When I offered this change in the Bankruptcy Code to try to move this process forward, the banking associations—all of them—opposed it. Only one bank, Citigroup, supported my efforts.

In fact, an interesting thing is that at one point in the negotiations, we said to the independent community bankers, the hometown bankers we all know: We will exempt you. Because you have such a small part of this problem portfolio, we will exempt you and give the large banks that are responsible for this.

The so-called independent community banks said: No, we don’t want any part of it. We are going to stick with our friends, the large banks.

That leads me to conclude that the independent community banks should drop the word “independent” from their title. They are now part of the larger bank operation when it comes to dealing with this foreclosure crisis.

Much can be said for credit unions. Given an opportunity to avoid being part of this change in bankruptcy modifications, they refused to support us as well.

So the entire financial industry has stood back and said: We are not going to support—with the exception of Citigroup—any change in the Bankruptcy Code, and quite honestly, we are not going to do much when it comes to renegotiating the mortgages.

I don’t think this economy is going to get well until we deal with this issue. I can take you to neighborhoods in Chicago and surrounding communities and tell you that they are flat on their backs because of mortgage foreclosures. It is very difficult, if not impossible, for these communities to come back, these neighborhoods to come back.

There are things we need to do.

First, Congress should consider passing legislation to give homeowners who can’t afford their mortgage payments the right to remain in their homes for a period of time by paying fair market rent to a bank. Why not let a family stay in a home rather than let it get run down and become a haven for criminal activities and other things when it is vacant? It is certainly no good assignment for a bank to be told: You now have a foreclosed home, cut the grass and take care of the weeds and throw the trash on the windows and try to keep the bad guys out. That is what most of them face.

Second, Congress should consider providing matching funds for cities and States to create mandatory arbitration programs. They have done it in Philadelphia with some success; we ought to do it here and across the Nation so that we move this toward arbitration, negotiation, and agreements for new modifications on mortgages.

Third, if the servicers of mortgages—many of which have taken billions of dollars in taxpayer bailouts, refuse to meet the foreclosure reduction standards and goals they have signed up for under this administration, they should be facing penalties. We gave them taxpayers’ money to save the banks. Some of them used it for bonuses for their employees, and now they won’t turn around and give a helping hand to people who are about to lose their homes? I am sorry, but if there is any justice in America, that has to change.

Will I come back with bankruptcy modification? Well, let’s see what happens in the next few months. I want to be able to come to my colleagues in the next 2 or 3 months and say: Alright, whether you support or oppose bankruptcy changes, when it comes to these mortgage modifications, let’s be honest about where we are today and where we need to go. That is absolutely essential.

So I hope this situation starts to resolve itself. I hope some of these banks that hold these mortgages get serious about helping people facing foreclosure. It is the only way we are going to stabilize this economy and get it moving forward.

I might add, the blip in the housing market we saw just a few weeks ago is likely just that. There had been a temporary moratorium on many mortgage foreclosures, leading many people to believe there was a turnaround in the housing industry. But a new wave of mortgage resets is coming. This time it’s the so-called “option ARMs” or “pick-a-payment” adjustable rate mortgages.

These are the ultimate exploding mortgages. They gave homebuyers the option of not even covering the interest some months, but after two or three years, the monthly mortgage payment can skyrocket, often by 50 percent or more. An estimated 2.8 million option ARMs are scheduled to reset over the next 2 1/2 years.

So I am looking for a turnaround in the housing industry. I don’t think we have quite seen it yet. I hope it comes soon.

Mr. LEAHY. Mr. President, I suggest the absence of a quorum.

The ACTING PRESIDENT pro tempore. The clerk will call the roll.

Mr. LEAHY. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

CONCLUSION OF MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Morning business is closed.
pragmatic than some other justices. I liked to find solutions that would work.

Justice O’Connor explained recently:

You do have to have an understanding of how some rule you make will apply to people in the real world. I think that there should be an awareness of the real-world consequences of the principles of the law you apply.

Just as all Democrats voted for Justice O’Connor, so did all Republicans.

I recall another Supreme Court nominee who spoke during his confirmation hearing of his personal struggle to overcome obstacles. He made a point of describing his life as:

One that required me to at some point touch on virtually every aspect, every level of our country, from people who couldn’t read or write to people who were extremely literate, from people who had no money to people who were very wealthy.

And added:

So what I bring to this Court, I believe, is an understanding and the ability to stand in the shoes of other people across a broad spectrum of life.

That is the definition of empathy. That nominee, of course, was Clarence Thomas. Indeed, when President George H.W. Bush nominated Justice Thomas to the Supreme Court, he touted him as:

A thoughtful and warm, intelligent person who has great empathy and a wonderful sense of humor.

Let me cite one example of a decision by Justice Thomas that I expect was informed by his experience. In Virginia v. Black, the Supreme Court, in 2003, held that Virginia’s statute against cross burning, done with an attempt to intimidate, was constitutional. However, at the same time, the Court’s decision also rejected another provision in that statute. Justice Thomas wrote a heartfelt opinion, where he stated he would have gone even further.

He began his opinion:

In every culture, certain things acquire meaning well beyond what outsiders can comprehend. For both the sacred and the profane. I believe that cross burning is the paradigmatic example of the latter.

He went on to describe the Ku Klux Klan as a “terrorist organization,” while discussing the history of cross burning, particularly in Virginia, and the brutalization of racial minorities and others through terror and lawlessness. Would anyone deny Justice Thomas seeks to belittle his perspective on these matters? I trust not. Who would call him biased or attack him as Judge Sotomayor is now being attacked? I trust no one would.

Real-world experience, real-world judging, and awareness of the real-world consequences of decisions are vital aspects of the law. Here we have a nominee who has had more experience as a Federal judge than any nominee in decades and will be the only member of the U.S. Supreme Court with experience as a trial judge.

I look forward to this debate. One of the Judiciary Committee’s newest members is now on the floor, Senator Klobuchar, the senior Senator from Minnesota. She has been a leader in support of this nomination. I see beside her the former Governor of my neighboring State of New Hampshire, then-Governor Shaheen, now Senator Shaheen. But of course we are going to speak, so I will talk no more now.

I yield the floor, first, to Senator Klobuchar.

The ACTING PRESIDENT pro tempore. The Senator from Minnesota is recognized.

Ms. KLOBUCHAR. Mr. President, I thank the chairman. I thank him for those strong remarks on behalf of Judge Sotomayor, strong remarks for a very strong nominee.

More importantly, as chairman of the Senate Judiciary Committee, I thank Senator LEAHY, and Senator SESSIONS, for the way they conducted the confirmation hearing, the dignity that was shown to the nominee in that hearing. I think that was very important. And I may not have agreed with the conclusions that some of our colleagues reached, but no one can dispute the hearing was conducted civilly and with great dignity. This is a nominee who shows great dignity every step of the way.

Today I will be speaking in support of Judge Sotomayor’s nomination, but first I am going to be joined by several of my esteemed fellow women Senators, including Senator Shaheen of New Hampshire, who is already, Senator RUBEN of Michigan, Senator GILLIBRAND of New York, and Senator MURRAY of Washington State.

We all know this nomination is history making for several reasons but one of them, of course, is that Judge Sotomayor will be only the third woman ever to join the Supreme Court of the United States of America.

We know she is incredibly well qualified. She has more Federal judicial experience than any nominee for the past 100 years. That is something that is remarkable. But I do think it is worth remembering what it was like to be a nominee for this Court as a woman even just a few years ago.

It is worth remembering, for example, that when Justice O’Connor graduated from law school, the only offers she got from law firms, after graduating from Stanford Law School, was for legal secretary positions. Justice Ginsburg, already on the bench, in her class in 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 1 of only 9 women in a class of more than 500. The dean of the law school actually demanded 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 these women persevered and they certainly prevailed. Their undeniable merits triumphed over those who sought to deny them opportunity. The women who came before Judge Sotomayor—all those women judges—helped blaze a trail. Although Judge Sotomayor’s record stands on her own, she is also standing on those women’s shoulders.

To those of you who are here today to speak in support of Judge Sotomayor. The first is my great colleague from New Hampshire, Senator Shaheen.

The ACTING PRESIDENT pro tempore. The Senator from New Hampshire is recognized.

Mrs. SHAHEEN. Mr. President, I am delighted to be here to join the senior Senator from Minnesota, Ms. KLOBUCHAR, and to speak also after the senior Senator from Vermont, my neighbor, Senator LEAHY, in support of Sonia Sotomayor.

This week, we have the opportunity to make history by confirming the first Hispanic and only the third woman to the U.S. Supreme Court. Senator Klobuchar spoke eloquently about the challenges women have faced, and I am pleased to say I had the honor as Governor of appointing the first woman to the New Hampshire Supreme Court.

I come to the floor to speak in support of Sonia Sotomayor’s nomination; however, not because of the historic nature of that nomination but because she is more than qualified to sit on the Supreme Court. I am somewhat perplexed by why the vote on her nomination will not be unanimous.

Judge Sotomayor is immensely qualified. The nonpartisan American Bar Association Standing Committee on the Federal Judiciary, which has evaluated the professional qualifications of nominees to the Federal bench since 1948, unanimously—unanimously—rated Judge Sotomayor as “well qualified” to be a Supreme Court Justice after carefully considering her integrity, professional competence, and judicial temperament.

Her decisions as a member of the Second Circuit Court of Appeals are well within the judicial mainstream of our country. A Congressional Research Service analysis on her opinions concluded she eludes easy ideological categorization and demonstrates an adherence to judicial precedent, an emphasis on facts to a case, and an avoidance of overstepping the circuit court’s judicial role. Described as a political centrist by the nonpartisan American Bar Association Journal, she has been nominated to the Federal courts by Presidents of both political parties.

When President George H.W. Bush, in 1992, nominated Sonia Sotomayor to the U.S. District Court for the Southern District of New York, this Senate approved her nomination by unanimous consent. When President Clinton, in 1998, nominated her to the Second Circuit Court of Appeals, this Senate voted 67 to 29 to confirm her on an overwhelmingly bipartisan vote.

Her now-familiar personal story is no less impressive. The confirmation of Judge Sonia Sotomayor to the highest
Court of our country will inspire girls and young women everywhere to work hard and to set their dreams high.

Americans look to lawmakers to work together to make the country stronger. They expect us to put partisanship aside to advance the interests of the people. If we fail on this issue we should be able to come together on, to put aside our differences on, it is the confirmation of Judge Sonia Sotomayor to the U.S. Supreme Court.

I look forward to having the opportunity to vote in support of her confirmation with the majority of my colleagues.

I thank Senator KLOBUCHAR. I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Minnesota is recognized.

Ms. KLOBUCHAR. Mr. President, having looked at Judge Sotomayor's whole record, as Senator SHAHEEN has pointed out, her 17 years on the bench and the fairness and integrity she will bring to the job, I am proud to support her nomination.

When Judge Sotomayor's nomination was first announced, I was inspired by her life story, which everyone else, which all of us know well by now. She grew up in her own words, "in modest and challenging circumstances," and she worked hard for everything she got.

Her dad died when she was 9 years old, and her mom supported her and her brother. One of my favorite images, as a member of the Judiciary Committee, from the hearing was her mother sitting behind her every moment of that hearing, never leaving her side, the mother who raised her on a nurse's salary, who saved every penny she had to buy an Encyclopedia Britannica for her family. That struck me because I know in our family we also had a set of Encyclopedias Britannicas that had a hallowed place in our hallway, and that is what I used to write all my reports.

Judge Sotomayor went on to graduate from Princeton summa cum laude and Phi Beta Kappa before graduating from Yale Law School.

Since law school, she has had a varied and interesting legal career. She has worked as a private civil litigator, she has been a district court and an appellate court judge, and she has taught law school classes.

But one experience of hers, in particular, resonates with me. Immediately after graduating from law school, she spent 5 years as a prosecutor at the Manhattan District Attorney's Office.

I want to talk a little about that because it is something she and I have in common. I was a prosecutor myself, Mr. President. You know what that is like, to have that duty. I was a prosecutor for Minnesota's largest county. As a prosecutor, after you have interacted with victims of crime, after you have seen the damage that crime does to individuals and to our communities, after you have seen defendants who are going to prison and you know their families are losing them, sometimes forever, you know the law is not just an abstract subject. It is not just a dusty book in the basement. The law has a real impact on the real lives of real people.

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 Judge Sotomayor, this includes the case of the serial burglar turned killer—the Tarzan murderer. For me, there was always the case of Tyesha Edwards, an 11-year-old girl with an unforgettable smile, who was at home doing her homework when a stray bullet from a gang shooting went through the window and killed her.

As a prosecutor, you don't have to just know the law, you have to know the people, the families, and you have to know human nature.

Judge Sotomayor's former supervisor said she is "an imposing and commanding figure in the courtroom, who could weave together a complex set of facts, even if her entire focus was not on the sight of whom she was fighting for."

As her old boss, Manhattan District Attorney Robert Morgenthau said: She is a "fearless and effective" prosecutor. Mr. President, as I turn this over to my colleague, the Senator from Michigan, who has just arrived, I thought it would be interesting for people to hear a little more about Judge Sotomayor's experience as a prosecutor, so I am happy to hear firsthand from her own colleagues.

This was a letter that was sent in from dozens of her colleagues who actually worked with her when she was a prosecutor. They were not her bosses necessarily but her colleagues who worked with her. This is what they said in the letter.

We served together during some of the most difficult years in our city's history. Crime was soaring, a sense of disorder prevailed in the streets, and the popular attitude was increasing violence was inevitable. Sonia Sotomayor 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 cases including serving as counsel at a notorious murder trial. She developed a specialization in the investigation and prosecution of child pornography cases. Her colleagues and I are proud 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.

Her colleagues go on in this letter:

We are proud to have served with Sonia Sotomayor. She solemnly adheres to the rule of law and believes that it should be equally applied to everyone. As a group, we have different world views and political affiliations, but our support for Sonia is entirely nonpartisan. And the fact that so many of her colleagues, friends with Sonia over three decades speaks well, we think, of her warmth and collegiality.

Mr. President, I see that my colleague from Michigan has arrived. I will continue my statement when she has completed hers, but I am proud to have Senator STABENOW, the Senator from Michigan, here to speak on behalf of Judge Sotomayor, and I yield the floor.

The ACTING PRESIDENT pro tempore. The Senator from Michigan is recognized.

Ms. STABENOW. Mr. President, first I am so pleased to be here with the senior Senator from Minnesota, and I have appreciated her wonderful words about Judge Sotomayor, as well as her advocacy on behalf of Minnesota. We have a lot in common, Minnesota and Michigan, and so it is always a pleasure to be with the Senator from Minnesota.

I rise today to strongly support the confirmation of Judge Sonia Sotomayor as the next Justice of the Supreme Court. Her story will be the experience of a uniquely American life—the American dream. She was raised in a South Bronx housing project where her family instilled in her values of hard work and sacrifice. At the age of 9, her father died while fighting in the Korean War, tragically. After that, her mother—a nurse—raised her the best she could. I would say she did a pretty good job.

Her mom urged her to pay attention in school. She pushed Sonia to work hard and get good grades. When she did. She studied hard and graduated at the top of her class in high school. It was through education that doors opened for Judge Sotomayor, as they have opened for millions of other Americans.

After law school, she went to work as an assistant district attorney in New York, prosecuting crimes such as murders and robberies and child abuse. She later went into private practice as a civil litigator, working in parts of the law related to real estate, employment, bankruptcy, and contract law.

In 1992, she was nominated by President George H.W. Bush and confirmed by the Senate unanimously as a district court judge. She performed admirably, and President Clinton—having been nominated first by a Republican and then again by a Democrat—elevated her to the Second Circuit Court of Appeals.

It is in part due to this enormous breadth of experience as a prosecutor, a lawyer in private practice, as a trial judge, and as an appeals court judge that the American Bar Association has given her their highest rating of "well qualified."

Judge Sotomayor's story is the American story—that a young person...
born into poverty can work hard, take advantage of opportunities, and then succeed brilliantly and rise to the very top of their profession. Judge Sotomayor is really an inspiration to all of us. She is a role model for millions of young people of every race, class, creed, and background living in America today.

Last November, we demonstrated that every child in America really can grow up to be President of the United States. Judge Sotomayor proves that with hard work and dedication they can be a Supreme Court Justice too.

Mr. President, I strongly urge my colleagues to vote to confirm Judge Sotomayor. The ACTING PRESIDENT pro tempore, The Senator from Minnesota is recognized.

Ms. KLOBUCHAR. Mr. President, I thank the Senator from Michigan for her strong words in favor of this very strong nominee. I was talking earlier about the experience Judge Sotomayor brings to the bench as a prosecutor. For me, it means one of my criteria for a nominee because I am looking for someone who deeply appreciates the power and the impact that laws and the criminal justice system have on real people's lives. From her first day in the Manhattan D.A.'s office, Judge Sotomayor talked about and understood how it was important to view the law as about people and not just the law.

But when you talk about people, it means you have to look at their cases, it means you have to look at the law, and you have to look at the facts. One of the things we learned in the hearings was that sometimes Judge Sotomayor had to make very difficult decisions. When she was a prosecutor, she had to turn down some cases. Although she was, by all accounts, more aggressive than other prosecutors and took on cases many wouldn't, when she was a judge she sometimes had to turn down cases away victims, as in the case involving the crash of the TWA flight. She actually disagreed with a number of other judges and said as much as she found the victims' families and their case to be incredibly sympathetic, the law took her somewhere else; that the facts and the law meant something else.

You could see that in a number of her cases, which is part of the reason people were looking at her record don't think of her as a judicial activist. They think of her as a judicial model—someone who, in her own words, has a fidelity to the law.

What are we looking for in a Supreme Court Justice? Well, I think actually one of Sonia Sotomayor's old bosses, Robert Morgenthau, said it best. He came and testified on her behalf, and he quoted himself from many years ago when speaking about what he was looking for when he tried to find prosecutors for his office. He said:

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 I look 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 decisions affect the people before her.

With that, I think comes a second essential quality—the quality of humility. I am looking for a Justice who appreciates the responsibility they will be given if confirmed, a Justice who understands the gravity of the office and who respects the very different roles the Constitution provides for each of the three branches of government—something Judge Sotomayor was questioned on extensively in the hearing and made very clear she respects those three different roles for the three different branches of government.

Finally, a good prosecutor knows their job is to enforce the law without fear or favor. Likewise, a Supreme Court Justice must interpret the laws without fear or favor. I am convinced that Judge Sotomayor meets all of these criteria.

She has been a judge for 17 years, 11 years as an appellate judge and 6 years as a trial judge. President George H.W. Bush gave her the first job she had as a Federal judge in the Southern District of New York. Her nomination to the Southern District was enthusiastically supported by both New York Senators—Democratic Senator Daniel Patrick Moynihan and Republican Senator Alfonse D'Amato. So she was first nominated by George H.W. Bush, supported by a Senator, and by Senator SHAHEEN noted, confirmed unanimously by this Senate.

Judge Sotomayor, as I noted before, has more Federal judicial experience than any nominee in the past 100 years. I think the best way to tell what kind of a Justice she will be is to look at what kind of a judge she has been. One person who knows a little something about Sonia Sotomayor as a judge is Louis Freeh, the former Director of the FBI, who served as a judge with her before he was the Director of the FBI. He actually came—again, a Republican appointee—and testified for her at her hearing. He didn't just testify based on a review of her record, he testified based on his own personal experience. He was actually her mentor when she arrived as a new judge. I want to read from the letter he submitted to the Judiciary Committee.

Louis Freeh writes:

It is with tremendous pride in a former colleague that I write to recommend wholeheartedly that you confirm Sonia Sotomayor to be an Associate Justice of the Supreme Court. Judge Sotomayor has the extensive judicial experience, the intellectual curiosity and independence that make her eminently qualified for this ultimate honor and I look forward to watching her take her place on the Nation's highest court.

Freeh goes on to say:

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 newest judge in the storied Courthouse at Foley Square in lower Manhattan, we followed the tradition of having the newly-appointed judge take the last arriving member of the bench. Despite the area's pressurized and unforgiving environment, where a new judge's every word, decision, writing and question is scrutinized and critiqued by one of the hardest, 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 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 desk, I focused on those ultimately more profound and priceless judicial qualities.

He goes on to talk about those qualities of a good judge.

1. Judging takes more than mere intelligence.
2. Always take the bench prepared.
3. Call them as you see them.

He then goes on to say:

Sotomayor would have gotten an “A+” from the “Judge from Central Casting,” as Judge Devitt was often called by his peers.

I think that says it all. You have Louis Freeh here testifying in behalf of Judge Sotomayor. As I said earlier, you have dozens of her former colleagues, Republicans, Democrats, Independents, writing about what kind of prosecutor she was. Every step of the way she impressed people.

And we are now joined by the Senator from New York, my distinguished colleague, who also will be speaking in favor of Judge Sotomayor.
Senator GILLIBRAND had the distinguished honor to introduce Judge Sotomayor when she so eloquently spoke at the hearing. I am very honored to have her join us here today.

I will turn this over to Senator GILLIBRAND.

Mrs. GILLIBRAND. Mr. President, I am grateful to the senior Senator from Minnesota for her kind words and thank her for her extraordinary advocacy on behalf of Judge Sonia Sotomayor. The Senator’s words and real belief in her contribution is extremely important. I thank the Senator.

I stand today to speak on behalf of Judge Sonia Sotomayor and lend my strong support to her nomination to the U.S. Supreme Court.

Judge Sotomayor will bring the wisdom of all her experiences to bear as she applies the rule of law, and will grace the Supreme Court with the intelligence, judgment, clarity of thought and determination of purpose that we have come to expect from all great Justices on the Court.

Much has been made of Judge Sotomayor’s remarkable personal story. There has been great import afforded to the characterization of a “wise Latina.” Clearly, the life lessons and experiences of Justices inform their decisions as has been noted during the confirmation process time and time again.

Justice Antonin Scalia discussed his being a racial minority, in his understanding of discrimination. Justice Clarence Thomas indicated that his exposure to all facets of society gave him the “ability to stand in the shoes of other people across a broad spectrum of this country.”

