cocaine, because the police had used ruses to obtain access to the defendants' cars, the police should have, but didn't obtain a warrant for the searches, and the police did not properly notify the defendants that the searches had occurred – all technical grounds and obviously irrelevant to the defendants' actual guilt. Judge Sotomayor reversed the lower court's decision and held that the seized evidence was admissible.

Similarly, in *United States v. Falso*, 544 F.2d 110 (2d Cir. 2008), she upheld the admissibility of evidence obtained with an invalid search warrant, relying on the good-faith of the law enforcement officers in believing that the search warrant was valid, even though it was not. A judge who is motivated by empathy for a defendant might well have used the invalid search warrant as a reason to reverse the conviction, for which the trial judge had imposed a 30 year sentence on the conviction relating to child pornography and engaging in illicit sexual conduct with minors (particularly as the defendant's only prior conviction was for a misdemeanor eighteen years before). In a companion decision in the same case [2008 WL 4376828 (C.A. 2 (N.Y.)], Judge Sotomayor also rejected that defendant's appeal in which he sought to suppress statements that he made, on the ground that he had not been given any Miranda warnings.

I could cite some of her decisions with which I strongly disagree, including the New Haven Firefighters case. It is, of course, proper for the members of the Senate, in considering her confirmation, to question her on those opinions, as well as on her speeches to which I referred above. But, if the handicap for confirmation of a sitting

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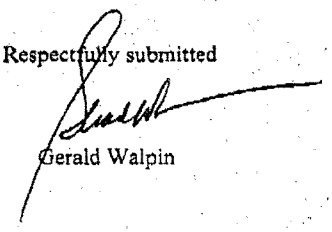
judge to appointment to a higher court is being correct 100% of the time, no sitting judge could ever be confirmed.

I must add one further comment on the ongoing discussion of her confirmation. I know that some of my conservative colleagues ask why she should be treated differently from the unacceptable manner in which some liberals treated Judges Thomas, Alito and Bork when they were nominated to the Supreme Court. My answer is that two wrongs do not make a right. Just as we expect Justice Sotomayor to live by the law when she is confirmed, we must show by our example that we do as we say. The President has nominated someone who has the necessary qualifications. I believe that the Constitution requires confirmation.

Respectfully submitted



Gerald Walpin

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Uncommon Detail Marks Rulings by Sotomayor

She Almost Oversteps Her Role, Experts Say

By Jerry Markon
Washington Post Staff Writer
Thursday, July 9, 2009

Supreme Court nominee Sonia Sotomayor's opinions show support for the rights of criminal defendants and suspects, skepticism of corporations, and sympathy for plaintiffs alleging discrimination, an analysis of her record by The Washington Post found. And she has delivered those rulings with a level of detail considered unusual for an appellate judge.

During nearly 11 years on the federal appeals court in New York, Sotomayor has made herself an expert on subjects ranging from the intricacies of automobile mechanisms to the homicide risks posed by the city's population density. Her writings have often offered a granular analysis of every piece of evidence in criminal trials, and sometimes read as if she were retrying cases from her chambers.

Legal experts said Sotomayor's rulings fall within the mainstream of those by Democratic-appointed judges. But some were critical of her style, saying it comes close to overstepping the traditional role of appellate judges, who give considerable deference to the judges and juries that observe testimony and are considered the primary finders of fact.

"It seems an odd use of judicial time, given the very heavy caseload in the 2nd Circuit, to spend endless hours delving into the minutiae of the record," said Arthur Hellman, a University of Pittsburgh law professor and an authority on federal courts.

Adrienne Urrutia Wisenberg, a Washington criminal appellate lawyer, said appellate judges "are not in the role of reweighing the credibility of a witness. Someone's demeanor is not reflected on a transcript."

But Wisenberg said she admires Sotomayor's "tenacious trial lawyer's personality," and Dan Himmelfarb, a Washington lawyer and former clerk to conservative Supreme Court Justice Clarence Thomas, said Sotomayor is "extraordinarily thorough, and a judge would ordinarily be praised for writing thorough opinions."

To examine the record of Sotomayor, whose Senate confirmation hearings begin Monday, The Post reviewed all 46 of her cases in which the 2nd Circuit issued a divided ruling, nearly 900 pages of opinions. Although Sotomayor has heard about 3,000 cases, judicial scholars say split decisions provide the most revealing window into ideology because in such cases the law and precedent are often unclear, making them similar to cases heard by the Supreme Court. President Obama, who nominated Sotomayor to replace retiring Justice David H. Souter, has said Supreme Court justices will be in agreement 95 percent of the time.

Sotomayor's votes in split cases were compared with those of other judges through a database that tracks federal appellate decisions nationwide, a random sampling of 5,400 cases. The

database codes decisions as "liberal" or "conservative" based on what its creator, University of South Carolina political scientist Donald Songer, says are common definitions. Votes in favor of a defendant, for example, are classified as liberal, while those supporting prosecutors are called conservative.

Sotomayor's votes came out liberal 59 percent of the time, compared with 52 percent for other judges who, like her, were appointed by Democratic presidents. Democratic appointees overall were 13 percent more liberal than Republican appointees, according to the database analysis.

Experts said the results show that Sotomayor's ascension would probably not alter the balance of a high court closely divided between conservatives and liberals such as Souter. But they also provide a more nuanced picture of the 17-year federal judge than those offered by her supporters and her critics.

The White House has portrayed Sotomayor as a tough-on-crime moderate who favors the "judicial restraint" often sought by Republicans, while conservatives call her a liberal activist whose decisions are influenced by ideology and her Latina heritage.

"She looks like a classic Democrat," Songer said. "I don't think it's fair to classify her as tough on crime. I would use the term 'moderately liberal,' not 'moderate.' But she certainly seems to be in the mainstream of Democratic judges."

The split decisions, which are heavy on the criminal and business cases that tend to dominate the Supreme Court's docket, show Sotomayor voting to overturn convictions or sentences eight times, at a rate comparable to that of other Democratic-appointed judges. Six times, she affirmed them.