Justice Samuel Alito described his parents growing up in poverty as a learning experience and his family’s immigration to the United States as influencing his views on immigration and discrimination.

As Americans, we honor the diversity of our society. As our esteemed jurists have noted, the construct of the court is shaped by the diverse experiences and viewpoints of each of its Justices. However, Sonia Sotomayor’s ethnicity or gender alone does not indicate what sort of Supreme Court Justice she will be. Rather, it is Judge Sotomayor’s experience and record that more fully inform us.

The breadth and depth of Judge Sotomayor’s experience makes her uniquely qualified for the Supreme Court. Her 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, corporate litigator, civil rights advocate, trial judge and appellate judge. With confirmation, Judge Sotomayor would bring to the Supreme Court more Federal judicial experience than any Justice in 70 years.

As a prosecutor, Judge Sotomayor fought the worst of society’s ills—from murder to child pornography to drug trafficking. Judge Sotomayor’s years as a corporate litigator exposed her to all facets of commercial law including, real estate, employment, banking, construction and her pro bono work on behalf of the Puerto Rican Legal Defense Fund demonstrates her commitment to our constitutional rights and the core value that equality is an inalienable American right.

On the U.S. District Court for the Southern District of New York, Judge Sotomayor presided over roughly 450 cases, earning a reputation as a tough, fair and thoughtful jurist.

As an appellate judge, Sonia Sotomayor has participated in over 3,000 panel decisions and authored roughly 400 published opinions. As evidence of the integrity of her decisions and adherence to precedent, only 7 cases were brought up for review by the Supreme Court, reversing only 3 of her authored opinions, 2 of which were closely divided.

In an analysis of her record, done by the Brennan Center for Justice, the numbers overwhelmingly indicate that Judge Sotomayor is solidly in the mainstream of the Second Circuit.

Judge Sotomayor has been in agreement with her colleagues more often than most—94 percent of her constitutional decisions have been unanimous. She has voted with the majority in over 98 percent of constitutional cases.

When Judge Sotomayor has voted to hold a challenged governmental action unconstitutional, her decisions have been unanimous over 90 percent of the time.

Republican appointees have agreed with her decision to hold a challenged governmental action unconstitutional in nearly 90 percent of cases.

When she has voted to overrule a lower court, her decisions have been unanimous over 93 percent of the time.

Republican appointees have agreed with Judge Sotomayor’s decision to overrule a lower court decision in over 94 percent of cases.

Judge Sotomayor’s record is a testament to her strict adherence to precedent—her unyielding belief in the rule of law and the Constitution. I strongly support Judge Sotomayor’s nomination and firmly believe she will prove to be one of the finest justices in American history. I urge my fellow Senators to join me in voting for her confirmation.

The PRESIDING OFFICER (Mr. BEN-NET). The Senator from Minnesota is recognized.

Mr. KLOBUCHAR. Mr. President, I thank the Senator from New York for her fine remarks. As she was talking, I was really thinking she is a pioneer of sorts, being the first woman Senator from New York who took her Senate seat in her very small children. I have seen them and they are small—babies—and she has been able to manage and do a fine job in her role of Senator while being a pioneer as a mother at the same time in the State of New York.

With that, it is a good segue to introduce my colleague from the State of Washington, Patty Murray, one of the first women to serve in the Senate. I love this story because when Patty started running for office she was working on some school issues and she went to the legislature. One of the elected legislators actually said to her: How do you think you are ever going to get this done? You are nothing but a mom in tennis shoes.

She went on to wear those tennis shoes and wear them right to the floor of the Senate. I am proud to introduce on behalf of Judge Sotomayor my colleague from the State of Washington, Patty Murray.

Mrs. MURRAY. I thank the senior Senator from Minnesota for all her work helping to move this very critical and important nomination through the Senate. I am here to support the nomination of Judge Sonia Sotomayor to the U.S. States Supreme Court.

The U.S. Supreme Court is the final arbiter of many our nation’s most important disputes.

And as the Constitution provides for a lifetime appointment to the Court, a Supreme Court Justice has an opportunity to have a profound effect on the future of the law in America. That is why the Constitution directs that the Senate is responsible for providing advice and consent on judicial nominees.

Naturally, I take my responsibilities in the nomination and confirmation process very seriously.

But I take a special, personal interest in Supreme Court nominations.

It was watching Supreme Court confirmation hearings many years ago that inspired me to challenge the status quo and run for the Senate.

I was deeply frustrated by the confirmation hearings of then-nominee Clarence Thomas. I believed that average Americans did not have a voice in the process.

There were important questions—questions that needed to be answered—that were never even raised to the nominee.

So, I have worked for years to be a voice for those average Americans when it comes to judicial appointments—and make sure those questions are asked.

I have had the opportunity to meet in person with Judge Sotomayor and ask her questions that will most affect all Americans, including working families in Washington State.

I have examined her personal and professional history, and studied her 19 years record on the bench.

I have followed her progress through the Senate Judiciary Committee and watched her answer a number of difficult questions.

And with all of this information and her answers in mind, I am pleased to support her nomination.

By now, many Americans have heard the remarkable life story of Judge
Sonia Sotomayor. Judge Sotomayor is truly the embodiment of the American dream. Though many Americans by now have heard Judge Sotomayor’s story, some points bear repeating.

Judge Sotomayor is the daughter of Puerto Rican parents. Her father died when she was 9, and she and her brother were raised by her mother in a public housing project in the Bronx.

Sotomayor’s mother, a nurse, worked extra hours so that she could pay for schooling and a set of encyclopedias for her children.

After graduating from high school, Judge Sotomayor attended college at Princeton and law school at Yale. She spent five years prosecuting criminal cases in New York, 7 years in private law practice, and 17 years as a Federal judge on the U.S. District Court and Court of Appeals.

Judge Sotomayor’s story is an inspiring reminder of what is achievable with hard work and the support of family and community.

Of course, a compelling personal story of triumph in tough circumstances is not itself enough. I have long used several criteria to evaluate nominees for judicial appointments: Are they ethical, honest, and qualified? Will they be fair, independent, and even-handed in administering justice? And will they protect the rights and liberties of all Americans?

I am confident that Judge Sotomayor meets these criteria. She has 17 years of Federal judicial experience and unaniomously received the highest rating of the American Bar Association—which called her “well qualified” based on a comprehensive evaluation of her record and integrity.

And she has directly answered questions about her personal beliefs—and prior statements.

She has been clear with me, the Judiciary Committee and the American people that her own biases and personal opinions never play a role in deciding cases. More importantly, her 17 years on the bench stand as the testament to this fact.

Judge Sotomayor has demonstrated her independence. She was nominated to the Federal district court by President George H.W. Bush and appointed to the U.S. court of appeals by President Clinton.

Judge Sotomayor has received rave reviews from her fellow judges on the Second Circuit, both Republicans and Democrats, as well as strong support from a diverse cross section of people and organizations from across the political spectrum.

Finally, it is clear to me that Judge Sotomayor is committed to protecting the rights and liberties of all Americans. She understands the struggle of working families. She understands the importance of civil rights. Her record shows a strong respect for the rule of law and that she evaluates each case based on its particular facts.

Having followed the criteria by which I measure judicial nominees, I am confident Judge Sotomayor will be a smart, fair, impartial, and qualified member of the U.S. Supreme Court.

I believe any individual or group from my home State could stand before her and receive fair treatment and that she will well serve the interests of justice and the public as our next Supreme Court Justice.

I wish to come to the floor to join with many of my women colleagues in the Senate and let the people of Washington State know that, after reviewing her qualifications and her record and reviewing her testimony, I am very proud to stand and support this nomination.

I yield the floor.

The PRESIDING OFFICER. The Senator from Minnesota is recognized.

Mr. KENNY said: I wish to first thank the Senator from Washington for her excellent remarks on Judge Sotomayor.

During this hour, we have heard from several of my colleagues, all strongly supporting Judge Sotomayor. I have talked about, first of all, her growing up and her difficult circumstances. I spoke about her work as a prosecutor and the support she has received from her prosecutorial colleagues.

I have talked about her work as a judge and read extensively from a letter from Louis Freeh, the former Director of the FBI and former Federal judge, about her work as a judge. Now, in the final part of my talk, I wish to address some of the other issues that have been raised with respect to Judge Sotomayor.

I have to say, I woke up this morning to the radio on my clock radio and heard one of my colleagues who decided he was not going to support her, in his words, because of the “empathy standard.”

I kind of put the pillow over my head. I thought: He must not have been sitting in the same room as I was when she was specifically asked by one of the other Senators about how she views the cases. They specifically asked her if she agreed with President Obama when he said: You should use your heart as well as the law.

She said: Actually, I do not agree with that. I look at the law and I look at the facts.

So people can say all kinds of things about her, if they would like, but I suggest they look at her record.

My colleagues in the Senate are entitled to oppose her nomination, if they wish; that is their prerogative. But I am concerned some people keep returning again and again to some quotes in the speeches, as if they actually said, a phrase, that she did not mean to offend anyone and she should have put it differently.

When have you 17 years of a record as a judge, what is more important—those words of the judge years or one phrase which she basically said was not the words she meant to use. What is more important?

In the words of Senator Moynihan: You are entitled to your own opinion, but you are not entitled to your own facts. So let’s look at the facts of her judicial record. This nominee was repeatedly questioned, and I sat there through nearly all of it. She was questioned for hours on end about whether she would let bias or prejudice infect her judgment.

But, again, the facts do not support these claims. In race discrimination cases, for example, Judge Sotomayor voted against plaintiffs in 25 percent of the time. She also handed out longer jail sentences than her colleagues as a district court judge. She sentenced white-collar criminals to at least 6 months in prison 48 percent of the time; whereas, her other colleagues did so only 34 percent of the time.

In drug cases, 85.5 percent of convicted drug offenders received a prison sentence of at least 6 months from Judge Sotomayor, compared with only 79 percent in her colleagues’ cases.

A few weeks ago, I was in the Minneapolis airport and a guy came up to me, he was wearing an orange vest. He said: Are you going to vote for that woman? I said: First, I did not know what he was talking about. I said: What do you mean?

He said: That judge. I said: Actually, I want to meet her first. This is before I had met her. I want to ask her some questions before I make a decision.

He said: Oh, I do not know how you are going to do that because she always lets her feelings get in front of the law.

This guy needs to hear these statistics. He needs to hear the statistics Senator GILLIBRAND was talking about, the statistics that when she had served on the bench with a Republican colleague, 95 percent of the time they made the same decision on a case.

Then I guess the thought is, why are these same Republican-appointed judges are letting their feelings get in front of the law if you take that logic to its extreme. So 95 percent of the time she sided with her Republican-appointed judge colleagues.

During her hearing, Judge Sotomayor was questioned about issues ranging from the death penalty to her use of foreign law. That was repeatedly mentioned that she might use foreign law to decide a death penalty case.

What do we have as the facts? What do we have as evidence? There was one case she decided when the death penalty came before her, and she rejected the claim of someone who wanted to say the death penalty would not apply when she was a district court judge.

She never cited foreign law. There was no mention of France or any kind of law anywhere in that decision. Those are the facts in her judicial record. In no place has she ever cited foreign law to help her interpret a provision of the U.S. Constitution.

I believe that everything in a nominee’s professional record is fair game.
to consider. After all, we are obligated to determine whether to confirm someone for an incredibly important lifetime position. That is our constitutional duty and I take it seriously.

But that said, when people focus on a few instances, they miss the context. Judge Sotomayor has given, phrases which she has basically said she would have said differently if she had another opportunity, you have to ask yourself again: Do those statements—are they outweighed by the facts?

Check out all these endorsements of people who have actually looked at her record, have looked at how she has come out on decisions. You have an endorsement from the National District Attorneys Association supporting her; you have the support from the Police Executive Research Forum; you have support from the National Fraternal Order of Police, not exactly a raging liberal organization; you have the support of the National Sheriffs Association. Again, these are the facts.

These are the facts: Unanimous top rating from the ABA, the American Bar Association. Those are the facts. I believe, if we want to know what kind of a Justice Sonia Sotomayor will be, our best evidence is to look at the kind of judge she has been.

I wish to address one more matter that I mentioned at the Judiciary hearing, and that is the vote for Judge Sotomayor, and that has been a point that irritated me. There have been some stories and comments, mostly anonymous, about Judge Sotomayor’s judicial temperament.

According to one newspaper story about this topic, Judge Sotomayor developed a reputation for asking tough questions at oral arguments and for being sometimes brisk and curt with lawyers. I voted for Judge Sotomayor, and that has been a point that irritated me. I believe, if we want to know what kind of a Justice Sonia Sotomayor will be, our best evidence is to look at the kind of judge she has been.

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Even the Obama Justice Department could not defend her actions and submitted a brief to the Supreme Court on the matter. In it, they agreed that the decision by Judge Sotomayor should be vacated and that further proceedings on the issues were warranted. This is the Justice Department of the Obama administration.

When the Supreme Court issued their opinion in the case, they stated that the precedent relied on for her decision did not exist. In reviewing the confirmation hearing about her decision, she avoided citing the particulars and simply explained that she was following established Supreme Court and Second Circuit precedent. The most troubling thing for me to grasp about this response is the Supreme Court says, in their reversal of her decision, that precedent for Ricci did not exist at all. It was a 5-to-4 decision by the Supreme Court, but all nine Justices disagreed with her reasoning—a unanimous rejection of her argument by the Supreme Court. The Supreme Court said precedent did not exist.

Maloney v. Cuomo, a second amendment case, is another decision of Judge Sotomayor that troubles my impression of her. I submit a brief to the Supreme Court on the case, and the Court decided their judicial precedent to come to a decision that precedent for Ricci did not exist. She decided the Maloney case after the historic Heller decision specifically concluded, without any explanation, that the right to bear arms is, in fact, not a fundamental right—a conclusion no court had reached, and one that could not be taken away by government without the highest standard of review. This was the argument that ultimately caused her to lose her confirmation hearing. She avoided citing the particulars and simply explained that she was following precedent of the Supreme Court. She was questioned during the confirmation hearing about her decision, she avoided citing the particulars and simply explained that she was following established Supreme Court and Second Circuit precedent. The most troubling thing for me to grasp about this response is the Supreme Court says, in their reversal of her decision, that precedent for Ricci did not exist at all. It was a 5-to-4 decision by the Supreme Court, but all nine Justices disagreed with her reasoning—a unanimous rejection of her argument by the Supreme Court. The Supreme Court said precedent did not exist.

To me, a nonlawyer, her decision in the Maloney case after the historic Heller decision specifically concluded, without any explanation, that the right to bear arms is, in fact, not a fundamental right—a conclusion no court had reached and one that could not be taken away by government without the highest standard of review. This was the argument that ultimately caused her to lose her confirmation hearing. She avoided citing the particulars and simply explained that she was following precedent of the Supreme Court. She was questioned during the confirmation hearing about her decision, she avoided citing the particulars and simply explained that she was following established Supreme Court and Second Circuit precedent. The most troubling thing for me to grasp about this response is the Supreme Court says, in their reversal of her decision, that precedent for Ricci did not exist at all. It was a 5-to-4 decision by the Supreme Court, but all nine Justices disagreed with her reasoning—a unanimous rejection of her argument by the Supreme Court. The Supreme Court said precedent did not exist.

I am troubled by the absence of any reason to question how she might rule. I have, and the Senate has, the benefit of reviewing Judge Sotomayor's actual decisions as a circuit judge, in addition to her statements to the record. I have the benefit of seeing if she stuck to the letter of the law as she stated she would do in her testimony when nominated for the appellate court. She has not stuck to the letter of the law.

In 1998, she said, in response to a question from the current ranking member of the Judiciary Committee:

Sir, I do not believe we should bend the Constitution under any circumstance. It says what it says. We should honor it.

Quite frankly, I believe she bent the Constitution when she ruled in the Maloney case that the right to bear arms was not a fundamental right of the American people.

I have repeatedly said that the decisions made by the Supreme Court affect the lives of every American. After taking into consideration Judge Sotomayor’s answers to my questions, reviewing her decisions that appear to have departed from the normal principles of jurisprudence, I find little predictability in her decisions and the implications of her rulings. I am concerned by the several examples where I believe Judge Sotomayor strayed from the rules of strict statutory construction and legal precedent and went with her own deeply-held beliefs, while providing little in the way of explanations. Therefore, I am unable to support her nomination to the Supreme Court.

The debate that will happen in the next several days, Judge Sotomayor has the votes to be a Justice. I will continue to watch the decisions she makes based upon the answers she provided to me. But as most, if not all, have stated, this is a lifetime appointment. The debate that will happen in the next 48 hours will determine, in many cases, whether a change might happen in this nomination. We cannot end this debate without the realization that we will live for generations to come with the decisions of this Court.

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98 votes. Every Democrat knew or probably should have known that they were voting for a conservative, but they also understood that then-Judge Scalia was incredibly qualified and should be serving on the Supreme Court. The question had been nominated by a President and had the requisite qualifications, which is really the essence of what this confirmation process is and should be about.

But things have changed since those votes. The standard of qualification is historically acceptable and what has been the long historic tradition of the Senate when it comes to Senate confirmations of judicial nominees. Over the past decade, I believe the Senate has lost sight of its role to advise and consent.

I notice another example. The nominations of Miguel Estrada, Chief Justice Roberts, and Justice Alito—all three of these illustrate how partisan politics have been permitted to overwhelm the fundamental question when the Senate fulfills its role to advise and consent. To which I would then say: So why won’t you vote for him? He then said of then-Judge Alito: I have no doubt that Judge Alito has the training and qualifications necessary to serve. He’s an intelligent man and an accomplished jurist. And there’s no indication he’s not a man of great character. But despite these emphatic statements of confidence, then-Senator Obama, who was then the majority leader, said: You made a mistake. Why? Because of his perception that their philosophy would not allow him to vote for them.

Given this record, some of my colleagues conclude that what is good for the goose is good for the gander; that because of these recent precedents, and despite her qualifications, they may still vote against Judge Sotomayor’s confirmation. I could not disagree more heartily. It is absolutely clear that starting today, we will no longer do what was done to Miguel Estrada; that beginning today, no Member will pursue a course and strategy that are so different than Judge Sotomayor. But here in this person we have a 17-year record. She has written thousands of opinions. These opinions provide the body of law of what she does as a judge—not what she said to a group of law school students several years ago. But that is the standard. She has a foundation in law, whether they had a foundation in law, whether they were reasonable decisions, whether she reached them on the basis of law and evidence that are supported by sound legal thinking. Her worst critics cannot cite a single instance where she strayed from sound judicial thinking.

I believe she will serve as an outstanding Associate Justice to the U.S. Supreme Court, and she will be a terrific role model for many young people in this country. Were I to have had my opportunity to pick, I may have chosen someone different than Judge Sotomayor. But that is not my job. I do not get to select judges. I get to give advice and consent. We sometimes confuse the role of the Senate. Elections have their consequences. Some of her writings and her statements indicate that her philosophy might be more liberal than mine, but that is what happens in elections.

When I was campaigning for my colleague and dear friend JOHN MCCAIN, I knew it was going to be important because there would be vacancies to the Court. I knew I would be much more comfortable with a nominee whom JOHN MCCAIN would nominate than one my former colleague and friend, President Barack Obama, might nominate. The President has the prerogative, the obligation, the responsibility to choose our nation’s nominees. Our job is to give advice and consent. The President has chosen a nominee, and my vote for her confirmation will continue to be in this limbo where he had been for 28 months because of the misguided notion that he was just too conservative and so it was OK to filibuster him. For 28 months he was hanging, dangling in the wind. That was not right. It was not to the Supreme Court, but might it not be a Supreme Court candidate, he might have been the first Hispanic serving in the Supreme Court, nominated, perhaps, by a Republican President.

So while the nominations of Chief Justice Roberts and Justice Alito ended quite differently from Mr. Estrada’s, the record is, frankly, equally disturbing. During the debates on both Roberts and Alito, then-Senator Barack Obama declared each man to be qualified to sit on the Supreme Court. Of then-Judge Roberts, Senator Obama said, right here on the Senate floor: There is absolutely no doubt in my mind Judge Roberts is qualified to sit on the highest court in the land.

To which I would then say: So why won’t you vote for him?

So what about our current nominee? What makes her qualified? Well, first, I think we do have in Judge Sotomayor a very historic moment, an opportunity. It will be the first Hispanic to serve and the highest Court of this land. It is a momentous and historic opportunity.

But that is not good enough. What makes her qualified? Well, I think experience, knowledge of the law, temperament, the ability to apply the law without bias—these qualifications should override all other considerations when the Senate fulfills its role to advise and consent to the President’s nominee, as dictated by the constitutional charge we have. These are the reasons why any body should determine who is qualified to serve on any Federal court, including the highest Court of the land. These are the standards I have used in evaluating Judge Sotomayor’s nomination to the Supreme Court. She has the experience. She knows the law. She has the proper temperament.

Here is something that is very important: Her 17-year judicial record overwhelmingly indicates she will apply the law without bias. That is very important because we could find someone who really is facially qualified but whose views might be, for some reason, outside the mainstream, so different from what the norm of our jurisprudence would be, that it might render them, facially qualified, truly unqualified—that they really could not be relied on to look at a case and apply the facts and the evidence and apply the law to the evidence presented, that they would not follow the law, that they would not be faithful to their oath because their views would be so extreme, so outside the mainstream, so completely beyond what would be the court’s policy.

But things have changed since those votes. They have changed from what is the proper temperament. The President has the prerogative, the obligation, the responsibility to choose our nation’s nominees. Our job is to give advice and consent. The President has chosen a nominee, and my vote for her confirmation will
be based solely and wholly on relevant qualifications. Judge Sotomayor is well qualified. She has been a Federal judge for 17 years. She has the most experience of any person—on-the-bench judicial experience of any person—nominated to the Supreme Court in a century. In 100 years, there has not been anyone who has been on the bench with such a distinguished record for such a long period of time. That is why, by the way, her record is really her judicial decisions. We have to wonder whether someday she will answer the siren call to judicial activism. As I have heard someone say on the floor of the Senate. You do not have to wonder. You can wonder, and it might give you an excuse to vote against someone who is otherwise qualified, but the fact is, with a 17-year record, you should have a pretty good idea whether that siren call would have been answered by now.

To my estimation, it has not been. She received the highest possible rating from the American Bar Association for a judicial candidate—equal to that of Miguel Estrada, equal to that of Chief Justice Roberts, and equal to that of Justice Alito. She has been a prosecutor. She has been a lawyer. Through her career, an outstanding lawyer. As a prosecutor, she was a pretty tough one too. With less than a handful of exceptions, her 17-year judicial record reflects that while she may be left of center, she is very well within the mainstream of legal thinking.

Her mainstream approach is so mainstream that it has earned her the support of the U.S. Chamber of Commerce as well as the endorsement of several law enforcement and criminal justice organizations. She has been endorsed by the National Fraternal Order of Police, the National Sheriffs’ Association, and the International Association of Chiefs of Police. I daresay she will be a strong voice for law and order in our country.

I disagree with Judge Sotomayor about several issues. I would expect to have disagreements with many judicial nominees of the Obama administration but probably fewer with her than some I might see in the future. Although I might disagree with some of her rulings, we know she has a commitment to well-reasoned decisions—decisions that seek, with restraint, to apply the law and to believe in the Bill of Rights. That has been her judicial history and philosophy. For instance, I believe her view as expressed in her panel’s Maloney v. Cuomo opinion of whether the second amendment applies against State and local governments is too narrow and contrary to the Founders’ intent. But I also know there is significant and well-reasoned disagreement among the Nations’ appellate courts on this issue. In other words, it is not out of the mainstream.

On this issue, I accept the idea that reasonable people may differ. This debate raises critical and difficult issues regarding the role of federalism in the application of fundamental constitutional rights. But the confirmation process is not the proper place to relitigate this question, nor is Judge Sotomayor’s judicial record on this issue outside the mainstream.

I believe her statements on the role of international law in American jurisprudence reflect a view that is too expansive. Yet her judicial record indicates that, in practice, she has given only limited, if any, weight to foreign law decisions. For example, in Croll v. Croll, a 2000 international child custody case involving the Hague Convention on International Child Abduction, Judge Sotomayor wrote a dissenting opinion in which she concluded that the holding of a court of foreign nations interpreting the same convention were “not essential” to her reasoning.

I believe some of the statements she has made in her speeches about the role of one’s personal experience are inconsistent with the judicial oath’s requirement that judges set aside their personal bias when making those decisions. There are several of my colleagues who say the statements demonstrate that Judge Sotomayor is a judicial activist in hiding. This assertion, however, is not supported by the facts. We can throw it out there, but it is not supported by the facts. The relevant facts—her 17-year judicial record—show she has not allowed her personal biases to influence her jurisprudence. They can talk about her speeches, but they cannot talk about a single solitary opinion in 17 years on the bench where that type of a view has been given life, where that type of a view has found itself into the pages of a single one of her opinions. I would rather put my trust and my expectations for the future on her 17-year record of judicial decision making than I would put on one or two speeches she might have given over 10 or 15 years.

Those who oppose Judge Sotomayor have yet to produce any objective evidence that she has allowed her personal bias to influence judicial decision making. Moreover, in her testimony before the Judiciary Committee, she reiterated her fidelity to the law, that as a Justice she would adhere to the law regardless of the outcome it required.

So based on my review of her judicial record and her testimony before the Judiciary Committee, I am satisfied Judge Sotomayor is well qualified to sit on our Nation’s highest Court. I intend to vote for her confirmation. I intend to also be very proud of her service on the Supreme Court of the United States where I think, again, she will serve a very historic and unique role to many people who I know will look to her with great pride.

Thank you, Mr. President. I yield the floor.

I suggest the absence of a quorum.

The PRESIDING OFFICER (Mr. Kaufman). The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. BOND. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. BOND. Mr. President, I rise to speak on the nomination of Judge Sonia Sotomayor to the Supreme Court of the United States.

Few positions carry more honor, or solemn duty, than becoming a Justice of the highest court of the greatest democracy.

Also, few duties carry more honor, or solemn responsibility, than giving advice and consent on who should become a Justice on the highest Court of the greatest democracy.

The walls of that Supreme Court form the vessel that holds the great protections of our liberty. Those black robes give life to the Constitution’s freedoms and the flourishing of our ideas and beliefs.

If the Congress is the heart of our democracy, walking to the drumbeat of the people, then the Supreme Court is our soul guiding us on what is right and what is wrong.

In my role as a Senator voting to fill that vessel, issuing those robes, I have always looked to the Constitution to guide my obligation to give advice and consent.

It is an obligation separate and apart from my role as a legislator, when I vote for or against legislation before this body.

Indeed, if the Constitution meant for us merely to vote on nominees, by simple or super majorities, it could easily have said so.

If we were meant to do nothing more than cast a vote based on whether we agreed or disagreed with a nominee, where would we be then?

Would the halls of government be empty every time a President faced a Congress of the opposite party?

Would the Cabinet sit empty because of partisan divide?

Would vacancies to the Supreme Court go unfilled, because a majority of one party simply disagreed with the President of another?

Of course, that could not have been the intent of the Framers.

What kind of Justices would we have, with nothing more than partisan majorities?

Would a Senate controlled by the opposition party allow only the most moderate of voices, or justices with no voice at all?

Would it approve only judges that said nothing, or wrote nothing with which the majority disagreed?

If some are saying that a Democratic President should not have a liberal Justice, does that mean a Republican President should not have conservative Justices?

That is not something I could support, for I surely supported judicially conservative Justices Roberts and Alito, Thomas and Bork—Scalia certainly if I had been in the Senate at the time.
That is the kind of Justice I support, a judge that calls balls and strikes like an umpire, not letting their own personal views bias the outcome of the trial. The statue of justice is blindfolded for a reason, so that she cannot tip the scales of justice with the prejudice of bias or belief.

But I have supported Justices with whom I disagreed on this philosophy. Justices Breyer and Ginsberg come to mind.

They take a more active role in shaping their decisions, to fit an ideal of their own vision. I supported these nominees of a Democratic President, as did 86 of my colleagues for Justice Breyer, and 65 of my colleagues for Justice Ginsberg. I hope those votes do not reflect a time that has slipped away, when partisanship did not infect every facet of our political system.

I could forget that time, as President Obama did when he was a Senator. I could easily say, as Senator Obama said, that I disagree with a nominee’s judicial approach, and that allows me to oppose the nominee of a different party.

Lucrily for President Obama, I do not agree with Senator Obama. I reject the Obama approach to nominees.

While I reject the way Senator Obama approached nominations, that does not mean that I support the way Judge Sotomayor approaches judging. I disagree that the civil rights of a firefighter are so small that they do not deserve even a full opinion before an appeals court.

I disagree that we should inspire with suggestions that wisdom has anything to do with the sex of a person or the color of their skin.

I disagree that judges should ever factor in foreign law when looking for meaning in U.S. statutes or the U.S. Constitution.

I disagree that the second amendment’s protection of an individual’s right to bear arms does not apply to States.

But I do agree that Judge Sotomayor has proven herself a well qualified jurist.

I do agree that she has proven herself as a talented and accomplished student, Federal prosecutor, corporate litigator, Federal trial judge, and Federal appeals court judge.

She has the backing of many in the law enforcement community including the Fraternal Order of Police, the National Sheriffs Association, and the National Association of District Attorneys.

I do agree that Judge Sotomayor has proven herself as a leader of her community, who inspires the pride and hopes of a large and growing portion of our American melting pot.

I do agree that Judge Sotomayor has proven herself as a symbol of breaking through glass ceilings.

And I do agree that my choice for President did not win the last election, and that our people’s democracy has spoken for the change and they are getting it. Elections do have consequences.

Now, hearing the call of that decision of our democracy does not mean that I support the President in everything he has proposed.

I did not agree with a stimulus that has meant only more government spending and national debt as the unemployment continues to rise.

I do not agree with cap and trade legislation that will raise energy taxes and kill millions of lost jobs without even changing the climate because China and India refuse to act the same.

I do not agree with a government takeover of health care that forces millions of Americans off their current health care, drives health care costs even higher for families, rationing care, restricts access to the latest cures and medical innovations, and makes decisions in the hands of government bureaucrats rather than doctors and patients.

But I do agree that the country is tired of partisan fight, every debate that makes our country is tired of every action by the Congress becoming a political battle.

And so, I will not follow the hypocrisy of many of my Democratic colleagues who refused to support Justices Roberts and Alito because they disagreed with their judicial philosophy and now suggest that Republicans do not do the same.

I respect and agree with the legal reasoning of my colleagues who will vote no, but I will follow the direction of the past, and my hope for the future, with less polarization, less confrontation, less partisanship.

My friends in the party can be assured. I will work as hard as anybody to ensure that the next Presidential election has consequences in the opposite direction.

For my conservative friends, the best way to ensure that we have conservative judges on the bench is to work to see that we elect Presidents who will nominate them.

Then we can resume filling the bench with more judges like Justice Roberts.

For my liberal friends I hope they remember this day when another qualified nominee is before the Senate who is conservative. The standard set by Senator Obama should not govern the Senate.

As for Judge Sotomayor, she has the accomplishments and qualities that have always meant Senate confirmation for such a nomination.

The Senate has reviewed her nomination and has asked her its questions.

There have been no significant findings against her. There has been no public uprising against her.

I do not believe the Constitution tells me I should refuse to support her merely because I disagree with her.

I will support her. I will be proud for her, the community she represents and the American dream she shows possible.

I will cast my vote in favor of the nomination of Judge Sotomayor, and I urge my colleagues to do the same.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The Senator from Texas.

Mr. CORNYN. Mr. President, I wish to address the nomination of Judge Sonia Sotomayor to be an Associate Justice of the U.S. Supreme Court as well. I have spoken about this nomination several times on the Senate floor and on the Senate Judiciary Committee on which I serve. I have shared what I admire about Judge Sotomayor, including her long experience as a Federal judge, her academic background, which is stellar, and her record of making decisions that for the most part are within the judicial mainstream.

I have also explained before why I will vote against this nomination and I wish to reiterate and expand on some of those comments here today as all of us are stating our intentions before this historic vote which I suspect will be held sometime tomorrow.

First, I cannot vote to confirm a nominee to the U.S. Court who restricts several of the fundamental rights and liberties in our Constitution, including our Bill of Rights. Based on her decision in the Maloney case, Judge Sotomayor apparently does not believe that the second amendment right to keep and bear arms is an individual right. Indeed, she held in that case that the second amendment did not apply to the States and local jurisdictions that might impose restrictions on the right to keep arms.

Then based on her decision in the Didden v. The Village of Port Chester case, she apparently does not believe that the takings clause of the fifth amendment protects private property owners when the government takes property to be used for public purposes. There has been no public finding of condemnation of private property only extend to public uses and then, and only then, when just compensation is paid.

Then based upon her decision in the Ricci case—this is the New Haven firefighter case—which calls into question her commitment to ensure that equal treatment applies to all of us when it comes to our jobs without regard to the color of our skin. Indeed, in that case, because of her failure to even acknowledge the seriousness and novelty of the claims being made by the New Haven firefighters, she wrote a short shrift to those claims in an unpublished order and denied Frank Ricci, Ben Vargas, and other New Haven firefighters an opportunity for a promotion, even though they excelled in a competitive, race-neutral examination, because of the color of their skin.

Fortunately, the Supreme Court of the United States saw fit to overrule
Judge Sotomayor’s judgment in the New Haven firefighter case. Millions of Americans became aware, perhaps for the first time, of this notorious decision and what a morass some of our laws have created when, in fact, distinguishing judges like Judge Sotomayor who think they have no choice but to allow people to be denied a promotion based upon the color of their skin for fear of a disparate impact lawsuit, even when substantial evidence is missing that such a disparate lawsuit would have merited success.

I cannot vote to confirm a nominee who has publicly expressed support for many of the most radical legal theories percolating in the faculty lounges of our Nation’s law schools. We heard this during the confirmation hearings and, frankly, Judge Sotomayor’s explanations were unconvincing. Previously, she said there is no such thing as neutrality or objectivity in the law—merely a series of perspectives that should be think undergirding the very concept of equal justice under the law. If the law is not neutral, if it is not objective, then apparently, according to her, at least at that time, the law is purely subjective, and outcomes depend on the makeup of the judges you get rather than what the law says.

She has said in one notorious YouTube video that it is the role of judges to make policy on the court of appeals. She has said that foreign law can get the “creative juices flowing” as judges interpret the U.S. Constitution, and she has said, as we know, ethnicity and gender can influence a judge’s decisions and judges of a particular ethnicity or gender can actually make better decisions than individuals of a different gender or ethnicity.

Third, I cannot vote to confirm a judicial nominee who testified before the Judiciary Committee that her most controversial opinions were guided by precedent, when her colleagues on the Second Circuit, and indeed the Justices of the U.S. Supreme Court who reversed her, said just the opposite; or who testified that she meant the exact opposite of what she said—every time she said something controversial and was trying to explain that; or a person who testified that she had any English when he came to the United States, graduated from a top university and law school in this country. He was filibustered seven times an denied an up-or-down vote. One member of the Judiciary Committee, disparaging Mr. Estrada’s character, called him a “stealth missile, with a nose cone, coming out of the right wing’s deepest silo.”

There then was Clarence Thomas—perhaps the one we remember as the best—an African American nominee to the Supreme Court who described his experience before the Judiciary Committee this way:

“This is a circus. It’s a national disgrace. And from my standpoint as a black American, it is a high-tech lynching for uppity blacks.

These nominees were accused at various times of certain offenses, even though the real crime, as we all know, was a crime of conscience. They dared to be judicial consciences. I phrased it as philosophical that the nominee we are talking about today and Senate Democrats now appear to embrace.

I hope the days of the unfair and undignified Judiciary Committee hearings are behind us. I hope our hearings are more respectful of the nominees, as was this hearing for Judge Sotomayor. She herself proclaimed that she could not have received fairer treatment. I appreciated acknowledging the fairness and dignity of the process.

I hope the “thought crimes” of yesterday have now become the foundation for a new bipartisan consensus, including the views that Judge Sotomayor affirmed at her hearing and that we affirmed as both Republicans and Democrats, and the views that Judge Sotomayor rejected at her hearings and we rejected as both Republicans and Democrats.

Let me give a few examples of our new bipartisan consensus on the appropriate judicial philosophy for a nominee to the U.S. Supreme Court. Judge Sotomayor, at her hearing, put it this way:

The intent of the Founders was set forth in the Constitution. It is their words that [are] the most important aspect of judging. You follow what they said in their words, and you apply it to the facts you’re looking at.

I cannot think of a better expression of a modest and judicially restrained philosophy that I embrace than what Judge Sotomayor said at her hearing. Both Republicans and Democrats appeared to be pleased with that statement.

We agreed that foreign law has no place in constitutional interpretation. Notwithstanding her earlier statements, Judge Sotomayor said at the hearing:

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.
As I said, notwithstanding her earlier statements, I agree with that statement she made at the hearing. I believe both Republicans and Democrats were satisfied with that statement as well. We agreed that “empathy or what’s in a person’s heart”—that phrase has emerged very recently. I hope they are right; I really do. I certainly intend to take my colleagues’ agreement with these statements at face value. I expect future nominees to the Supreme Court to conform to this new consensus articulated by Judge Sotomayor at her hearing and embraced in a bipartisan fashion by the members of the Judiciary Committee.

Mr. President, I have no question about the outcome of this vote on Judge Sotomayor. I regret, for the reasons I have stated, that I cannot vote for her because I cannot reconcile her previous statements with her testimony at the Judiciary Committee hearing. Also, I wish Judge Sotomayor well in her future. I surmise on the Supreme Court. The concerns that I raised here, and the uncertainty I have about regarding what kind of Justice she will be—I hope she will prove those concerns unjustified by the way she distinguishes herself as a member of the U.S. Supreme Court. I hope her tenure will strengthen the Court, as well as its fidelity to the plain meaning of the Constitution. I congratulate her and her loved ones on her historic achievement. I yield the floor and suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. SPECTER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. SPECTER. Mr. President, I have sought recognition to comment about the confirmation of Judge Sotomayor for Associate Justice to the Supreme Court. I ask other subjects directly related to the confirmation process and comment about the reality of judicial legislation, about the emerging standard on rejecting the tradition of deference to the President, and about the Court’s reduced workload, the failure to decide major cases, the lack of public understanding of what the Court does, the need for accountability and transparency, and the problems made for televising the Supreme Court.

For me, the confirmation of Judge Sotomayor is an easy one. During the 11 confirmation proceedings I have participated in and others I have studied, I know of no one who brings a stronger record than Judge Sotomayor: summa cum laude at Princeton, Yale Law School, Yale Law Journal, prestigious New York firm, assistant district attorney, published books in law, her praises, 17 years on the Federal bench.

The criticisms which were made against her, my judgment is they were vacuous. A great deal of time in committee was spent on her comment about “a wise Latina woman.” My view is that she should have been condemned for that statement, not criticized. Why do I say “condemn”? Why shouldn’t a woman stand up for women’s capabilities? In a society which didn’t grant women the right to vote until 1920, in a society which still harbors the tough glass ceiling limiting women, in a society where only two women have served on the Supreme Court, in a society where about 100 Senators are women, I would expect a woman to proudly speak up for women’s competency.

To talk about being a Latino, well, what does that mean? What is ethnic pride? And isn’t it about time that we had some greater diversity on the Supreme Court? Isn’t it surprising, if not scandalous, that it took until 1967 to have an African American on the Court, Thurgood Marshall, and it took until 1981 to have the first woman on the Court, Sandra Day O’Connor?

Judge Sotomayor is a role model and will be a broader role model if confirmed. The conventional wisdom is that she will be confirmed. Isn’t there a greater assurance in a society as diverse as ours to have someone on the Court to represent that kind of diversity, all within the rule of law?

A criticism here with respect to the New Haven firefighters case—very complex, very subtle, very nuanced on disparate impact. The Supreme Court divided 5 to 4. So what is there to criticize on Judge Sotomayor’s standing for joining a per curiam opinion?

I asked a question of the New Haven firefighters who appeared: Do you have any reason to believe that Judge Sotomayor operated in anything but good faith? Both of the young firefighters candidly said they had no opinion on that subject.

Then there is the criticism about her conclusion, her judgment that second amendment rights operated within the 14th amendment due process clause to be applied to the States. That is the precedent of the Supreme Court of the United States. It is not up to a certain court to rule differently when their hands are bound by the Supreme Court, even if it is an old case.

The distinguished seventh circuit agreed with Judge Sotomayor. The argument was made well. The ninth circuit has said second amendment rights are applicable to the States.

Since the hearing, the court on banc in the ninth circuit has granted review of a decision by the three-judge panel with every indication that the three-judge panel in the ninth circuit will be reversed.

So when you add up all of the comments and all of the criticism, nothing, in my judgment, is left standing.

The issue of judicial legislation is one which occupied the thinking and consideration of a number of those who were opposed to Judge Sotomayor. But there is nothing in her record to suggest she will engage in judicial legislation.

When you take a look at the Supreme Court of the United States, that has become the rule of the era, as opposed to rule of law where the Court is supposed to interpret the Constitution and statutes and leave to the Congress and the State legislatures the job of establishing public policy.

During the era of the Warren Court, there was a vast expansion of constitutional rights. I was in the Philadelphia district attorney’s office at the time and literally saw the Constitution change day by day. In 1961, Mapp v. Ohio came down applying the fourth amendment protection on search and seizure to the States. In 1963, Gideon v. Wainwright established the right to counsel; 1964, Escobedo v. Illinois; 1966, Miranda. Those were constitutional rights and changing values as articulated by Justice Cardozo in Palko.

But in more recent times, there has been a vast expansion of the Supreme Court, in effect, legislating. I refer specifically to the case United States v. Morrison which involved the issue of the legislation protecting women against violence. Chief Justice Rehnquist handed down an opinion saying that the “method of reasoning” of the Congress was deficient. The dissects on that 5-to-4 opinion laid out the vast record which supported the legislation.

The Supreme Court has adopted a standard of judging constitutionality by the “appearance of congruence and proportionality,” a standard which has emerged very recently. It defies understanding to quantify or
WHY I VOTED AGAINST BORK

(By Arlen Specter)

From the day in mid-July when Judge Robert H. Bork stopped by for a courtesy call until I telephoned him last week to say I would oppose his nomination, my goal was to figure out what impact Judge Bork would have on the people who came to the Supreme Court in search of their constitutional rights. At the end, having come to like and respect Judge Bork, I reluctantly decided to vote against his nomination. I had a substantial number of doubts about what he would do with fundamental minority rights, about equal protection of the law and freedom of speech.

From the beginning, it was evident that he was at odds with Chief Justice Burger's broader view of the Constitution which was totally integrated. The Founding Fathers designed the Constitution so that there was no application of the equal protection clause, that you couldn't incorporate any of the 10 amendments and you couldn't incorporate the equal protection clause into the Constitution. The Supreme Court desegregated the DC schools on the basis of holding that the equal protection clause was part of due process and due process did apply to the District of Columbia. Judge Bork was of the view that there was no application of the due process clause; that you couldn't incorporate any of the 10 amendments and you couldn't incorporate the equal protection clause into the Constitution.

So I was a bit of a critic of the problem of judicial legislation, it is my view that you ought to look at what Judge Sotomayor has done in 17 years on the bench. And there is no indication at all of her substituting her values. But when you come to the Supreme Court of the United States, there is good reason to question what they are doing.

There is, simply stated, a lack of understanding as to what goes on in the Court.

The one comment I do have, other than full support for Judge Sotomayor, was her reluctance to answer questions. One question which I asked her was illustrative. Chief Justice Roberts, in his confirmation hearing, when confronted with the light workload of the Court, said that he thought the Court could take on more responsibility. I asked Judge Sotomayor if she agreed. She said she would have to be more fully familiarized, even though the statistics which I quoted to her about the Court's workload contrasted with 1886 when the Supreme Court decided 451 cases; in 1965, there were only 161 written opinions; in 2007, only 67 written opinions.