In one case, Sotomayor and seven mostly Democratic colleagues voted to set free a convicted murderer who did not contest his guilt but had been tried on what the court called the wrong murder charge. In another, she joined an opinion that cited flawed jury instructions in throwing out a man's conviction for enticing someone he believed was a 13-year-old girl into sex.

And when she threw out a life prison term for a convicted heroin dealer, ordering that he be resentenced, Sotomayor wrote that judges should not show "slavish adherence" to the "literal terms" of then-mandatory sentencing guidelines when their language is flawed. The view echoed her criticism of the guidelines from the bench that became an issue in her 1997 confirmation hearings.

At those hearings, Republicans criticized Sotomayor for apologizing to a defendant for a mandatory minimum sentence she imposed and for calling the sentence an "abomination." She told senators that the apology expressed her frustration over a feature in the sentencing rules that Congress later changed, conceded she should not have used the word "abomination" and expressed general support for the guidelines.

Other cases displayed Sotomayor's support for First Amendment protections, campaign finance reforms challenged by conservatives and privacy rights. She ruled against corporations in six of eight business cases.

Although her decisions are filled with citations of the law and precedent, Sotomayor once pointed to "powerful policy considerations" in allowing a lawsuit against Visa and MasterCard to go forward, and she worried about damage to U.S.-British relations in arguing that British subjects should have access to U.S. courts. Conservatives have criticized Sotomayor for saying in 2005 that "the Court of Appeals is where policy is made. I know this is on tape, and I should never say that." The White House has defended her, saying the remark was taken out of context.

Sotomayor, appointed to the appeals court by President Bill Clinton, is a former assistant district attorney in Manhattan and a trial judge, and acquaintances say that background has helped shape her judicial style. She overturns lower courts at roughly the same rate as other Democratic appointees. Her writings are full of details from the trial record, especially in criminal matters, where she often meticulously analyzes witness testimony.

When she reinstated a verdict against Ford Motor Co. in 2002 in the lawsuit of a woman who said her van suddenly accelerated without her touching the gas pedal, Sotomayor wrote that one witness's testimony "requires two simultaneous malfunctions in the cruise control circuitry. The first is an open ground connection to the speed amplifier, resulting from a loose or broken wire."

Last year, in voting to overturn a firearms defendant's sentence, Sotomayor joined a Democratic appointee and a Republican in analyzing whether New York City's dense population puts bystanders at greater risk from gunfire than those elsewhere. She wrote a separate dissent, acknowledging that the trial judge's opinion on the subject was "detailed" but citing government reports and newspaper articles to argue it was "insufficient" to support a sentence above the range recommended by federal guidelines.

A Republican appointee who disagreed wrote that "appellate courts are not factfinders. . . . I do not understand it to be our role . . . to engage in this kind of dissection of the empirical evidence cited by the district court. Nor is it to identify competing studies or news articles pointing in other directions."

In 2004, Sotomayor appeared to go beyond the facts established at trial in arguing that two teenage girls were illegally strip-searched at Connecticut juvenile detention facilities. Their lawsuit against the state was dismissed by a federal judge but reinstated in an opinion written by a Democratic 2nd Circuit appointee, who said four of the strip searches at issue were unlawful but four others were legal.

Sotomayor dissented, arguing that all were illegal and blasting any strip search as "severely intrusive." Citing documents from pretrial discovery, she broke down all 34 strip searches at the facilities in which contraband was found on a prisoner from 1995 to 2000 -- searches that were not part of the lawsuit. She concluded that there was "absolutely no evidence that suspicionless strip searches were necessary."

(The Supreme Court last month voiced skepticism of strip-searching teenage girls, ruling 8 to 1 that Arizona school officials violated the constitutional rights of a 13-year-old girl when they strip-searched her on suspicion that she might be hiding ibuprofen in her underwear.)

Hellman, the law professor, called Sotomayor's approach "a kind of carpet-bombing, a relentless mustering of facts. She goes well beyond what is necessary for the case and is determined not to just defeat the other side, but to annihilate it."

Sotomayor's style is consistent even when she finds against defendants, such as when she affirmed the conviction of a child pornography defendant in 2004. A U.S. district court judge had concluded after an evidentiary hearing that the man was innocent but denied his petition because it was filed too late.

Even though she had decided the core issue -- the conviction -- Sotomayor broke down the witnesses and testimony at the judge's hearing. She concluded that his finding of innocence was "clearly erroneous," even as she said that district courts "are generally best placed to evaluate testimony in light of the witnesses' demeanor."

A fellow Democratic appointee, Judge Rosemary S. Pooler, dissented. Sotomayor's opinion, she wrote, was based on "speculations and conjectures" and disregarded the judge's "role as the finder-of-facts."

"It is inappropriate in all but the most extraordinary cases for this Court to second-guess a district court's credibility findings," Pooler concluded. "The majority's dissection of the district court's decision departs from our precedents and wrongly supplants the lower court's assessment of the evidence with its own factual inferences, never having seen or heard any of the testimony that it now seeks to discredit."

Database editor Sarah Cohen contributed to this report.

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POLICE EXECUTIVE
RESEARCH FORUM

Chuck Wexler
Executive Director

June 8, 2009

The Honorable Patrick Leahy, Chairman
The Honorable Jeff Sessions, Ranking Member
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

Dear Senators Leahy and Sessions,

I am writing in support of President Obama's nomination of Judge Sonia Sotomayor to serve as associate justice of the Supreme Court of the United States. I believe that Judge Sotomayor's inspiring life story, and especially her experience as a prosecutor in New York City, where I spent most of my career, demonstrate a strength of character that will serve her well on our nation's highest court.

Judge Sotomayor grew up in a housing project in the South Bronx. I patrolled the streets of the South Bronx in the 1970s and know what a tough environment that was. I did not have the privilege of working with Assistant District Attorney Sotomayor, but recently I have spoken to several of my colleagues who did work with her, and they give her nothing but rave reviews. They were impressed with her intelligence, her strong work ethic, and her fierce determination to prosecute criminals, and they use words like "salt of the earth" to describe her.