It seemed to me plain that the Court could undertake more work, as Chief Justice Roberts had agreed, during his confirmation hearings. But there has developed an attitude among nominees who appear before the Judiciary Committee that it is unsafe to answer questions because of what happened to Judge Bork.

As I have pointed out in committee, and it is worth repeating, it is a myth that Judge Bork was defeated because he answered too many questions. In the context of his writings and in the context of his record where he advocated original intent, it was necessary for Judge Bork to speak up. The Bork nomination was rejected because he had a view of the Constitution which was totally outside the constitutional continuum or outside the constitutional mainstream.

For example, in his testimony, he said that the equal protection clause applied only to race and ethnicity, but would not be extended to women, aliens, indigents, illegitimates, or others, in line with the decisions of the Supreme Court of solid precedents on the application of the equal protection clause. Judge Bork disagreed with the clear and present danger standard, established as far back as Justice Oliver Wendell Holmes.

When it came to his doctrine on original intent, he was at a loss to explain how you could desegregate the District of Columbia schools. On the same day that Brown v. Board of Education was decided, there was a companion case captioned Bolling v. Sharpe applicable to the District of Columbia. Judge Bork was of the view that there was no application of the due process clause; that you couldn't incorporate any of the 10 amendments and you couldn't incorporate the equal protection clause into the Constitution. The Supreme Court desegregated the DC schools on the basis of holding that the equal protection clause was part of due process and due process did apply to the District of Columbia. Judge Bork was at a loss to answer that.

Mr. President, I ask unanimous consent to have printed in the RECORD a copy of an op-ed I wrote for the New York Times, dated October 9, 1987, which sets forth in some greater detail—although the time to go into now—the reasons why I voted against Judge Bork and I think the reasons why Judge Bork's nomination was defeated by the margin of 58 to 42 when it came before the Senate for a vote.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

(From the New York Times, Oct. 9, 1987)

WHY I VOTED AGAINST BORK

(By Arlen Specter)

From the day in mid-July when Judge Robert H. Bork stopped by for a courtesy call until I telephoned him last week to say I would oppose his nomination, my goal was to figure out what impact Judge Bork would have on the people who came to the Supreme Court in search of their constitutional rights. At the end, having come to like and respect Judge Bork, I reluctantly decided to vote against his nomination.

I had a substantial number of doubts about what he would do with fundamental minority rights, about equal protection of the law and freedom of speech.

From the start, I feared that this nomination process would be different from most. The traditional courtesy calls turned out to be much more because Judge Bork was willing—really anxious—to discuss his judicial philosophy. Unlike other nominees who had barely given name, rank and serial number, he enjoyed and doubtless figured that his extensive writings were so unusual that he would have to talk if he were to have any chance at confirmation.

Our first hour and a half meeting was interrupted by a Senate vote, so he returned a few weeks later for a similar session. In those discussions, I found a man of intellect and charm, who said, in essence, that his writings were academic and professorial and not necessarily indicative of what he would do on the Court.

During the August recess, when I had a chance to read many of his approximately 80 speeches, 30 law review articles and 145 circuit court opinions, I found a scholar and jurist whose views and opinions were vast and complex. In voting to confirm Chief Justice William H. Rehnquist and Justice Antonin Scalia last year, I had already decided that a nominee's judicial philosophy need not agree with mine. But I also believed that a nominee's views should be within the tradition of our constitutional jurisprudence. With that in mind, I compared Judge Bork's views with those of other conservative justices. Without adherence to original intent, it was necessary for him to read many of his approximately 80 speeches, 30 law review articles and 145 circuit court opinions, I found a scholar and jurist whose views and opinions were vast and complex. In voting to confirm Chief Justice William H. Rehnquist and Justice Antonin Scalia last year, I had already decided that a nominee's judicial philosophy need not agree with mine. But I also believed that a nominee's views should be within the tradition of our constitutional jurisprudence. With that in mind, I compared Judge Bork's views with those of other conservative justices.

In Judge Bork's earliest views, only political speech was to be protected. These views were later modified to include literature and art that involved political discussion. In the confirmation hearings, I was even more surprised to find him change his position and commit himself to apply the Holmes test even though he continued his strong philosophical disagreement.

Judge Bork's views on equal protection of the law also underwent a major change at the hearings. He committed himself to apply current case law after having long insisted there was no equal protection for commercial speech and Justice (now Chief Justice) Rehnquist's Court opinion protecting a sexually explicit work disapproved from an obscene movie from censurship.

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cause—with which I deeply disagree—could be aided by a Justice who questioned the legitimacy of judicial review.

I had also been concerned by Judge Bork's insistence on a "principled" view of the Constitution. 

...the idea that, in the absence of explicit constitutional limits, legislatures should be free to act as they please. Conservative justices have protected individuals and minority rights even without a specifically enumerated right or proof of original intent where there were fundamental values rooted in the tradition of our people. 

Just this year, for example, Chief Justice Rehnquist and Justices O'Connor and Scalia had found the Constitution did not protect a prisoner to marry. But Judge Bork, at his confirmation hearing, could still find no acceptable rationale for the decision desegregating the District of Columbia schools 33 years ago.

I was further troubled by his writings and testimony that expanding rights to minorities reduced the rights of majorities. While perhaps arithmetically sound, it seemed morally wrong. The majority in a democracy can take care of itself, while individuals and minorities often cannot. Moreover, our history has demonstrated that the majority benefits when equality helps minorities become a part of the majority.

Despite these concerns, I was genuinely undecided—perhaps leaning a little toward Judge Bork—when he finished his impressive testimony at the end of the first week. He had created was a "powerful argument from a strong tradition" to find rights rooted in the conscience of the people, although not specified in the Constitution. He had demonstrated that the "needs of the nation" on some constitutional matters that did not fall within the Framers' original intent. Perhaps his writings were only professors theorizing.

As I listened to the other witnesses during the second and third weeks, and considered the implications of Judge Bork's total approach, my doubts grew about the application of his changed positions. For example, in Judge Bork's former view, which he last expressed 20 days before his nomination, equal protection should have been kept to concerns like race and ethnicity. Considering the many subtle and discretionary judgments the Court makes, it would be difficult to people who sought equal protection in the Supreme Court to have their cases decided by someone who had so long thought their claims justified by the Constitution under standards that were so elusive to apply.

Similarly, the hearings showed the great difficulty, if not impossibility, of Judge Bork's applying the "clear and present danger" standard to free speech cases. If there was a critical turning point, it was Judge Bork's decision in two cases.

...a clear and present danger" standard was restated by the Court in 1969, in Brandenburg v. Ohio, and again in 1973, in Illinois ex rel. Karo v. Board of Elections. Judge Bork committed himself to accepting Brandenburg, I pressed as to how we could be confident that he would apply that test in the next case, which obviously would be different on the facts. 

He promised he would, but then promptly insisted that he was not committed to Hees because it was a "negligent" case.

Judge Bork's disagreement on Hess, a "clear and present danger" case, cast substantial doubt on his ability to apply cases he philosophically opposed and had long decried.

The hearings brought a record 140,000 calls and letters to my office. Wherever I went, it seemed that everyone had a strong opinion. The pressure was pervasive. On the afternoon the hearings ended, I talked again with Judge Bork for more than an hour, and met later that evening with Lloyd Cutler, the former adviser to Jimmy Carter, who had been a principal supporter. My substantial doubts persisted, so I decided I would vote no.

Mr. SPECTER. Moving on to another subject, which perhaps is of the greatest importance of what we see emerging from these hearings and the confirmation proceeding, is an emerging standard on rejecting the traditional deference to the President, with Senators substituting their own ideology in order to make the decision.

In the article I referred to on Bork, in the op-ed piece, I noted that in voting as to Chief Justice Rehnquist and Justice Scalia, I decided the judicial philosophy of a nominee need not agree with mine. When the hearings came up as to Justice Clarence Thomas, I made the observation that there might be an occasion, one day, when there would be a partnership between the Senate and the President with respect to looking at ideology. It has become accepted that elections do matter when the President moves to the nominating process. They are active parts in the Presidential campaigns, and the tradition has kept deference to the President's ideology.

I suggest we are seeing, in the confirmation process of Justice Sotomayor, in conjunction with the nomination process of Justice Alito, that there is a shift in the standard of that judgment. The issues were framed by the comments of then-Senator Barack Obama now President Barack Obama when he was commenting about his judgment on the Alito nomination and then Senator Obama had this to say:

"There are some who believe that the President, having won an election, should have complete authority to appoint his nominee and the Senate should only examine whether the Justice is intellectually capable. Senator Obama went on to say:

I disagree with this view. I believe it calls for meaningful advice and consent, and that includes an examination of the judge's philosophy, ideology.

In the Alito hearings, there is no doubt that in terms of academic, professional, and judicial competence, Justice Alito was well qualified—a Yale law graduate with a distinguished career in private practice, serving as a U.S. attorney for New Jersey, with 15 years on the circuit court. Some commented that Alito's ideology was on his view of a woman's right to choose; his dissenting opinion in Planned Parenthood v. Casey in the Third Circuit. Only four Democrats crossed the aisle to vote for Justice Alito. Today, according to the announcements that have been made, about that many Republicans are going to cross the aisle to vote for Judge Sotomayor.

Some of those who have announced their intention to vote against Judge Sotomayor do not note long record of having opposed any judicial nominee. It is a complex issue. There is a question of pressure from the far right, from those who might be looking at primary opposition. There is a question of partisanship, which has gripped this body with such intensity. But there is an overwhelming view that the approach of Judge Sotomayor and what she is likely to do, the Supreme Court is something which is contrary to their views as to when the matters ought to be decided.

It has long been accepted that you can't ask a Supreme Court nominee how he or she would decide a specific case, but there is an opportunity to glean from many factors the disposition or inclination of the nominees. And although many in this body had, for a long time, as I view it, made decisions based upon their own ideology, contrasted to what they accepted the nominee to do on the Court, I think that view has become crystallized and, as articulated by then-Senator Obama, is a view which has perhaps added weight now that it is President Obama.

Certainly, there are nominees whom I have voted for, if I were to have been the President and made the selection, it would have been different. If I were to have applied my own philosophy or ideology, then I might have voted differently. And although many in this body had, I think it is worth noting what is happening to the confirmation process, as Senators are moving to utilize their own ideology in deciding how to vote—illustrated, as I say, by Alito and the confirmation which we currently have—and not giving the traditional and customary deference to the President.

Moving on to the subject of the Court's reduced workload and the failure to decide major cases, in the concurring opinion of Justice Alito, pages 451—455, there are 270 cases decided in 1986, 161 written opinions in 1985; the year 2007, only 67 signed opinions; the Supreme Court having decided not to hear the case involving the terrorist surveillance program, which posed a dramatic conflict between congressional authority under article I to enact the Foreign Intelligence Surveillance Act, with the President's asserted authority under article II as Commander in Chief to have warrantless wiretaps; the district court in Detroit declaring the President's terrorist surveillance program unconstitutional.

The Sixth Circuit reversed 2 to 1 on the grounds of standing—with the dissent being much better reasoned—a doctrine to avoid deciding the case and the Supreme Court defending. Similarly, on the conflict which was posed by legislation brought by the survivors of victims of 9/11 against Saudi Arabian princes, where the Congress had legislated in the Foreign Sovereign Immunities Act to exclude torts, as when the terrorist struck the World Trade Center, the executive branch intervened. The Department of State objected through the Solicitor General to
the court hearing the case, and that case was not decided. Many circuit splits, which are detailed in a series of letters which I am going to ask to be admitted into the RECORD, letters which I sent to Judge Sotomayor, dated July 6, June 15, and June 25, detail the myriad of circuit splits which the Court has not decided.

Mr. President, I ask to have printed in the RECORD the letters I referred to.

There being no objection, the material was ordered to be printed in the RECORD, as follows:


HON. SONIA SOTOMAYOR, c/o The Department of Justice, Washington, DC.

Dear Judge Sotomayor: As noted in my letters of June 15 and June 25, I am writing to alert you to subjects which I intend to cover at your hearing. During our courtesy meeting you noted your appreciation of this advance notice. This is the third and final letter in this series.

The decisions by the Supreme Court not to hear cases may be more important than the decisions actually deciding cases. There are certainly decisions in which the Court is right, but even those are less decided than the single sentence denials with no indication of what they involve or why they are rejected. In some high profile cases, it is apparent that the Court is responding to the challenge of the Court’s refusal to decide.

The rejection of significant cases occurs at the same time the Court’s caseload has dramatically decreased. The number of lower court law clerks has quadrupled, and justices are observed lecturing around the world during the traditional three-month break from the end of Justices’ terms. On the first Monday in October while other Federal employees work 11 months a year.

During his Senate confirmation hearing, Chief Justice John G. Roberts, Jr., said the Court “could contribute more to the clarity and uniformity of the law by taking more cases.” The number of cases decided by the Supreme Court in the 19th century shows the capacity of the nine Justices to decide more cases. According to Professor Edward A. Hartnett, the Court in 1870 had 636 cases on its docket and decided 365; and in 1886, the Court had 1,396 cases on its docket and decided 451. The downward trend of decided case is noteworthy since 1985 and has continued under Chief Justice Roberts’ leadership. The number of signed opinions decreased from 161 in the 1985 term to 67 in the 2007 term.

It has been reported that seven of the nine justices, excluding Justices Stevens and Alito, have called the Court’s decision to decline to hear cases a “cert, pool” to review the thousands of petitions for certiorari. The clerk then writes and circulates a summary of the case and its issues and Justice’s clerks’ reading of cert. petitions is, at most, limited.

At a time of this declining caseload, the Supreme Court has left undecided circuit court authority on many important cases such as:

1. The necessity for an agency head to personally assert the deliberative process privilege.
3. Equitable tolling of the Federal Tort Claims Act’s statute of limitations period.
4. The standard for deciding whether a Chapter 11 bankruptcy may benefit from exemption constitutional and proportional. As a general
matters, we are ill-advised to adopt or adhere to constitutional rules that bring us into conflict with a coequal branch of Government.

During the confirmation hearing of Chief Justice Roberts, he testified extensively in favor of the Court’s deferring to Congress on fact finding. In response, Senator DeWine, he testified, “...The reason that congressional fact finding and determination is important in these cases is because the courts recognize that they can’t do that. Courts can’t have, as you said, whatever it was, the 13 separate hearings before passing particular legislation. Courts—the Supreme Court has heard after witness after witness in a particular area and develop that kind of a record. Courts can’t make the policy judgments about what type of legislation is necessary in light of the findings that are made”... “We simply don’t have the institutional expertise or the resources or the authority to engage in that type of a process. So that is sort of the basis for the deference to the fact finding that is made. It’s institutional competence. The courts don’t have it. Congress does. It’s constitutional authority. It’s not our job. It is your job. So the defense to congressional findings in this area has a solid basis.

In response to my questioning, Chief Justice Roberts said: “And I appreciate very much the differences in institutional competence between the judiciary and the Congress as 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 judgment. Just as a determination over a record. It’s a question of whose job it is to make a determination based on the record”... “ as a judge that you may be beginning to understand the process that is involved in the area of law is when you are in a position of re-evaluating legislative findings, because that doesn’t look like a judicial function.”

The Supreme Court heard oral argument in Northwest Austin Municipal Utility District v. Holder on April 29, 2009 involving the sufficiency of the Congressional record on authorizing the Voting Rights Act. While too much cannot be read into comments by justices at oral argument, Chief Justice Roberts’ statements suggest a very different attitude on deference to Congressional fact finding than he expressed at his confirmation hearing. Referring to the argument that “...Americans have a very ingrained and proportional to what it’s trying to remedy,” Justice Roberts said that “...one-twentieth of 1 percent of the submissions are not precluded. That to me, suggests that they are sweeping far more broadly than they need to, to address the intentional discrimination under the Fifteenth Amendment.

“Well, that’s the old—you know, it’s the elephant whistle. You know, I have this whistle to keep away the elephants. You know, well, well, well, there are no elephants, so it must work. I mean if you have 99.98 percent of these being precluded, why isn’t that reaching far too broadly.”

As for the 2007 Voting Rights Act, Congress heard from dozens of witnesses over ten months in 21 different hearings. Applying the approach from Chief Justice Roberts as articulated through Senator DeWine would appear to satisfy the “congruence and proportionality standard”.

Questions and answers:

1. Would you apply the Justice Harlan “rational basis” standard or the “congruence and proportionality standard”?

2. What do you think Justice Scalia’s characterization that the “congruence and proportionality standard” is a “flabby test” and “an invitation to judicial arbitrariness and policy driven decision making”?

3. Do you agree with Chief Justice Rehnquist’s conclusion that the Violence Against Women Act legislation was unconstitutional because of Congress’s “method of reasoning”?

4. Do you agree with the division of constitutional authority between Congress and the Supreme Court articulated by Chief Justice Roberts in his responses cited in this letter to questions posed at his hearing by Senator Sotomayor and me?

Sincerely,

ARLEN SPECTER
U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC, June 25, 2009
Hon. SONIA SOTOMAYOR,
D.C. c/o The Department of Justice,
Washington, DC.

DEAR JUDGE SOTOMAYOR: As noted in my letter to you dated June 15, 2009, I am writing to alert you to another subject which I intend to cover at your hearing. I appreciate your comment at our meeting that you welcome such comments.

In an electronic era where the public obtains much, if not most, of its news and information from television, there is a strong case for stare decisis and the Supreme Court of the United States should have its public proceedings televised just as the United States House of Representatives and United States Senate are. It is well established that the Constitution guarantees access to judicial proceedings to the press and the public. In 1980, the Supreme Court relied on this tradition when it held in Richmond Newspapers, Inc. v. Virginia, that the right of a public trial belongs not just to the accused but to the press and the public. In 1980, the Supreme Court relied on this tradition when it held in Richmond Newspapers, Inc. v. Virginia, that the right of a public trial belongs not just to the accused but to the press as well. The Court noted that such openness has “long been recognized as an indisputable attribute of an Anglo-American trial.”

The value of transparency was cogently expressed by Chief Justice William Howard Taft who said: “Nothing tends more to render judges careful in their decision and anxiously solicitous to do exact justice than the consciousness that every act of theirs is subject to the intelligent scrutiny of their fellow men and to candid criticism.”

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In the same vein, Justice Felix Frankfurter said: “If the news media would cover the Supreme Court as thoroughly as it did the 1932 campaign, it would do much to foster a belief that since ‘public confidence in the judiciary hinges on the public perception of it’.”

To give modern-day meaning, the term “press” used in Richmond Newspapers would include television. Certainly Justice Frankfurter’s use of the term “media” would include television in today’s world. Televising Supreme Court proceedings would provide the “scrutiny” sought by Chief Justice Taft.

Justices of the Supreme Court have been frequently televised, including Chief Justice Roberts and Justice Stevens appearance on “Prime Time” ABC TV, Justice Ruth Bader Ginsburg’s interview on CBS by Mike Wallace, Justice Breyer’s participation in Fox News Sunday and the debate between Justice Scalia and Justice Breyer filmed and available for viewing on the web.

Many of the justices have commented favorably on televising the Court. Justice Stevens, in an article by Henry Weinstein in July 14, 1989 said he supported cameras in the Supreme Court and told the annual Ninth Circuit Judicial Conference at about the same time that, “In my view, it is worth trying to obtain a television news camera in 1994, I indicated support for televising Supreme Court proceedings. He has since equivocated, but noted that it would be a wonderful teasting device.

In December 2000, Marjorie Cohn’s article noted Justice Ruth Bader Ginsburg’s support for television coverage at it travels on gavel. Justice Alito in his Senate confirmation hearing said that as a member of the Senate, if he was invited to admit cameras; but added that it would be presumptive of him to take a final position before he had consulted with his colleagues, if he wished, promised an open mind. Justice Kennedy, according to a September 10, 1990 article by James Rubin, told a group of visiting high school students that cameras are in the Constitution. He has since equivocated, stating that if any of his colleagues raise serious objections, he would be reluctant to see the Court televising. Chief Justice Rehnquist said confirmation hearing that he would keep an open mind on the subject.

Recognizing the sensitivity of justices to favor televising the Court in the face of a colleague’s objection, there may be a new perspective with Justice Souter’s retirement since he expressed the most vociferous opposition to television. I can tell you su that if you come into our courtroom, it is going to roll over my dead body."

In the 199th and 110th Congresses, with several bipartisan co-sponsors, I introduced legislation for providing for televising public Supreme Court proceedings. Both bills were favorably out of the Judiciary Committee, but were never taken up by the full Senate. Sensitve to separation of powers and recognizing the authority of the Supreme Court to invalidate any such legislation, it should be noted that there are analogous directives from Congress to the Court on procedural/ administrative matters such as the first Monday of October as the beginning of the Court’s term, requiring six sitting justices to form a quorum and establishing nine as the number of Supreme Court justices.

In May 2007, Associate Professor Bruce Peabody of the Political Science Department of Fairleigh Dickinson wrote an article in the Journal on Legislation concluding the proposed legislation was constitutional.

There is obviously enormous public interest in Supreme Court proceedings. When the Bush v. Gore case was decided in December 2000, news cameras around the Supreme Court building were filled with television trucks, although no camera was admitted inside the chamber. Senator Biden had raised the political importance of the question in the first Senate hearings our proposal and I wrote to Chief Justice Rehnquist urging that the proceedings be televised and received a prompt reply in the negative; but the Supreme Court did break precedent by releasing an audiotape when the proceedings were over and the Court has since intermittently made audiotapes available. Such developments are obviously no substitute for television, but are a step in the right direction.

The keen public interest is obvious since the Supreme Court decides the cutting-edge questions of the day such as: who will become president; congressional power; executive power; defendants’ rights—habeas corpus—Guantanamo; civil rights—affirmative action; abortion.

In 1990, the Federal Judicial Conference authorized a three-year national television coverage of civil proceedings in six federal district courts and two federal circuit courts. The program began in July 1991 and ran through December 1994. The Federal Judicial Center monitored the program and issued a positive final evaluation. The Judicial Center concluded: “Overall attitudes toward television coverage of civil proceedings were initially neutral and became more favorable after experience..."
under the pilot program.” The Judicial Center also said: “Judges and attorneys who had experience with electronic media coverage under the program generally reported observing no negative effects of camera presence on participants in the proceedings, courtroom decorum, or the administration of justice.”