I believe it is important to note that in the questionnaire that she filled out for the Judiciary Committee, Judge Sotomayor included several criminal cases from her years as a prosecutor in a list of the 10 litigated matters in her career that she considers "most significant." These include the case of the so-called "Tarzan murderer," as well as a child pornography case that Ms. Sotomayor pursued relentlessly when others seemed to consider it a low priority.

Like many others, I have been inspired by Judge Sotomayor's personal story. Through hard work and determination, she earned degrees from Princeton and the Yale Law School. After getting her law degree, she could have cashed in at a blue-chip law firm, but she chose instead to take a low-paid position in the Manhattan District Attorney's office, where she gained priceless real-world experience that cannot help but inform her judgment as she decides criminal cases that come before her.

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1120 Connecticut Avenue, NW Suite 930 Washington, D.C. 20036
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Sonia Sotomayor went out of her way to stand shoulder to shoulder with those of us in public safety at a time when New York City needed strong, tough, and fair prosecutors. I am confident that she will continue to bring honor to herself, and now to the Supreme Court, when she is confirmed for this critically important position.

Thank you for your consideration.

Sincerely,

John F. Timoney

John F. Timoney
Chief of Police, Miami, Florida
President, Police Executive Research Forum

Statement of

The Honorable Sheldon Whitehouse

United States Senator
Rhode Island
July 13, 2009

Opening Statement of Sheldon Whitehouse
Confirmation Hearing: Judge Sonia Sotomayor to be
an Associate Justice of the Supreme Court
As Delivered

Thank you, Mr. Chairman.

Judge Sotomayor, welcome, welcome to you and to your family. Your nomination caps what has already been a remarkable legal career. And I join many, many Americans who are so proud to see you here today. It is a great country isn't it? And you represent its greatest attributes.

Your record leaves no doubt that you have the intellectual ability to serve as a Justice. From meeting with you and from the outpouring of support I've experienced both personally and from organizations that have worked with you, your demeanor and your collegiality are well established. I appreciate your years as a prosecutor, working in the trenches of law enforcement. I am looking forward to learning more about the experience and judgment you are poised to bring to the Supreme Court.

In the last two and a half months and today, my Republican colleagues have talked a great deal about judicial modesty and restraint. Fair enough to a point, but that point comes when these words become slogans, not real critiques of your record. Indeed, these calls for restraint and modesty, and complaints about "activist" judges, are often codewords, seeking a particular kind of judge who will deliver a particular set of political outcomes.

It is fair to inquire into a nominee's judicial philosophy, and we will here have a serious and fair inquiry. But the pretence that Republican nominees embody modesty and restraint, or that Democratic nominees must be activists, runs starkly counter to recent history.
I particularly reject the analogy of a judge to an "umpire" who merely calls "balls and strikes." If judging were that mechanical, we would not need nine Supreme Court Justices. The task of an appellate judge, particularly on a court of final appeal, is often to define the strike zone, within a matrix of Constitutional principle, legislative intent, and statutory construction.

The "umpire" analogy is belied by Chief Justice Roberts, though he cast himself as an "umpire" during his confirmation hearings. Jeffrey Toobin, a well-respected legal commentator, has recently reported that "[i]n every major case since he became the nation's seventeenth Chief

Justice, Roberts has sided with the prosecution over the defendant, the state over the condemned, the executive branch over the legislative, and the corporate defendant over the individual plaintiff." Some umpire. And is it a coincidence that this pattern, to continue Toobin's quote, "has served the interests, and reflected the values of the contemporary Republican party"? Some coincidence.

For all the talk of "modesty" and "restraint," the right wing Justices of the Court have a striking record of ignoring precedent, overturning congressional statutes, limiting constitutional protections, and discovering new constitutional rights: the infamous Ledbetter decision, for instance; the Louisville and Seattle integration cases; the first limitation on Roe v. Wade that outright disregards the woman's health and safety; and the DC Heller decision, discovering a constitutional right to own guns that the Court had not previously noticed in 220 years. Some "balls and strikes." Over and over, news reporting discusses "fundamental changes in the law" wrought by the Roberts Court's right wing flank. The Roberts Court has not kept the promises of modesty or humility made when President Bush nominated Justices Roberts and Alito.

So, Judge Sotomayor, I'd like to avoid codewords, and look for a simple pledge from you during these hearings: that you will respect the role of Congress as representatives of the American people; that you will decide cases based on the law and the facts; that you will not prejudge any case, but listen to every party that comes before you; and that you will respect precedent and limit yourself to the issues that the Court must decide; in short, that you will use the broad discretion of a Supreme Court Justice wisely.

Let me emphasize that broad discretion. As Justice Stevens has said, "the work of federal judges from the days of John Marshall to the present, like the work of the English common-law judges, sometimes requires the exercise of judgment – a faculty that inevitably calls into play notions of justice, fairness, and concern about the future impact of a decision."

Look at our history. America's common law inheritance is the accretion over generations of individual exercises of judgment. Our Constitution is a great document that John Marshall noted leaves "the minor ingredients" to judgment, to be deduced by our Justices from the document's great principles. The liberties in our Constitution have their boundaries defined, in the gray and overlapping areas, by informed judgment. None of this is "balls and strikes."

It has been a truism since Marbury v. Madison that courts have the authority to "say what the law is," even to invalidate statutes enacted by the elected branches of government when they conflict with the Constitution. So the issue is not whether you have a wide field of discretion: you will. As Justice Cardozo reminds us, you are not free to act as "a knight-errant, roaming at will in pursuit of [your] own ideal of beauty or of goodness," yet, he concluded, "[w]ide enough in all conscience is the field of discretion that remains."

The question for this hearing is: will you bring good judgment to that wide field? Will you understand, and care, how your decisions affect the lives of Americans? Will you use your broad discretion to advance the promises of liberty and justice made by the Constitution?

I believe that your diverse life experience, your broad professional background, your expertise as

a judge at each level of the system, will bring you that judgement. As Oliver Wendell Holmes, Jr. famously said, the life of the law has not been logic, it has been experience.

If your wide experience brings life to a sense of the difficult circumstances faced by the less powerful among us:
the woman shunted around the bank from voicemail to voicemail as she tries to avoid foreclosure for her family;
the family struggling to get by in the neighborhood where the police only come with raid jackets on;
the couple up late at the kitchen table after the kids are in bed sweating out how to make ends meet that month;
the man who believes a little differently, or looks a little different, or thinks things should be different;
if you have empathy for those people in this job, you are doing nothing wrong.

The Founding Fathers set up the American judiciary as a check on the excesses of the elected branches, and as a refuge when those branches are corrupted, or consumed by passing passions. Courts were designed to be our guardians against what Hamilton in the Federalist Papers called "those ill humors, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people . . . and which . . . have a tendency . . . to occasion ? serious oppressions of the minor party in the community." In present circumstances, those oppressions tend to fall on the poor and voiceless. But as Hamilton noted, "[c]onsiderate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts: as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer to-day."

The courtroom can be the only sanctuary for the little guy when the forces of society are arrayed against him, when proper opinion and elected officialdom will lend him no ear. This is a correct, fitting, and intended function of the judiciary in our constitutional structure, and the empathy President Obama saw in you has a constitutionally proper place in that structure. If everyone on the Court always voted for the prosecution against the defendant, for the corporation against the plaintiffs, and for the government against the condemned, a vital spark of American democracy would be extinguished. A courtroom is supposed to be a place where the status quo can be disrupted, even upended, when the Constitution or laws may require; where the comfortable can sometimes be afflicted and the afflicted find some comfort, all under the stern shelter of the law. It is worth remembering that judges of the United States have shown great courage over the years, courage verging on heroism, in providing that sanctuary of careful attention, what James Bryce called "the cool dry atmosphere of judicial determination," amidst the inflamed passions or invested powers of the day.

Judge Sotomayor, I believe your broad and balanced background and empathy prepare you well for this constitutional and proper judicial role.

And I join my colleagues in welcoming you to the Committee and looking forward to your testimony.

WOMEN of MUJERES de
EL BARRIO
Founded / Fundado 2000

Oscar Garcia Statios
P.O. Box 307
El Barrio, New York 10029
Email: womenoeb@gmail.com

May 8, 2009

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Honorable Patrick J. Leahy, Chairman
Committee on the Judiciary
United States Senate Fax (202) 224-3479
433 Russell Senate Office Building
Washington, DC 20510

Re: United States Supreme Court Nomination of Judge Sonia Sotomayor

Dear Mr. Leahy:

Women of El Barrio (WOEB) proudly and respectfully urge you to make Judge Sonia Sotomayor your first appointment to the Supreme Court of the United States of America. Our appeal is consistent with WOEB's mission to develop the leadership and promote the contributions of Puerto Rican grandmothers and young women from our community, through efforts that extend from preserving a block, to honoring the gifts of our precious Planet! Sonia Sotomayor, is a star whose light shows working class boys and girls that they can become men and women who achieve in order to serve.

As a Latina, Judge Sotomayor's appointment addresses two glaring deficiencies in the court's lack of diversity and will bring our court system closer to real equality of opportunity.

In their appeal New York Senators Schumer and Gillibrand recognize that "Latinos are a large and growing segment of our society that have gone grossly underrepresented in our legal system. Indeed, while Latinos comprise around 15 percent of the population, only about 7 percent of federal judges are Latino. Moreover, not a single Latino has served on the United States Supreme Court in the history of our country."

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While more than half the U.S. population is female, nearly one-third of all U.S. lawyers are women. Approximately 30 percent of the judges serving on the lower federal courts are women. It is truly shameful that the retirement of Justice Sandra Day O'Conner should have resulted in the reduction of the paltry number of women from two to one. Most recently the lone remaining female, Justice Ruth Bader Ginsburg, has battled serious health problems.

In Judge Sotomayor you have a nominee of unquestioned legal prowess and excellent academic credentials. She's a Princeton University graduate, summa cum laude; a Juris Doctor from Yale Law School, including Editor of the Yale Law Journal. As a practicing attorney, she was a litigator in an international law firm and served as Manhattan Assistant District Attorney under Robert Morgenthauy 17 years on the federal bench as trial judge in the Southern District of New York and her current position on the 2nd Circuit

In its October 2008 issue of Esquire magazine found that "In her rulings, Sotomayor has often shown suspicion of bloated government and corporate power. She's offered a reinterpretation of copyright law, ruled in favor of public access to private information, and in her most famous decision, sided with labor in the Major League Baseball strike of 1995. More than anything else, she is seen as a realist. With a likely 20 years ahead on the bench, she'll have plenty of time to impart her realist philosophy."

Just as importantly, we, the people want a Supreme Court of men and women who uphold the Constitution of the United States and the laws flowing from it; a court that is balanced when it is called upon to scrutinize preemptive war, torture, black prisons, warrantless surveillance, erosion of the common wealth, and deemed the true arbiter of social, economic and electoral justice for all.

Sincerely,

Sandra Talavera

Sandra Talavera, Chair

AMERICANS UNITED FOR LIFE

TESTIMONY OF
DR. CHARMAINE YOEST, PRESIDENT AND CEO
AMERICANS UNITED FOR LIFE
BEFORE THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY
ON THE CONFIRMATION OF SONIA SOTOMAYOR
TO THE UNITED STATES SUPREME COURT

Thank you Chairman Leahy, Ranking Member Sessions, and members of the Committee for inviting me to testify before you today. I am here on behalf of Americans United for Life (AUL), the nation's oldest pro-life legal organization. Our vision at AUL is a nation where everyone is welcome in life and protected by law. We have been committed to defending human life through vigorous judical, legislative, and educational efforts since 1971, and have been involved in every abortion-related case before the United States Supreme Court including *Roe v. Wade*.