I am especially interested in your experience when a trial was televised in your courtroom under the pilot program.

My questions: (1) Do you agree with Justice Stevens that televising the Supreme Court is “worth a try”? (2) Do you agree with Justice Breyer that televising judicial proceedings would be a wonderful teaching device? (3) Do you believe, as expressed by Justice Kennedy, that televising the Supreme Court is “inevitable”? (4) What effect, if any, did televising the trial in your Court have on the lawyers, witnesses, jurors and you? (5) Do you think that televising the trial in your Court was useful to inform the public on the way the judicial system operates?

Sincerely,

Arlen Specter.

Mr. Specter. Mr. President, when the Federalist Papers were written, the authors said that the Supreme Court was the least dangerous branch. I think if the Framers had seen the status of events in the year 2009, they might have written that the Supreme Court, the Second Branch, is especially the least accountable branch—the least transparent branch.

For many years, I have urged that the Supreme Court be televised. Legislation which I have introduced has twice been defeated in committee, and it is pending again. I think this is an especially good time to take up the issue. The Congress has the authority to establish when the Supreme Court sits—the first Monday in October; what it takes to have a quorum; how many members there will be on the Court—contrast that to what President Roosevelt tried to do to expand the number of justices when a quorum was not available after the pilot program. Judges and attorneys who had experience with electronic media coverage under the program generally reported observing no negative effects on participants in the proceedings, courtroom decorum, or the administration of justice.

It is my suggestion it would be very healthy for our country to have a little sunshine come into the Supreme Court. The President. The Senator’s time has expired.

Mr. Specter. I ask unanimous consent for 2 additional minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. Specter. I think it would be very beneficial to have a little sunlight come into the Supreme Court so there could be a public understanding of what is going on in the最高法院 as the Court is going on now judicial legislation—that they are going beyond constitutional rights, that they are reaching into statutes such as the statute protecting women against violence, to declare it unconstitutional notwithstanding a well-reasoned opinion based on the method of reasoning of Congress, as if our method of reasoning was deficient to theirs; or on the standard of congruence and proportionality, which is simply not understandable; or in the context of a workload which defies explanation, with so many circuit splits going undecided.

It may surprise people to know that it was not until 1961 that the Judiciary Committee of the Senate telemetered some Committee proceedings. The Supreme Court was telemeasured. Seeing what a great appearance it is today, and of how much value—this is really our only opportunity to speak to the Court, to speak to Chief Justice Roberts. Are you going back on your commitment that it is up to the Congress to decide facts on a congressional record? Why are you doing congruence and proportionality when no one understands it?

So while the judgment on Sonia Sotomayor, as I said initially, was easy for me to vote aye, there are many more perplexing issues that have emerged, especially what I perceive to be an institutional change here, with Senators substituting their own judgments and ideology for the traditional deference allotted to the President.

Before I yield the floor, Mr. President, I have been asked to read an adjournment statement, if I may? It is an introduction for a letter from members of the Senate Judiciary Committee in favor of Judge Sotomayor:

The Committee recently received a letter of support for Judge Sotomayor’s nomination from over 45 regular practitioners at the Supreme Court including a number of former Solicitors General and Assistants to the Solicitor General. Among those who joined this letter were a number of highly respected Republican appointees such as Charles Fried, nominated by President Reagan to be Solicitor General; John Gibbons, the former Chief Judge of the Third Circuit Court of Appeals who was nominated by President Nixon; and Tim Lewis, nominated by President George H.W. Bush and confirmed as a Judge of the Third Circuit Court of Appeals.

I ask unanimous consent to have this letter printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

Hon. Patrick J. Leahy, Chairman, U.S. Senate Committee on the Judiciary, Russell Senate Office Building, Washington, DC.

Hon. Jeff Sessions, Ranking Member, U.S. Senate Committee on the Judiciary, Russell Senate Office Building, Washington, DC.

Dear Chairman Leahy and Ranking Member Sessions: As members of the Senate Judiciary Committee, we respectfully support confirmation of Judge Sonia Sotomayor as an Associate Justice of the Supreme Court.

We believe that Judge Sotomayor would bring to the Court an impressive background in the law. As an Assistant District Attorney in New York for 17 years, she earned a reputation as a focused prosecutor. In her seventeen years as a federal judge, she demonstrated impartiality, clear thinking, and careful attention to the facts and issues before her. Her legal rulings are typically tailored to the facts and are respectful of precedent and the rule of law. Throughout her legal career, Judge Sotomayor has distinguished herself.

Judge Sotomayor’s strong legal background and impressive credentials make her an extremely well-qualified nominee for the Supreme Court. We urge her speedy confirmation.

Sincerely,

Donald B. Ayer, Jones Day LLP; Deputy Attorney General, 1989-90; Principal Deputy Solicitor General, 1986-88.

Timothy S. Bishop, Mayer Brown LLP; Assistant to the Solicitor General, 1996-97.


Walter Dellinger, O’Melveny & Myers LLP; Solicitor General, 1986-88.

Drew S. Days III, Yale Law School; Solicitor General, 1986-90.

Andrew L. Frey, O’Melveny & Myers LLP; Solicitor General, 1996-97.


Jamie S. Gorelick, WilmerHale LLP; Deputy Attorney General, 1997-99; Deputy Attorney General, 1993-96.


Declaration of Support for Judge Sonia Sotomayor to the Senate Judiciary Committee.

David C. Frederick, Keller, Heuber, Hansen, Todd, Evans & Figel, PLLC; Assistant to the Solicitor General, 1973-1980.


Samuel Estreicher, NYU School of Law; Jones Day LLP;

Bartow Farr, Farr & Tanaro; Assistant to the Solicitor General, 1976-1978.

Meir Feder, Jones Day LLP;


John J. Gibbons, Gibbons PC; former Chief Judge, U.S. Court of Appeals for the Third Circuit

Jamie S. Gorelick, WilmerHale LLP; Deputy Attorney General.

Jeffrey T. Green, Sidney Austin LLP.

Pamela Harris, Georgetown University Law Center.

George W. Jones, Jr., Sidney Austin LLP; Assistant to the Solicitor General, 1980–1983.

Pamela S. Karlan, Stanford Law School.


Douglas W. Kmiec, Pepperdine Law School.


Rory K. Little, U.C. Hastings College of Law.


Deanne E. Maynard, Morrison & Foerster LLP; Assistant to the Solicitor General, 2004–2009.


Randolph M. Morgan, WilmerHale LLP.


Virginia A. Sietz, Sidley Austin LLP.


Paul M. Brest & Block LLP.

Jerald S. Solovy, Jenner & Block LLP.

Kathleen M. Sullivan, Quinn Emanuel Urquhart Oliver & Hedges LLP & Stanford Law School.


Alan Untrier, Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP.


Christopher J. Wright, Wiltsie & Grannis LLP; Assistant to the Solicitor General, 1984–1994.

The PRESIDING OFFICER (Mr. MERKLEY). The Senator from New Jersey is recognized.

Mr. LAUTENBERG. Mr. President, today is an auspicious day. I have had 25 years of service now to the Senate. This is one of those moments when what we do will be recorded in history forever—the opportunity to nominate a distinguished jurist to the highest judicial post in this country.

I rise to express my strong support for President Obama’s nomination of a distinguished jurist, Sonia Sotomayor, to become a Supreme Court Justice of the United States, confirming the continuity of our duty to the Constitution and to fairness to all the people in our country, and that obedience to the law continues uninterrupted.

In Newark, NJ, there exists a venerable courthouse that bears my name. On the wall facing the courtroom there is an inscription that says:

The true measure of a democracy is its dispensation of justice.

That summarizes my feeling about our beloved country. I authored that quote after considerable thought, and I truly believe it reflects a principal value upon which our Nation was founded. We must scrupulously insist that these values endure throughout our common legal system and particularly in our Nation’s highest court.

Based on her history, my meeting with Judge Sotomayor, and her testimony before the Senate Judiciary Committee, I know that if confirmed, Judge Sotomayor will pursue the fair, wise, and unbiased dispensation of justice. That is why I believe we must confirm Judge Sotomayor’s appointment without delay.

When I had a private meeting with her, she confirmed her unwavering commitment to the equity of our American justice system, her knowledge of the law, and her recognition of the enormous responsibility she has to fulfill to our country.

I conveyed to her the excitement we are hearing in my State of New Jersey that President Obama’s nominee grew up in a poor urban environment, in the close-knit neighborhood with New Jersey with a similar tradition of a people starting at the bottom and succeeding through determination, education, and hard work.

We also discussed a shared admiration for Justice Benjamin Cardozo, who was renowned for his integrity and his diligence in applying precedent. I served for several years on the board of a law school bearing Justice Cardozo’s name, where I saw the achievements of renowned legal scholars. I feel so deeply that Sonia Sotomayor will be remembered one day as an outstanding member of the most revered and respected Court in the world.

During our meeting, Judge Sotomayor and I came to realize we had a common thread through our personal histories. The phrase “only in America” truly applies to Judge Sotomayor, and I can say that with a special understanding. Humble beginnings were the touchstones that enabled each of us to achieve beyond any parent’s dream.

I grew up in Paterson, NJ, a hard- scrabble mill town. My family lacked resources but left an inheritance of values with high principles. My parents brought to America by my grand- parents seeking an opportunity to be free and to make a living. We were taught that we were obligated, if we had the opportunity, to make sure we gave something back to the community in which we lived.

Judge Sotomayor’s family moved here from Puerto Rico, and she grew up in a housing project where she saw, up front and close, the struggles of people living in poor areas. Like my father, Judge Sotomayor’s dad died at a very young age, and her mother, like mine, became a widow at a very young age. She became a single mother, like mine. Judge Sotomayor’s mother had to raise her and her brother in the face of racial, social, and financial adversity. In fact, her mother worked two jobs to support her children.

Despite the many difficulties, Judge Sotomayor has reached the highest rung of our society. At Princeton and also at Yale Law School, she achieved academic honors, and then she worked in the Manhattan District Attorney’s Office. As a district attorney, she prosecuted murder, rape, and assault cases. Others. From the DA’s office she became a corporate litigator and rose to partner at a prestigious New York law firm. While there, she threw herself into her job and became an expert on trademark and intellectual property law. Her career then led her to the bench, where she has been a Federal judge for the last 17 years. That is a pretty good time for testing.

The truth is, Judge Sotomayor comes to this nomination process with more judicial experience than any Supreme Court nominee in a century. Think about it when the detractors try to find ways to sully her reputation. But before she became a judge and long before she appeared before the Judiciary Committee, we heard where she picked her to be his nominee. They had their gunsights settled on whoever it might be. But in this instance, we have one of the more distinguished scholars of the law to be able to be honored and to honor us at the same time. They tried to paint her as a radical. They tried to paint her as a bully. They even tried to paint her as lacking intelligence. But there was absolutely no place in her judicial record to use anything serious against her. They went down the path of personal destruction; it has become a habit around here. They picked through her speeches. They zeroed in on one sentence here and another there to try to discredit her as nothing more than an affirmativa- tion-action choice.

To get to one thing straight, Judge Sotomayor represents the best this country has to offer. She is a role model for all Americans, and she is, deservedly so, a source of great pride for the Latino community. By any standard, Judge Sotomayor is exceptionally well qualified to serve as an Associate Justice of the Supreme Court. With 17 years of judicial experience and 12 of those on the Second Circuit Court of Appeals, she is well equipped for the task of Supreme Court Justice.

If confirmed, she will be the only member of the Supreme Court who has previously worn a trial judge robe. The experience should not be overlooked.
INSPIRING. I WATCHED AND LISTENED CAREFULLY TO WHAT SHE HAD TO SAY DURING HER CONFIRMATION HEARINGS AND WHEN WE MET IN PERSON.

HER LIFE HAS BEEN ONE OF BREAKING DOWN BARRIERS. I LOOK FORWARD TO SEEING HER BREAK ONE MORE. FOR THOSE REASONS, AND TO SUPPORT JUDGE SOTOMAYOR’S BREAKTHROUGH NOMINATION, I HOPE MY COLLEAGUES WILL STEP UP AND VOTE THEIR CONSCIENCE AND VOTE THEIR BELIEFS AND NOT INJECT ANY OF THE INSIGNIFICANT THINGS THAT HAVE DISCUSSED ALL OVER THE PLACE UNTIL THIS. I HOPE THEY WILL CONFIRM HER IN AN OVERWHELMING MAJORITY, WHICH IS WHAT SHE AND THE COUNTRY DESERVE.

I YIELD THE ROAR.

MR. DODD. MR. PRESIDENT, I SUGGEST THE ABSENCE OF A QUORUM.

MR. DODD. MR. PRESIDENT, I RISE IN STRONG SUPPORT OF THE NOMINATION OF JUDGE SONIA SOTOMAYOR TO BE AN ASSOCIATE JUSTICE OF THE U.S. SUPREME COURT.

I WISH TO THANK PAT LEAHY, MY SEAT Mate HERE IN THE SENATE, THE CHAIRMAN OF THE JUDICIARY COMMITTEE, FOR HIS LEADERSHIP. LET ME ALSO THANK JEFF SESSIONS, WHO IS THE RANKING REPUBLICAN ON THE COMMITTEE, AND ALL MEMBERS OF THE COMMITTEE.

THEY ARE IMPORTANT JOBS THEY HAVE. OBVIOUSLY THEY ARE CONSIDERING NOMINEES FOR THE DISTRICT COURT, THE APPELLATE COURT. BUT MOMENTS WHEN YOU CONSIDER A NOMINEE TO THE SUPREME COURT ARE NOT HAPPEN EVERY DAY AND ARE PRETTY SIGNIFICANT MOMENTS.

I COMMEND THE COMMITTEE FOR THE SPEED WITH WHICH THEY HANDLED THIS. A LOT OF TIME THESE MATTERS CAN GET TIED UP FOR WEEKS ON END, AS WE HAVE SEEN IN PRIOR YEARS. BUT I PARTICULARLY COMMEND PAT LEAHY, WHO DOES A GREAT JOB CHAIRING THE JUDICIARY COMMITTEE, AND ALL MEMBERS FOR THEIR WORK IN THIS AREA.

ARTICLE II OF THE CONSTITUTION GIVES THE SENATE AN AWESOME RESPONSIBILITY FOR PROVIDING ADVICE AND CONSENT ON JUDICIAL NOMINATIONS. THOSE WHO WE CONFIRM ARE IN A LIFETIME POSITION AS ONE OF THE NINE MEN AND WOMEN WHO WILL HAVE THE ABILITY TO LITERALLY SHAPE EVERY PHASE OF AMERICAN LAW AND SOCIETY.

OTHER THAN AUTHORIZING WAR OR AMENDING THE U.S. CONSTITUTION, THIS BODY HAS NO MORE IMPORTANT POWER THAN THE ONE WE EXERCISE WHEN WE CHOOSE TO CONFIRM A NOMINEE TO SIT ON THE U.S. SUPREME COURT.

CLEARLY, THE CONSTITUTION DEMANDS THAT WE SUBJECT NOMINEES TO VERY CLOSE SCRUTINY. BUT IT DOES NOT TELL US HOW. EACH SENATOR MUST DETERMINE FOR HIMSELF OR HERSELF THE APPROPRIATE CRITERIA.


I HAVE ALWAYS RELIED ON A THREE-PART TEST.

THE FIRST TEST I APPLY, AND HAVE DONE THIS ACROSS THE BOARD OVER THE YEARS: DOES THE NOMINEE HAVE THE TECHNICAL COMPETENCE AND LEGAL SKILLS TO DO THE JOB?

SECOND: DOES THE NOMINEE HAVE THE PROPER CHARACTER AND TEMPERAMENT TO SERVE ON THE HIGHEST COURT OF OUR LAND?

AND THIRD: DOES THE NOMINEE’S RECORD DEMONSTRATE RESPECT FOR AND ADHERENCE TO THE PRINCIPLE UNDERLYING OUR LEGAL SYSTEM—THAT IS, EQUAL JUSTICE FOR ALL?

I AM CONVINCED, WITHOUT ANY DOUBT OR HESITATION, THAT JUDGE SOTOMAYOR PASSES ALL THREE TESTS WITH DISTINCTION.

AS TO JUDGE SOTOMAYOR’S COMPETENCE: HER RESUME IS THAT OF EXPERIENCED AND ACCOMPLISHED JURIST, ONE WHO WILL TAKE HER SEAT WITH MORE BENEFIT, EXPERIENCE, I MIGHT POINT OUT, AS I AM SURE OTHERS HAVE, THAN ANY OTHER JUDGE CURRENTLY SERVING ON THE U.S. SUPREME COURT.

SHE GRADUATED FROM YALE LAW SCHOOL IN MY HOME STATE OF CONNECTICUT, HAS BEEN A PROSECUTOR AND PRIVATE ATTORNEY, AND SPENT 17 YEARS ON THE FEDERAL BENCH AS BOTH A DISTRICT COURT JUDGE AND AN APPELLATE COURT JUDGE.

AS TO JUDGE SOTOMAYOR’S CHARACTER: HER LONG LIST OF ENTHUSIASTIC RECOMMENDATIONS AND HER TERRIFIC PERFORMANCE BEFORE THE JUDICIARY COMMITTEE REVEALED HER TO BE A REMARKABLE WOMAN OF DEEP INTEGRITY. HER INCREDI

LIFE STORY, RISING FROM A HOUSING PROJECT IN THE BRONX TO THE HEIGHT OF AMERICAN JURISPRUDENCE, IS TRULY AN INSPIRATION. AND, OF COURSE, AS SOMEONE WHO WOULD BE THE FIRST LATINA AND THIRD WOMAN TO SERVE ON THE COURT, JUDGE SOTOMAYOR IS AN HISTORIC FIGURE.

AS TO JUDGE SOTOMAYOR’S LEGAL PHILOSOPHY: HER WRITINGS AND HER THOUGHTFUL ANSWERS TO DIFFICULT QUESTIONS RAISED BY OUR COLLEAGUES ON THE JUDICIARY COMMITTEE MAKE IT CLEAR THAT JUDGE SOTOMAYOR IS COMMENDED TO THE PRINCIPLE OF EQUALITY THAT FORMS THE FOUNDATION OF AMERICA’S SYSTEM OF JURISPRUDENCE.

FOR JUDGE SOTOMAYOR, AS FOR ANY NOMINEE, THAT IS ENOUGH TO EARN MY VOTE, REGARDLESS OF WHAT I THINK ABOUT ANY PARTICULAR DECISION. I VOTED TO CONFIRM CHIEF JUSTICE ROBERTS, MUCH TO THE DISAPPROVAL OF PEOPLE IN MY OWN PARTY AND OTHERS WHO FEEL WE SHOULD OBJECTION TO US, BUT WE DID NOT AGREE WITH JUDGE ROBERTS’ DECISIONS IN A NUMBER OF CASES. BUT I APPLIED MY THREE-PART
test and Justice Roberts passed. I have applied that test over the years.

So while I have not agreed with every decision that the Chief Justice has taken during his tenure on the bench, I would still tell you it was a good choice. It is an agreement with some of his decisions. It is the kind of quality you want on the Supreme Court.

I worry deeply in this body that if we start taking standards to apply to the nominee for the Supreme Court which as we appear to be doing, I think we do damage to the tradition we must uphold in this body of applying standards that go far beyond our particular concerns about decisions here and there, or to listen to constituency groups to such a degree that they dominate the vote patterns here in the Senate.

Frankly, I do not think I am telling any of my colleagues anything they do not know already. I do not think anybody in this Chamber believes that she is incompetent or temperamentally unsuited for the job, or that she does not believe in equal justice under the law.

The actual debate, however, has focused not on the nominee’s enormous body of exemplary work but a few examples from her career, selected for their ability to create controversy.

Out of thousands of decisions—and that is not hyperbole; she has been involved in thousands of decisions—if it were not amusing, it would be disturbing to me. There are eight cases that were the subject of debate in her nomination, eight cases out of thousands in which she rendered an opinion either as a joint participant in the opinion or as the sole decider in the case.

So out of thousands of cases, eight items were brought up. Frankly, you could do that with anybody. But someone who has had 17 years on the bench, going through thousands of cases, if that is not amusing, I am focused on those cases that disturb me. I do not know if anyone can ever pass the test here if that were the case, if you are looking for people with experience and temperament and ability to judge.

She should not be confirmed just because of her ethnicity. As someone who is proud that he speaks the Spanish language, served the Peace Corps in Latin America, in the Dominican Republic, and knows the area where Judge Sotomayor grew up in the Bronx, her nomination should not rest solely on ethnicity. And she would be offended if she thought it were the case.

But it also is a moment of celebration as well, that we in this country respect diversity of our population. Many have said this is a remarkable story, and I appreciate the point they are trying to make. But it is not terribly remarkable, it is America. And in America that story is not remarkable. That is the brilliance of our country. We have a President of the United States who was raised by a single mother under difficult circumstances.

Bill Clinton, whom we are talking about today because of his heroic efforts to help release the two women who were held in North Korea, had an equally compelling story. Ronald Reagan had a compelling story.

There are many people who have risen to incredible heights in our country in circumstances in the private and public sector who have come from similar circumstances as Judge Sotomayor. It is a great tribute to our country that people such as Judge Sotomayor can achieve the success she has because we celebrate it in our country.

So it is more a reflection I think of today’s political climate than it is on this terrific nominee who we have the privilege of voting for. The legal and political issues raised during her confirmation hearings are complex and interesting, as they should be. But the decision currently facing the Senate is not a hard call, in my view. I have been here when there have been hard calls. This is not a hard call. This ought to be an easy call for Members here.

She is a brilliant jurist. She is a remarkable American. And she is going to make a fantastic Justice on the U.S. Supreme Court. I would be prouder, when the time arrives, to cast my vote in favor of this nominee.