Introduction

I am here today because of AUL's deep concern about the nomination of Judge Sonia Sotomayor to the United States Supreme Court. Based on our research, we believe that Judge Sotomayor's judicial philosophy is far outside of the mainstream, and that her confirmation will dramatically shift the dynamics of the Court. There are three primary points that I want to leave with you today. First, like most Americans, we believe that a nominee's judicial philosophy goes to the heart of his or her qualifications to serve on the United States Supreme Court. Second, we believe that based on Judge Sotomayor's record of prior statements and her involvement with the Puerto Rican Legal Defense and Education Fund ("PRLDEF"), Judge Sotomayor's judicial philosophy makes her unqualified to serve on the Court. Finally, we believe that as a justice, Judge Sotomayor would undermine any efforts by our elected representatives to pass even the most widely accepted regulations on abortion and circumvent the will of the people.

I. The Importance of Judicial Philosophy

A United States Supreme Court nominee's judicial philosophy, i.e. the methodology that she would use to decide a case, is as relevant to whether she is qualified to serve on the Court as her intellectual ability, education, and professional experience. AUL does not expect Judge Sotomayor to state how she would vote on hypothetical abortion-related cases. However, we do expect Judge Sotomayor to articulate her judicial philosophy, and a component of that is whether she will respect the right of the people to determine the content of abortion-related laws through the democratic process.

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a. The role of the Justice is not to make policy.

Supreme Court Justices should exercise restraint by applying our laws, not directing policy. When judges fail to respect their limited role under our Constitution, their decisions merely reflect their personal preferences regarding public policy. In 1973, the Supreme Court did exactly that when it purported to find a right to abortion in the Constitution in *Roe v. Wade*,[1] and virtually eliminated the ability of states to regulate this new "fundamental right" with the notoriously broad definition of health in *Doe v. Bolton*.[2] Since that day, the Supreme Court has permitted some regulation of abortion,[3] but far less than before *Roe*. Elected legislative bodies are constantly struggling to determine what language will pass whatever is the current "test"[4] used by the Supreme Court in abortion jurisprudence.[5] This confusion is the direct result of judicial interference in a matter that should be handled by the legislative process. If the Court continues to interfere in abortion-related law, a simple ideological shift in the Court will completely undermine abortion regulations across the country – even those regulations that have the most widespread support among Americans, like parental notification statutes, informed consent laws, and partial birth abortion bans.

Recent polling data confirms that Americans want judges who follow the law. Majorities of self-identified Republicans, Independents, and Democrats agreed that "[w]hen considering a new Justice for the United States Supreme Court, I would prefer that my United States Senators look for a man or woman who will interpret the law as it is written and not take into account his or her personal viewpoints and experiences." (Agreement: 87% Total, 84% of Democrats, 86% of Independents, 92% of Republicans, 80% of liberals, 85% of moderates, 91% of conservatives).[6] Also, Americans strongly opposed a nominee who "believes that the Courts, and not the voters or elected officials, should make policies on abortion in the United States." (70% Total, 69% of Democrats,

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[1] 410 U.S. 113 (1973).
[2] 410 U.S. 179 (1973).
[3] *See, e.g.,* Maher v. Roe, 432 U.S. 464 (1977) (upholding a Connecticut prohibition on the use of public funds for abortions, except those that are "medically necessary"); Harris v. McRae, 448 U.S. 297 (1980) (upholding the Hyde Amendment which restricts federal funding of Medicaid abortions only to cases of life endangerment); Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (upholding Missouri statute that (1) prohibited the use of public facilities and personnel to perform abortions and (2) in pregnancies of 20 weeks or more, required ultrasound tests to determine viability of the unborn child); Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990) (upholding an Ohio statute requiring a minor to notify one parent or obtain a judicial waiver); Rust v. Sullivan, 500 U.S. 173 (1991) (upholding federal regulation prohibiting personnel at family planning clinics that receive Title X funds from counseling or referring women regarding abortion); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (upholding provisions of a Pennsylvania statute that required informed consent, a waiting period, reporting requirements, and parental consent with a judicial bypass); Gonzales v. Carhart, 550 U.S. 124 (2007) (upholding the "Federal Partial-Birth Abortion Ban of 2003").
[4] Clarke D. Forsythe, *Who Will Fix the Supreme Court's Mess? A history of United States Supreme Court abortion decisions and how they have shaped abortion law, in Defending Life 2009: Proven Strategies for a Pro-Life America* 47 (Denise M. Burke et al. eds., 2009) (discussing how the Supreme Court has changed the standard of review for abortion legislation at least four times).
[5] *Id.* at 47-49 (discussing the challenges that legislative bodies face when writing abortion-related laws).
[6] The Polling Company, Inc. / WomanTrend. "Americans United for Life." Survey. 17-18 May 2009.

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65% of Independents, 78% of Republicans, 65% of liberals, 71% of moderates, 75% of conservatives).[7]

Americans across the political spectrum understand that it is not the role of judges to substitute their policy preferences for the deliberations of legislatures.

b. Justices must respect precedent, but may overturn it.