The Judiciary Committee has received letters of support from several State and local bar associations, including the New York City Bar, the Women’s Bar Association of the State of New York, the Connecticut Hispanic Bar Association, and the Connecticut Hispanic Bar Association, which honored Judge Sotomayor in 1998 with its Achievement Award at its Annual Awards Dinner, wrote:

Since being appointed to the bench, Judge Sotomayor has compiled an exemplary and distinguished record. She has earned a stellar reputation as a defender of the rule of law and a jurist who is fair and decent in all her dealings. Judge Sotomayor’s judicial opinions faithfully adhere to applicable legal precedents, and her conclusions do not fall into superficially predictable categories. Judge Sotomayor’s application of the law hews closely to established law and precedents. Her striking voice on the Second Circuit bench has praised her as “a brilliant lawyer and a very sound and careful judge” who is “fair and decent in all her dealings.”

EXHIBIT 1
WOMEN’S BAR ASSOCIATION OF THE STATE OF NEW YORK,
New York, NY, July 1, 2009.
Senator Patrick J. Leahy,
U.S. Senate, Russell Senate Office Building, Washington, DC.

DEAR SENATOR: As president of the Women’s Bar Association of the State of New York (WBASN), I am pleased to present the attached statement in support of the confirmation of Judge Sonia Sotomayor—a WBASN member—to the United States Supreme Court. Her outstanding experience, her philosophy of judicial moderation, and her distinctive perspective, as demonstrated by her legal opinions, make her superbly qualified for this service.

I respectfully request that WBASN be given the opportunity to testify about Judge Sotomayor during the U.S. Senate confirmation hearings.

Sincerely,
Cynthia Schrock Shelly.
had not been presented to the Court. Similarly, upon reviewing an immigration asylum case that addressed China’s restrictive family planning policies, Judge Sotomayor wrote that her majority opinion opinion "reflects our understanding of the long-range effects of judicial decisions undergirds her passion for judicial restraint. Addressing an immigration asylum claim brought by three Chinese nationals who had been subjected to female genital mutilation in their native Guinea, Judge Sotomayor wrote that a colleague’s analysis of continuing persecution includes this one, the particular phrasing of the law: "The Supreme Court has struck a subtle but important ways, has altered this balance . . . In the vast majority of cases, including this one, the particular phrasing of the statute at issue [yet] the effect in future cases may not always be so benign . . . It is time to . . . recognize our . . . analysis with the Supreme Court’s most recent, authoritative jurisprudence."

DISTINCTIVE COMMON-SENSE PERSPECTIVE
Judge Sotomayor brings a distinctive common-sense perspective to the Court, and it is an appreciation of the difference between litigants’ individual attributes and experiences. In 2007, then-Senator Obama might have been describing Judge Sotomayor when he said, “Part of the role of the Court is not to escape at the same time, and as the government stated at oral argument, it is not uncommon for Chinese couples to separate and one spouse go abroad in order to amass the necessary resources to bring over the other spouse. I believe the majority here opinion is opining on a subject—imbued with potentially multifaceted experiences—\( \text{which it has no expertise or empirical evidence.}\)"

Judge Sotomayor has also demonstrated an understanding of the particular difficulties women and girls face in our society. In a case alleging discriminatory failure to provide and retaliatory discharge, Justice Sotomayor held that the plaintiff had failed to establish that she was discriminated against on either basis.” However, addressing the same employee’s claim of sexual harassment, Judge Sotomayor held that testimony that the woman’s supervisor repeatedly called her "bitch" and that she would stand very close to women when talking to them and would ‘look [at them] up and down in a way that’s very uncomfortable’“ I would submit the plaintiff to a jury trial on the question of whether she had been subjected to a hostile work environment."

In a case involving strip searches of young girls admitted to juvenile detention centers, Judge Sotomayor wrote that the majority failed adequately to consider “the privacy interests of emotionally troubled children,” most of whom “have been victims of abuse or neglect, and may be more vulnerable mentally and emotionally, of course, than their age.” She cautioned, “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... Dissenting from a dismissal of a claim that a school district had discriminated against an African American child in demoting him from first grade to kindergarten, Judge Sotomayor wrote, “I consider the treatment of this long time to have been . . . unprecedented and contrary to the school’s established policies.” She found it “crucial” that the student as “the first black child in the goal of one of the very few black students in the entire school.”

Addressing a claim brought by a father who was investigated by the Vermont Department of Social and Rehabilitation Services after his estranged wife accused him of abuse, Judge Sotomayor concluded that the U.S. Supreme Court has afforded constitutional protection to parents’ interest in the care, custody, and control of their children, and that a compelling governmental interest in the protection of minor children, particularly in circumstances such as this, is not "necessary and important as against the parents themselves.” Carefully analyzing the actions of the social workers that resulted in the father’s immediate arrest, Judge Sotomayor concluded that the respondents had a reasonable basis for their substantiation determination and that therefore did not violate plaintiffs’ constitutional State Bar Examination. Judge Sotomayor conducted a total of twenty-five days of trial, reviewed thousands of pages of exhibits and briefs, and heard testimony from eightWBASNY seeks to protect: women and other seekers and U.S. citizens when making applications for employment is considered necessary, such as immigrants, but it only sufficiently explained that both spouses suffer a "profound emotional loss" as a result of a forced abortion and sterilization. Such facts sufficiently explain why the harm of sterilization or abortion constitutes persecution only for the person who is forced to undergo such a procedure, and not for that person’s spouse as well. [The majority’s conclusion disregards] the immutable fact that a desired pregnancy necessarily requires such spouses to occur, and that the state’s interference with this fundamental right “may have subtle, far reaching and devastating effects” for both parents and their children. Justice Sotomayor also addressed the Court’s obligation to consider the compelling interests of emotionally troubled children, most of whom “have been victims of abuse or neglect, and may be more vulnerable mentally and emotionally, of course, than their age.” She cautioned, “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...”

In conclusion, Judge Sotomayor’s jurisprudence defies easy categorization because each of her decisions has been characterized by a clear and compelling analysis of the law and the facts. Her clear and compelling analyses and her fair treatment of the parties epitomize the ideal qualities of a Supreme Court Justice. Judge Sotomayor has enhanced the balance and perspective to the Court and will enhance the delivery of justice to all.
Dear Senator Leahy: The Connecticut Hispanic Bar Association (CHBA) writes on the eve of the commencement of the hearing on Judge Sonia Sotomayor’s nomination to the United States Supreme Court to urge you and the other members of the United States Senate Judiciary Committee to treat Judge Sotomayor respectfully and decide in the respective day, serves, examine her extensive record thoughtfully, and perform your constitutional duty to advise and consent to her nomination expeditiously and without obstruction.

Founded in 1993, the CHBA works to enhance the visibility of Hispanic lawyers throughout the state; to facilitate communication and sharing of information and resources among our members; to serve as mentors to new lawyers and law students; and to assist the public and private sectors in achieving diversity in their law firms and legal departments. The CHBA also serves to address and respond to issues impacting our Hispanic communities, including the issues of access to the courts, judicial diversity, and other social challenges.

Judge Sotomayor is a member and a longtime supporter of the CHBA. In recognition of her career, Judge Sotomayor has chosen to serve the American public, first as a prosecutor, next as a federal district judge, then as a federal appeals court judge, and now as a Supreme Court justice. Throughout her career, Judge Sotomayor has chosen to serve the American public, first as a prosecutor, next as a federal appeals court judge, and now as a Supreme Court justice.

Sonia Sotomayor graduated summa cum laude and was elected a member of Phi Beta Kappa. She went on to earn her law degree at Yale Law School where she was an active member of the law school’s minority bar association. In her more than 11 years of service with the United States Second Circuit Court of Appeals, she has participated in over 3,000 decisions and authored approximately 400 opinions on important issues of constitutional law, difficult procedural matters, and complex corporate and business issues.

Additionally, as you know, her personal story—simply compelling. Judge Sotomayor grew up in a working-class family in New York City. She attended Princeton University on a scholarship where she graduated summa cum laude and was elected Phi Beta Kappa. She went on to earn her law degree at Yale Law School where she was an active member of the law school’s minority bar association. In her more than 11 years of service with the United States Second Circuit Court of Appeals, she has participated in over 3,000 decisions and authored approximately 400 opinions on important issues of constitutional law, difficult procedural matters, and complex corporate and business issues.

Dear Senator Leahy: The Association of the Bar of the City of New York finds Judge Sonia Sotomayor to be Highly Qualified. The Association of the Bar of the City of New York finds Judge Sonia Sotomayor to be Highly Qualified. The Association of the Bar of the City of New York finds Judge Sonia Sotomayor to be Highly Qualified. The Association of the Bar of the City of New York finds Judge Sonia Sotomayor to be Highly Qualified.

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RENE´ ALEJANDRO ORTEGA,
President.


The CHBA fully supports the appointment of Judge Sotomayor to the United States Supreme Court and urges the United States Senate Judiciary Committee to do the same.

Sincerely,

PATRICIA M. HYNES, President.

A report detailing our findings can be found at: http://www.nybar.org/pdf/report/11695606_3.pdf

The ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK finds Judge Sonia Sotomayor to be 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, announces that the Association has concluded that Judge Sonia Sotomayor is Highly Qualified to be a Justice of the United States Supreme Court.

Assessing that The Association has evaluated Judge Sotomayor’s written opinions from her seventeen years on the court circuit and district court; her speeches; and commentary; public statements made by members and committees; press reports; biographical information; 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; and (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 in the protection of the personal rights of individuals.

The Association has been evaluating judicial candidates for nearly 140 years in a non-partisan manner. The Association views the nominees’ competence and merit. Although the Association has evaluated a number of Supreme Court candidates over the course of its history, in 1867 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 ability, experience, knowledge of the law, intellectual and analytical skills, maturity of judgment, sensitivity, honesty, integrity, independence, and temperament appropriate to be a Justice of the United States Supreme Court. The nominee also respects the independence of the judiciary from 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 nominee is qualified 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.

The PRESIDING OFFICER. The Senator from Kansas is recognized.

ROBERTS. Mr. President, I ask unanimous consent that the Republican for the next hour be allocated as follows: myself for 10 minutes, Senator BARRASSO for 10 minutes, Senator CRAPO for 15 minutes, Senator WICKER for 10 minutes, and Senator COLLINS for 15 minutes.

THE PRESIDING OFFICER. Without objection, it is so ordered.

ROBERTS. Mr. President, I rise today to express my opposition, my considered opposition to Judge Sonia Sotomayor’s nomination to the U.S. Supreme Court.

As Senators, I think we all know we have an obligation to ensure that our courts are filled with qualified and impartial judges.

While Judge Sotomayor has an impressive resume—that is a given—I am concerned that her personal judgments and views will impact her judicial decisions. In addition, I find some of her rulings very troubling.

During the Senator’s debate on the nomination of Chief Justice John Roberts, then-Senator Obama stated: that while adherence to legal precedent and rules of statutory or constitutional construction will dispose of 95 percent of the cases that come before the Court, so that both a Scalia or Ginsburg will arrive at the same place most of the time on those cases, what matters on the Supreme Court is those 5 percent of cases that are truly difficult. In those cases, adherence to precedent and the rules will only get you thinking about the 50th move. That last mile can only be determined on the basis of one’s deepest values, one’s core concerns, one’s broader perspectives on how the world works, and the depth and breadth of one’s empathy.

Thus the entrance of the “empathy” issue to this debate. I respectfully disagree with now-President Obama.

Judges must decide all cases in adherence to legal precedent and rules of statutory or constitutional construction. It does not mean if they do that they do not have empathy. I agree—and I think everybody would agree—everybody on the Supreme Court has empathy. But the role of a judge is not to rule based on his or her own personal judgments but to adhere to the laws as they are written.

While Judge Sotomayor stated during her confirmation hearing that “it is not the heart that compels conclusions in cases, it is the law.” I still have concerns regarding her empathy to remain impartial. She has made some statements in Law Review articles and speeches that are of serious concern.
am not convinced that Judge Sotomayor will set aside her personal judgments and views.

While on the Second Circuit Court of Appeals, Judge Sotomayor joined a four-paragraph ruling on property rights in Didden v. Chester, the appellants claimed that a developer demanded $800,000 in order to avoid condemnation of the property by the city. When the appellants refused to pay the $800,000, they received a citation to initiate condemnation. Although the Second Circuit Court of Appeals dismissed the case, it was noted that relief could not be granted based on the U.S. Supreme Court’s decision in Kelo v. City of New London. That four-paragraph ruling didn’t even provide an in-depth analysis as to how the Kelo ruling applied to the facts at hand. In fact, the Kelo decision acknowledges that “a city no doubt would be forbidden from taking land for the purpose of conferring a private benefit on a particular party.”

The four-paragraph ruling in Didden is very troubling. In Kansas, land is gold; farmland is platinum. We have a healthy respect for property rights in Middle America. It also bothers me that a court could make a broad statement without analyzing and applying the facts of the case.

Turning to firearm rights, Judge Sotomayor joined an opinion ruling that the second amendment is not a fundamental right and, therefore, does not apply to State and local government. In contrast to her extensive commentary in Kelo v. City of New London, her opinion in Didden v. Chester, is not a ruling by the rules [not by empathy], but it is a ruling by the facts and Constitution to speak. Third, a Justice’s responsibility is to apply the law not to write it.

I have reviewed Judge Sotomayor’s record, and I met with her to learn more about her. I want to take a moment to share my thoughts on Judge Sotomayor’s nomination.

Judge Sotomayor has a compelling life story. She was raised in public housing projects in the Bronx. She was diagnosed with type 1 diabetes at age 8. Her father died when she was 9, and she was subsequently raised by her mother. Judge Sotomayor graduated valedictorian of Franklin D. Roosevelt High School in the Bronx. She graduated summa cum laude from Princeton. She earned her juris doctorate from Yale Law School, where she was editor of the Yale Law Review. After graduating from law school, Judge Sotomayor worked as an attorney in New York City for 5 years. She then worked in private practice for 7 years.

In 1991, Judge Sotomayor was nominated to the Federal bench by President George Herbert Walker Bush. In 1998, President Clinton nominated her to the Second Circuit Court of Appeals where she currently sits.

I believe Judge Sotomayor has the legal experience and the skills to be considered for the Supreme Court. During the confirmation process, questions were raised about her ability to make decisions on the facts presented not on events and facts that became ingrained during her life. Judges must be impartial and allow the facts and the Constitution to speak not their personal experience. For America’s judicial system to work, judges must always remain impartial.

At her confirmation hearing, Judge Sotomayor stated that her judicial philosophy is “fidelity to the law.” This is in contrast to her extensive commentary over the past 15 years, a commentary that emphasizes personal experience over impartiality in a judge’s decision. The two are not as far apart as many believe.

During Chief Justice John Roberts’ confirmation hearing, he noted:

Judges and justices are servants of the law, not the law itself. Judges are like umpires. Umpires don’t make the rules. They apply them. The role of an umpire and judge is critical. They make sure everybody plays by the rules [not by sympathy], but it is a limited role. Nobody ever went to a ball game to see the umpire.

I am not convinced that Judge Sotomayor will be an umpire and consistently adhere to the rule of law as opposed to expressing personal views.

For these reasons and others cited by some of my colleagues, I oppose her nomination.
States and local authorities broad powers to deny individuals the right to bear arms. The court’s ruling that the second amendment right is not a fundamental right can’t be reconciled with recent decisions on other courts.

The U.S. Supreme Court, in a 2008 case, with regard to the District of Columbia could deny its citizens rights afforded to them under the second amendment. In its ruling, which was issued before Judge Sotomayor’s 2009 decision, the Supreme Court said the second amendment confers an individual’s right to keep and bear arms. The Court rightfulluly overturned the laws of the District of Columbia that denied citizens of the District the right to own a firearm.

In a 2009 ruling from the Ninth Circuit Court of Appeals, the court concluded that the series of 19th century Supreme Court cases cited by Judge Sotomayor were not controlling on the issue. The second amendment establishes a fundamental right. The Ninth Circuit Court concluded the Constitution did confer that right. The court ruled that the second amendment right to bear arms is a fundamental right of the people, and it is to be protected.

Judge Sotomayor, if confirmed, will receive a lifetime seat on the highest Court of the land. Her decisions may impact Americans and America for generations. Every American has the right to know what standard Judge Sotomayor will apply in judging future cases—fidelity to the law, as she stated in the hearings or, as she has stated in the past: “My experience will affect the facts I choose to see.”

The Senate should know with absolute certainty the standard that Judge Sotomayor will use before confirming her to the Supreme Court. Without having that certainty, I am unable to support her nomination to the U.S. Supreme Court.

I yield the floor.

The PRESIDING OFFICER (Mr. WHITEHOUSE). The Senator from Idaho.

Mr. CRAPO. Mr. President, I rise today to discuss President Obama’s nomination of Judge Sonia Sotomayor to serve on the U.S. Supreme Court.

First, I want to say I appreciate the efforts of my colleagues on the Judiciary Committee to hold thorough hearings and a full nomination process.

There is no doubt that Judge Sotomayor’s resume is impressive, with degrees from Princeton and Yale Law School. She then worked as an assistant district attorney, and later in private practice before serving as a U.S. district court judge, and currently as a U.S. circuit court judge.

It is unfortunate the Senate confirmation process has reached a point where nominees with such extensive backgrounds are no longer comfortable candidates for the judicial philosophy and views on key issues.

To date, I have received over 1,000 letters, e-mails, and phone calls from Idaho constituents who are overwhelmingly opposed to Judge Sotomayor’s nomination. Many of the concerns raised in this correspondence are similar to concerns I personally have about the nomination—concerns relating to the second amendment right to bear arms and questions about her judicial activism, concerns relating to whether foreign law should be utilized in interpreting U.S. statutes and our Constitution.

It was my hope that through the committee hearings and my personal meeting with Judge Sotomayor and other evaluation of her writings and her judicial decisions that these concerns and those of my constituents could be addressed. Unfortunately, though, when it came to the key issues, Judge Sotomayor’s testimony often lacked the substance necessary and was even contradictory to her own previous statements, rulings, and writings.

I would like to discuss some of those areas of concern. Before I do so, though, I want to make it very clear that with this nomination, many are very rightfully proud that for the first time in our country’s history we have a Latina nominated to our highest Court. And it must be noted that she is receiving and being afforded a clean up-or-down vote on the floor of the Senate this week.

As I indicated at the outset, it is unfortunate the confirmation process in the Senate has deteriorated so much over the last few years that others have not received similar opportunities. I am referring in this example to Miguel Estrada. Like Judge Sotomayor, Judge Estrada was rated unanimously “well qualified” by the American Bar Association when President Bush nominated him to the U.S. Court of Appeals for the DC Circuit.

The DC Circuit is often considered to be a stepping stone to the Supreme Court on judicial nominations, and at that time many thought Judge Estrada would be a strong nominee, that he might be the first Latino nominated to the Supreme Court. Judge Estrada would have deserved such an opportunity as Judge Sotomayor does. Unfortunately, some on the left feared that scenario, and as a result there was a filibuster and Judge Estrada was never even allowed to have an up-or-down vote on the floor of the Senate on her nomination. It is important our country recognize this.

I make this point now just to remind us all that although there are many here who have concerns about some of the positions and philosophies Judge Sotomayor has, there has been no effort to deprive her of an opportunity for an up-or-down vote on the floor of the Senate on her nomination. It is important our country recognize this.

Let me now turn to some of the issues I indicated earlier that are of concern. I know a number of my colleagues have spoken already about the issue of the second amendment right to keep and bear arms. That is one of my most significant concerns.

On July 27, 2008, the U.S. Supreme Court ruled in District of Columbia v. Heller that the second amendment to the Constitution protects an individual’s right to keep and bear arms, and to use those arms for traditionally lawful purposes, such as self-defense within the home.

This ruling affirmed what common sense has told us all for a long time: that the second amendment was intended to ensure access to all law-abiding citizens for the protection of themselves and others. Unfortunately, despite this ruling in Heller, Judge Sotomayor ruled in the Maloney case that the second amendment does not apply to the States.

Even the Ninth Circuit Court of Appeals, which has jurisdiction over my home State of Idaho and is often considered one of the most liberal courts in the land, has ruled the opposite way in a similar case, making it clear that the second amendment rights are binding on the States.

In Nordyk v. King, the Ninth Circuit held that the right to bear arms is “deeply rooted in this Nation’s history and tradition.” Additionally, the court noted that the “crucial role this deeply rooted right has played in our birth and history compels us to recognize that it is indeed [a] fundamental [right].”

Furthermore, and again even after the Supreme Court’s ruling in Heller, Judge Sotomayor held that the second amendment does not protect a fundamental right.

With regard to whether the second amendment applies to States, I do not believe any reasonable person believes that other freedoms contained in the Bill of Rights do not apply to the States, such as freedom of religion, freedom of speech, or freedom of the press. Why is there a different standard of effort to try to keep the second amendment right to bear arms from being freely available to all individuals in the United States?

The Supreme Court has held in a series of opinions that the 14th amendment incorporates most portions of the Bill of Rights as enforceable against the States. Despite that Heller addressed firearms laws in the District of Columbia and not in a particular State, the Supreme Court used State constitutional precedential analysis in Heller. In fact, the Court’s ruling was based in part on its reading of applicable language in State constitutions adopted soon after our Bill of Rights itself was adopted and ratified. By doing so, the Supreme Court recognized that the second amendment was, in fact, a fundamental right guaranteed under the Constitution.

On the issue of whether the second amendment right to bear arms is a fundamental right, I am extremely concerned about the highest Court in our
Nation could so construe the second amendment right to bear arms. This disregard of history and legal precedent is, to me, a clear sign of a penchant toward judicial activism.

As I have said, to reach her decision in Maloney, Judge Sotomayor had to and did, make a judicial finding that the second amendment right to bear arms is not a fundamental right. In contrast, the Ninth Circuit Court of Appeals, in a footnote, said it as well as I think it can be said. The Ninth Circuit Court of Appeals stated:

The county—

Which in this case was the defendant which was seeking to implement some restrictions that were an infringement on the right to bear arms—

The county and its amici—

Those others who have filed briefs on the county's behalf—

point out that, however universal its earlier support, the right to keep and bear arms has now become controversial.