Supreme Court Justices must have a respect for precedent, but also recognize that following precedent is "not an inexorable command."[8] In his hearing before this Committee, Chief Justice Roberts explained the factors to consider under the principle of *stare decisis*: "[1] [S]ettled expectations . . . [2] [w]hether or not particular precedents have proven to be unworkable . . . [3] whether the doctrinal bases of a decision have been eroded by subsequent developments. . . ."[9] In fact, the Court enhances its legitimacy when it reverses a decision after overstepping its bounds into policymaking. Furthermore, the Supreme Court should never affirm a decision at odds with the Constitution.[10]

Under the principles of *stare decisis*, *Roe* is a prime example of precedent on shaky ground. First, any argument that settled expectations and reliance[11] should prohibit the overturning of *Roe* reflects unawareness of the state of the law; in fact, if *Roe* were overturned, abortion would still be legal in at least 41 states.[12] Second, *Roe* and its progeny have clearly proven to be unworkable. For over 30 years, state legislatures and federal courts have struggled to understand what regulations of abortion are permissible, and legislatures often resort to copying the language found in laws previously deemed constitutional by the Court.[13] Third, the purported justifications of *Roe*, flimsy as they were, have dramatically eroded with further in-depth scientific information about when life begins and prenatal development, as well as public health data showing the substantial and negative physical and psychological impact of abortion on women.[14] Finally, people who favor[15] and people who oppose abortion rights agree that *Roe* is

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[7] *Id.*
[8] Payne v. Tennessee, 501 U.S. 808, 828 (1991).
[9] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Supreme Court*, 109 Cong. 142 (2005).
[10] *See* Brown v. Board of Education, 347 U.S. 483 (1954).
[11] *See* Casey, 505 U.S. at 855-56 (discussing "reliance" on the availability of abortion).
[12] Clarke D. Forsythe, *The Day After Roe: Abortion would still be legal in at least 41 states, in Defending Life 2009: Proven Strategies for a Pro-Life America* 83-85 (Denise M. Burke et al. eds., 2009).
[13] *See supra* notes 5, 12.
[14] *See generally* John M. Thorp, Jr., MD, Katherine E. Hartmann, MD & Elizabeth Shadigian, MD, *Long-Term Physical and Psychological Health Consequences of Induced Abortion: Review of the Evidence*, 58 Obst. & Gyn. Survey 67 (2003 (finding an increased risk for placenta previa, subsequent preterm delivery, and "mood disorders substantial enough to provoke attempts of self-harm" following an induced abortion).
[15] *See, e.g.*, Laurence H. Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1, 7 (1973) (stating "[o]ne of the most curious things about Roe is that, behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found."); Benjamin Wittes, *Letting Go of Roe*, The Atlantic Monthly, Jan/Feb 2005 (stating Roe "is a lousy opinion that disenfranchised millions of conservatives on an issue about which they care deeply."); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 935-37

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fundamentally a policy decision, without Constitutional language to support it. In fact, the Supreme Court has substantially modified the doctrine announced in *Roe* in subsequent cases.[16]

As I previously mentioned, AUL does not expect Judge Sotomayor to state whether, as a Supreme Court Justice, she would vote to overturn *Roe v. Wade*. However, as then-Chairman Specter stated in Chief Justice Roberts' hearing, *Roe* is "the central issue which perhaps concerns most Americans."[17] AUL agrees, and we believe that Americans should know whether Judge Sotomayor is able to recognize the problems with *Roe* and its progeny.

II. Judge Sotomayor's Judicial Philosophy

As discussed above, a nominee's judicial philosophy is a critical part of her qualification to serve on the Court. Based on many of Judge Sotomayor's past statements and the extreme arguments made in the PRLDEF abortion briefs, AUL believes that her judicial philosophy makes her unqualified to serve on the Supreme Court.

a. Judge Sotomayor does not believe that the facts and applicable law in a case are sufficient to reach a decision.

Much has been made of President Obama's statements about wanting a justice who possesses empathy and varied life experiences. These attributes are not intrinsically problematic. However, it is fundamentally inappropriate for a justice on the Supreme Court to decide cases based on these attributes rather than the written law. What Americans need to know is whether Judge Sotomayor is capable of deciding cases based on constitutional principles, regardless of whether she empathizes with plaintiffs or defendants. In light of many of Judge Sotomayor's statements, we are deeply concerned that she does not understand or respect the appropriate role of a judge.

In her 2001 lecture "A Latina Judge's Voice," Judge Sotomayor repeatedly argued that the facts and applicable law in a case are not sufficient for a judge to reach a decision. Judge Sotomayor emphasized the importance of personal viewpoints and experience: "I would hope that a wise Latina woman with the richness of experience would more often than not reach a better conclusion than a white male who hasn't lived that life."[18] She later implied that as a judge, she does not choose to see all of the facts in cases before her: "Personal experiences affect the facts that judges choose to see. . . . I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage." [19]

(1973) (stating "[w]hat is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure. . . ").

[16] Casey, 505 U.S. at 869-79.

[17] *See supra* note 9 at 141.

[18] Sonia Sotomayor, *Lecture: "A Latina Judge's Voice," available* at http://www.nytimes.com/2009/05/15/us/politics/15judge.text.html?pagewanted=1&_r

[19] *Id.*

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Of even greater concern, Judge Sotomayor stated in the same lecture that "[t]he aspiration to impartiality is just that--it's an aspiration because it denies the fact that we are by our experiences making different choices than others. . . ."[20] However, impartiality is not merely an aspiration. It is a discipline, and its necessity is enshrined in the judicial oath. A judge who applies the law to all of the relevant facts in a case and avoids selectively favoring one litigant over another, ensures equal protection under the law. A judge who injects personal experiences into a decision does the opposite.

Perhaps the clearest example of Judge Sotomayor's problematic philosophy is her April 2009 speech about international law. Judge Sotomayor demonstrated that she believes that she has an unbounded creative right to decide cases:

> Ideas [from foreign law] have no boundaries, ideas are what set our creative juices flowing, they permit us to think. And to suggest to anyone that you could outlaw the use of foreign or international law . . . would be asking American judges to . . . close their minds to good ideas. . . . But ideas are ideas, and whatever their source—whether they come from foreign law or international law, or a trial judge in Alabama, or a circuit court in California or any other place—if the idea has validity, if it persuades you, . . . then you are going to adopt its reasoning.[21]

In other words, Judge Sotomayor believes that judges need not rely solely on Constitutional and applicable statutory law to decide cases.

b. Judge Sotomayor's record on abortion demonstrates that she would not support the commonsense regulations permitted under Planned Parenthood v. Casey.

The argument has been made that Judge Sotomayor's record is not hostile towards the regulation of abortion. Her supporters first argue that Judge Sotomayor faithfully followed precedent on abortion-related issues while on the 2nd Circuit, and never authored any scholarship on life or bioethics issues. Second, they argue that because Judge Sotomayor was simply a board member of the PRLDEF when it submitted six pro-abortion briefs in Supreme Court cases, the legal arguments in the briefs cannot be attributed to her. I will address each of these arguments in turn.

i. Decisions and Writings

First, AUL acknowledges that in her seventeen years on the bench, Judge Sotomayor has never had the opportunity to decide directly on whether a law regulating

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[20] *Id.*

[21] Sonia Sotomayor, Speech to the American Civil Liberties Union of Puerto Rico, *available at* http://video.nytimes.com/video/2009/06/10/us/politics/1194840839480/speech-to-the-a-c-l-u-of-puerto-rico.html, April 2009.

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abortion was constitutional. This is not surprising, given that the states within the federal Second Circuit—New York, Connecticut, and Vermont—have not produced significant pro-life legislation in the last two decades. The life-related cases on which she has ruled provide very limited information about her approach to abortion jurisprudence.[22] However, Judge Sotomayor's lack of opportunity to address the constitutionality of abortion does not reassure us that she will vote to uphold regulations on abortion enacted by the people through their legislators. Additionally, a judge's willingness to follow precedent while serving on a Circuit Court, as she is obligated to do, does not necessarily indicate how that judge will rule when serving on the Supreme Court.

ii. The PRLDEF's Abortion Briefs – Judge Sotomayor's Involvement.

During the twelve years that Judge Sotomayor served as a governing board member of the PRLDEF, the organization filed six amicus briefs in five abortion-related cases before the Supreme Court. AUL believes that the legal arguments advanced by the PRLDEF in these briefs, which she has never disavowed, reflect Judge Sotomayor's personal views. This is a concern, given her particular emphasis on personal viewpoint in jurisprudence.

Judge Sotomayor served the PRLDEF "at various points" as a member and vice president of the Board of Directors, and as Chairperson of the Education and Litigation Committees.[23] Judge Sotomayor was described in *The New York Times* as "frequently meeting with the legal staff to review the status of cases . . . [and] play[ing] an active role as the defense fund staked out aggressive stances on issues. . . ." *The New York Times* continues: "The board monitored all litigation undertaken by the fund's lawyers, and a number of those lawyers said Ms. Sotomayor was an involved and ardent supporter of their various legal efforts during her time with the group."[24]

It is difficult to imagine that a member of the Board of a legal organization that has staked out a pro-abortion advocacy agenda, who was "an ardent supporter of their . . .

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[22] Most of Judge Sotomayor's abortion-related cases involved asylum claims arising from forced abortion or sterilization. *See e.g.,* Zhu v. Holder, (2d Cir. Apr. 15, 2009) (order); Lin v. Mukasey, 553 F.3d 217 (2d Cir. 2009). These cases, however, give no clear indication of Judge Sotomayor's views on Roe v. Wade. Justice Sotomayor has also voted for and against abortion protestors. For: Amnesty America v. Town of West Hartford, 361 F.3d 113 (2d Cir. 2004); Amnesty America v. Town of West Hartford, 288 F.3d 567 (2d Cir. 2002); Against: United States v. Lynch, 181 F.3d 330 (2d Cir. 1999). In Center for Reproductive Law and Policy v. Bush, 304 F.3d 183 (2d Cir. 2002). Judge Sotomayor found that a "reproductive rights" group had standing to challenge the Mexico City Policy. Judge Sotomayor specifically concluded that the group had "competitive advocate standing," on the grounds that the government's allocation of a benefit "creates an unequal playing field" for organizations advocating their views in the public arena. However, Judge Sotomayor applied Supreme Court precedent (Rust v. Sullivan) directly on point as well as a prior Second Circuit decision upholding the Mexico City policy.

[23] United States Senate Committee on the Judiciary, Questionnaire for Sonia Sotomayor at 13.

[24] Raymond Hernandez and David W. Chen, *Nominee's Links with Advocates Fuel Her Critics,* N.Y. Times, May 28, 2009 *available at* http://www.nytimes.com/2009/05/29/us/politics/29puerto.html?_r=1&scp=1&sq=prldef&st=cse.

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legal efforts," would not agree with the organization's decision to sign onto amicus briefs in major Supreme Court cases, and she has provided no evidence to the contrary. Even the most conservative view of her involvement with the PRLDEF – the argument advanced by the Fund itself – supports our belief that the organization's legal arguments can be associated with her. The PRLDEF states on its website: "At most Board Members help decide which legal issues the organization should focus on."[25] Similarly, Cesar Perales, the PRLDEF'S president and general counsel, stated that Sotomayor's role included setting policy.[26] Clearly, if Judge Sotomayor helped set policy and decide which legal issues to focus on, she knew the position the PRLDEF would take when it focused on abortion.

Finally, the mere fact that the PRLDEF was not the lone party on their abortion-related briefs is not significant. It is highly unlikely that a legal organization would sign onto a series of politically charged and controversial opinions without reading and agreeing with them, and the fact that other organizations joined with the PRLDEF does not make the arguments in the brief mainstream.

iii. The PRLDEF's Abortion Briefs – Out of Touch with Supreme Court Jurisprudence.

The six briefs submitted by the PRLDEF in five abortion-related cases during Judge Sotomayor's service included arguments that were not in line with current Supreme Court jurisprudence. The PRLDEF's consistent position was that abortion was a fundamental right, with any regulation of abortion subject to strict scrutiny. Notably, the positions taken by the PRLDEF during Judge Sotomayor's service indicate that Sotomayor's support of abortion rights is more extreme than that of retiring Justice David Souter.