Again, this is the Ninth Circuit Court of Appeals speaking.

But do not measure the protection the Constitution affords a right by the values of our own times. If contemporary desuetude sufficed to read rights out of the Constitution, then there would be little benefit to a written statement of them. Some may disagree with the decision of [our] Founders to enshrine a given right in the Constitution. If so, then people can amend the document. But such amendments are not for the courts to ordain.

That is the kind of correct analysis the Supreme Court has clearly guided us to with regard to the second amendment right to bear arms.

Throughout Idaho and across the United States, many millions of Americans believe the second amendment is a fundamental right, and I am one of those. Soon enough, the Supreme Court will decide whether the second amendment is respected by the 14th amendment to apply to the States. When that case is taken up, the Court will decide just how “fundamental” the second amendment is and whether States and communities can take away Americans’ right to bear arms any time they want.

I cannot support a nominee to the Supreme Court who does not recognize this fundamental right in our Constitution. For this reason, I must oppose the nomination of Judge Sotomayor.

In addition, with regard to the role of a judge and judicial activism, when it comes to her views on the proper role of a judge, once again Judge Sotomayor’s testimony before the Senate Judiciary Committee appears to directly contradict her publicly stated words and philosophy expressed prior to her nomination.

In 2003, when discussing her gender and heritage, Judge Sotomayor said:

My experiences will affect the facts I choose to see.

In another previous speech, she said:

Personal experiences affect the facts that judges choose to see.

This is simply shorthand for judicial activism and making policy rather than applying the law—exactly what the Ninth Circuit said courts were not to do. To defend against this very notion, however, justice is supposed to be blind. Indeed, Judge Sotomayor’s view is depicted with blindfolds. To judge selectively choosing which facts to emphasize is akin to lowering the blindfold and taking a peek, thereby rejecting equal justice under the law. Those who are called to judge must adhere to the rule that they personally think the law should be or what the outcome of a particular case should be.

After she was nominated to the Supreme Court, Judge Sotomayor told the Judiciary Committee:

My personal and professional experiences help me listen and understand, with the law always commanding the result in every case. So we are left to wonder what has caused this contradiction, and whether it will continue to influence her decisions. This is the Ninth Circuit Court of Appeals speaking.

But do not measure the protection the Constitution affords a right by the values of our own times. If contemporary desuetude sufficed to read rights out of the Constitution, then there would be little benefit to a written statement of them. Some may disagree with the decision of [our] Founders to enshrine a given right in the Constitution. If so, then people can amend the document. But such amendments are not for the courts to ordain.

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Personal experiences affect the facts that judges choose to see.

This is simply shorthand for judicial activism and making policy rather than applying the law—exactly what the Ninth Circuit said courts were not to do. To defend against this very notion, however, justice is supposed to be blind. Indeed, Judge Sotomayor’s view is depicted with blindfolds. To judge selectively choosing which facts to emphasize is akin to lowering the blindfold and taking a peek, thereby rejecting equal justice under the law. Those who are called to judge must adhere to the rule that they personally think the law should be or what the outcome of a particular case should be.

After she was nominated to the Supreme Court, Judge Sotomayor told the Judiciary Committee:

My personal and professional experiences help me listen and understand, with the law always commanding the result in every case. So we are left to wonder what has caused this contradiction, and whether it will continue to influence her decisions. This is the Ninth Circuit Court of Appeals speaking.

But do not measure the protection the Constitution affords a right by the values of our own times. If contemporary desuetude sufficed to read rights out of the Constitution, then there would be little benefit to a written statement of them. Some may disagree with the decision of [our] Founders to enshrine a given right in the Constitution. If so, then people can amend the document. But such amendments are not for the courts to ordain.

That is the kind of correct analysis the Supreme Court has clearly guided us to with regard to the second amendment right to bear arms.

Throughout Idaho and across the United States, many millions of Americans believe the second amendment is a fundamental right, and I am one of those. Soon enough, the Supreme Court will decide whether the second amendment is respected by the 14th amendment to apply to the States. When that case is taken up, the Court will decide just how “fundamental” the second amendment is and whether States and communities can take away Americans’ right to bear arms any time they want.

I cannot support a nominee to the Supreme Court who does not recognize this fundamental right in our Constitution. For this reason, I must oppose the nomination of Judge Sotomayor.

In addition, with regard to the role of a judge and judicial activism, when it comes to her views on the proper role of a judge, once again Judge Sotomayor’s testimony before the Senate Judiciary Committee appears to directly contradict her publicly stated words and philosophy expressed prior to her nomination.

In 2003, when discussing her gender and heritage, Judge Sotomayor said:

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Following Judge Sotomayor’s nomination by the President, I, as did nearly all my colleagues in this Chamber, had a private, one-on-one meeting with her. We had a very cordial conversation, one in which I found Judge Sotomayor both likeable and gracious. I appreciated learning more about her background. Make no mistake, Judge Sotomayor has a great personal and professional story to tell. She is proud of it, and she certainly should be. But in the instance of a Supreme Court nomination, I believe the nation has a right to know the credentials and qualifications of the nominee. This is the standard by which the Senate has reviewed nominees and we have both a constitutional and a historical duty to fulfill. I am sure Judge Sotomayor’s panel decision. This is a case in which a group of firefighters who had studied for months and passed a test were denied promotion because not enough minority firefighters had done as well. In a one-paragraph, unsigned, and unpublished cursory opinion, Judge Sotomayor summarily—almost casually—dismissed the claims of these firefighters who had worked hard for a promotion I wish her well in the future. However, I am not convinced she understands the proper role of the courts in our legal system. Her record and her pronouncements are those of someone who sees the court as a place to legislate and make policy. I am not convinced Judge Sotomayor believes in the bedrock of our judicial system, which is impartiality under the law. Therefore, I must withhold my consent and vote no on her confirmation.

I yield the floor.

The PRESIDENT. The Senator from Maine.

Ms. COLLINS. Mr. President, I rise in support of the nomination of Sonia Sotomayor to serve as an Associate Justice of the U.S. Supreme Court.

The Constitution grants the President the power to nominate and appoint individuals to the Federal judiciary. It also gives the Senate the power to confirm or cobnfirm or confirm or confirm such appointments. It does not, however, provide any specific guidance to the Senate on how we should exercise this important power.

In a democracy, discourse and disagreement are expected, including myself, would say that these ingredients are not only expected, they are necessary for the healthy continuation of our vibrant, dynamic democracy.

Given this backdrop, disputes regarding the scope of the Senate’s power of “advice and consent” are not uncommon or unexpected whenever the President puts forth a nominee for the Supreme Court. In fact, the ink on our Constitution was barely dry when the Senate rejected John Rutledge, one of President Washington’s 13 nominees to the Supreme Court. Some Senators suggested they had voted against Mr. Rutledge out of a concern that he was losing his sanity. But the main reason for opposition to Mr. Rutledge appears to have been the nominee’s opposition to the Jay Treaty with Great Britain—a treaty popular with the federalist-controlled Senate.

Since Mr. Rutledge’s rejection by the Senate in 1795,Senators have continued to grapple with the criteria applicable to their evaluation of Supreme Court nominees and the degree of deference that should be accorded to the President.

There is no easy answer to this difficult question. Some argue that closer scrutiny by the Senate and less deference to the President is required when confirming judicial nominees, not only because Federal judges are in a separate branch of government but also because they have lifetime appointments. Thus, constitutional law scholar John McGinnis concludes that the text of the Constitution gives the
Senate "complete and final discretion in whether to accept or approve a nomination."

Many other legal scholars, however, articulate a more constrained role for the Senate. They argue that the Senate's role should be exercised narrowly, giving extraordinary deference to the President. Under this standard, the Senate would not reject judicial nominees unless they were clearly unqualified to serve.

Citing Alexander Hamilton's Federalist 76, those who would constrain the Senate's review of judicial nominees explain that the "advice and consent." responsibility was only intended as a safeguard against incompetence, cronyism, or corruption. As Dr. John Eastman testified before the Judiciary Committee in 2003, the Senate's power of "advice and consent" does not give "the Senate a coequal role in the appointment of Federal judges.

The real arguments on both sides of this question of how much deference to give the President are enlightening. But, as is so often the case, my personal belief is that the truth lies between the two extremes. As a Senator, I have offered considerable deference to my Democratic and Republican Presidents on their Supreme Court nominees. In considering judicial nominees, I carefully consider the nominee's qualifications, competency, personal integrity, judicial temperament, and precedent. These are the tests I have applied to Sonia Sotomayor. Having reviewed her record, questioned her personally, and listened to the Judiciary Committee hearings, I have concluded that Judge Sotomayor should be confirmed to our Nation's highest Court.

My decision to support this nominee does not reflect agreement with her on all of her rulings as a judge serving on the Second Circuit Court of Appeals. I disagreed, for example, with the perfunctory manner in which Judge Sotomayor has disposed of one case of constitutional consequence. Her panel's cursory analysis of the complex and novel questions about the Fourth amendment's equal protection clause and title VII in the Ricci case—the case involving the New Haven firefighters, which has been called a reverse discrimination case—was as unfortunate as the decision itself. Indeed, in contrast to her panel's one-paragraph opinion, the Supreme Court, in this case, needed nearly 100 pages to debate and resolve just the statutory question presented—never mind the difficult constitutional questions that were set aside for another day.

But, my objection is not about a handful of Judge Sotomayor's rulings, as well as some of her prior comments over the course of her 17 years on the Federal bench, do not warrant my opposing her confirmation. Upon reading some of her other decisions, talking personally with her, questioning her at length, and hearing her response to probing questions, I have concluded that she understands the proper role of a judge and that she is committed to applying the law impartially, without bias or favoritism. Specifically, in her testimony before the Judiciary Committee, Judge Sotomayor reaffirmed that her judicial philosophy is one of "fidelity to the law."

She pledged "to apply the law," not to make it. She testified that her "personal and professional experiences" will not influence her rulings.

There is no reason to doubt that Judge Sotomayor is well qualified to be an Associate Justice of the Supreme Court. She has impressive legal experience. She has excelled throughout her life, and she is a tremendously accomplished person. Indeed, the American Bar Association Standing Committee on the Federal Judiciary—after an exhaustive review of her professional qualifications, including more than 500 interviews and analyses of her opinions, speeches, and other writings—unanimously rated her as "well qualified."

Based on my personal review—a careful review—of her record, my assessment of her character, and my analysis of her adherence to precedent, Judge Sotomayor warrants confirmation to the High Court.

I know I will not agree with every decision Justice Sotomayor reaches on the Court, just as I have disagreed with some of her previous decisions. I believe, however, that her legal analyses will be thoughtful and sound and that her decisions will be based on the particulars of the case before her. My expectation is that Justice Sotomayor will adhere to Justice O'Connor's admonition that "a wise, old woman and a wise, old man would eventually reach the same conclusion in a case."

Based on her responses to the Judiciary Committee, Justice Sotomayor will avoid the temptation to usurp the legislative and the Executive authority of the President. As Chief Justice John Marshall famously wrote in Marbury v. Madison, the Court must "say what the law is." That, after all, is a nutshell, is the appropriate role for the Federal judiciary. For a judge to do more would undermine the constitutional foundations of the separate branches.

I will cast my vote in favor of the confirmation of Judge Sotomayor, as I believe she will serve our country honorably and well on the Supreme Court.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. SCHUMER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

Mr. SCHUMER. Mr. President, I rise today in wholehearted support of the historic nomination of Judge Sonia Sotomayor to become an Associate Justice of the U.S. Supreme Court. I have two words to summarize my feelings about this nomination: It's time. It is time we have a nominee to the Supreme Court whose record has been truly tested. It is time we have a nominee with practical experience in all levels of the justice system, whose upbringing in a Bronx housing project, whose experience as a prosecutor, literator, and district court judge has enabled her to say she said in her own statement, "the human consequences" of her decisions. And it is time that we have a nominee who is Hispanic, a member of the fastest growing population in America. Finally, it is time we have someone with a great family history, an American family history. It is time we confirm the first Hispanic Justice to the U.S. Supreme Court.

Let's start with Judge Sotomayor's record, which is most important. Several of my Republican colleagues said, as they cast their votes against her in the Judiciary Committee, that they did not know what kind of Supreme Court Justice they might be getting in Judge Sotomayor. I find this conclusion to be confounding. Judge Sotomayor is hardly a riddle wrapped in mystery inside an enigma. No matter what cross section, we take of her extensive record, down to examining individual cases, we see someone who has never expressed any desire or intention to overturn existing precedent, nor have my colleagues been able to point to any such case.

Instead, we see someone who lets the facts of each case guide her to the correct application of the law. We see someone who does not put her thumb on the scales of justice in any way, even if any sentient human being would want to reach a different result for a sympathetic plaintiff.

We know more about Judge Sotomayor than we have known about any nominee in 100 years. The 30,000-foot view of her record, gleaned from numerous studies about the way she has ruled in cases for 17 years—and that is the best way to tell how a judge is going to be, to look at their previous cases—when you look at those cases, it tells plenty about her moderation.

She has agreed with her Republican colleagues 95 percent of the time. She has ruled for the government in 83 percent of immigration cases, presumably against the immigrant. She has ruled for the government in 92 percent of criminal cases, against the criminal. She has denied race claims in 83 percent of cases. She has split evenly in a variety of employment cases.

No matter how we slice and dice these cases, we come up with the same conclusion about her moderation.
Within the category of criminal cases she decided, she ruled for the government 87 percent of the time in fourth amendment cases. This is important because the fourth amendment is an area where decisions are highly fact based and judges have discretion to decide whether the facts exceed their bounds in executing searches and seizures. But she has not abused this discretion. In the overwhelming number of cases, she sides with the government, deciding each case carefully based on the facts before her.

Let’s also look further at her immigration asylum cases. There she ruled for the government, against the petitioner for asylum, in 83 percent of the cases. That is also telling of her modulated approach to judging. Asylum law, as her colleague Judge Newman has pointed out, gives judges a great deal of discretion to decide who can be granted asylum to stay in the United States. Judge Sotomayor has not abused that discretion. Given her upbringing in a Hispanic neighborhood of the Bronx, we might expect that her personal background would make her more, to borrow a word of her colleague Judge Newman, more sympathetic to immigrants seeking asylum. But the cases show that any perceived empathy did not affect her results. In fact, her 83-percent record puts her right in the middle of judges in her circuit.

Even in the realm of sports cases, which are always contentious and closely watched, Judge Sotomayor has shown her evenhandedness. She ruled for the professional football league in an antitrust case brought by a player and against Major League Baseball when she ruled for the players and ended the baseball strike. I can go on. Judge Sotomayor voted to deny the victims of TWA Flight 800 crash a more generous recovery because that was “clearly a legislative policy judgment which should not be made by the courts.” If you have empathy, you certainly are going to decide with the victims. I met some of their families. She did not. The law did not allow her.

Judge Sotomayor ruled against an African-American couple who claimed they were bumped from a flight because of their race. Again, against a couple, a case called King, that said the ruling showed the judge was unable or unwilling to grapple with major constitutional issues. But in each of these cases, Judge Sotomayor agreed with the other two members of her court that the second circuit or Supreme Court precedents squarely dictated the result. There was no need for a fuller explanation. In fact, second circuit rules forbade panels from revisiting squarely divided precedents. In other words, in these cases, she was avoiding making policies that conflicted with the precedents. She was bound. They were decided by settled law. It was just the fact my friends across the aisle do not like what the settled law was. So we are getting awfully close to a double standard.

In Ricci, they wanted her to overturn the second circuit discrimination law. And in the gun case, they wanted her to ignore the law that governs how the second amendment is applied to the States. In the property rights case, they wanted her to ignore the law that governed the statute of limitations. My colleague Judge Sotomayor about an EPA case. In that case, she ruled the EPA had mistakenly considered a certain factor in deciding whether a company had used the “best technology available” to clean water. Even though she gave deference to EPA’s interpretation of the law, Judge Sotomayor ruled against the government.

Yet, my friend, Senator Sessions of Alabama, stated that one of his reasons for opposing Sotomayor is that she exhibits liberal progovernment ideology. It appears that being progovernment is a bad thing, except when it is not.

Let’s talk about her answers to questions. Some of my friends on both sides of the aisle have said Supreme Court nominees need to be more forthcoming during the confirmation process. They fear that the hearings have become a little more choreographed Kabuki dance in which, as Senator Specter observed some time ago, nominees answered just enough questions to get confirmed.

I have shared this concern as well. It is too easy for a candidate who wishes to hide his or her ideology to decline to answer questions, to submit to cautious coaching, and to offer meaningless platitudes—promises that they would keep an open mind, respect the law, give everyone an equal chance. Of course, they would.

Candidates with little to hide, not surprisingly, have answered more questions than stealth nominees who have truly been outside the mainstream. Examples of candidates who had nothing up their sleeves and answered questions in a straightforward manner include Judge Stephen Breyer in 1994. He answered the question posed by Senator D’Amato: “I believe that Washington v. Davis is settled law; and second, do you believe it was correctly decided?” And then-Judge Ruth Bader Ginsburg—despite criticisms that she begged off too many questions—answered dozens about abortion precedent and Casey.

Justices Alito and Roberts, in stark contrast, declined to answer question after question after question. Then-Judge Roberts would not answer the most basic questions about settled commerce clause jurisprudence. Then-Judge Alito would not say whether he thought the constitutional right to privacy included the holding of Roe.

I think we can see now, and I will discuss this in more detail, that this was part of a strategy to play an ideological shell game.

Now we are presented with a candidate whose views are truly moderate, as proven through the most copious records in 100 years. Nonetheless, my friend, Senator Grassley, of Iowa believes that “Judge Sotomayor’s performance at her Judiciary Committee hearing left me with more questions than answers.” I have to respectfully disagree.

But Judge Sotomayor, again, in addition to her full and transparent record, proved in her answers that she is not a stealth candidate. On abortion and the holding of Roe, when asked by Senator Franken: “Do you believe that this right to privacy includes the right to have an abortion?” Judge Sotomayor answered clearly and to the point: “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 women have with respect to the determination of their pregnancies in certain situations.” Clear. To the point.

When then-Judge Roberts was asked this question, he replied: Well, I feel I need to stay away from a discussion of particular cases. I’m happy to discuss the principles of stare decisis, and the Court has developed a series of precedents on precedent, if you will. They have a number of cases talking about how this principle should be applied.

So who spoke clearly to the question? If you don’t believe Judge Sotomayor did, how could you vote for Judge Roberts?

On property rights, when asked by Senator Grassley about her understanding of the Court’s holding in Kelo, Judge Sotomayor explained fully her understanding of the Court’s holding, and there is a quote. When asked about his view of Kelo, then-Judge Alito declined to discuss it. But there are many more examples of how Judge Sotomayor answered questions about existing cases in much fuller detail.
than the past two nominees and certainly about the key cases—property rights and abortion—which we debate, as we should, in this body.

As I said at the outset, it is time. It is time for a searching examination of why we judge my colleagues are still determined to vote against Judge Sotomayor. She has a remarkably moderate record, she is highly qualified, she answers questions, and she is a historic choice who will expand the diversity of the Court.

What nominee of President Obama’s would my Republican colleagues vote for—one who would have reached out and found that the right to bear arms should be incorporated to apply to the States, despite 100-year-old precedent to the contrary; one who would have ignored the Second Circuit precedent and prohibited the city of New Haven from trying to fix a promotional exam to give minorities a better chance at advancement; one who declined to answer whether existing precedents? In other words, an activist who was intent on changing the law?

Of course, we now turn to the last refuge of objection to Judge Sotomayor: her statements outside the courtroom, which have been the advocate of the principle that we consider carefully each nominee’s entire record, including speeches and other judicial writings. But Judge Sotomayor is different than most because she has an enormous judicial record to review and consider. She is not a stealth candidate. There is a push and pull here in terms of what is important to evaluate with respect to each individual nominee. With 17 years of judicial opinions, 30 panel opinions, and 3,000 cases in total, how much emphasis should we put on the three words “wise Latina woman,” whether we disagree with them or not?

I would submit the answer should be, compared to her copious record, not much. Nonetheless, by my count, my colleagues on the other side of the aisle asked no fewer than 17 questions about her “wise Latina woman” comment. In contrast, they asked questions of about 6–6–of Judge Sotomayor’s cases over the course of the 3 days; 6 cases out of 3,000 in 17 years of judging.

I don’t agree with this approach to analyzing her record. Nonetheless, I agree with my colleague, Senator Grassley, for holding Justice Thomas, 10 being all the way to the left, such as Justice Brennan, I think the Bush nominees to the Supreme Court and court of appeals were almost exclusively 1’s and 2’s—way over. If you looked at President Clinton, you would return to somewhat left of center. But not much, mainly sixes and sevens—prosecutors, partners in law firms—not lawyers who had spent their careers in activist causes.

President Obama has taken a different approach. He is trying to return the Court to the middle, to the pre-Bush days, the days of having judges who may not be exactly what the right wants in a judge or even what the left—the far left—wants in a judge. We are returning to the days where judges were fives and sixes and sevens—may—fours. They were squarely in the mainstream. We are returning to the days when judges put the law first.

Somehow my Republican colleagues are aghast. The only judges they seem to want to vote for are ones and twos—judges who are on the hard right. The President is not going to nominate judges who have that view. After all, elections do matter.

My colleagues say they do not want activist judges. What they mean is they do not want judges who will put the rule of law first. They only want judges who will impose their own ultra-conservative views. An activist now seems to be not someone who respects the rule of law but someone who is not hard right. If you are mainstream, even though you are interpreting the law, you are an activist because you will not stick to the clock and the Constitution.

We must and will continue to fight for mainstream judges.

I have heard some say this fight isn’t about Judge Sotomayor, given her proven record of mainstream judging and fidelity to the law. These commentaries argue that Republicans are laying down their marker for President Obama’s next nominee. I don’t know who that nominee will be, but I am confident it will be a qualified candidate who has done nothing but move through the democratically elected branches of government.