In *Planned Parenthood v. Casey*,[27] the PRLDEF urged the Court to apply strict scrutiny and strike down Pennsylvania's informed consent requirements and reflection period. The PRLDEF declared that it "oppose[d] any efforts to . . . in any way restrict the rights recognized in *Roe v. Wade*," compared abortion to the First Amendment right to free speech, and argued that any "burden" on the right to abortion was unconstitutional. Justice Souter, however, voted in *Casey* to uphold Pennsylvania's informed consent law and 24-hour reflection period.

In *Ohio v. Akron Center for Reproductive Health*[28] and *Casey*, the PRLDEF asked the Court to strike down parental involvement statutes, arguing in *Akron* that "adolescent women's right to choose [should] not [be] infringed by [parental] notification statutes,"

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[25] LatinoJustice PRLDEF, http://www.prldef.org.
[26] Deepti Hajeila, *Hispanic Rights Group is fodder for Sotomayor foes*, Associated Press, July 11, 2009 *available at* http://www.lifenews.com/nat5185.html.
[27] Brief of Amici Curiae NAACP Legal Defense and Educational Fund, Inc. et al., Planned Parenthood v. Casey, 505 U.S. 833 (1992) (Nos. 91-744 and 91-902).
[28] Brief of Amici Curiae American Indian Health Care Association et al., Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990) (No. 88-805).

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and insisted that minors should be "protected against parental involvement that might prevent or obstruct the exercise of their right to choose." Justice Souter, however, has twice voted to uphold state parental-involvement laws. (*Casey* and *Lambert v. Wicklund*[29]).

In *Williams v. Zbaraz*[30] and *Rust v. Sullivan*,[31] the PRLDEF argued strongly for judicially compelling taxpayer funded abortion with both state and federal taxes. In *Zbaraz*, the PRLDEF unsuccessfully argued that abortions must be publicly funded and that failure to do so was "discriminat[ory]" and a violation of equal protection guarantees. Furthermore, the PRLDEF unsuccessfully argued in *Rust* that since abortion is a "fundamental right," restrictions on taxpayer funding through Title X that prohibited its use to refer for abortions should be invalidated. Finally, the PRLDEF argued in *Webster v. Reproductive Health Services*[32] that the Court should apply strict scrutiny and strike down limitations on the use of state resources to provide abortions. Justice Souter, however, voted with the Supreme Court in *Rust* to uphold prohibitions on the use of taxpayer dollars for abortion counseling and referrals.

In *Webster*,[33] the PRLDEF argued that record keeping and reporting requirements relating to abortion were solely designed to "harass" abortion patients and providers. Also, in *Casey*, the PRLDEF unsuccessfully urged the Court to apply strict scrutiny and strike down Pennsylvania's record keeping and reporting requirements. Justice Souter, however, voted in *Casey* to uphold a portion of Pennsylvania law that required "record keeping and reporting" on abortions performed in the state, viewing such requirements as "reasonably directed to the preservation of maternal health."

Justice Souter voted repeatedly to uphold laws such as those placing limits on taxpayer funding for abortion, those providing for informed consent, and those providing for parental notification – which polls show are supported by at least 70 percent of the American public – whereas the PRLDEF, during Judge Sotomayor's service, consistently argued that such common sense regulations were unconstitutional.

III. Abortion Regulations under Justice Sotomayor

As a Supreme Court Justice, Judge Sotomayor's judicial philosophy would allow her to shape judicial decisions to suit her policy preferences. When you couple her judicial-interventionist philosophy with her support for the radical arguments made by the PRLDEF in abortion-related cases, Judge Sotomayor's presence on the United States Supreme Court surely would prove disastrous for virtually all abortion regulations passed by popularly elected representatives in the states.

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[29] 520 U.S. 292 (1997).
[30] Brief of Amici Curiae The Physicians National Housestaff Association et al., Williams v. Zbaraz, 448 U.S. 358 (1980) (Nos. 79-4, 79-5, 79-491).
[31] Brief of Amici Curiae The American Public Health Association et al., Rust v. Sullivan, 500 U.S. 173 (1991) (Nos. 89-1391, 89-1392).
[32] Brief of Amici Curiae The National Council of Negro Women, Inc., Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (No. 88-605).
[33] *Id.*

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Americans do not want this rollback on abortion regulation. New polling data reveal that Americans want Justices who disavow politics and who will uphold the Constitution and the rule of law as written, including on issues involving abortion. They agreed on upholding common sense abortion regulations already in place in the states, including parental consent laws, and opposed late-term abortions and taxpayer-funded abortions in the U.S. and overseas. Further, this consensus was held even among Americans who self-described themselves as "pro-choice."[34]

Conclusion

AUL believes that a careful analysis of Judge Sotomayor's positions taken in the PRLDEF briefs and of her judicial philosophy clearly indicate that as a justice, she would not respect the will of the people or their elected representatives, or even our written Constitution. Such views, unless explicitly disavowed under oath by Judge Sotomayor, disqualify her to serve on the United States Supreme Court. Thank you for allowing me to testify today.

[34] *See supra* note 6 (opposed a nominee who "Supports late-term abortions, which are abortions in the 7th, 8th, or 9th months of pregnancy, and are also known as 'Partial-Birth Abortions.'" (81%, Total, 77% of Democrats, 78% of Independents, 89% of Republicans, 67% of liberals, 80% of moderates, and 89% of conservatives; Opposed a nominee who "Opposes making it illegal for someone to take a girl younger than the age of 18 across state lines to obtain abortions without her parents' knowledge." (68% Total, 62% of Democrats, 74% of Independents, 73% of Republicans, 59% of liberals, 67% of moderates, and 73% of conservatives; Opposed a nominee who "Favors using tax dollars to pay for abortions here in the United States." (71% Total, 61% of Democrats, 67% of Independents, 86% of Republicans, 54% of liberals, 62% of moderates, and 86% of conservatives; Opposed a nominee who "Favors using tax dollars to pay for abortions in other countries." (89% Total, 97% of Republicans, 86% of Independents, 84% of Democrats, 76% of liberals, 87% of moderates, and 95% of conservatives)). [34]

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