The Bush administration complied with the hard-right and nominated judges who was so far out of the mainstream it would have been irresponsible for us to confirm them blindly. So we asked them questions about their judicial philosophy and their ideology, and our questions were met with thorough answers or with a demonstrated record of mainstream judging but with banalities or even obtuse silence.

If we tried to rank the ideology of nominees on a scale of 1 to 10, with 10 being all the way to the left, such as Justice Thomas, and 10 being all the way to the right, such as Justice Brennan, I think the Bush nominees to the Supreme Court and court of appeals were almost exclusively 1’s and 2’s—way over. If you looked at President Clinton, you would return to somewhat left of center. But not much, mainly sixes and sevens—prosecutors, partners in law firms—not lawyers who had spent their careers in activist causes.

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been distilled to disputes over snippets of speeches.

But we are not going to let that stop the national pride we take in this moment. We are not going to let it stop us from confirming, by a broad and bipartisan margin, Judge Sonia Sotomayor to be the first Hispanic Justice on the U.S. Supreme Court.

In conclusion, as John Adams said: "We are a Nation of laws, not of men."

But if the law were just words on parchment, it would never evolve to reflect our own changing society. "Separate but equal" would never have been understood to be "inherently unequal."

Equality for women would never have been viewed as guaranteed under the Constitution’s promise of equal protection under law. In fact, the second amendment might never have been viewed to extend beyond the right to possess a front-loading musket to defend, in a militia, against an occupying force.

With the nomination of Judge Sotomayor, we have an opportunity—a noble opportunity—to restore faith in the notion that the courts should reflect the same mainstream ideals that are embraced by America. Our independent judiciary has served as a beacon of justice for the rest of the world. Our system of checks and balances is the envy of every freedom-seeking nation. As I look at the arc of Judge Sotomayor’s life, her record, and these hearings, I am confident we are getting a Justice who both reflects American values and who will serve them.

I yield the floor.

The ACTING PRESIDENT pro tem. The Senator from Arizona is recognized.

Mr. KYL. Mr. President, every American should be proud that a Hispanic woman has been nominated to serve on the Supreme Court. In fulfilling our advice and consent role, of course, Senators evaluate Judge Sotomayor on her merits, not on the basis of her ethnicity.

As I noted at the beginning of Judge Sotomayor’s hearing, she has a background that creates a prima facie case for confirmation. She graduated from Princeton University and Yale Law School and then was an assistant district attorney, a corporate litigator, a district court judge, and a circuit court judge.

This background led the American Bar Association to rate her “Well Qualified.” My counterpart on the Democratic side, Senator DURBIN, has said, “The burden of proof for a Supreme Court Justice nominee is on the nominee.” No one has a right to sit on the Supreme Court. . . . It is not enough for a nominee to be found well qualified by the American Bar Association.”

It is obvious that the Senate cannot just rubberstamp the ABA. This is why we conduct our own evaluation of the nominee’s background and record and then attempt to resolve outstanding questions at her hearing.

In evaluating a nominee, it is, of course, important to look at all aspects of the person’s career. The nominee’s prior judicial opinions are obviously an important consideration in this process. A lower court judge who issues judicial opinions of the mainstream will, in all likelihood, continue to issue opinions that are outside the mainstream if promoted to a higher court.

But even judicial opinions do not tell us the entire story, especially when we consider her commitment to the Supreme Court. District and appellate court judges operate under the restraining influence of judicial review. They have a strong incentive to avoid aberrant interpretations of the law, otherwise they risk embarrassment if cases are appealed to a higher authority. This check disappears, however, when a judge becomes a justice on the Supreme Court. There is no higher authority to reign in a lifetime-appointed Justice who decides, for whatever reason, to adopt a strained interpretation of the law.

Nor will a nominee generally be very specific about how he or she may rule on matters that could come before the Court. So it is important to examine anything else in a nominee’s background that could shed light on how the nominee really thinks about important issues. One source of information is a nominee’s extra-judicial statements in speeches and writings. In these contexts, the nominee is not constrained by facts of particular cases, by precedents or the fear of appellate reversal. Then she came back to her overriding theme: “I accept the proposition that, as Judge Resnik describes it, ‘to judge is an exercise of power,’ and because as . . . Professor Martha Minnow of Harvard Law School states ‘there is no objective impartiality, no neutrality, no escape from choice in judging. . . .’”

I believe judges must seek objective truth as found in the law of the case. I do not believe in jurisprudence, so I find her comment alarming. The essence of judging is neutrality. That is why Lady Justice is depicted with a blindfold. And that is why Federal judges are required to swear 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 all of the duties incumbent on [her].” That oath makes no allowance for a judge to choose the result based on his or her “perspective.” The oath requires the opposite: a dispassionate adherence to impartiality and the rule of law.

Now, back to Judge Sotomayor’s speech. After agreeing with law professors who say that there is no objective truth, only a series of perspectives, no neutrality, Judge Sotomayor then said, “I further accept that our experiences as women and people of color will in some way affect our decisions.” What Professor Minnow’s quote means is not that we mean to bring color, in all or 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. Judge Sotomayor is talking here about different outcomes in cases based upon who the judge is. She goes on to substantiate her case by citing an outcome in a State court father’s visitation case and two studies, which tended to demonstrate differences between women’s and men’s decisions in cases. She said, “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 effect on the development of law and on judging." She continued: "Our gender and national origins make and will make a difference in our judging." To recap: Judge Sotomayor announced her position on the theme, refuted the arguments of those with a different view, and substantiated her point of view with some evidence. Up to this point, she had made the case that gender or ethnicity would have an impact on the way judges decide. Now she was not just speaking of the differences. She was more than that; she was talking about this as an issue. She is stating an opinion that cannot be disputed. Her statement has been accepted and pronounced as the result of a case. What I was talking about was the obligation of judges to examine what they're feeling as their 'judicial biases' and to ensure that that's not influencing the outcome. I've read the speeches in their entirety many times, and have verified that that is most certainly not what she was "talking about." Judge Sotomayor's recharacterization of her speeches before the Judiciary Committee sounds like the objective, neutral approach that her speech explicitly dismissed. It is hard to understand how the same person could believe both honestly. They are irreconcilably antithetical. Further examples abound, but for the sake of time I will offer only one more. When Judge Sotomayor tried to explain her statement by Justice O'Connor's statement about how a wise old man and a wise old woman would reach the same conclusions, she said: "The words that I used, I used agreeing with the sentiment that Justice Sandra Day O'Connor was attempting to convey." That's not true. Her explanation strains credulity. Both as to whether she really believes judges should try to set aside biases, including those based on race and gender, and the basic element of judicial temperament, fortitude and fidelity to the oath of truth she took before the Judiciary Committee, I conclude she did not carry the very low burden of proof. I also would like to discuss another of Judge Sotomayor's statements, an address to the Puerto Rican ACLU on the subject of foreign law. But first, I should take a moment to explain why this issue is so critical. There is a long history of thought among some academics, and even some judges, that foreign law and practices should be used as an aid to understanding and interpreting our own laws and Constitution. This is problematic for two main reasons. First, as Chief Justice John Roberts pointed out during his confirmation hearing, the consideration of foreign law by American judges is contrary to principles of democracy. Foreign judges and legislatures are not accountable to the American electorate. Using foreign law, even as a thumb on the scale, to help decide key constitutional issues devalues Americans' expressions through the democratic process. It is simply irrelevant, except in a very few specific situations. Second, even if the use of foreign law were not inconsistent with our constitutional system, its use would free judges to enact their personal preferences under the cloak of legitimacy. Against this backdrop, Judge Sotomayor delivered her April 28, 2009, speech entitled, "How Federal Judges Look to International and Foreign Law Under Article VI of the U.S. Constitution." From that speech, we begin to see how foreign law could shape Judge Sotomayor's jurisprudence in the future. I believe her observations, but directed to this specific topic, and, presumably says what she means. After conceding that judges don't use foreign law, Sotomayor suggested that judges consider foreign law as a source for "good ideas" that can "set [i.e., judges'] creative juices flowing." Putting aside for a moment the fact that deciding an antitrust case, or a commerce clause dispute, or an Indian law issue, or an establishment of religion case does not require "creative juices," Judge Sotomayor's suggestion that judges consider foreign law would interfere with specific rules of construction or application of precedent. Judge Sotomayor went on in this same ACLU speech to distance herself from the critical of judges considering foreign law and align her views with those of Justice Ginsburg who recently endorsed the use of foreign law at a symposium at the Moritz College of Law at Ohio State University. Specifically, Judge Sotomayor stated that "[t]he nature of the criticism comes from . . . the misunderstanding of the American use of that concept of using foreign law. That misunderstanding is unfortunately endorsed by some of our own Supreme Court justices. Both Justice Scalia and Justice Thomas have written extensive criticisms of the use of foreign and international law in Supreme Court decisions . . . ." She continues: "I share more the ideas of Justice Ginsburg in thinking . . . that unless American courts are more open to discussing the ideas raised by foreign law, we will lose influence in the world. 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.

Judge Sotomayor's rationale for judges looking to foreign law—so that the United States does not "lose influence in the world"—is astonishing. Not only is such an approach irrelevant to the role of judges, vis-a-vis the other branches of government, and arguably usually irrelevant even for the President and Congress as a yardstick with which to measure U.S. domestic and foreign policy, it is totally irrelevant to the considerations for deciding any particular dispute between two parties. In response to questions from committee members concerned about these kinds of statements, Judge Sotomayor again tried to drastically recharacterize her prior statements. She testified that her speech was quite clear
that “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.” But in April of this year, Judge Sotomayor said, “ideas are ideas, 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.” These two statements cannot be squared, even though they occurred just 2½ months apart.

Later in her hearing, Judge Sotomayor gave the following testimony: “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.” While this kind of reference to American law normally provide some measure of comfort, it is belied by words Judge Sotomayor uttered less than 3 months ago, that judges were “commanded” to look to “persuasive” sources, including foreign law.

It gives me great pause that Judge Sotomayor could say one thing at a public speech earlier this year and say the opposite while under oath before the Judiciary Committee, especially since she never repudiated her speech.

Finally, when Judge Sotomayor had an opportunity to reflect upon her testimony, review the transcript, and correct the record, she reverted to her former position, omitting the meaning of the word “use.”

Specifically, as I just noted, in her hearing before the Senate Judiciary Committee, Judge Sotomayor testified under oath that “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.” In written answers submitted for the record she wrote: “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 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.”

So we are back to “considering,” but not “using.” Or is it, using as ideas, but not binding precedent? And if so, of what use are ideas if not used in some way? And if used in some way, could they influence the decision? I am totally baffled by what she could consider foreign law as a source of ideas consistent with her testimony that foreign law should not influence the outcome of cases. Effectively, immediately after the hearing, she has sworn testimony regarding foreign law.

Judge Sotomayor’s supporters argue that we should not focus on her speech, but on her “mainstream” judicial opinions. They mentioned statistics that purport to show that Judge Sotomayor agreed with her colleagues, including Republican appointees, the vast majority of the time. That may be true; but, as President Obama has reminded us, most judges will agree in 95 percent of all cases. The hard cases are where differences in judicial philosophy become apparent.

I have looked at Judge Sotomayor’s record in these hard cases and again have found cause for concern. The U.S. Supreme Court on occasion reversed directly ten of her decisions—eight of those decisions have been reversed or vacated, another sharply criticized, and one upheld in a 5–4 decision. Indeed, just in the past 4 months, the Supreme Court has vacated three of her decisions. That does not inspire confidence.

The most recent reversal is a case in point. In Ricci v. DeStefano, a case where Judge Sotomayor summarily dismissed before trial the discrimination claims of 20 New Haven firefighters, the Supreme Court reversed 5–4, with all nine Justices rejecting key reasoning of Judge Sotomayor’s court. But in my view, the most astounding thing about the case was the incorrect outcome reached by Judge Sotomayor’s court; it was that she rejected the firefighters’ claims in a mere one paragraph opinion and that she continued to maintain in the hearings that she was bound by precedent that the Supreme Court said didn’t exist.

As the Supreme Court noted, Ricci presented a novel issue regarding “two provisions of Title VII to be interpreted and reconciled, with few, if any, precedents in the court of appeals discussing the issue.” One would think that this would be precisely the kind of case that deserved a thorough and thoughtful analysis by an appellate court.

But Judge Sotomayor’s court instead disposed of the case in an unsigned and unpublished opinion that contained zero—and I do mean zero—analysis. This is confounding given Judge Sotomayor’s Judiciary Committee testimony, in which she said: “I believe my 17-year record on the 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 result is correct. And, whether their position is sympathetic or not, I explain why the result is commanded by law.”

Because her initial decision was unpublished, the case—and the firefighters’ meritorious claims—would have been swept under the rug and lost forever if not for fellow Second Circuit Judge Jose Cabranes, who read about the firefighters’ case in a local newspaper, the New Haven Register.

Judge Cabranes looked into the situation, recognized the importance of the case, and requested that the entire Second Circuit, including judges who were not involved in the original decision, rehear the case. By a vote of 7–6, the Second Circuit denied rehearing the case, with Judge Sotomayor providing the seventh and deciding vote to avoid further consideration of her panel’s decision. Fortunately for the firefighters, Judge Cabranes wrote a blistering dissent that no doubt caught the attention of the Supreme Court. He charged that Judge Sotomayor and her panel had “failed to give” with respect to exceptional importance raised in this appeal.”

Some have speculated that the Judge Sotomayor’s panel intentionally disposed of the case in that manner, and unpublished opinion in an effort to hide it from further scrutiny. Was the case intentionally kept off of her colleagues’ radar? Did she have personal views on racial quotas that prevented her from seeing the merit in the firefighters’ claims? Was it merely coincidence that the standard adopted by Judge Sotomayor—which in the Supreme Court’s words “would encourage race-based action at the slightest hint of disparate impact”—leads to a “de facto quota system”—was consistent with policy and legal positions advocated by the Puerto Rican Legal Defense and Education Fund, an organization with which she was intimately involved for 12 years? In repeated speeches through the years, Judge Sotomayor said, “I . . . accept that our experiences as women and people of color affect our decisions.” Was this such a case?

Judge Sotomayor was asked about her Ricci decision at length during the confirmation hearing. Her defense was that she was just following “established Supreme Court and Second Circuit precedent.” The problem with this answer is that Ricci presented a novel question for which there were no Supreme Court precedents squarely on point. Indeed, the Supreme Court noted that there were “few, if any” circuit court opinions addressing the issue.

During the hearing, I pressed Judge Sotomayor to identify those controlling Supreme Court and Second Circuit precedents that allegedly dictated the outcome in Ricci. Rather than answering the question, she ran out the clock. Perhaps that was because, as Judge Cabranes’s dissent stated, the “core issue presented by this case—the scope of a municipal employer’s authority to disregard examiners’ recommendations—is not addressed by any precedent of the Supreme Court or our Circuit.” But even
August 5, 2009

CONGRESSIONAL RECORD — SENATE

S8821

if we accept Judge Sotomayor’s contention that there was some relevant Second Circuit precedent, it is quite clear that such cases would not bind her or other judges in considering en banc review. It is telling that even the Obama Justice Department found her legal position impossible to defend. It filed a brief in the case asking the Supreme Court to vacate and remand the case for further proceedings, essentially what the dissent favored, as well.

The Court will not know the reasons that guided the outcome of the case. But we know, at the very least, that Judge Sotomayor exercised poor judgment in dismissing serious claims in an unsettled area of the law without engaging in an analysis of the issues. As Judge Cabranes wrote in dissenting from the denial of rehearing en banc: “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 conversations straightforward questions that do not require explanation 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 settled.

Clearly, Judge Sotomayor did not adequately explain to the litigants—or the Judiciary Committee—why the law required the result she supported. And she cast the decisive vote to ensure that the full court could not review the case. Is this the kind of behavior we should expect of a judge who is seeking a promotion to the Supreme Court?

Finally, if I had been a litigant before her court and Judge Sotomayor had asked me the questions I asked her Ricci, and had I “answered” them as she responded to me in the hearing, she would rightly have told me to either sit down or start answering her “questions.” Her “answers” answered nothing, and, in my opinion, violated her obligation to be forthcoming with the Judiciary Committee.

Ricci is not the only Judge Sotomayor decision that gives reason to question her commitment to impartial justice. I am concerned about her analysis—or lack thereof—in Maloney v. Cuomo, a second amendment case that could find its way to the Supreme Court next year. Maloney was decided after the Supreme Court’s landmark ruling in District of Columbia v. Heller, which held that the right to bear arms was an individual right that could not be taken away by the Federal Government.

In Maloney, Judge Sotomayor had the opportunity to consider whether that individual right could also be enforced against the States, a question that was not before the Heller court. In yet another unsigned opinion, Judge Sotomayor and two other judges held that it was not a right enforceable against States.

What are the legal implications of this holding? State regulations limiting or prohibiting the ownership and use of firearms would be subject only to “rational basis” review. As Sandy Froman, a respected lawyer and former president of the National Rifle Association, said in her witness testimony, this is a “very, very low threshold” for States to regulate or eliminate the capacity that wishes to prohibit all gun ownership, even in the home. Thus, if Judge Sotomayor’s decision were allowed to stand as precedent, then states could, irony, be able to do whatever the Second Circuit explicitly declined to decide in the first instance whether the right to bear arms is, in legal parlance, “fundamental,” and therefore enforceable against states as well as the Federal Government.

Judge Sotomayor’s perfunctory decision did not leave this question open. Her panel specifically concluded, without any explanation, that the right to bear arms is in fact not a “fundamental” right. A constitutional right, that to the best of my knowledge, no other court has ever reached—and that, as Sandy Froman noted, “we would rob the Second Amendment of all that we have achieved and which would trample on the individual rights of America’s nearly 90 million gun owners.” Indeed, Judge Sotomayor’s assessment stands in stark contrast to the Supreme Court’s own opinion in Heller, which not once but twice refers to the right to bear arms as “fundamental.”

Judge Sotomayor’s opinion in Maloney is extraordinary both for its lack of serious analysis and for reaching an unprecedented conclusion that was wholly unexpected. She could have as easily chosen the path taken by the seventh circuit, and reserved for the Supreme Court the opportunity to decide in the first instance whether the right to bear arms is “fundamental.”

Or, like the ninth circuit, she could have conducted a thorough analysis of the issue and determined that the right is, indeed, fundamental. She did neither.

As Sandy Froman stated: 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... By failing to conduct a proper Fourteenth Amendment analysis, the judge erred by deferring to a precedent.
Before the hearing, my biggest question about Judge Sotomayor was whether she could abide by that standard. We spent 3 days asking her questions, trying to understand what she meant in some of her controversial speeches and whether she drove to questionable conclusions in cases such as Ricci and Maloney.

Judge Sotomayor did not dispel my concerns. Her sworn testimony was evasive, lacking in substance, and, in several instances, incredibly misleading. Her dissembling was widely noticed. Indeed, in an editorial, the Washington Post criticized Judge Sotomayor’s testimony about her “wise Latina” statement. Here is what the Washington Post said:

Judge Sotomayor’s attempts to explain away and distance herself from that statement were unconvincing and at times uncomfortably close to disingenuous, especially when she argued that her reason for raising questions about gender or race was to warn against injecting personal biases into the judicial process. Her repeated and lengthy speeches on the matter do not support that interpretation.

Until now, Judge Sotomayor has been operating under the restraining influence of a higher authority—the Supreme Court. If confirmed, there would be no such restraint that would prevent Judge Sotomayor from—per paraphrase President Obama—deciding cases based on her heartfelt views.

If the Senate votes to confirm herself worthy of a lifetime appointment to the Nation’s highest Court, she must do more than avoid a “meltdown” in her testimony. She must be able to rationalize contradictory statements—assuming she does not repudiate one or the other—such as the differences between her speeches and her committee testimony. Her failure to do that has left me unpersuaded that Judge Sotomayor is absolutely committed to setting aside her biases and impartially deciding cases based upon the rule of law.

Judge Sotomayor is obviously intelligent, experienced, and talented. She represents one of the greatest things about America—the opportunity to become whatever you want with your God-given abilities. She is a role model for young women, as well as minorities, specifically. She is personable and, apparently, hard working. I respect the views of those who regard her well.

Moreover, I appreciate her many declarations during the hearing that judges must decide cases solely on the basis of the facts and the law; and especially her disagreement with the President’s formula that, in the hard cases, a judge should rely on empathy and what is in his or her heart.

It may have been possible to vote to confirm Judge Sotomayor without knowing her decisions in Ricci, Maloney, and some other questionable cases. What I cannot abide, however, is her unwillingness to forthrightly confront the contradictions among her many statements, so as to give us confidence that her Judiciary Committee testimony represents what she believes and what she will do. Instead, she would have us believe that there is no contradiction, that she can hold on to what she said before her speeches and decisions—for example, that she merely followed Supreme Court and circuit precedent in Maloney, and that the dissenters in Ricci did not disagree with her reasoning—and also her testimony. I cannot ignore her willingness to answer Senators’ questions straightforwardly—for instance, her insistence that as chair of PRLDEF’s litigation committee, she had little to do with the organization’s legal positions. She has not carried her burden of proof and, therefore, regrettably, I cannot vote to confirm her.

The PRESIDING OFFICER. Under the previous order, the Senate stands in recess until 5 p.m. Thereupon, the Senate will return to order at 5 p.m. and reassemble when called to order by the Presiding Officer (Mr. BURRIS).

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. COBURN. Mr. President, I rise today to discuss the nomination of Judge Sonia Sotomayor to be a Justice on the U.S. Supreme Court. Judge Sotomayor comes to the Senate with a compelling personal story and notable professional accomplishments. She has worked as a prosecutor, a corporate attorney, and as a federal district court and circuit court judge. And, after meeting with Judge Sotomayor and visiting with her, I like her. She is a very kind and affable person.

Certainly Judge Sotomayor has an impressive resume; however, the Senate’s inquiry into her suitability for a seat on the Supreme Court does not end with her professional accomplishments. Equally important to our providing “consent” on this nomination is our determination that Judge Sotomayor has the appropriate judicial philosophy for the Supreme Court.

Judge Sotomayor needed to prove to the Senate that she will adhere to the